EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
ANGIE BONILLA, Plaintiff, vs. JEMSC, LLC D/B/A LA ESPECIAL BAKERY #2, M.S. SHORE COMPANY, INC., ANDERSON PLAZA, LLC, AND 827 BROADWAY, LLC, Defendants.	)	Civil Action No. 2017-CP-23-4278 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

TO: SAM BASS, ATTORNEY FOR PLAINTIFF:

Defendant, JEMSC, LLC d/b/a La Especial Bakery #2 ("Defendant"), hereby moves the Court for an Order granting it summary judgment in the above-referenced case. Defendant asserts there are no genuine issues of material fact and that the Defendant is entitled to judgment as a matter of law. Specifically, Defendant asserts Plaintiff has not produced any evidence that Defendant was responsible for maintenance of the area where Plaintiff fell, or that Defendant was on notice of, either actual or constructive, any defective or dangerous condition on the sidewalk outside its store. Further, Defendant will crave reference to its Lease Agreement with its Landlord, which indicates maintenance of common areas for the subject premises is the responsibility of the Landlord, not this Defendant (tenant).

This motion is based on the South Carolina Rules of Civil Procedure, the common and statutory law of South Carolina, affidavits, depositions and any other evidence which may be admissible by the Court. Defendant reserves the right to submit a Memorandum in support of its motion prior to hearing.

MCANGUS GOUDELOCK & COURIE, L.L.C.

s/Charles o. Williams, III
Charles O. Williams, III (S.C. Bar No: 69495)
Post Office Box 2980
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ATTORNEYS FOR DEFENDANT, JEMSC, LLC D/B/A LA ESPECIAL BAKERY #2

March 7, 2018

EXHIBIT B

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT

COUNTY OF SUMTER

Case No: 2022-CP-43-1781

R. Michael Ardis,

Plaintiff,

vs.

Sykes Enterprises Inc., a Business Process Outsourcing Company; Vanessa Cox; Fausto Salas; Johnny Villalobos; Latoya Walker-Cole; Jane Does 1-5; and John Does 1-5,

Defendants,

_____/

PLAINTIFF'S EMERGENCY, VERIFIED MOTION FOR REHEARING, JUDICIAL NOTICE AND OTHER RELIEF

COMES NOW, R. Michael Ardis, the Plaintiff, ("Ardis")[1]

[1] See *Erickson v. Pardus* 551 U.S. 89, 127 S. Ct. 2197 U.S., 2007.A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal leadings drafted by lawyers. Pleadings in this case are being filed by the Plaintiff *in propria persona*, wherein pleadings are to be considered without regard to technicalities. *Propria* pleadings are not to be held to the same high standards of perfection as practicing lawyers. See *Haines v. Kerner* 92 S. Ct. 594, also See *Powell v. Lennon*, 914 F2d 1459 (11th Cir 1990).

pursuant to **S.C. R. Civ. P. 7(b)(1)** and hereby moves the Court for an Expedited Order granting a Rehearing of the hearing held on January 29, 2024, Judicial Notice and Other Relief. In support the Plaintiff would show the Court as follows:

1. The Plaintiff is not an attorney and will attempt to present his arguments in legal language. However, the Plaintiff is hurrying to get this Motion before the Court and may, at times, result to colloquial or first person language. If this occurs, no disrespect is intended towards the Court.

2. The Plaintiff was not given Notice of today's hearing by the Clerk and found out about it afterwards. The Plaintiff acted as diligently as he could to prepare for the hearing.

3. During the hearing the Plaintiff was unable to locate the Disabilities Accommodations Letter written by his physician and presented to the Defendants on October 14. 2019. The Plaintiff, *ore tenus*, asked the Court to Supplement the Record and the Court gave the Plaintiff verbal permission. This Emergency Motion serves as said Supplement.

4. Attached as **Exhibit A** is the Docket Sheet from January 29, 2024 where some nine (9) pending Motions were scheduled for today. However, the attorney for the Defendants basically dominated the allotted time and none of the Plaintiff's six pending Motions were heard as schedule. The Plaintiff is Supplementing the Record since he was not heard on his pending Motions.

5. Before setting forth his arguments that he did not get to make at today's hearing, the Plaintiff will briefly summarize each of the attached **Exhibits A-U**, and detail why they are important as it relates to the Plaintiff's case-in-chief. Then the Plaintiff will make his arguments.

6. **Exhibit A** has already been described. However, **Exhibit B** is the Plaintiff's Original Complaint filed with the Court on October 27, 2022. The Plaintiff avers that there are material issues of disputed fact that do not warrant a Dismissal under the Rules.

7. **Exhibit C** is the Disabilities Accommodations Letter written by the Plaintiff's physician, Dr. Joseph Adams and presented to the Defendants on October 14, 2019. It would be a mere 3 weeks later that the Plaintiff was suspended and fired. The Plaintiff avers that this was more than a coincidence.

8. **Exhibit D** is the Plaintiff's Official Employee Complaint and Notice to Preserve Evidence submitted to the Defendants on November 9, 2019. This was the first time the Plaintiff requested a copy of all Sykes Employee Handbooks and the Sykes Employee Grievance Form, only to be ignored. It should also be noted, as I have done in prior filings, that employee discipline and terminations are usually handled on the local level by the Site Director. However, the Plaintiff is informed and believes that he was singled out, and dealt with by the International Corporate Headquarters of Sykes in Tampa, Florida.

9. **Exhibit E** is the Plaintiff's First Interrogatories to Defendants filed and served on February 23, 2023. The Plaintiff would draw the attention of the Court to the following found in Exhibit E.

Page 2, A(1)

Page 3 D(3)

Page 6, Paragraphs 13-16

Page 7, Paragraphs 17-20

All of these entries constitute lawful Discovery Request per the Rules that the Defendants have refused to provide.

10. **Exhibit F** is **Rule 15 SCRCP** which holds that a party may amend his pleading once as a matter of course. The Plaintiff respectfully avers that his Complaint pleads sufficient state tort allegations and should not be dismissed. Although the attorney for the Defendants argued that I should have brought my case in federal court, that is not correct. I have the ultimate decision of what jurisdiction I decide to bring my case. If the Defendants felt so strongly it was a federal court matter, then they had the Right to file to Remove it to federal court under the Federal Removal Statute. They did not do so, so this matter is properly before this Honorable Court.

11. **Exhibit G** is the first of the Discovery Rules I am including. **Exhibit G** is **S.C. R. Civ. P. 26**, and I have highlighted section (b)(1), which gives me the absolute right to obtain Discovery on any matter which is not privileged. The Defendants have steadfastly refused to adhere to **Rule 26.**

12. **Exhibit H** is **S.C. R. Civ. P. 33**, Interrogatories to Parties. Please cross reference with **Exhibit E**. The Defendants have steadfastly refused to adhere to **Rule 33.**

13. **Exhibit I** is **S.C. R. Civ. P. 34,** Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes. Please cross reference with my pending Discovery Requests. The Defendants have steadfastly refused to adhere to **Rule 34.**

14. **Exhibit J** is **S.C. R. Civ. P. 36,** Request for Admission. Please see my pending Request for Admissions in the Court file. The Defendants have steadfastly refused to adhere to **Rule 36.**

15. **Exhibit K** is **S.C. R. Civ. P. 37**, Failure to Make or Cooperate in Discovery: Sanctions. I began requesting information from the Defendants when I was still an employee. Please see Exhibit D. Subsequently, I have requested Discovery and have been repeatedly stonewalled and ignored. Please see Exhibit E. If there was ever a Defendant befitting of being held accountable under **Rule 37,** the Defendants have earned that right.

16. Now I would transition into decisional law. **Exhibit L** is the case of *Barron v. Labor Finders of S.C.,* and it supports the arguments in my Complaint, **Exhibit B**, based upon wrongful termination in violation of Public Policy.

17. **Exhibit M** is the Court of Common Pleas Case of *Doe v. S.C. Dep't of Soc. Servs.*, and it states that there is an affirmative duty on the part of a Defendant to answer interrogatories. On Page 3 of Doe the following is written:

> An affirmative duty exists to answer interrogatories and respond to requests to produce. CFRE, LLC, Greenville Cnty. Assessor, 395 S.C. 67, 83, 716 S.E.2d 877, 885 (2011). The discovery rules provide for full and fair disclosure of relevant information. Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997). The Court is mindful that "the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Id at 113-14, 495 S.E.2d at 217.

18. **Exhibit N** is the South Carolina Court of Appeals Case of *Richardson v. Twenty-One Thousand & no/100 Dollars ($21,000.00) United States Currency & Various Jewelry*. On the bottom right of Page 1 of Richardson the following is found:

> The text of S.C. R. Civ. P. 37 tells that a party does not need to file a motion to compel to request a sanction for another

> party's failure to answer a properly served discovery request. A party served with written discovery has a duty to answer it, unless the party objects based on a stated reason or moves for a protective order. S.C. R. Civ. P. 26(c), 33(a), and 34.

19. **Exhibit O** is the Court of Common Pleas Order Granting Plaintiff Bulldogs Marketing, LLC'S Motion for Sanctions and Default Judgment. On Page 6 of **Exhibit O** the following is found:

> The Court finds that Plaintiff is prejudiced by the Defendants' refusal to participate in discovery and provide documentation supporting RPM of Florida's counterclaims or refuting the allegations in Plaintiff's Verified Complaint.

20. **Exhibit P** is the South Carolina Court of Appeals Case of *Burns v. Universal Health Services, Inc.,* and it deals with what is prevalent in the instant case. Namely, the Defendants failure to act and deal within the confines of the covenant of good faith.

21. **Exhibit Q,** is my Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss Complaint. This pleading

does an excellent job of explaining why these matters should not be dismissed.

22. **Exhibit R**, is what I refer to as my Sykes Overview. I find that with the passage of time incidents and particulars become lost to memory. Therefore, what I did when things were fresh in my mind is that I put pen to paper and set forth the specific facts concerning the Defendants and my employment with them.

23. **Exhibit S** is the Order of this Court mandating Mediation which the Defendants have chosen to ignore. An Order of the Court is not a suggestion and I would submit to the Court that it is precisely because of incidents like this that these matters have degenerated and resulted in not one, but two Complaints with the Office of Disciplinary Counsel.

24. As I stated at today's hearing, I was not going to bring up the pending Office of Disciplinary Counsel Complaints that I have filed against Mr. Lehrer and Mr. Reuwer. The Complaints speak for themselves and the fact that they have not been dismissed, some 6 months later, makes me believe that my Complaints have substance. I would encourage the Court to consider that most of Mr. Lehrer's time today was spent attempting to prejudice the Court against me regarding

matters heard and ruled on last April when I was represented by my friend Ken Young. The "sanction" I was given was to pay $25.00, which I did. However, the Judge from that hearing also put those matters under Seal. It is in the Court file and the Court can confirm this on its own. Basically, today, Mr. Lehrer violated Judge Curtis's Order placing those matter under Seal. He actually provided a neatly indexed book to the Court with the matters under Seal within it. It's because of reasons like this that the attached **Exhibit T** and **Exhibit U** are currently pending before the Office of Disciplinary Counsel.

ARGUMENTS AGAINST DISMISSAL

25. A motion to dismiss under Rule 12(b)(6) should be denied because the complaint alleges facts sufficient to state a cause of action. The court must view the allegations in the light most favorable to the plaintiff.

26. Dismissal is improper at this early stage because the plaintiff has not had the opportunity to conduct discovery and present evidence to support his claims. Dismissal before discovery would unfairly prejudice the plaintiff.

27. The defendant's motion makes arguments based on disputed issues of fact that are not appropriate for resolution on a motion to dismiss.

Factual disputes should be settled only **after discovery** reveals evidence on both sides.

28. The complaint satisfies notice pleading standards by providing the defendant fair notice of the nature and basis of the claims. The plaintiff is not required to prove his whole case in the complaint.

29. The complaint pleads factual allegations supporting each element of the stated causes of action. Bare legal conclusions are not accepted as true, but the complaint goes beyond legal labels and recites specific facts.

30. Dismissal of any part of the complaint would be premature because the plaintiff should be granted leave to amend the complaint to add more factual details if needed. Leave to amend should be freely given under **Rule 15, SCRCP**.

31. The defendant mischaracterizes or fails to acknowledge key allegations in the complaint that are sufficient to allege wrongdoing if accepted as true. The court cannot ignore well-pleaded facts at this stage.

32. Public policy strongly favors **determination of cases on the merits** whenever possible. Doubts should be resolved in favor of allowing the plaintiff to proceed to develop the case.

33. Based on the information provided in the lawsuit here are additions arguments to counter the defendants' motion to dismiss.

a. Sufficiency of Factual Allegations:

- Being one of only a handful of white employees (only approximately 20) among over 700 employees (despite a larger white population in the surrounding area).
- Being one of only 40 total male employees out of over 700.
- Suffering from disabilities and seeking accommodations.
- Exceeding performance expectations despite medical conditions.
- Being singled out for disciplinary action compared to similarly situated African American employees.

b. The specific instances of discriminatory behavior, such as the unscheduled "meeting," forced surveys, and disparate discipline compared to others.

