

**IN THE SUPREME COURT OF OHIO**

**ESTATE OF TIMOTHY J. OEDING,  
J & R EQUIPMENT AND STORING  
AND AUTO-OWNERS INSURANCE  
COMPANY**

**Defendants-Appellants,**

**-vs-**

**DAVID FRALEY dba  
FRALEY TRUCKING**

**Plaintiff-Appellee.**

\* **On appeal from the**  
\* **Butler County Court of Appeals,**  
\* **Twelfth Appellate District**  
\* **Court of Appeals**  
  
\* **Case No. CA2011-09-0180**  
  
\* **Supreme Court Case No. 12-1994**  
  
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**MERIT BRIEF OF APPELLEE**

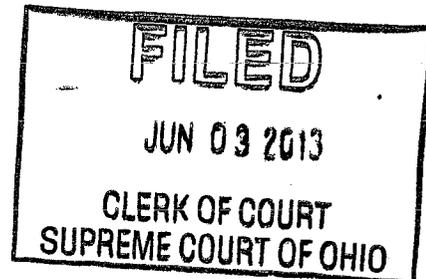
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**Christopher J. Pagan**  
Supreme Court #0062751  
REPPER, PAGAN, COOK, Ltd.  
1501 First Ave.  
Middletown, OH 45044  
(513) 424-1823; Fax (513) 424-3135  
[cpagan@cinci.rr.com](mailto:cpagan@cinci.rr.com)-Email

**COUNSEL FOR PLAINTIFF-APPELLEE**

**James P. Nolan, II**  
Supreme Court #0055401  
600 Vine Street, Suite 2600  
Cincinnati, OH 45202  
(513) 579-0080; Fax (513) 579-0222  
[jnolan@smithrolfes.com](mailto:jnolan@smithrolfes.com)- Email

**COUNSEL FOR DEFENDANTS-APPELLANTS**



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## STATEMENT OF THE FACTS

Fraley largely adopts the facts from Defendants-Appellants' brief.

Two salient facts were not addressed: Oeding, while driving in the scope of his employment with J&R, caused the accident by driving while intoxicated; and Fraley alleged a connection between Auto Owners and Ohio in that Auto Owners knew Fraley's business was in Ohio and that placing a 5-month hold on Fraley's truck would cause foreseeable harm in Ohio. See, Fraley affidavit ¶¶ 6-8.

## ARGUMENT

This case involves application of the two-part personal jurisdiction test. The first part considers whether the defendants' acts come within Ohio's long-arm statutes and Civ.R. 4.3(A); the second part considers whether long-arm jurisdiction satisfies Due Process on the facts of the case. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75, 559 N.E.2d 477 (1990). Neither party disputes this test. Instead, the dispute concerns whether an insurer—acting for and in the name of its insured—satisfies the test by placing an out-of-state hold on a truck during a liability investigation, where the hold caused foreseeable economic injury in Ohio to an Ohio business.

### FIRST PROPOSITION OF LAW

The actions of an agent, personal representative, alter ego, subsidiary, or affiliate impute to the nonresident defendant under Ohio's long-arm statutes and Civ.R. 4.3(A) for purposes of long-arm jurisdiction.

Ohio's long-arm statutes and Civ.R. 4.3(A) defines a person subject to personal jurisdiction to include that person's "agents" or "other personal representatives." R.C. 2307.381 and .382(A). Consequently, Ohio courts have

imputed the actions of an agent or personal representative to a nonresident defendant for long-arm jurisdiction purposes.

This is not controversial. All states and the federal courts apply the same rule, and even impute the actions of alter egos and subsidiaries to a parent company for personal jurisdiction. *See, e.g., Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5<sup>th</sup> Cir. 1983)(describing when a parent company is subjected to jurisdiction due to the activities of an alter ego or subsidiary.)