Violation of Employment Policies and Procedures:

- The defendants' actions violated their own progressive discipline policy, as outlined in the employee handbook. Which they have refused to provide. I requested both on November 9, 2019, and subsequently in my Discovery Requests. The Defendants are seeking to benefit from their own refusal to provide Discovery.

- The Plaintiff was not afforded the standard process, including counseling, written warnings, and proper meeting procedures.

c. Violation of South Carolina Employment Law:

- Relevant South Carolina statutes prohibiting discrimination based on race, sex, age, and disability. **South Carolina Code § 1-13-80** prohibits employment discrimination based on race, religion, color, sex, age, national origin, or disability. Employers are required to make reasonable accommodations for individuals with disabilities.
- The Plaintiff's alleged infractions were insignificant compared to those committed by non-disabled employees, suggesting discriminatory intent.

d. Compelling Discovery to Further Strengthen Claims:

- The Court should allow discovery to proceed as the pending motions to compel could uncover additional evidence supporting the Plaintiff's claims.
- The defendants' refusal to provide requested documents, such as the employee handbook and progressive discipline policy, which could further demonstrate their discriminatory practices.

e. Public Policy Arguments:

- The Plaintiff's termination violated the clear mandate of public policy against discrimination based on protected characteristics.

34. Based on the relevant South Carolina statutes prohibiting discrimination that I previously cited, I can make the following argument that the Plaintiff's termination violated public policy:

- The Plaintiff was terminated from their employment. The circumstances indicate this was based on the Plaintiff's protected characteristics of his race, sex, age over 40, and his disabilities.

- South Carolina has clearly articulated a public policy against discrimination in employment based on **South Carolina Code § 1-13-80** which prohibits employment discrimination based on race, religion, color, sex, age, national origin, or disability [protected characteristics] through the enactment of **South Carolina Code Section 1-13-80**. This statute expressly prohibits employment discrimination based on protected characteristics and requires employers to provide reasonable accommodations.

- The Plaintiff's termination was plainly based on his protected characteristics and therefore was in direct violation of the public policy manifested in **South Carolina Code Section 1-13-80**.

- South Carolina's legislature enacted this law to prevent discrimination and protect individuals from adverse employment actions based on immutable characteristics like race, religion, color, sex, age, national origin, or disabilities [protected characteristics]. Terminating the Plaintiff due to his protected characteristics contravenes this clear public policy against employment discrimination.

- Therefore, the Plaintiff's termination constitutes a **violation of the clear mandate of public policy** in South Carolina against discrimination in employment based on protected characteristics. The termination should be considered wrongful as against public policy, entitling the Plaintiff to civil remedies.

- The case of *Barron v. Labor Finders of S.C.* supports the point that retaliatory termination based on such violations can be actionable.

35. Additional Considerations: the actions of the Defendants have caused me emotional distress and financial hardship suffered by the Plaintiff due to the alleged discrimination and wrongful termination.

36. This Honorable Court should hold the Defendants to account fopr their actions and permit these matters to proceed, unabated in accordance with the law which supplements this Emergency Motion.

37. There is an apparent contradiction between the defendants' motion to dismiss arguing there was no employment contract, and the publication from the defendants' own law firm stating that at-will employment is still a contractual relationship. This contradiction undermines the credibility of the defendants' position. Please reference the Ford/Harrison Publication I presented to the Court during today's hearing.

38. The plaintiff made repeated requests over 4+ years for documents he is legally entitled to as an employee, including the employee handbook, discipline policies, etc. The defendants cannot in good faith refuse to provide these documents and then argue the plaintiff failed to identify a contract.

39. I would point out as referenced in my Complaint, Exhibit B, that the plaintiff's stellar performance record as a top 1-2% agent makes it highly suspicious he would suddenly be targeted for discipline without justification. This bolsters the argument he was singled out due to his race, age, gender and disabilities. The protected characteristics.

40. There are most definitely racial and gender hierarchies at play and discrimination at the Sumter facility, with statistics showing a huge discrepancy between the number of African American employees versus white employees compared to the area's racial demographics. This supports a pattern of racial bias.

41. The Plaintiff was coerced into the meeting and forced to complete surveys under threat of termination which violated company policies and principles of good faith and fair dealing. This wrongful conduct should not be rewarded.

42. The defendants' use simple, boilerplate legal arguments which fail to specifically address the facts of the Plaintiff's Complaint. The

allegations, if accepted as true, are sufficient to state valid causes of action that should proceed.

43. It is respectfully submitted to the Court that proceeding with dismissal before discovery would be improper and unfairly disadvantage the plaintiff, preventing him from obtaining key evidence in the defendants' possession.

CONCLUSION

44. I. Factual Background

Plaintiff alleges sufficient facts in his Complaint to state claims of discrimination under South Carolina law.

45. II. Legal Standard

A Rule 12(b)(6) motion should be denied if the factual allegations, viewed most favorably to Plaintiff, would entitle Plaintiff to relief under any theory of law. Williams v. Condon, 347 S.C. 227, 232, 553 S.E.2d 496, 500 (Ct. App. 2001).

46. III. Racial Discrimination

The South Carolina Human Affairs Law prohibits racial discrimination in employment. S.C. Code Ann. § 1-13-10 et seq. To plead a prima facie case, a plaintiff must allege (1) membership in a protected class; (2) qualification for the position; (3) an adverse action; and (4) circumstances giving rise to an inference of discrimination.

47. IV. Age Discrimination

The South Carolina Human Affairs Law prohibits age discrimination for individuals 40 and over. S.C. Code Ann. § 1-13-10 et seq.; § 1-13-30(l). To plead a prima facie case, a plaintiff must allege (1) protected class membership; (2) qualification; (3) an adverse action; and (4) circumstances inferring discrimination.

48. V. Gender Discrimination

The South Carolina Human Affairs Law prohibits gender discrimination in employment. S.C. Code Ann. § 1-13-10 et seq. To plead a prima facie case, a plaintiff must allege (1) protected class membership; (2)

qualification; (3) an adverse action; and (4) circumstances suggesting discrimination.

49. VI. Disability Discrimination

The South Carolina Bill of Rights for Handicapped Persons prohibits disability discrimination. S.C. Code Ann. § 43-33-10 et seq.; § 43-33-530. Allegations that termination followed a request for accommodation can support an inference of discrimination.

50. VII. Conclusion

Plaintiff has sufficiently pled prima facie discrimination claims under South Carolina law. The Court should deny Defendants' motion to dismiss.

WHEREFORE the Plaintiff R. Michael Ardis respectfully requests that the Court **GRANTS** the following Emergency Relief:

a. That the Court GRANTS Rehearing so as to permit the Plaintiff to argue his six (6) pending Motions as evidenced on the Court Docket. Please see **Exhibit A;**

b. That the Court DENIES the Defendant's Motion to Dismiss until Discovery can be lawfully conducted as set forth in this Motion and in its Exhibits'

c. That the Court issues an Order which SANCTIONS the Defendants for bringing up matters which were Ordered Sealed by Judge Curtis. Please see Defense Notebook presented to the Court at the January 29, 2024, hearing;

d. That the Court issues an Order holding the Defendants in Contempt for refusing to provide lawful Discovery as set forth in this Motion and its Exhibits;

e. Any other Relief the Court deems just, proper, and in the interests of justice;

Dated: January 29, 2024

Respectfully submitted,

R. Michael Ardis, Plaintiff
P.O. Box 2949
Sumter, S.C. 29151
(803) 236-0859
michael.ardis2001@gmail.com

Respectfully submitted this 29th day of January 2024.

R. Michael Ardis, *pro se*
Post Office Box 2949
Sumter, South Carolina 29151
803.236.0859
michael.ardis2001@gmail.com

Sumter, South Carolina
January 29, 2024

I HEREBY VERIFY THAT EVERYTHING CONTAINED IN THIS VERIFIED MOTION FOR CONTINUANCE AND OTHER RELIEF IS THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

State of South Carolina, County of _____ Before me, the undersigned notary public, this day, personally, appeared Robert Michael Ardis, upon presenting identification, South Carolina Driver's License Number 008136670, who being duly sworn according to law, deposes the following: that everything set forth in this Verified Motion for Continuance and Other Relief and its Exhibits, is the truth, the whole truth, and nothing but the truth. I am attesting to this under penalty of perjury.

_____(Signature of Affiant)

Subscribed and sworn to before me this _____ day of_____, 20___._____Notary Public My Commission Expires: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachments have been furnished to the attorneys for the Defendants, via United States Mail with proper postage affixed, on this 29th day of January 2024.

_____
R. Michael Ardis, Plaintiff

EXHIBIT C

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT

COUNTY OF SUMTER

2022-CP-43-1781

R. Michael Ardis,

Plaintiff,

vs.

Sykes Enterprises Inc., a Business Process Outsourcing Company; Vanessa Cox; Fausto Salas; Johnny Villalobos; Latoya Walker-Cole; Jane Does 1-5; and John Does 1-5,

Defendants,

_____/

PLAINTIFF R. MICHAEL ARDIS' VERIFIED, EXPEDITED MOTION TO HOLD JEFFREY LEHRER AND THE DEFENDANTS IN CONTEMPT

COMES NOW the Plaintiff R. Michael Ardis[1] hereby files this

[1] See *Erickson v. Pardus* 551 U.S. 89, 127 S. Ct. 2197 U.S., 2007.A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal leadings drafted by lawyers. Pleadings in this case are being filed by the Plaintiff *in propria persona*, wherein pleadings are to be considered without regard to technicalities. *Propria* pleadings are not to be held to the same high standards of perfection as practicing lawyers. See *Haines v. Kerner* 92 S. Ct. 594, also See *Powell v. Lennon*, 914 F2d 1459 (11th

Verified, Expedited Motion to Hold Jeffrey Lehrer and the Defendants in Contempt. In support thereof the Plaintiff would show the Court as follows:

1. The Defendants by and through the actions of Jeffrey Lehrer are in constructive, civil contempt of the authority of this Court.

2. A hearing in these matters was held before the Court on January 29, 2024, at which nine (9) motions were scheduled to be heard. At the hearing in question, the attorney for the Defendants, Mr. Jeffrey Lehrer dominated the hearing time so that only his client's motion to dismiss was heard. Only one (1) of the nine (9) scheduled Motions were heard. Namely, only the motion to dismiss filed by the Defendants.

3. The Plaintiff has filed an **Emergency Motion for Rehearing, Judicial Notice and for Other Relief** on January 29, 2024, and that motion is currently pending before the Court.

4. The Plaintiff emailed the Court on the afternoon of January 29, 2024, to make the Court aware that he had filed his Emergency Motion

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and also to make the Court aware of this forthcoming Motion. The Plaintiff's email is attached hereto as **Exhibit B**, and Mr. Lehrer was copied on said email so that it did not constitute an impermissible *ex parte* communication.

5. Prior to that hearing another hearing was held in these matters on April 21, 2023, before the Honorable Kristi F. Curtis. And Judge Curtis issued her Order which is attached as **Exhibit A.**

6. In her Order Judge Curtis specifically Ordered the Clerk to remove the affidavit of *pro hac vice* counsel Viktoryia Johnson from the public record and place it under Seal along with other documents. Please see Page 2, Paragraph 4(d) of Judge Curtis's Order, **Exhibit A.**

7. Defendant's attorney Lehrer decided to violate Judge Curtis's Order because he felt it would assist him in attempting to prejudice the trier-of-fact against me at the hearing on January 29, 2024.

8. From dealing with Mr. Lehrer and Ms. Johnson, I know what to expect. Now the Court should have a better idea of what I have had to deal with.

9. An Order (**Exhibit A**), from a Circuit Judge is **not** a recommendation **nor** is it a suggestion. It is an Order, and it is to be obeyed and most certainly not openly violated.

10. Mr. Lehrer included documents and pleadings that were Ordered, removed from the public record and Sealed, in his "notebook" bound inside and presented, in Open Court, to Judge Cothran. Such actions are contemptuous of the Orders of this Court.

11. I am not including the affidavit of *pro hac vice* counsel Johnson with this Contempt Motion. Mr. Lehrer did that himself with his "notebook" presented, in Open Court, during the January 29, 2024, hearing.

12. Additionally, as brought up by Mr. Lehrer yesterday, again, in Open Court, I have filed detailed Complaints against him and attorney David Reuwer with the South Carolina Office of Disciplinary Counsel.

13. Complaints and Investigations by the Office of Disciplinary Counsel are deemed Confidential per their own Rules and Procedures. Again, Mr. Lehrer thought that by violating said Confidentiality that this

would earn him points before the Court. The following is found in The South Carolina Lawyer Discipline Process, X. The Duty to Report:

> Another important consideration is whether or not public statements about a pending disciplinary matter (by the complainant or by the respondent) would violate the restrictions on prejudicial, extrajudicial statements set forth in Rule 3.6, RPC or would constitute conduct prejudicial to the administration of justice in violation of Rule 8.4(e), RPC.

14. "A party who refuses to abide by an injunction entered by the court would of course be in contempt of course and subject to sanctions . . . ." *Grosshuesch v. Cramer*, 377 S.C. 12, 29-30, 659 S.E.2d 112, 121 (2008). Mr. Lehrer has reintroduced matters that were tried some 9 months ago and placed under Seal by Judge Curtis. By and through his actions Mr. Lehrer has violated the Order of Judge Curtis in his attempt to prejudice the Court against me.

15. What Mr. Lehrer committed at the January 29, 2024, hearing is more troublesome and egregious because it constitutes Direct Contempt in that it was committed in Open Court. This was no "oversight" in that the Plaintiff avers that Mr. Lehrer knew exactly what he was doing. As a licensed attorney he is supposed to be bound by ethical standards and exercise due diligence and not attempt to win at any costs. In these endeavors he failed, miserably. There must not be two standards in these matters. One standard for the Plaintiff and another standard for the Defendants, is inherently unfair, and flies in the face of due process.

16. "Direct contempt is defined as contemptuous conduct occurring ***in the presence of the Court."*** *State v. Kennerly*, 331 S.C. 442, 450, 503 S.E.2d 214, 219 (Ct. App 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999) (citing *State v. Goff*, 228 S.C. 17, 88 S.E.2d 788 (1955)).

17. "Constructive contempt is contemptuous conduct occurring outside the presence of the court." *Kennerly*, 331 S.C. at 451, 503 S.E.2d at 219 (citing *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994)).

18. Since the Contempt of Mr. Lehrer was Direct Contempt, and was committed in the presence of the Court, then a Show Cause Order is not

required. Please reference Mr. Lehrer's "notebook" presented to the Court on January 29, 2024 and made a part of the Record despite the Order of Judge Curtis. The cover of the Notebook is attached as **Exhibit C.** Once again the Plaintiff reiterates that he will not act in a contemptuous manner towards this Honorable Court and include matters which are under Seal.

19. If the primary purpose of the sanctions imposed is to preserve the Court's authority and to punish for disobedience of its Orders, the Contempt is considered criminal. Id. Conversely, if the purpose of the sanctions is to coerce obedience to a Court Order, the Contempt is civil. *Cheap-O's Truck Stop, Inc.*, 350 S.C. 596, 609, 567 S.E.2d 514, 520 (Ct. App. 2002). "If the sanction is a fine, it is punitive when it is paid to the Court." *Poston v. Poston,* 331 S.C. 106, 112, 502 S.E.2d 86, 89 (1998). A fine may also be "remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine. *Miller v, Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007) (citations omitted.) However, "[a]ny component of a sanction must be directly related to the contemptuous conduct and the loss and the loss uncured by the offending party." *Cheap-O's Truck Stop, Inc.,* 350 S.C. at 609, 567 S.E.2d at 520.

20. Compensatory Contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the Court's Orders. "In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the Court's prior Order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted in the Contempt proceeding." *Poston*, 331 S.C. at 114, 502 S.E.2d at 90; *Lindsay v. Lindsay*, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees."). The Court is not required to provide the contemnor with an opportunity to purge him/herself of these attorney's fees in order to hold the individual in civil contempt. *Floyd v. Floyd*, 365 S.C. 56, 76, 615 S.E.2d 465, 476 (Ct.App.2005) (citing *Poston*, 331 S.C. at 111-15, 502 S.E.2d at 88-91). "[T]he award of attorney's fees is not part of the punishment; instead, [the] award is made to indemnify the party for expenses incurred in seeking enforcement of the court's order." Id. AR

21. Regarding the Mr. Lehrer's Table of Contents of the notebook he presented in Open Court. He attempts to blatantly mislead the Court at **Paragraph (4)(e),** where he writes, wrongly:

e. *All statutes of limitations expired 7/7/21*

22. Mr. Lehrer's Table of Contents is attached as **Exhibit D.**

23. I filed the instant case under South Carolina Law, and not federal law, as is my Right. Attached as **Exhibit E** is **Article 5 of the South Carolina Code of Laws** wherein it clearly delineates that the statute of limitations in these matters is **three (3) years**.

24. The tortuous actions committed by the Defendants occurred on November 8, 2019. The instant case, contrary to Mr. Lehrer's Table of Contents, was commenced on October 27, 2022. Even assuming, *arguendo*, that Mr. Lehrer's dates were correct (but they are not), and even if the instant case began on November 3, 2022, that date is still well within the State of South Carolina Statute of Limitations of 3 years. This is another example of Mr. Lehrer's lack of candor towards the Court.

25. Mr. Lehrer mistakenly argues in his pleadings, and in Court hearings, that I am somehow "*threatening*" him by exercising my fundamental Rights to pursue actions against him with the Office of

Disciplinary Counsel. He would much rather that I tuck my tail and let him do whatever he wants. He has me mistaken for someone else.

26. Mr. Lehrer misinterprets the meaning of the word "*threat.*" A "*threat*" is founded in hyperbole and bravado, when the person making such statements has no other recourse or avenues and seeks to intimidate another. Such actions (threats) are aggressive allegation(s) made in an effort to change behavior. I am not attempting to change Mr. Lehrer's behaviors. I do not care what Mr. Lehrer does or does not do. However, there is nothing, absolutely nothing in the Order of Judge Curtis, attached as **Exhibit A**, which prohibits me from pursuing the any and all avenues available to me against Mr. Lehrer, or any other unscrupulous attorney, with the South Carolina Office of Disciplinary Counsel.

27. At Monday's hearing Mr. Lehrer said mine was his first Bar Complaint. If true, I cannot help that fact. Because it is and has been his actions, not mine, like those set forth in this Contempt Motion, which have earned Mr. Lehrer his Bar Complaint. Mr. Lehrer has an ethical responsibility, as a member of the South Carolina Bar, to self-report his actions as set forth in this Motion for Contempt. However, I have no illusions that he will do so, so it is left up to me, and I will most

definitely be doing so by Amending my pending Complaint with the Office of Disciplinary Counsel.

CONCLUSION

The facts as set forth in this Motion more than show Jeffrey Lehrer and the Defendants are in Direct Contempt of this Court. As a result of Lehrers' actions and untruthfulness and disregard for this Court, Plaintiff has now been forced to file this Motion and incur the financial costs associated with said filing. The Plaintiff is informed and believes that he is entitled to an Order of this Court finding and holding Lehrer and the Defendants in Direct Contempt based upon his actions and submissions in Open Court during the January 29, 2024, hearing, and should require Lehrer and the Defendants to pay the Plaintiff's costs in having to file this Contempt Motion.

SCRCP 11 AFFIRMATION

Based on the nature of Lehrers' offenses, and his likely unwillingness to agree that he has treated this Court with Contempt, the undersigned certifies that consultation with Lehrer and the Defendants regarding the substance of this Contempt Motion, to hold Lehrer and the Defendants in Contempt, would serve no useful purpose.

Dated: January 31, 2024

Respectfully submitted,

R. Michael Ardis, Plaintiff
P.O. Box 2949
Sumter, S.C. 29151
(803) 236-0859
michael.ardis2001@gmail.com

Respectfully submitted this 31st day of January 2024.

R. Michael Ardis, *pro se*
Post Office Box 2949
Sumter, South Carolina 29151
803.236.0859
michael.ardis2001@gmail.com

Sumter, South Carolina
January 31, 2024

VERIFICATION

I HEREBY VERIFY, UNDER PENALTY OF PERJURY, THAT EVERYTHING CONTAINED IN THIS VERIFIED MOTION TO HOLD JEFFREY LEHRER AND THE DEFENDANTS IN CONTEMPT

R. Michael Ardis, *pro se*
Post Office Box 2949
Sumter, South Carolina 29151
803.236.0859
michael.ardis2001@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachments have been furnished to the attorneys for the Defendants, via electronic mail and United States Mail with proper postage affixed, on this 31st day of January 2024.

_____

R. Michael Ardis, Plaintiff

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT

Case No: 2022-CP-43-1781

R. Michael Ardis,

Plaintiff,

vs.

Sykes Enterprises Inc., a Business Process Outsourcing Company; Vanessa Cox; Fausto Salas; Johnny Villalobos; Latoya Walker-Cole; Jane Does 1-5; and John Does 1-5,

Defendants,

_____/

VERIFIED EMERGENCY MOTION FOR THE DISQUALIFICATION AND/OR RECUSAL OF THE HONORABLE RALPH FERRELL COTHRAN, JR.

COMES NOW, R. Michael Ardis, the Plaintiff, ("Ardis")[1] who respectfully submits this Verified Emergency Motion for the

[1] See *Erickson v. Pardus* 551 U.S. 89, 127 S. Ct. 2197 U.S., 2007.A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal leadings drafted by lawyers. Pleadings in this case are being filed

Disqualification and/or Recusal of the Honorable Ralph Ferrell Cothran, Jr. The Plaintiff does not take the filing this Verified Emergency Motion lightly and is in actual fear that he has not, and will not, be treated fairly by Judge Cothran. In a Motion for Disqualification or Recusal of a Judge what the Judge believes is immaterial to the Motion. What matters, the Disqualification Standard, is what is in the mind of the movant and this movant has a genuine, real fear that Judge Cothran has been, and continues to be biased against him.

If Judge Cothran does grant the defendants' *"motion for summary judgment"* which does **not** exist, then the undersigned will be forced to file a Complaint against him with the South Carolina Commission on Judicial Conduct for misconduct prejudicial to the administration of justice, as well as denying the Plaintiff his fundamental right to due process of law. This is the first Disqualification and/or Recusal Motion filed in the present case and Judge Cothran may not pass on the "truth"

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by the Plaintiff *in propria persona*, wherein pleadings are to be considered without regard to technicalities. *Propria* pleadings are not to be held to the same high standards of perfection as practicing lawyers. See *Haines v. Kerner* 92 S. Ct. 594, also See *Powell v. Lennon*, 914 F2d 1459 (11th Cir 1990).

of the allegations and can only base his decision on whether or not the undersigned's Motion is *legally sufficient*. The Plaintiff is swearing, Under Oath, before a Notary Public, that this Motion is most assuredly legally sufficient, warranting Judge Cothran's Disqualification and/or Recusal.

In support of this Verified Motion the Plaintiff would show the Court as follows:

ARGUMENT AND FACTUAL BASIS FOR DISQUALIFICATION AND/OR RECUSAL

1. The Plaintiff respectfully submits this Verified Motion for the Disqualification and/or Recusal of the presiding Judge, the Honorable Ferrell Cothran, Jr., pursuant to Rule 63, SCRCP, and Canon 3E(1) of the South Carolina Code of Judicial Conduct and any and all other legal authorities available, but not cited by the Plaintiff.

2. The Plaintiff contends that the actions of Judge Cothran have demonstrated a clear, prejudicial bias against the Plaintiff, thereby shattering the presumption of neutrality and impartiality required of a

judicial officer.

3. Rule 63, SCRCP, provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice concerning a party. Canon 3E(1) of the South Carolina Code of Judicial Conduct similarly mandates that a judge disqualify himself in any proceeding in which his impartiality might reasonably be questioned (https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=501.0&subRuleID=Canon%203&ruleType=APP).

4. The Plaintiff is attaching as **Exhibit A** and incorporating, by reference as if quoted verbatim herein, his **Plaintiff's Emergency, Verified Motion for Rehearing, Judicial Notice and Other Relief** (minus attachments), filed with the Court on January 29, 2024. Judge Cothran ignored this legally sufficient Motion thereby demonstrating his bias and prejudice against the undersigned.

5. Additionally, the Plaintiff is attaching as **Exhibit B** and incorporating, by reference as if quoted verbatim herein, his **Plaintiff R. Michael Ardis' Verified, Expedited Motion to Hold Jeffrey Lehrer**

and the Defendants in Contempt (minus attachments), filed with the Court on January 31, 2024. Judge Cothran ignored this legally sufficient Motion thereby demonstrating his bias and prejudice against the undersigned.

6. In filing this Verified Motion for Disqualification and/or Recusal, the Plaintiff would respectfully request that Judge Cothran fully considers the following:

- "[A] judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case." See *Caperton v. A.T. Massey Coal Co. Inc.*, (2009) 129 S. Ct. 2252, 2259

- The underlying theme of the Code of Judicial Conduct is that judges above all else must preserve the integrity and independence of the judiciary. Canons 1, 2A, Rule 501, SCACR. See *Matter of McKinney* 324 S.C. 126 (1996) 478 S.E.2d 51

- In addition, Canon 3(C) requires judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, particularly where they have any personal bias. See *Matter of McKinney* 324 S.C. 126 (1996) 478 S.E.2d 51

7. The Plaintiff respectfully submits that Judge Cothran is, and has been, deferring to the defendants because they are represented by a law firm and the Plaintiff is *pro se*. Such actions have a chilling effect on the

public's confidence in the judiciary and completely subverts the fairness of the system and the concept of due process and the right to be heard.

8. In order to proceed with the present case Judge Cothran realizes that he must hold a fellow member of the Bar, defendants' attorney Jeffrey Lehrer, in **Direct Contempt of the Orders of this Honorable Court**. However, instead of holding Lehrer in **Direct Contempt**, as is required, Judge Cothran would rather grant a summary judgment that has **never** been sought, instead of a dismissal without prejudice, thereby negating the possibility of the Plaintiff Amending his Complaint.