The rationale for imputing the acts of an agent or representative for long-arm jurisdiction was expressed in *Magnecomp Corp. v. Athene Co.*, 209 Cal.App.3d 526, 257 Cal. Rptr. 278 (1989). In *Athene*, the court imputed the acts of a consultant to a foreign, corporate defendant—a Japanese business with no activity or contacts in California or the United States. *Id.* at 538-9. The court reasoned that the failure to impute the acts of an agent to a nonresident defendant for long-arm jurisdiction would confer immunity on a nonresident defendant for its tortious acts when others acted on its behalf; and it would defeat California's public policy of providing civil remedies to injured citizens.

Like California, Ohio has evinced a public policy under the long-arm statutes and Civ.R. 4.3(A) to reach nonresident defendants that cause harm through agents by supplying civil remedies to Ohio citizens.

- A. ***Auto Owners' act in seizing Fraley's truck imputes to J&R under the long-arm statutes and Civ.R. 4.3(A).***

The first issue in this case is whether Auto Owners acted as an (i) agent or (ii) personal representative to its insured, J&R, to permit imputation within the meaning of the long-arm statutes and Civ.R. 4.3(A).

A1. ***Under Ohio law, agency principles and imputation apply when an insurer acts for its insured during litigation, injuring a plaintiff. So agency principles and imputation should likewise apply where an insurer acts for and in the name of its insured for long-arm jurisdiction.***

The court of appeals held that Auto Owners acted as an agent of J&R, within the meaning of the long-arm statutes and Civ.R. 4.3(A), when it placed a hold on Fraley's truck and caused economic harm in Ohio to an Ohio business. Opinion, ¶ 14. In reaching that conclusion, it relied upon cases using agency principles and imputation in the insurer/insured relationship to third-party plaintiffs. Id. at ¶¶ 10-13.

Thus, in *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987), this court imputed an insurer's neglect in failing to defend a suit to its insured, resulting in a judgment for the plaintiff and against the insured. In *Peyko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986), Fn. 1, this court imputed an insurer's tortious litigation conduct to its insured for purposes of a prejudgment interest award to the plaintiff. Finally, in *Marks v. Allstate Ins. Co.*, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E.2d 129, the court extended *Peyko* to post-judgment interest claims, again recognizing that the insurer's litigation conduct is imputed to its insured for a third-party claim.

The court of appeals was correct to rely on these cases.

First, the cases cited by the court of appeals support Fraley's argument that agency principles and imputation also extend to an insurer acting for and in the name of its insured for long-arm jurisdiction. Agency is determinative for jurisdiction here; and because this court applies agency concepts to bind an insured for the insurer's litigation conduct, it follows that the same binding should occur for long-arm jurisdiction.

Second, the cases recognize the realities of insurance litigation. As *Peyko* observed, the insurer acts for and in the name of its insured, and its litigation conduct towards a plaintiff must be imputed to the insured to account for any injury done in the insured's name, given that the insurer is immune from direct suit. 25 Ohio St.3d at 166-67. Further, as *Griffey* observed, it is equitable to impute the insurer's neglect to the insured because the insured is responsible for contracting with the insurer and bringing it into the case, while the plaintiff is merely a victim of the insurer's neglect. 33 Ohio St.3d at 77-78.

These realities—the bases for the holdings in *Peyko* and *Griffey*—are present in our case and therefore justify extending an insurer's agency to long-arm cases. Auto Owners acted for and in J&R's name when it caused injury in Ohio to an Ohio business by placing a hold on Fraley's truck; and it was J&R that contracted with Auto Owners and brought it into the case. Therefore, it was logical and consistent for the court of appeals to conclude that if an insurer's tortious acts or neglect imputes to its insured during litigation, its tortious acts (here, seizing the truck for and in the name of the insured) should likewise impute for long-arm jurisdiction.

Finally, the court of appeals, in citing to *Griffey* and *Marks*, drew upon academic support for its holding. Both *Griffey* and *Marks* cited to the leading insurance treatise, which characterizes the insurer/insured relationship as complicated as resistant to easy labeling, but most akin to agency in relation to third-parties. *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987), Fn. 2; and *Marks v. Allstate Ins. Co.*, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E.2d 129, ¶ 30. Thus, Defendants-Appellants' citation to law stating that the insured/insurer relationship is "purely contractual" is not to the point. Brief, pp. 6. This case is not about that insurer/insured relationship; instead, it is about the insurer/insured relationship *to third-party plaintiffs*.