9. The Plaintiff firmly believes that Judge Cothran's granting of summary judgment, when it was **not** pled, is nothing more than a pretextual mechanism to protect a fellow member of the Bar from **Direct Contempt**. Such actions on the part of Judge Cothran exudes a palpable bias and prejudice which cannot be denied and his Disqualification and/or Recusal is mandatory.

10. The Plaintiff is including as **Exhibit C** the email from the judicial assistant of Judge Cothran, Ms. Caroline "Bitsy" Land, from February 21, 2024, wherein Ms. Land states that Judge Cothran is *granting*

summary judgment, even though summary judgment has **never** been pled by the defendants.

11. The Plaintiff is including as **Exhibit D** the email he received from the attorney for the defendants, Jeffrey Lehrer, from February 1, 2024, where Lehrer wrote:

> **Jeffrey Lehrer**
> to Audrey, me, Sherry
>
> Mr. Ardis – The Defendants object to scheduling any depositions **prior to the Court ruling on their Motion to Dismiss** pursuant to their Motion to Stay Discovery filed on March 15, 2023. All of these motions are currently before Judge Cothran for ruling. If he grants the **Motion to Dismiss**, there will be no depositions**. (emphasis and underline provided)**

12. Lehrer, in his very own email, wrote that the defendants were waiting on Judge Cothran to rule on their *motion to dismiss* and **not** a motion for summary judgment which is found nowhere in the Record. By and through his actions Judge Cothran has become an "active" participant, and his Disqualification and/or Recusal is required.

13. The Plaintiff brought forth his lawsuit against the defendants based upon **South Carolina Code of Laws § 15-3-350**. Yet, Judge Cothran has completely ignored what the Plaintiff alleged in his Complaint and

decided to accept the arguments of what the defendants *say* the Plaintiff supposedly alleged, instead of what the undersigned *actually alleged*. If I wanted to bring forth my Complaint based upon the South Carolina Human Affairs Law, I would have done so. However, I brought forth my Complaint in accordance with **South Carolina Code of Laws § 15-3-350.**

14. This is absolutely wrong and is clearly indicative of the bias and prejudice of Judge Cothran against the Plaintiff.

15. In the present case, Judge Cothran's refusal to grant rehearing on six (6) motions scheduled, but **not** heard, and the granting of summary judgment to the defendants **without a pleading seeking such**, are clear indications of his bias. A judges' impartiality might reasonably be questioned when his factual findings are not supported by the record. *Ellis,* 315 S.C. at 285, 433 S.E.2d at 857.

16. These actions have effectively denied the Plaintiff the opportunity to be heard, a fundamental right in any legal proceeding.

17. The South Carolina Supreme Court in *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), held that a judge's impartiality can

reasonably be questioned when there is a significant personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts.

18. In the present case, the actions of Judge Cothran have demonstrated a significant bias against the Plaintiff, thereby necessitating his disqualification and/or recusal. Simply put, a Judge cannot grant something that has not been sought.

> A judge should recuse himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. *Murphy v. Murphy, 319 S.C.*

19. *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998). In *Roche,* the Court applied Canon 3(E)(1)(a) of Rule 501, SCACR. Under Canon 3(E)(1)(a), a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. The Plaintiff has met his burden in the instant case.

20. The Plaintiff, and the Plaintiff **alone**, gets to decide upon which statutes or legal arguments he or she wishes to bring forth a lawsuit. It is most certainly not the decision of the defendants and most certainly not the decision of the Judge. A Judge is duly bound by the four corners of a pleading. However, Judge Cothran has superseded this principal of law and decided, on his own, to grant summary judgment when no such pleading exists.

21. However, in the present case Judge Cothran completely ignored the averments of the Plaintiff, contained within his Complaint and, furthermore, he granted Relief **not** sought by the defendants. There could not be a more clear case of bias that these actions.

22. The U.S. Supreme Court in *Liteky v. United States*, 510 U.S. 540 (1994), held that judicial rulings alone almost never constitute a valid basis for a bias or partiality motion, **except when they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible** (https://supreme.justia.com/cases/federal/us/510/540/).

23. Judge Cothran, by granting of summary judgment to the defendants **without a pleading seeking such**, and his refusal to grant a

rehearing on six (6) motions that were **Noticed for Hearing**, but not heard and a Verified Contempt Motion, see **Exhibits A - D**, reveal a high degree of antagonism and personal bias, on his part, against the Plaintiff, making fair judgment impossible.

24. Therefore, in light of the aforementioned legal principles and case law, the Plaintiff respectfully requests that Judge Cothran be Disqualified and/or Recused from further proceedings in this case, and that the present case be randomly reassigned to a successor Judge.

Respectfully submitted this 22nd day of February 2024.

R. Michael Ardis, *pro se*
Post Office Box 2949
Sumter, South Carolina 29151
803.236.0859
michael.ardis2001@gmail.com

Sumter, South Carolina
February 22, 2024

I HEREBY VERIFY THAT EVERYTHING CONTAINED IN THIS VERIFIED EMERGENCY MOTION FOR THE DISQUALIFICATION AND/OR RECUSAL OF THE HONORABLE FERRELL COTHRAN, JR. IS THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

State of South Carolina, County of _____ Before me, the undersigned notary public, this day, personally, appeared Robert Michael Ardis, upon presenting identification, South Carolina Driver's License Number 008136670, who being duly sworn according to law, deposes the following: that everything set forth in this Verified Emergency Motion for the Disqualification and/or Recusal of the Honorable Ferrell Cothran, Jr., and its Exhibits A-D, is the truth, the whole truth, and nothing but the truth. I am attesting to this under penalty of perjury.

_____(Signature of Affiant)

Subscribed and sworn to before me this _____ day of_____, 20___._____Notary Public My Commission Expires: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachments have been furnished to the attorneys for the Defendants, via United States Mail with proper postage affixed, on this 22nd day of February 2024.

_____
R. Michael Ardis, Plaintiff

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS FOR THE THIRD JUDICIAL CIRCUIT

Case No: 2022-CP-43-1781

R. Michael Ardis,

Plaintiff,

vs.

Sykes Enterprises Inc., a Business Process Outsourcing Company; Vanessa Cox; Fausto Salas; Johnny Villalobos; Latoya Walker-Cole; Jane Does 1-5; and John Does 1-5,

Defendants,

_____/

VERIFIED EXPEDITED AMENDED MOTION FOR THE DISQUALIFICATION AND/OR RECUSAL OF THE HONORABLE RALPH FERRELL COTHRAN, JR. AND OTHER RELIEF

Comes now the Plaintiff, R. Michael Ardis ("Plaintiff"), by and through himself *pro se*,[1] and hereby respectfully moves this Honorable

[1] See *Erickson v. Pardus* 551 U.S. 89, 127 S. Ct. 2197 U.S., 2007.A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal leadings

Court to Disqualify the Honorable Judge Ferrell Cothran, Jr. ("Judge Cothran") from any further involvement in this case pursuant to the authorities cited below. This Amended Disqualification Motion incorporates, by reference, the attached Original Disqualification Motion, and everything it contains, as if quoted verbatim herein. In support thereof the Plaintiff states as follows:

1. Judge Cothran has exhibited incontrovertible bias and partiality favoring Defendants by unilaterally and improperly granting them summary judgment *sua sponte*, without any motion for summary judgment having been filed as required by Rule 56, SCRCP. This brazen judicial over-reach violates the most basic notions of due process and fair notice.

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drafted by lawyers. Pleadings in this case are being filed by the Plaintiff *in propria persona*, wherein pleadings are to be considered without regard to technicalities. *Propria* pleadings are not to be held to the same high standards of perfection as practicing lawyers. See *Haines v. Kerner* 92 S. Ct. 594, also See *Powell v. Lennon*, 914 F2d 1459 (11th Cir 1990).

2. The draft order, prepared by the defense counsel, regarding things never, ever said by Judge Cothran demonstrates and reveals that Judge Cothran (actually Jeffrey Lehrer) has pre-judged the merits of Plaintiff's well-pleaded claims by misconstruing them solely as discrimination claims under statutes like the S.C. Human Affairs Law. However, Plaintiff's Complaint explicitly brings claims for breach of contract, fraud, infliction of emotional distress, and wrongful discharge in violation of public policy under the S.C. common law pursuant to S.C. Code § 15-3-350 - **not** the statutory discrimination schemes.
3. Despite binding precedent requiring courts at summary judgment (if summary judgment is actually moved for which it was not) to view the evidence in the light most favorable to the non-moving party. Judge Cothran's draft (actually Jeffrey Lehrer's) impermissibly makes adverse factual findings and credibility determinations discounting Plaintiff's evidence and allegations.
4. Furthermore, nothing, absolutely nothing was filed for summary judgment as required by Rule 56, SCRCP. There were no affidavits

filed, there was not even a motion for summary judgment filed. To grant something not requested is a clear, unequivocal example of bias, prejudice, and, to a lesser degree, laziness in that Judge Cothran is permitting the defendants to "*speak his words*" when he never said anything contained within the draft summary judgment order. Jeffrey Lehrer does not wear the black robe, however, the person in the black robe, whomever that will end up being, needs to hold Lehrer accountable for his blatant Direct Contemptuous actions before this Court.

5. The draft order lays bare that Judge Cothran(Jeffrey Lehrer) has improperly become an advocate for Defendants rather than a neutral arbiter. In essence, Judge Cothran has shed himself of his neutral dispassionate role as a Judge and has become an active participant on the part of the defendants. He has assisted Defendants' counsel by actively researching and fashioning legal arguments favoring dismissal, rather than appropriately testing the sufficiency of the pleadings. At the risk of redundancy, Judge Cothran has done nothing. He has abdicated and divested himself

of all responsibilities and allowing the defense counsel, who is in DIRECT CONTEMPT of this Court, to draft a proposed Order that he never sought. The entire spectacle is surreal in its concept. An officer of the Court, who is clearly in Direct Contempt of this Court, is drafting a proposed Order on something he never filed. You simply cannot make this stuff up.

6. Most egregiously, Judge Cothran's (actually Jeffrey Lehrer's statements) statement that he is dismissing the entire case, including other pending motions, objectively demonstrates his inability to preside fairly as he has pre-judged matters without affording Plaintiff constitutional due process.

7. Judge Cothran's pervasive bias is further exemplified by his refusal to rule on Plaintiff's prior Emergency Motion for Rehearing and Motion to Hold Defense Counsel Jeffrey Lehrer in Contempt, both of which outlined Lehrer's misconduct the Court has turned a blind eye towards, creating a crystal clear appearance of improper favoritism and bias.

8. The actuality and appearance of Judge Cothran's deep-seated bias and partiality are so unmistakable and incurable that they unquestionably deprive Plaintiff of his constitutional due process rights and right to a fair trial before an impartial tribunal as guaranteed by the 5th and 14th Amendments.

9. Both the U.S. Supreme Court in *Liteky v. United States*, 510 U.S. 540 (1994) and South Carolina courts have held that disqualification is mandatory when a judge's actions "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." Judge Cothran's exhibited extreme bias and inability to remain impartial clearly compel his disqualification under the objective standards of Rule 63, SCRCP, Canon 3E of the S.C. Code of Judicial Conduct, and *Caperton v. Massey*, 556 U.S. 868 (2009).

10. The circumstances here are even more egregious than those requiring disqualification in *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998), where the court found the judge's

impartiality could reasonably be questioned based on far less evidence of bias than present in this case.

WHEREFORE, based on the foregoing clear and compelling grounds, Plaintiff urgently requests this Honorable Court immediately enter an Order:

a) Granting this Amended Motion and disqualifying Judge Ferrell Cothran, Jr. from any further proceedings in this matter due to his unequivocal bias and inability to preside impartially;

b) Reassigning this case to another judge not tainted by the extreme prejudice so abundantly evidenced herein;

c) Vacating the draft order granting summary judgment as *void ab initio* for lack of jurisdiction and also that it was written by a man who is in Direct Contempt of this Court; and

d) Granting such other and further relief as this Court deems just and proper to preserve the integrity of these proceedings.

Respectfully submitted this 11th day of March 2024.

R. Michael Ardis, *pro se*
Post Office Box 2949
Sumter, South Carolina 29151
803.236.0859
michael.ardis2001@gmail.com

Sumter, South Carolina
March 11, 2024

I HEREBY VERIFY THAT EVERYTHING CONTAINED IN THIS VERIFIED EXPEDITED AMENDED MOTION FOR THE DISQUALIFICATION AND/OR RECUSAL OF THE HONORABLE FERRELL COTHRAN, JR. AND FOR OTHER RELIEF IS THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

State of South Carolina, County of _____ Before me, the undersigned notary public, this day, personally, appeared Robert Michael Ardis, upon presenting identification, South Carolina Driver's License Number 008136670, who being duly sworn according to law, deposes the following: that everything set forth in this Verified Emergency Motion for the Disqualification and/or Recusal of the Honorable Ferrell Cothran, Jr., and its Exhibits A-D, is the truth, the whole truth, and nothing but the truth. I am attesting to this under penalty of perjury.

_____(Signature of Affiant)

Subscribed and sworn to before me this _____ day of_____, 20___._____Notary Public My Commission Expires: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and its attachments have been furnished to the attorneys for the Defendants, via electronic mail, on this 11th day of March 2024.

_____

R. Michael Ardis, Plaintiff

EXHIBIT F

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT
R. Michael Ardis, Plaintiff, v. Sykes Enterprises Inc., a Business Process Outsourcing Company; Vanessa Cox; Fausto Salas; Johnny Villalobos; Latoya Walker-Cole; Jane Does 1-5; and John Does 1-5, Defendants.	C. A. NO. 2022-CP-43-1781

ORDER GRANTING SUMMARY JUDGMENT

This matter comes before the Court on a Motion to Dismiss Plaintiff's Complaint filed by Defendants Sykes Enterprises, Inc. ("Sykes"), Vanessa Cox, Fausto Salas, Johnny Villalobos, and Latoya Walker-Cole (together, "Defendants"). For the reasons provided herein, Defendants' Motion is converted to a motion for summary judgment and is GRANTED.

Defendants' Motion seeks to dismiss all of the claims in Plaintiff's Complaint, which includes: (1) breach of contract (Complaint ¶¶34-44), (2) "money and benefits owed" but referencing an alleged tortious interference with contract (Complaint ¶¶45-47), (3) "fraud" but referencing breach of contract accompanied by an alleged fraudulent act (Complaint ¶48-53), (4) intentional infliction of emotional distress (Complaint ¶¶54-61), and (5) wrongful discharge in violation of public policy (Complaint ¶¶62-75). Defendants filed a legal memorandum in support of their Motion on December 5, 2022. Plaintiff filed objections to Defendants' Motion on December 15, 2022, and then filed a Supplemental Memorandum of Law in Opposition to Defendants' Motion on August 4, 2023. Defendants filed a Reply in Support of Defendants' Motion on September 13, 2023.

The Court held a hearing on Defendants' Motion on January 29, 2024. Present at the

hearing were Jeffrey Lehrer, counsel for Defendants, and Plaintiff, appearing *pro se*. During this hearing, both parties submitted additional information for the Court to consider. Relevant to Defendants' Motion, Defendants submitted a copy of Defendant Sykes' Employment-At-Will Policy, Corrective Action Policy, EEO Policy, Plaintiff's Charge of Discrimination filed with the South Carolina Human Affairs Commission (SCHAC) and the Equal Employment Opportunity Commission (EEOC), and the dismissals and notices of right to sue issued by SCHAC and EEOC. Defendants submitted other documents related to other pending motions before the Court. Plaintiff submitted additional information and articles for the Court to consider and answered the Court's questions about his claims. Both parties have been provided a full opportunity to present arguments and provide any additional materials related to Defendants' Motion. Defendants' Motion has been fully and extensively briefed by both parties. The Court has reviewed all the information filed and presented by the parties related to Defendants' Motion.

Both parties have submitted information and facts outside of the Complaint. The Court has considered information outside the Complaint and specifically relied on information and documents related to the dismissal of Plaintiff's Charge of Discrimination with SCHAC and the EEOC, and the statute of limitations deadlines noted therein. Accordingly, the Court has converted Defendants' Motion into a motion summary judgment. In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) ("Although the motion to dismiss was made under Rule 12(b), SCRCP, the circuit court appropriately treated the proceeding as one for summary judgment, because the motion was supported by matters outside the pleadings."). Pursuant to Rule 56, SCRCP, the Court

has viewed Plaintiff's Complaint, Plaintiff's allegations and all inferences reasonably drawn therefrom in the light most favorable to Plaintiff. *Strother v. Lexington Cnty Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

FINDINGS OF FACT

Plaintiff worked for Defendant Sykes as a Customer Service Agent from March until November 2019. (Compl. at ¶¶ 3, 27.) Plaintiff's Complaint alleges that Plaintiff was singled out for an "unscheduled" meeting on November 7, 2019, during which he was "coerced" into completing "surveys," and, the next day, he was suspended, without details albeit with pay, and then terminated. (Compl. at ¶¶ 13-20.) Plaintiff's Complaint also alleges Plaintiff asked Defendant Salas for copies of various Defendant Sykes' policies and procedures and was not provided with these policies. (Compl. at ¶ 20.) Plaintiff's Complaint further alleges Defendant Cox "live listened" to Plaintiff's calls with customers "searching for something against him"; that his disciplinary "situation" got escalated to Defendant Sykes' corporate offices in Tampa, Florida, contrary to the normal process; and that his treatment was harsher than the treatment of non-white, non-disabled, female, and younger comparators. (Compl. at ¶¶ 23, 26, 28.) Plaintiff claims Defendants' actions violated either Defendant Sykes' progressive discipline policies and procedures, South Carolina employment law, or public policy. (Compl. at ¶¶ 24, 27.) The allegations in Plaintiff's Complaint concerning Defendant Villalobos are only that he is Latino, a Costa Rican native, was promoted to Sumter from Defendant Sykes' Costa Rica site, and that Plaintiff requested a meeting with Defendant Villalobos. (Compl. at ¶ 10 & Ex. A at ¶ 27(b).) Plaintiff's Complaint does not contain any factual allegations concerning Defendant Walker-Cole.

On August 7, 2023, Plaintiff filed a Supplemental Response in opposition to Defendants' Motion, alleging that his Complaint properly alleges violations of the South Carolina Human

Affairs Law. Plaintiff's primary argument in his Supplemental Response is that he has "alleged race, age, gender and disability discrimination under the South Carolina Human Affairs Law and other statutes." (Plaintiff's Supplemental Response ¶ 1.) Plaintiff then proceeded to cite cases and arguments related to a claim under the South Carolina Human Affairs law. (*See* Sections III, IV, V, and VI of Plaintiff's Supplemental Response.)

CONCLUSIONS OF LAW

It is clear from a review of Plaintiff's Complaint, Plaintiff's responses to Defendants' Motion, and his arguments that all of Plaintiff's claims are based on the underlying allegations that Defendants discriminated against him because of his race (Caucasian), gender (male), age (over 40), and disability. The Court finds that Plaintiff's exclusive remedy for pursuing such claims of discrimination were the South Carolina Human Affairs law, S.C. Code Ann. § 1-13-10, *et. seq.*, and/or the applicable federal employment law statutes prohibiting such discrimination (Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

Plaintiff initially pursued these discrimination claims as required under the applicable statutes by filing an administrative Charge of Discrimination with the EEOC and the SCHAC on December 6, 2019. S.C. Code Ann. § 1–13–90(a) ("Any person shall complain in writing under oath or affirmation to the Commission within one hundred eighty days after the alleged discriminatory practice occurred."); 42 U.S.C. § 2000e-5 (stating that "such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred").

SCHAC dismissed Plaintiff's Charge of Discrimination on February 26, 2021. The dismissal notified Plaintiff of the specific statute of limitations for filing any claim under the

Human Affairs Law, which is as follows:

> If a charge filed with the commission by a complainant pursuant to this chapter is dismissed by the commission, or if within one hundred eighty days from the filing of the charge the commission has not filed an action under this chapter or entered into a conciliation agreement to which the complainant is a party, the complainant may bring an action in equity against the respondent in circuit court. The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier, except that this period may be extended by written consent of the respondent.

S.C. Code Ann. § 1-13-90(d)(6). Plaintiff's Charge of Discrimination admitted that the "Latest" date of alleged discrimination was November 22, 2019, which he admitted was the date Defendant Sykes terminated his employment. Thus, Plaintiff's one-year statute of limitations under the Human Affairs law expired on November 22, 2020, one year from the date of the violation alleged. Plaintiff filed the instant lawsuit on November 3, 2022, almost two years after the statute of limitations for any claims under the Human Affairs law expired.

Similarly, the EEOC issued a dismissal and notice of rights to Plaintiff on April 7, 2021, and notified Plaintiff that he only had 90 days to file a lawsuit related to his federal statutory discrimination claims. Plaintiff was required to initiate any federal discrimination claims alleged in his EEOC Charge of Discrimination on or before approximately July 7, 2021. Plaintiff failed to do so, filing this lawsuit on November 3, 2022, over 16 months after his statute of limitations expired.

It is clear from Plaintiff's Complaint and his statements and arguments in opposition to Defendants' Motion that he is attempting to now pursue his discrimination claims under state common law claims. However, the Court finds that, because Plaintiff had statutory remedies to pursue his discrimination claims, he was required to pursue those statutory claims instead of the

common law claims he is attempting to assert in this case. The South Carolina Supreme Court has made clear that "[w]hen a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy." *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992) (holding the common law claim was not available where the employee had a state or federal statutory remedy); *see also Barron v. Labor Finders of S.C.*, 393 S.C. 609, 615 (2011). In enacting the South Carolina Human Affairs law, the South Carolina General Assembly created a state agency, SCHAC, to handle complaints of employment discrimination, and provided a required procedure for plaintiffs to timely pursue such claims in court. Similarly, the United States Congress established the EEOC and provided required procedures for pursuing federal discrimination claims in court. Plaintiff failed to comply with the statute of limitations periods established by these laws despite being informed of the specific statute of limitations that applied by both the SCHAC and the EEOC.

The Court further finds that Plaintiff has not alleged facts other than the alleged discrimination sufficient to support any of his common law claims. He has not alleged any specific mandatory language in Defendants' policies that could create a contractual obligation that was breached by his separation. *Hessenthaler v. Tri-Cnty. Sister Help, Inc.*, 365 S.C. 101, 616 S.E.2d 694, 698 (2005) (to establish a contract claim, language must be "definitive in nature, promising specific treatment in specific situations"). In addition, at the hearing on Defendants' Motion, Plaintiff admitted that he never received or read Defendant Sykes' policies during his employment with Sykes. Accordingly, he could not have relied on any promises in such policies in a way that could create a contractual obligation. Nevertheless, the Court has reviewed Defendant Sykes' policies, and they contain no such mandatory language related to discipline or termination of employment that could create a contractual obligation.

Plaintiff cannot maintain a claim for tortious interference with contract because he has only alleged facts of discrimination by supervisory employees of Defendant Sykes and has not asserted facts that support an alleged interference by a third party. *See Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012) ("[T]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract."); *Threlkeld v. Christoph*, 280 S.C. 225, 312 S.E.2d 14 (Ct. App. 1984) (granting summary judgment where alleged interference was by two supervisors).

Plaintiff cannot maintain a claim for breach of contract accompanied by fraudulent act because he has not alleged a valid breach of contract as discussed above. *See Anthony v. Atl. Group, Inc.*, 909 F. Supp. 2d 455, 472 (D.S.C. 2012) (granting summary judgment to the employer on plaintiffs' breach of contract accompanied by fraud claim, given that no contract existed altering the employees' at-will employment status).

Plaintiff cannot maintain a claim for intentional infliction of emotional distress because, other than allegations of discrimination, he has not alleged conduct that could be viewed as so extreme and outrageous as to exceed all possible bounds of decency. *See Johnson v. Dailey*, 318 S.C. 318, 323, 457 S.E.2d 613, 615 (1995) (outrage claim properly dismissed because the employee's termination could not be "regarded as atrocious and utterly intolerable in a civilized society").

Plaintiff cannot maintain a claim for wrongful discharge because the only public policy he has identified are the statutory prohibitions against discrimination for which he had a statutory remedy that he failed to timely pursue as discussed above. *See Barron*, 393 S.C. at 614, 713 S.E.2d at 637.

For all the foregoing reasons, the Court hereby GRANTS summary judgment in favor of Defendants and dismisses all of Plaintiff's claims in this case. Because the Court is dismissing this case in its entirety, the remaining pending motions filed by both parties after Defendants' Motion to Dismiss are deemed moot and denied.

IT IS SO ORDERED.

_____

The Honorable R. Ferrell Cothran, Jr.

_____, 2024

Sumter, South Carolina

Sumter Common Pleas

Case Caption: R Michael Ardis VS Sykes Enterprises Inc , defendant, et al

Case Number: 2022CP4301781

Type: Order/Summary Judgment

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

EXHIBIT G

LexisNexis

Date and Time: Sunday, March 24, 2024 4:42:00PM EDT

Job Number: 220260934

Document (1)

1. *Stanley v. S. States Police Benevolent Ass'n, 435 S.C. 524*

Client/Matter: -None-

Headnote:HN3 - Cox v. S.C. Educ. Lottery Comm'n, 441 S.C. 209

[HN3 - When an appellant neither raises an issue at trial nor through a S.C. R. Civ. P. 59(e) motion, the issue is not preserved for appellate review. If a circuit court grants relief not previously contemplated or presented to the circuit court, the aggrieved party must move, pursuant to Rule 59(e), to alter or amend the judgment in order to preserve the issue for appeal. Imposing preservation requirements on an appellant prevents a party from keeping an ace card up his sleeve, intentionally or by chance, in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.]