**A2. *Even if not an agent, an insurer is at least a personal representative of its insured within the meaning of the long-arm statutes and Civ.R. 4.3(A).***

There is a separate aspect of the long-arm statutes and Civ.R. 4.3(A) that the court of appeals was not required to address and that Defendants-Appellants ignore in its brief. Imputation occurs for agents *or* other personal representatives. R.C. 2307.381 and .382(A). This is disjunctive phrasing. This indicates a legislative intent for maximum reach over nonresident defendants, extending beyond traditional agency relationships. *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 51.

The term "other personal representative" is undefined in the Code or rule. So this court must apply its natural and plain meaning. *May v. Lubinski*, 9<sup>th</sup> Dist. No. 26528, 2013-Ohio-2173, ¶ 13.

Auto Owners represented J&R regarding the Fraley claim. It acted for and in J&R's name when it investigated liability and placed a 5-month hold on Fraley's truck. This representation was personal to J&R and its employees, involving no other. It personally benefited J&R and its employees, providing them a defense and indemnification. And J&R personally chose Auto Owners by contracting with them and by bringing them in the suit. Therefore, Auto Owners was a "personal representative" within the meaning of the long-arm statutes and Civ.R. 4.3(A). This represents an alternative basis for Ohio's long-arm jurisdiction in the case, aside from the agency theory.

A3. ***Defendants-Appellants' arguments that an insurer is not an agent within the meaning of the long-arm statute and Civ.R. 4.3(A) are without merit.***

Defendants-Appellants' first argument is textual. It parses the long-arm statute to conclude that it is the nonresident defendant's actions towards Ohio, and not the agent's or personal representative's actions, which are examined for long-arm jurisdiction. Brief, pp. 5-6. According to this argument, the pronoun "he" refers solely to the nonresident defendant and no other; as such, the conditions in the statute that permit Ohio jurisdiction—like conducting business and earning revenue—regard only what the nonresident defendant does. The effect of such a construction in our case is to exclude all of what Auto Owners' did in deciding long-arm jurisdiction.

But this argument fails on multiple levels. First, it improperly constructs the word "person." Person is defined to include agent or personal representative.

R.C. 2307.381 and .382(A). The use of the pronoun "he" in the place of person necessarily includes the definition of person, including agent or personal representative. Under Defendant-Appellant's proposed construction, however, "person" and "he" possess separate meanings.

Also, the proposed construction defeats the statute's intended purpose. As noted in *Athene*, supra, if long-arm jurisdiction failed to encompass agents and representatives, a bad actor could cause injury with impunity by simply using others to act for it. Thus, under the proposed construction, Ohio citizens and businesses would be exposed, vulnerable, and without an Ohio remedy for their injuries.

Further, Defendants-Appellants' proposed construction runs contrary to established cases. Many courts have extended jurisdiction over international, nonresident companies because of the singular activity of an agent or representative in the forum state. See, e.g., *Aircraft Guaranty Co. v. Strato-Lift, Inc.*, 74 F.Supp. 468, 473 (E.D. Pa. 1997)(contacts of Connecticut agent with Pennsylvania imputed to nonresident Belgian defendant for personal jurisdiction in Pennsylvania); and *Grand Entertainment Group, Ltd., v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3<sup>rd</sup> Cir. 1993)(contacts of California agent with Pennsylvania imputed to nonresident Spanish defendants for personal jurisdiction in Pennsylvania). Under the proposed construction, however, these holdings are impossible.

Finally, the *Peyko* rationale forbids the proposed construction. In *Peyko*, the insurer argued that its file was irrelevant to a claim for prejudgment interest

because the insured, and not the insurer, was ultimately liable for damages. But this court rejected the argument. It reasoned that it was unrealistic to pretend that the insurer was not directing the litigation, acting for and in the name of its insured. 25 Ohio St.3d at 166-67. Analogously, it is unrealistic to decide long-arm jurisdiction without accounting for the insurer's contacts with Ohio, for and in the name of the insured.