Search Type: Natural Language - Expanded Results

Narrowed by:

Content Type	Narrowed by
Cases	Court: South Carolina

Stanley v. S. States Police Benevolent Ass'n

Court of Appeals of South Carolina

November 10, 2021, Heard; December 22, 2021, Filed

Opinion No. 5882

Reporter
435 S.C. 524 *; 868 S.E.2d 412 **; 2021 S.C. App. LEXIS 160 ***

Donald Stanley and Sean Reiter, Individually and as Class Representatives, Respondents, v. Southern States Police Benevolent Association, Inc., Appellant.

Subsequent History: Rehearing denied by *Stanley v. Southern State Police, 2022 S.C. App. LEXIS 29 (S.C. Ct. App., Feb. 25, 2022)*

Writ of certiorari dismissed *Stanley v. Southern State Police, 2023 S.C. LEXIS 183 (S.C., Sept. 5, 2023)*

Prior History: **[***1]** Appeal From Charleston County Edward W. Miller, Circuit Court Judge. Appellate Case No. 2019-000182.

Disposition: DISMISSED.

Core Terms

injunction, immediately appealable, class certification, class action, class member, interlocutory, orders, final judgment, trial court, communicate, constitutes, unpreserved, certifies, appeals, notice, rights

Case Summary

Overview

HOLDINGS: [1]-The appellate court could not address the issues of whether the trial court's class certification order under *S.C. R. Civ. P. 23* should be reversed as the order did not address the merits, was interlocutory and could not be appealed until after a final judgment; further, the provision of the trial court's orders restraining communications with class members was not discussed before the order was issued; when a party received an order containing relief that was not requested or contemplated, the party had to present its objections to the issue to the trial court in a ***S.C. R. Civ. P. 59(e)*** motion to preserve the issue for appeal; and appellant did not object to or mention the provision in its ***Rule 59(e)*** motion and raised the issue for the first time on appeal.

Outcome
Appeal dismissed.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 **Class Actions, Certification of Classes**

Where a S.C. R. Civ. P. 23 class certification ***order*** does ***not*** address the merits, it is interlocutory and may ***not*** be ***appealed*** until after final ***judgment***.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Judgments > Relief From Judgments

HN2 **Reviewability of Lower *Court* Decisions, *Preservation* for *Review***

When a ***party*** receives an ***order*** containing ***relief*** that was ***not*** requested or ***contemplated***, the ***party must present*** its objections to the ***issue*** to the ***trial court in*** a

S.C. R. Civ. P. 59(e) motion to preserve the issue for appeal.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN3[] **Reviewability of Lower Court Decisions, Preservation for Review**

An appellate court is a court of review, not of first view.

Counsel: James Andrew Yoho, of Boyle, Leonard & Anderson, P.A. of Charleston; James Edward Bradley, of Moore Bradley Myers, PA, of West Columbia; and Barry Goheen, of Atlanta, Georgia; all for Appellant.

Andrew John Savage, III, of Savage Law Firm, of Charleston; Eric Steven Bland, of Bland Richter, LLP, of Columbia; Daniel Francis Lynch, IV, and Carl Everette Pierce, II, both of Pierce, Sloan, Wilson, Kennedy & Early, LLC, of Charleston; Scott Michael Mongillo and Ronald L. Richter, Jr., both of Bland Richter, LLP, of Charleston; and Joseph C. Wilson, IV, of Joseph C Wilson Law Firm LLC, of Folly Beach; all for Respondents.

Judges: HILL, J. KONDUROS and HEWITT, JJ., concur.

Opinion by: HILL

Opinion

[*525] [413] HILL, J.:** This is an appeal of an order certifying a class action lawsuit against Appellant, the Southern States Police Benevolent Association, Inc. (PBA). PBA attacks the order on several fronts, **[*526]** but none of the preserved issues are immediately appealable. We therefore dismiss the appeal.

I.

The order certifies as a class certain South Carolina PBA members for the purpose of determining the scope of their rights to legal **[***2]** representation PBA provides. PBA claims the trial court's class certification order should be reversed because it improperly impairs PBA's business activities and wrongly certified a damages class.

We cannot address these issues because they are not immediately appealable. HN1[] Where, as here, a Rule 23, SCRCP, class certification order does not address the merits, it is interlocutory and may not be appealed until after final judgment. Hensley v. S.C. Dep't of Soc. Servs., 429 S.C. 144, 148, 838 S.E.2d 510, 512 (2020); Salmonsen v. CGD, Inc., 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008). Believing it has found a path around this precedent, PBA points to the following portion of the certification order:

> Any notices required by the law and the South Carolina Rules of Civil Procedure shall be given to the class in a form and manner to be determined by the Court upon application by Plaintiffs or Defendants. In the interim, no party shall communicate with the class members regarding this class action and the allegations contained herein.

According to PBA, this provision amounts to an injunction, triggering S.C. Code Ann. § 14-3-330(4) (2017), which provides an interlocutory order granting an injunction is immediately appealable. See Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (holding precertification order allowing defendant but not plaintiff to contact potential class members amounted to an injunction that was immediately appealable). **[***3]** PBA further asserts the order runs afoul of Eldridge and Gulf Oil Co. v. Bernard, which require that orders restraining communications with class members must "be based on a clear record and specific findings reflecting a weighing of the need for a limitation and the potential interference with the parties' rights." Gulf Oil Co. v. Bernard, 452 U.S. 89, 101, 101 S. Ct. 2193, 68 L. Ed. 2d 693, (1981).

[*527] We question whether the communication order here, which was designed by the skilled circuit judge to evaporate once the class notice was issued, is a true injunction of the type envisioned by Eldridge. The order at issue there only applied to the plaintiff, and was entered before the class was certified. Several courts and commentators have cautioned that procedural orders in class action cases that in no way provide substantive relief or address the merits of a case are not appealable as injunctions under the federal final judgment statute. See Cobell v. Kempthorne, 455 F.3d 317, 322, 372 U.S. App. D.C. 232 (D.C. Cir. 2006)

[**414] (setting forth test of when a provision of a Rule 23, Fed. R. Civ. P., class certification order qualifies as an immediately appealable injunction); 16 Charles Alan Wright, Arthur R. Miller, *Federal Practice and Procedure* § 3922.2 (3d ed. 1998); 3 William B. Rubenstein, *Newberg on Class Actions* § 8:41 (5th ed. 2021). We note the federal appealability statute mirrors the phrasing regarding [***4] "injunctions" found in S.C. Code Ann. § 14-3-330(4). See 28 U.S.C.A. § 1292(a)(1) (2006) ("The courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ."). We are also concerned that an overly generous view of what constitutes an injunction for purposes of appealability may sap the efficiency of class actions by allowing for immediate appeal of what in reality may be an interlocutory procedural ruling. If any routine phrase in a class certification order may be interpreted as an immediately appealable injunction, the entire class action—premised as it is on the idea that the advantages of economy of scale might help both sides and streamline the litigation—could be brought to a halt by a party bent on delay.

But we do not have to confront these questions about what constitutes an "injunction" here. The provision of the trial court's order limiting communication was not discussed before the order was issued. PBA did not object to or mention the provision in its Rule 59(e), SCRCP, motion and raises the issue for the first time on appeal. We therefore find the issue unpreserved. HN2[↑] When a party receives an order containing relief that was not requested [***5] or contemplated, the party must present its objections to the issue to the trial court in a Rule 59(e), SCRCP, motion to preserve the issue for appeal. Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, [*528] 311 S.C. 56, 60-61, 427 S.E.2d 673, 675-76 (1993); In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998). This gives the trial court the opportunity to consider and rule upon the issue in the trial setting after it has been refined by fact-finding and sharpened by argument. This in turn allows us to provide the meaningful consideration only a complete record provides. HN3[↑] As an appellate court, "we are a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

Because PBA's challenge to the communication limitation is unpreserved and none of PBA's other issues are immediately appealable, PBA's appeal is

DISMISSED.

KONDUROS and HEWITT, JJ., concur.

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EXHIBIT H

LexisNexis

Date and Time: Sunday, March 24, 2024 4:40:00PM EDT

Job Number: 220260888

Document (1)

1. *Gibbons v. Aerotek, Inc., 441 S.C. 180*

Client/Matter: -None-

Headnote:HN3 - Cox v. S.C. Educ. Lottery Comm'n, 441 S.C. 209

[HN3 - When an appellant neither raises an issue at trial nor through a S.C. R. Civ. P. 59(e) motion, the issue is not preserved for appellate review. If a circuit court grants relief not previously contemplated or presented to the circuit court, the aggrieved party must move, pursuant to Rule 59(e), to alter or amend the judgment in order to preserve the issue for appeal. Imposing preservation requirements on an appellant prevents a party from keeping an ace card up his sleeve, intentionally or by chance, in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.]

Search Type: Natural Language - Expanded Results

Narrowed by:

Content Type	Narrowed by
Cases	Court: South Carolina

Gibbons v. Aerotek, Inc.

Court of Appeals of South Carolina

June 5, 2023, Heard; August 2, 2023, Filed

Opinion No. 6006

Reporter
441 S.C. 180 *; 893 S.E.2d 326 **; 2023 S.C. App. LEXIS 86 ***

Trisha Gibbons, Respondent, v. Aerotek, Inc., Appellant.

Prior History: [***1] Appeal From Richland County. Perry H. Gravely, Circuit Court Judge. Appellate Case No. 2020-001065.

Disposition: AFFIRMED.

Core Terms

employment agreement, attorney's fees, trial court, authenticate, costs

Case Summary

Overview
HOLDINGS: [1]-In determining whether the appellant had an obligation to authenticate the contract, the appellant failed to preserve the issue because after the court issued its order, the appellant was required to file a S.C. R. Civ. P. 59(e) motion addressing the trial court's finding that the appellant did not properly authenticate the Employment Agreement. Therefore, because the appellant failed to preserve the issue, the issue barred appellate review.

Outcome
Denial of motion for attorneys' fees and costs affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery

HN1 **Standards of *Review*, Abuse of Discretion**

The decision to award or deny attorneys' fees and costs ***will not*** be disturbed on ***appeal*** absent an abuse of discretion. An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN2 ***Relief*** **From** ***Judgments***, ***Altering*** **&** ***Amending Judgments***

S.C. R. Civ. P. 59(e) motions serve a vital purpose for proper ***issue preservation***.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN3 ***Relief*** **From** ***Judgments***, ***Altering*** **&** ***Amending Judgments***

When a ***party*** receives an ***order*** that ***grants*** certain ***relief not previously contemplated*** or ***presented*** to the ***trial court***, the ***aggrieved party must move***, ***pursuant to S.C. R. Civ. P. 59(e)*** to ***alter*** or ***amend*** the ***judgment in order to preserve*** the ***issue*** for ***appeal***.

Civil Procedure > Judgments > Relief From

Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN4 **Relief From Judgments, Altering & Amending Judgments**

The losing ***party*** ***must*** first try to convince the ***circuit court*** it has ***ruled*** wrongly and then, if that effort fails, convince the ***appellate court*** that the ***circuit court*** errs.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN5 **Relief From Judgments, Altering & Amending Judgments**

When an ***appellant*** ***neither*** ***raises*** an ***issue*** at ***trial*** nor ***through*** a ***S.C. R. Civ. P. 59(e)***, ***motion***, the ***issue*** is ***not*** ***preserved*** for ***appellate review***.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN6 **Preclusion of Judgments, Law of the Case**

Under the two-***issue*** ***rule***, when a decision is based on more than one ground, the ***appellate court*** ***will*** affirm unless the ***appellant*** ***appeals*** all grounds because the unappealed ground ***will*** become law of the ***case***.

Counsel: Bryson Moore Geer, of Nelson Mullins Riley & Scarborough, LLP, of Charleston; Patrick Devin Quinn, of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and William E. Corum and Megan A. Scheiderer, both of Kansas City, Missouri, all for Appellant.

James Paul Porter, of Cromer Babb Porter & Hicks, LLC, of Columbia, for Respondent.

Judges: LOCKEMY, A.J. KONDUROS and VINSON, JJ., concur.

Opinion by: LOCKEMY

Opinion

[*182] [327] LOCKEMY, A.J.:** ***In*** this ***appeal*** from an ***order*** denying a ***motion*** for attorney's fees and costs, Aerotek, Inc. argues the ***trial court*** erred by holding (1) Aerotek had an obligation to plead its entitlement to attorneys' fees and that it did ***not*** sufficiently do so ***in*** its answer and (2) Aerotek did ***not*** authenticate an employment agreement. We affirm based on ***preservation*** and the two-***issue rule***.

FACTS/PROCEDURAL HISTORY

In October 2018, Gibbons filed a complaint against Aerotek and Schneider Electric USA, **[**328]** Inc.[1] (Schneider Electric), alleging (1) a violation of *section 41-1-70 of the South Carolina Code* (2021)[2] and (2) a breach of contract. She asserted Schneider Electric and Aerotek terminated her employment because she complied with a subpoena to testify **[***2]** ***in court*** and they breached "a written agreement" when they failed to increase her pay from $12 per hour to $16 per hour after ninety days of employment.