Defendants-Appellants' second category of arguments is based on two out-of-state cases.

First, they cite *Kirchen v. Orth*, 390 F.Supp. 313 (E.D. Wis. 1975) for the proposition that an insurer's negotiation of a claim for its insured does not impute under Wisconsin's long-arm statute, as the insured lacks the necessary control over negotiations required for an agency. But *Kirchen* arises from a different legal regime. Wisconsin's long-arm statute, cited in the court's decision, is silent on imputing the acts of an agent or representative to a nonresident defendant, while Ohio's is not. In fact, Ohio's statute extends beyond agencies to include "other personal representatives." Moreover, the *Kirchen* court permitted long-arm and personal jurisdiction over the insurer for its bad-faith negotiations with the plaintiff, thus approving a direct action against the insurer for its litigation behavior. Ohio, on the other hand, forbids direct actions, even when the insurer is the culpable actor. If Ohio followed *Kirchen's* direct-action holding, Fraley could proceed against Auto Owners for seizing his truck without concern for J&R and imputation. Finally, and most importantly, *Kirchen* was cited by a dissent in *Griffey*, supra, for the same proposition as advanced by

Defendants-Appellants—that an insured is without power to control his insurer's negotiations, thus preventing an agency. But this proposition was expressly rejected by the *Griffey* majority, which stated, in rejecting this very control argument, "\*\*\* we resist the temptation to let our determination of [imputation to the insured] rest upon a mechanical labeling of the relationship between an insurer and its insured." *Id.* at 78.

Second, they cite *Georgia Insurers Insolvency Pool v. Brewer*, 602 So.2d 1264 (1992) for the proposition that Florida's long-arm statute precluded " \*\*\* imputing the actions of the insolvent member of the pool [Allied Ins.]" to a statutory Georgia pooling entity. Brief, pp. 8. But a closer reading of the case shows that this is actually backwards and wrong. In Footnote 6, the court observed that the relevant Georgia statute made the pooling entity the *agent* for the insolvent insurer, and not the *principal* as stated in Defendants-Appellant's brief. And, according to the court, the Florida long-arm statute, like Ohio's, allows imputation from an agent to a principal, but not vice-versa. This is the general rule. Consequently, the *Brewer* court observed that, "[t]his is not a situation where Allied acted as an agent of GIIP [the pooling entity], *thus clearly satisfying [Florida's long-arm statute].*" *Id.* at 1267 (emphasis added).

Properly understood then, *Brewer* supports Fraley. Fraley's facts are exactly those that the Florida Supreme Court said *would satisfy* its long-arm statute—an agent's acts (Auto Owners) imputing to the principal (J&R). In contrast, the *Brewer* plaintiff attempted to have the principal's acts impute to the agent, which is unauthorized.

**B. *Auto Owners' conduct satisfies the long-arm statute and Civ.R. 4.3(A).***

The second issue in the case is whether Auto Owners' acts, imputed to J&R, satisfy at least one of the conditions for long-arm jurisdiction under R.C. 2307.382(A) and Civ.R. 4.3(A). Because there was no discovery or evidentiary hearing in the case, the pleadings, Fraley's affidavit, and all inferences are construed in Fraley's favor, and the applicable standard is a prima facie showing that one of the long-arm conditions is met. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 638 N.E.2d 541 (1994).

The court of appeals found that Auto Owners maintains an Ohio insurance license, permitting the inference that it conducts Ohio business; that, after the collision, it placed an out-of-state hold on Fraley's truck with knowledge that Fraley's business was in Ohio, and that economic loss would occur in Ohio; that it directed calls and correspondence to Fraley's Ohio attorney to try and resolve the claim; and that it availed itself of Ohio law by invoking immunity under R.C. 3929.06, the bar against direct tort actions against insurers. Opinion, ¶ 19.

These findings trigger long-arm jurisdiction in two ways. First, under R.C. 2307.382(A)(4), the court's findings support: (i) a tortious injury in Ohio (the lost economic use of the truck); (ii) by an act in Indiana (the hold on the truck); where the agent/representative (Auto Owners) (iii) conducts regular business or derives substantial revenue in Ohio (use of the Ohio insurance license). Second, under R.C. 2307.382(A)(1), the findings support: (i) that Auto Owners transacted any or some business in Ohio (use of the Ohio insurance license).

In its brief, Defendants-Appellants only challenge imputing Auto Owners' acts to J&R for long-arm jurisdiction; they do not argue that Auto Owners' acts fail to satisfy these conditions.

C. ***Auto Owners purposefully established minimum contacts in Ohio and it is fair and just to require J&R to submit to Ohio jurisdiction.***

The final issue in this case is whether Ohio jurisdiction over Defendants-Appellants violates the Due Process minimum-contacts test.

The minimum-contacts test has two purposes, "First, it protects the nonresident defendant 'against the burdens of litigating in a distant or inconvenient forum.' Second, it ensures that the states do not encroach on each other's sovereign interest." *U.S. Sprint v. Mr. K's Foods*, 68 Ohio St.3d 181, 186, 624 N.E.2d 1048 (1994).

C1. ***Auto Owners' contacts with Ohio are deliberate, continuous, and deep.***

The minimum-contact test contains two parts. The first part demands proof that the agent or representative, whose actions are imputed to the nonresident defendant, deliberately engages the forum State. Deliberate engagement occurs when the actor obtains the privilege of conducting business in the forum State; where the actor avails himself of the protections of the forum State's laws; or, where the nonresident defendant, through an agent or representative, causes foreseeable injury in the forum State, and his conduct towards the forum State are such that he should reasonably anticipate being

haled into the forum State's courts. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 77, 559 N.E.2d 477 (1990).

Deliberate engagement is present on this record. Auto Owners maintains an Ohio insurance license, permitting the inference that it conducts Ohio business. Auto Owners availed itself of Ohio law by claiming immunity from direct suit under R.C. 3929.06. And Auto Owners knew that foreseeable economic harm would occasion to Fraley in Ohio when, in the name and for the benefit of J&R, it placed a hold on his truck. Because of the foreseeability of harm, and because Auto Owners was charged with a duty to avoid that harm, Auto Owners should have anticipated suit in Ohio over its 5-month hold.

In its brief regarding minimum contacts, Defendants-Appellants profess that, "[t]he only allegations in the record involving Ohio are the Plaintiff's residence in Ohio and telephone calls and correspondence exchanged in efforts to resolve Fraley's claim." Brief, pp. 14. It then goes on to cite cases that it says stand for the idea that calls and correspondences are insufficient for minimum contacts. *Id.* at 15. But this misstates record. The court of appeals identified other, more significant minimum contacts from the record: i.e., that Auto Owners held an Ohio insurance license, permitting the inference it conducted Ohio business; that it availed itself of the Ohio direct-action statute; and that its truck hold caused foreseeable harm in Ohio to an Ohio business. Opinion, ¶ 19-20. So the entire premise of Defendants-Appellants' minimum-contacts argument based on calls and correspondence is counterfactual.

Defendants-Appellants also repeat their argument that J&R itself has no contacts with Ohio, as if this were a determinative point. Brief, pp. 14. But, again, the cases are legion where courts have found minimum contacts for a nonresident defendant with no forum State contacts at all, all because of the acts of an agent/representative. See, e.g., *Aircraft Guaranty Co. v. Strato-Lift, Inc.*, 74 F.Supp. 468, 473 (E.D. Pa. 1997); and, *Grand Entertainment Group, Ltd., v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3<sup>rd</sup> Cir. 1993). This is hardly radical. So it is difficult to take seriously Defendants-Appellants' claim that grave "constitutional implications" arise solely in imputing an agent's forum contacts to a nonresident defendant.