Aerotek answered and argued it took no part ***in*** the decision to terminate her and although the Employment Agreement provided Gibbons was employed as a temporary contract employee assigned to Schneider Electric for a wage of $12 per **[*183]** hour, the Employment Agreement never provided she would receive a ***raise*** after ninety days of employment. Aerotek concluded its answer with a request for dismissal of Gibbons's complaint and an award of attorneys' fees and costs.

Aerotek ***moved*** for summary ***judgment*** and asserted

---

[1] During litigation, all ***parties*** consented to the dismissal of Schneider Electric with prejudice.

[2] *Section 41-1-70* provides:

> Any employer who dismisses . . . an employee because the employee complies with a valid subpoena to testify ***in*** a ***court*** proceeding . . . is subject to a civil action ***in*** the ***circuit court*** for damages caused by the dismissal . . . .
>
> Damages for dismissal are limited to no more than one year's salary or fifty-two weeks of wages based ***on a*** forty-hour week ***in*** the amount the employee was receiving at the time of receipt of the subpoena.

Gibbons's claims ***pursuant to*** *section 41-1-70* failed as a matter of law because (1) it had no involvement ***in*** Schneider Electric's **[***3]** decision to terminate Gibbons and (2) it had no knowledge Gibbons was served with a subpoena to testify.[3] Aerotek's memorandum ***in*** support of summary ***judgment*** was accompanied by four attachments: the Employment Agreement; an affidavit of Jason Pritchard, an employee relations manager at Aerotek; Aerotek's job posting for a position with Schneider Electric; and Gibbons's April 2019 deposition transcript.

The ***trial court*** denied Aerotek's ***motion*** for summary ***judgment***. ***In*** January 2020, the matter proceeded to a jury ***trial***. At the close of evidence, Aerotek ***moved*** for a directed verdict, which the ***trial court granted***.

Subsequently, Aerotek requested attorneys' fees ***in*** the amount of $201,450.50 and costs ***in*** the amount of $10,365.10. Aerotek asserted it was ***not*** involved ***in*** terminating Gibbons's employment and it had no initial knowledge Gibbons was served with a subpoena. Aerotek argued the Employment Agreement entitled it "to recover reasonable attorneys' fees and all costs." Aerotek also addressed the reasonableness of hours and rates and attached the Employment Agreement and affidavits asserting the reasonableness of the fees and costs.

In opposition, Gibbons requested the ***court*** deny the ***motion***. **[***4]** She asserted various defenses and equitable matters as to why the fee-shifting provision ***in*** **[**329]** the Employment Agreement was invalid. She attached various documents to her ***motion in*** opposition, including her affidavit, stating that (1) Aerotek never mentioned or explained the fee-shifting provision, (2) she never had notice of the Employment Agreement, (3) she had "no contemporaneous memory of receiving or ***reviewing*** that document ***in*** any form or fashion when [she] allegedly signed it electronically," and (4) even if she did sign the **[*184]** Employment Agreement, she "received nothing of value for doing so."

The ***trial court*** denied Aerotek's ***motion*** for attorneys' fees and costs "on [two] separate grounds." First, the ***court*** found *Rule 8(a), SCRCP*, required Aerotek's pleadings to contain a "short and plain statement of the facts" showing Aerotek was entitled to ***relief***. The ***trial court*** determined Aerotek's pleadings did ***not*** comport with *Rule 8(a)* because the pleadings failed to include the allegations and facts supporting Aerotek's basis for attorneys' fees and costs and made no reference to the Employment Agreement. Second, the ***trial court*** determined the authenticity of the Employment Agreement was ***in*** dispute. It noted the **[***5]** Employment Agreement was never introduced as evidence at ***trial***. Further, the ***trial court*** stated the authenticity of the Employment Agreement was at ***issue*** because Gibbons stated she did ***not*** recall signing the Employment Agreement and Aerotek did ***not*** include a representative's affidavit as to the authenticity of the Employment Agreement. Therefore, the ***trial court*** concluded Aerotek did ***not*** meet its burden of authenticating the Employment Agreement. Aerotek did ***not*** file a *Rule 59(e), SCRCP*, ***motion***. This ***appeal*** followed.

ISSUES ON ***APPEAL***

1. Can Aerotek seek contractual attorneys' fees ***in*** this action for which fees have been incurred, without having pled a counterclaim for such fees, if Gibbons brought a claim for breach of the same contract under which Aerotek seeks its fees, and when Aerotek did request an award of attorneys' fees ***in*** its answer, or ***must*** it file a separate lawsuit asserting an original claim for its attorneys' fees?

2. Did Aerotek have an obligation to authenticate the contract under which it seeks contractual, prevailing ***party*** attorneys' fees and, if so, did it do so sufficiently?

STANDARD OF ***REVIEW***

HN1[↑] "The decision to award or deny attorneys' fees and costs ***will not*** be disturbed on ***appeal*** absent **[***6]** an abuse of discretion." *Maybank v. BB&T Corp., 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016)*. "An abuse of discretion occurs when there is an error of law or a factual conclusion that is **[*185]** without evidentiary support." *Ellis v. Davidson, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004)*.

LAW/ANALYSIS

Aerotek argues the ***trial court*** erred ***in*** holding it failed to authenticate the Employment Agreement. Aerotek contends it provided the document to the ***court*** when it attached it to the ***motion*** and memorandum for summary ***judgment*** and provided Pritchard's affidavit,

[3] Gibbons and Aerotek subsequently filed a joint stipulation of dismissal as to the breach of contract claim.

stating Gibbons electronically signed the agreement. It avers the burden to authenticate was **not** high and notes that during her deposition, Gibbons did **not** dispute signing the agreement. Finally, Aerotek contends the **trial court** did **not** cite any authority to support its holding for this **issue** and it had no **opportunity** to address the authentication **issue** because the **trial court** *sua sponte* **raised** the **issue in** its **order** denying attorneys' fees. We disagree.

Initially, we hold Aerotek failed to **preserve issue** two, regarding the authentication of the contract, for **review**. *HN2*[↑] **Rule 59(e) motions** "serve a vital purpose for proper **issue preservation**." *Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009)*. A **Rule 59(e) motion** would have **given** Aerotek the **opportunity** to argue the errors it believed the **trial court** committed **in** denying its **motion** for attorneys' **[***7]** fees and allowed the **trial court** to reconsider the *sua sponte* ground and its **ruling**. However, **in** the absence of this **motion**, such an **opportunity** was lost. After the **trial court issued** its **order**, Aerotek was required to file a **Rule 59(e) motion** addressing the **trial court**'s finding that Aerotek did **not** properly authenticate the Employment Agreement. *See In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998)* (*HN3*[↑] "When a **party** receives an **order** that **grants** certain **relief not previously contemplated** or **presented** to the **trial court**, the **aggrieved party must move**, **pursuant to** Rule 59(e), SCRCP, to **alter** or **amend** the **judgment in order to preserve** the **issue** for **appeal**."). Because Aerotek's failure to **preserve issue** two barred **appellate review**, this **issue** is therefore, right or wrong, the law of the **case**. *See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)* **[*186]** ("*HN4*[↑] The losing **party must** first try to convince the [**circuit**] **court** it . . . has **ruled** wrongly and then, if that effort fails, convince the **appellate court** that the [**circuit**] **court** erred."); *Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006)* ("*HN5*[↑] [W]hen an **appellant neither raises** an **issue** at **trial** nor **through** a **Rule 59(e), SCRCP, motion**, the **issue** is **not preserved** for **appellate review**."). Accordingly, we affirm **issue** two.

Further, the **trial court** based its decision to deny Aerotek's **motion** for attorneys' fees on "[two] separate grounds": **[***8]** first, that Aerotek failed to sufficiently plead its entitlement to attorneys' fees and costs and second, that it did **not** properly authenticate the Employment Agreement. Because we hold the **[**330]** **trial court**'s finding regarding the authentication **issue** is the law of the **case**, it is, therefore, a ground supporting the denial of Aerotek's **motion** for attorneys' fees and costs. Accordingly, **pursuant to** the two-**issue rule**, we affirm and do **not** address **issue** one. *See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)* (*HN6*[↑] "Under the two[-]**issue rule**, whe[n] a decision is based on more than one ground, the **appellate court will** affirm unless the **appellant appeals** all grounds because the unappealed ground **will** become law of the **case**."), *abrogated on other grounds by Repko v. County of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018)*; *see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)* (stating "an unappealed **ruling**, right or wrong, is the law of the **case**").

CONCLUSION

Based on the foregoing, the **trial court**'s denial of Aerotek's **motion** for attorneys' fees and costs is

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

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EXHIBIT I

LexisNexis

Date and Time: Sunday, March 24, 2024 4:43:00PM EDT

Job Number: 220260960

Document (1)

1. *Moses v. State, 2024 S.C. App. LEXIS 1*

Client/Matter: -None-

Headnote:HN3 - Cox v. S.C. Educ. Lottery Comm'n, 441 S.C. 209

[HN3 - When an appellant neither raises an issue at trial nor through a S.C. R. Civ. P. 59(e) motion, the issue is not preserved for appellate review. If a circuit court grants relief not previously contemplated or presented to the circuit court, the aggrieved party must move, pursuant to Rule 59(e), to alter or amend the judgment in order to preserve the issue for appeal. Imposing preservation requirements on an appellant prevents a party from keeping an ace card up his sleeve, intentionally or by chance, in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.]

Search Type: Natural Language - Expanded Results

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Content Type	Narrowed by
Cases	Court: South Carolina

Neutral
As of: March 24, 2024 8:43 PM Z

Moses v. State

Court of Appeals of South Carolina

November 16, 2023, Heard; January 3, 2024, Filed

Opinion No. 6041

Reporter
2024 S.C. App. LEXIS 1 *

George N. Moses, Petitioner, v. State of South Carolina, Respondent.

Notice: THIS DECISION IS NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Prior History: **[*1]** Appeal from Orangeburg County. Appellate Case No. 2020-000093. Edgar W. Dickson, Circuit Court Judge.

Disposition: AFFIRMED.

Core Terms

preservation, testing, circuit court, shorts, appellate review

Case Summary

Overview
HOLDINGS: [1]-The petitioner failed to preserve the errors he assigned for appellate review that did the circuit court err in finding the petition failed to meet the requirements of S.C. Code Ann. § 17-28-40(c), which enumerated the required contents of the DNA testing application, rather than the requirements of S.C. Code Ann. § 17-28-90(B) and no extraordinary circumstances warranted the appellate court to set aside preservation rules and reach the issue; because the issues the petitioner brought on appeal were neither raised to nor ruled on by the circuit court. Also, the state had no opportunity to address any of the arguments as the appeal was the first time, he had raised them.

Outcome
Order affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

Evidence > Burdens of Proof > Allocation

Evidence > ... > Scientific Evidence > Bodily Evidence > DNA

Evidence > Burdens of Proof > Preponderance of Evidence

HN1 **Postconviction Proceedings, DNA Testing**

Under the DNA Testing Act, applicants have the burden of showing the items for which testing is sought still exist. S.C. Code Ann. § 17-28-90(B) (2014 & Supp. 2023) The ***court*** shall ***order*** DNA testing of the applicant's DNA and the evidence upon a finding that the applicant has established each of the factors by a preponderance of the evidence.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

Evidence > ... > Scientific Evidence > Bodily Evidence > DNA

Criminal Law & Procedure > Appeals > Right to Appeal > Government

HN2 **Postconviction Proceedings, DNA Testing**

S.C. Code Ann. § 17-28-90(G) provides that both the State and the applicant have a right to ***appeal*** a final ***order granting*** or denying an application under the DNA Testing Act.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

HN3[] **Postconviction Proceedings, DNA Testing**

Applications under S.C. Code Ann. § 17-28-90(G) are ***in*** some ways similar to applications seeking post-conviction ***relief*** under the Uniform Post-Conviction Procedure Act.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

Evidence > ... > Scientific Evidence > Bodily Evidence > DNA

HN4[] **Postconviction Proceedings, DNA Testing**

Whereas the Uniform Post-Conviction Procedure Act provides that all ***rules*** and statutes applicable ***in*** civil proceedings are available to the ***parties***, the DNA Testing Act provides that all ***rules*** and statutes applicable ***in*** criminal proceedings are available to the ***parties***.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN5[] **Clearly Erroneous *Review*, Findings of Fact**

In criminal ***cases***, the ***appellate court*** sits to ***review*** errors of law only. Therefore, the ***appellate court*** is bound by the ***trial court***'s factual findings unless the ***appellant*** can demonstrate that the ***trial court***'s conclusions either lack evidentiary support or are controlled by an error of law.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error

HN6[] ***Preservation* for *Review*, Failure to Object**

South Carolina ***appellate courts*** do ***not*** follow the plain error standard when sitting ***in review*** of a ***trial court***'s decision. The plain error ***rule*** does ***not*** apply ***in*** South Carolina state ***courts***. Instead, a ***party must*** have a contemporaneous and specific objection to ***preserve*** an ***issue*** for ***appellate review***. It is a litigant's duty to bring to the ***court***'s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. However, ***appellate courts*** are to be mindful of the need to approach ***issue preservation rules*** with a practical eye and ***not in*** a rigid, hyper-technical manner and should ***not*** apply ***preservation rules in*** a manner that elevates form over substance to trap ***trial*** lawyers so as to ***prevent*** the ***appeal*** of a legitimate ***issue***.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN7[] ***Preservation* for *Review*, *Requirements***

One primary purpose of the ***appellate court***'s ***issue preservation rules*** is to ***give*** the ***trial court*** a fair ***opportunity*** to ***rule***. Second, ***preservation rules*** work to ensure that both ***parties*** are aware of the nature of the objection such that they may ***present*** their best arguments addressing that objection. The ***appellate court***'s supreme ***court*** has assessed requests to set aside ***preservation in*** the interest of justice against both of these high-level goals.

Criminal Law & Procedure > Postconviction Proceedings

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN8[] **Criminal Law & Procedure, Postconviction Proceedings**

Only under extraordinary circumstances such as when a post-conviction ***relief court*** fails to make sufficiently specific findings of fact do the interests of justice permit a ***court*** to reach unpreserved ***issues***. Although the ***appellate court*** has overlooked the lack of a posttrial ***motion in*** the past, those decisions clearly represent extraordinary circumstances.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN9 Preservation for Review, Requirements

It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

HN10 Preservation for Review, Requirements

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and provide the appellate court with a platform for meaningful appellate review.

Counsel: Appellate Defender Jessica M. Saxon, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia, and Solicitor David Michael Pascoe, Jr., of Orangeburg, all for Respondent.

Judges: GEATHERS, J. THOMAS and KONDUROS, JJ., concur.

Opinion by: GEATHERS

Opinion

ON WRIT OF CERTIORARI

GEATHERS, J.: Petitioner George N. Moses appeals the December 16, 2019 denial of his application under the *Access to Justice Post-Conviction DNA Testing Act (the DNA Testing Act)*,[1] in which he sought post-conviction DNA testing of evidence used to convict him of voluntary manslaughter and armed robbery in February 2009. Moses argues the circuit court erred by relying on the incorrect part of the statute and misapplying the statutory factors used to review his application. We affirm.

FACTS

George Moses was convicted of voluntary manslaughter and armed robbery and sentenced to life without parole on February 12, 2009, for the killing of Harry Livingston (the victim). On September 29, 2006, Moses visited the victim to purchase drugs. A fight broke out between **[*2]** the two surrounding the terms of the exchange and resulted in Moses stabbing and hitting the victim with a stick until the victim passed out. The victim was subsequently found dead, and an autopsy attributed his death to a closed-head injury and subarachnoid hemorrhaging. After the altercation, Moses went to a friend's house and hid a pair of bloody shorts, which police later found. A grand jury indicted Moses for armed robbery and murder. At trial, Moses admitted to the altercation with the victim and argued that he acted in self-defense. DNA testing of several pieces of evidence, including strips cut from the bloody shorts Moses stashed after his fight with the victim, did not reveal Moses' DNA.

Moses filed an application under the DNA Testing Act on January 3, 2017, requesting that the State perform a DNA test on two other items: swabs taken from the pockets of the pair of shorts he admitted to hiding and fingernail clippings taken from the victim. Moses alleged that testing these items would reveal the true identity of the person wearing the shorts and the identity of the person who actually killed the victim.[2]

Moses' application sat pending for over two years, apparently owing to **[*3]** confusion over how the application was to be handled. On August 28, 2019, the circuit court held an evidentiary hearing in which Moses' counsel began by advising the court he had been unable to verify that the items for which testing

[1] *S.C. Code Ann. §§ 17-28-10 to -120* (2014 & Supp. 2023).

[2] At oral argument, Moses' counsel explained that Moses was likely confused by the fact that multiple DNA swabs were taken from the bloody shorts and that Moses thought that there were two pairs of shorts somehow involved in the State's case. Because Moses admitted at trial that he was wearing the bloody shorts of which he now seeks DNA testing, counsel explained that the focal point of Moses' case was testing the victim's fingernail clippings, which he asserts could potentially show that an interceding actor caused the victim's death.

was sought still existed.[3] The **parties** then spent most of the hearing arguing whether identity was a critical factor at Moses' **trial**. On this point, Moses argued that DNA evidence from the shorts and the victim's fingernails would reveal that the victim had been **in another** altercation after his fight with Moses. The State argued Moses' testimony at **trial** that he engaged **in** an altercation with the victim before his death and that he stashed the bloody shorts at a friend's house precluded a finding that identity was an **issue** during the **trial**.

After taking the **parties**' arguments under advisement, the **circuit court issued** an **order** on December 16, 2019, denying Moses' application. Moses concedes on **appeal** that no objections were **raised** at the hearing nor was the **circuit court** asked to reconsider its **order**. Indeed, Moses reads the record as making clear "that everyone involved, from [Moses'] DNA counsel to the [s]olicitor to the **circuit court**[,] did **not** properly **[*4]** address [Moses'] DNA application." Moses sought certiorari from this **court pursuant to** Rule 247(a), SCACR,[4] and this **court granted** the petition on June 16, 2021.

ISSUE ON APPEAL

Did the **circuit court** err **in** finding Petitioner failed to meet the **requirements** of section 17-28-40(C) of the South Carolina Code, which enumerates the required contents of the DNA testing application, rather than the **requirements** of section 17-28-90(B), which specifies the factors to be **proved** at the hearing on the DNA testing application?

STANDARD OF REVIEW

HN2[↑] Section 17-28-90(G) of the South Carolina Code provides that both the State and the applicant have a right to **appeal** a final **order granting** or denying an application under the DNA Testing Act. Our research has revealed no published **appellate court** decision defining the standard of **review** for such **appeals**. HN3[↑] Applications under this statute are **in** some ways similar to applications seeking post-conviction **relief** (PCR) under the Uniform Post-Conviction Procedure Act (the PCR Act).[5]

HN4[↑] However, whereas the PCR Act provides that "[a]ll **rules** and statutes applicable **in** *civil* proceedings are available to the **parties**," the DNA Testing Act provides that "[a]ll **rules** and statutes applicable **in** *criminal* proceedings are available to [the **parties**]." *Compare* § 17-27-80 (emphasis added), *with* § 17-28-90(A) (emphasis added). This **[*5]** key difference between the two acts justifies applying the standard of **review** for criminal proceedings to the **present case**. HN5[↑] "**In** criminal **cases**, the **appellate court** sits to **review** errors of law only." State v. Elwell, 403 S.C. 606, 609, 743 S.E.2d 802, 804 (2013). "Therefore, this [c]ourt is bound by the **trial court**'s factual findings unless the **appellant** can demonstrate that the **trial court**'s conclusions either lack evidentiary support or are controlled by an error of law." *Id.*

LAW AND ANALYSIS

The State contends that Moses' arguments are unpreserved while Moses asks this **court** to relax **preservation rules** to reach the merits of his claims. We agree with the State and hold Moses' arguments on **appeal** are **not preserved** for **appellate review**.

HN6[↑] South Carolina **appellate courts** do **not** follow the "plain error" standard when sitting **in review** of a **trial court**'s decision. State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error **rule** does **not** apply **in** South Carolina state **courts**."). "Instead, a **party must** have a contemporaneous and specific objection to **preserve** an **issue** for **appellate review**." *Id.* "[I]t is a litigant's duty to bring to the **court**'s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." State v. Geer, 391 S.C. 179, 193, 705 S.E.2d 441, 448 (Ct. App. 2010) (quoting S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)). However, **appellate courts** are to be **[*6]** "mindful of the need to approach **issue preservation rules** with a

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[3] HN1[↑] Under the DNA Testing Act, applicants have the burden of showing the items for which testing is sought still exist. § 17-28-90(B) ("The **court** shall **order** DNA testing of the applicant's DNA and the [evidence] . . . upon a finding that the applicant has established each of the . . . factors by a preponderance of the evidence[.]").

[4] Rule 247(a), SCACR, provides: "A final **order** of the **circuit** or family **court** denying or **granting** DNA testing under the . . . DNA Testing Act . . . shall be **reviewed** upon petition of either **party** for a writ of certiorari according to the procedure set forth **in** this **rule**."

[5] S.C. Code Ann. §§ 17-27-10 to -160.

practical eye and not in a rigid, hyper-technical manner'" and thus should not apply preservation rules in a manner that "elevat[es] form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." State v. Morales, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (quoting Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011)).

HN7[↑] "One primary purpose of our issue preservation rules is to 'give the trial court a fair opportunity to rule.'" Id. (quoting Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Second, preservation rules work to ensure that "both parties are aware of the nature of the objection such that they may present their best arguments addressing *that* objection." Id. Our supreme court has assessed requests to set aside preservation in the interest of justice against both of these high-level goals. *See id.* (noting that the court's refusal to ignore issue preservation rules "serves each [of the two aforementioned] purposes").

Moses asks this court to analyze the merits of his appeal, regardless of whether the issues are preserved, in the interest of justice. To support this, Moses cites state and federal case law supporting the proposition that at times, "the interests of justice require . . . courts to be flexible with procedural requirements before [*7] . . . applicants suffer procedural default on substantial claims." Mangal v. State, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017).

In *Simmons v. State*, our supreme court took the "extraordinary action" of remanding a PCR case to the lower court even though it found "the State [was] technically correct" that the applicant's issue on appeal was not preserved. 416 S.C. 584, 592-93, 788 S.E.2d 220, 225 (2016). It noted that "[a] remand under these circumstances must . . . be granted sparingly and be reserved for the *rarest of cases*." Id. at 593, 788 S.E.2d at 225 (emphasis added). The applicant in Simmons had been sentenced to death for murder and filed a PCR application, asserting ineffective assistance of counsel, newly discovered evidence, and a claim that he was deprived of due process by the State's presentation of false DNA evidence to the jury and its failure to disclose exculpatory evidence. Id. at 589, 788 S.E.2d at 223. The PCR court vacated the applicant's death sentence and denied the remaining claims, including the challenge to the DNA evidence. Id. at 591, 788 S.E.2d at 224. On appeal, the State did not deny that "the strength of the State's DNA evidence against [the applicant] was misrepresented to the jury," but our supreme court noted that it found "no evidence of conscious wrongdoing in the prosecution of [the] case." Id. Instead, it attributed the misrepresentation [*8] to faulty evidence the State had received "concerning a complex matter." Id. Finding that the PCR court did not make specific findings of fact, our supreme court vacated the PCR court's order in part and remanded it for further factual findings. Id. at 592-93, 788 S.E.2d at 225.[6]

Simmons and similar cases cited by Moses are distinguishable from the instant case. Whereas in *Simmons*, the PCR court failed to make sufficient factual findings required of it by the law, Moses makes no allegation here that the circuit court did not make the factual findings required of it under the DNA Testing Act. Rather, Moses essentially argues the circuit court erred by deriving the factors it applied from the wrong part of the DNA Testing Act.[7] HN8[↑] Only under extraordinary circumstances—such as when a PCR court fails to make sufficiently specific findings of fact—do the interests of justice permit a court to reach unpreserved issues. *See* Fishburne v. State, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019) (Hearn, J., concurring) ("Although we have overlooked the lack of a [posttrial] motion in the past, . . . those decisions clearly represent extraordinary circumstances. Our issue preservation rules are well-settled. [We depart] from [these rules] only in exceptional circumstances."). [*9]

Softening preservation rules for Moses' claim would be

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[6] *Simmons* is in the same vein as a line of cases stemming from McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). In McCray, our supreme court took the opportunity to remind PCR courts of their obligation to "make specific findings of fact, and state expressly [their] conclusions of law, relating to each issue presented." 305 S.C. at 330, 408 S.E.2d at 241 (quoting S.C. Code Ann. § 17-28-80). Finding that "[t]he PCR court's conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute," our supreme court remanded the case. Id. A year later, in Pruitt v. State, our supreme court expressed "concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant" and vacated and remanded the case to the PCR court for additional findings. 310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992) (per curiam).

[7] Specifically, Moses argues the circuit court relied on section 17-28-40(C), which sets out factors for evaluating an *application* under the DNA Testing Act, instead of section 17-28-90(B), which specifies the factors to be applied to a *hearing* held under the DNA Testing Act.

tantamount to employing the plain error rule. Although—as discussed—our jurisprudence sometimes permits reaching unpreserved issues to avoid hyper-technical applications of preservation rules, the case at hand is not one in which preservation rules must be tortured or even construed strictly in order to function as a bar to Moses' claim. Rather, Moses did not object during the DNA testing hearing. In short, the issues Moses brings on appeal were neither raised to nor ruled on by the circuit court. *Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)* (HN9[↑] "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). The State had no opportunity to address any of the arguments about the circuit court's order that Moses makes on appeal because this appeal is the first time he has raised them. The same can be said about the circuit court. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)* ("HN10[↑] Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review."). Thus, Moses failed to preserve the [*10] errors he assigns for appellate review and no extraordinary circumstances warrant this court to set aside preservation rules and reach the issues.

CONCLUSION

For the foregoing reasons, the circuit court's order is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

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