Finally, Defendants-Appellants admit that *Univ. S. Alabama v. Mississippi Farm Bureau S.D. Ala. No. CA05-00257-C, 2005 LEXIS 48084 (27 July 2005)*, which was relied upon by the court of appeals, supports the instant decision for minimum contacts. Brief, pp. 13. In that case, the court found personal jurisdiction over a nonresident insured for the acts of her insurer in negotiating a tort claim. Defendants-Appellants seek to distinguish the case because the *Alabama* court also authorized a direct action against the insurer, while Ohio forbids such a direct action. Brief, pp. 13. But what difference does that make? The relevant point was imputation to the insured from the insurer's actions regarding a duty owed to a third-party plaintiff. They also seek to distinguish the case because the *Alabama* plaintiff was injured by the insurer's impairment of a hospital's subrogation lien, while "\*\*\*\* Fraley's claims do not arise as a result of the settlement activity of Auto Owners nor does he claim he

was injured by those actions." *Id.* This is flatly false. Fraley's remaining claim arises precisely because of Auto Owner's settlement activity in placing a hold on his truck.

C2. ***It is fair and just to subject J&R to Ohio jurisdiction for the injury Auto Owners' caused, in J&R's name and for its benefit, to Fraley.***

The second part of the test is whether the personal jurisdiction over the nonresident defendant "\*\*\*\* would comport with 'fair play and substantial justice.'" *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 77, 559 N.E.2d 477 (1990). Fair-play factors include the burden to the nonresident defendant; the interest that Ohio has in adjudicating the case; Fraley's interest in convenient and effective relief; and the shared interests of Indiana and Ohio in furthering public policies. *Id.*

The fair-play factors tip in Fraley's favor. Auto Owners is directing the litigation for and in the name of J&R in Ohio, and frequently conducts Ohio litigation. Indiana is adjacent to Ohio, reducing any travel burden. Because Fraley's only remaining claim is for indirect economic damages, the only evidence are business records depicting the lost contracts, located in Ohio. And Ohio's interest in Fraley's remaining claim is greater than Indiana's. While the drunken driving and personal injury arose in Indiana, the lost contracts occurred in Ohio, damaging an Ohio citizen, an Ohio business, and Ohio's tax base. Finally, Ohio has an interest in advancing R.C 3929.06, the direct-action bar.

In its brief, Defendants-Appellants fail to cite and apply any of the fair-play factors. To the contrary, they ask this court to consider the slight burden to

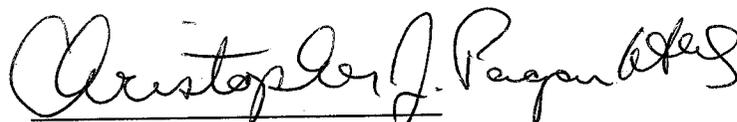
Fraley by litigating in Indiana, Brief, pp. 16, introducing a new and curious fair-play factor. But no court has ever examined the ease on a plaintiff in coming to the non-resident defendant's forum. Finally, Defendants-Appellants suggest that the fair-play factors include the possible misuse of this opinion in other cases. Id. That is not an appropriate factor; and the personal-jurisdiction cases are so fact bound that Defendants-Appellants fail to offer any specific misuse of this opinion, and could not do so.

### CONCLUSION

An insurer acts for and in the name of its insured during litigation. This affiliation brings an insurer within the definition of agent or personal representative under the long-arm statutes and Civ.R. 4.3(A). And there are no constitutional infirmities with extending jurisdiction over Defendants-Appellants on the unique facts of this case. For these reasons, the court of appeals' decision should be affirmed.

To the court, the instant Brief is

Respectfully submitted,



**CHRISTOPHER J. PAGAN**

S.C. #0062751

Repper, Pagan, Cook, Ltd.

1501 First Avenue

Middletown, OH 45044

513.424.1823

Fax: 513.424.3135

Cpagan@cinci.rr.com

Counsel for Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been mailed to James P. Nolan, II, Smith, Rolfes & Skavdahl, Co., LPA, 600 Vine Street, Suite 2600, Cincinnati, OH 45202 on this 3rd day of June, 2013.

  
**CHRISTOPHER J. PAGAN**  
S.C. #0062751  
Counsel for Plaintiff-Appellee