

James G. Long III  
Member  
Admitted in SC

August 15, 2013

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

RECEIVED

AUG 15 2013

SC Court of Appeals

Re: **Michael Jarrard v. Federal Express Corporation**  
**Appellate Case No. 2011-204646 / Case No. 11-CP-23-898**

Dear Mr. Shearouse:

Enclosed for filing with the Court are the original and seven copies of the **Petition For Writ Of Certiorari and Proof Of Service**. Also enclosed for filing are the original and two copies of the **Appendix To Petition For Writ Of Ceritorari and Proof Of Service**. Please return a clocked-in copy of each to us via our courier. We are also enclosing our firm's check in the amount of \$100 for the filing fee.

Charleston

Charlotte

**Columbia**

Greensboro

Greenville

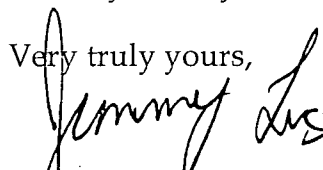
Hilton Head

Myrtle Beach

Raleigh

Thank you for your assistance in this matter.

Very truly yours,

  
James G. Long III

JGL/hjr

Enclosures

cc: The Honorable Jenny Abbott Kitchings  
C. Daniel Vega, Esquire  
Blake A. Hewitt, Esquire

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

RECEIVED

AUG 15 2013

Honorable Edward W. Miller, Circuit Court Judge

SC COURT OF APPEALS

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Appellate Case No. 2011-204646  
Case No. 11-CP-23-898

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Michael Jarrard, ..... Respondent,

v.

Federal Express Corporation, ..... Petitioner.

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PROOF OF SERVICE

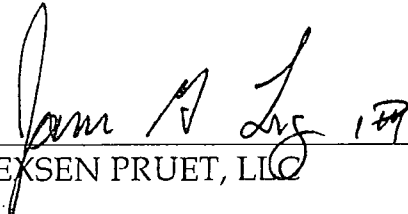
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I certify that I have served a copy of the **Petition For Writ Of Certiorari** on Michael Jarrard by hand-delivering a copy of it on August 15, 2013, addressed to his attorneys of record.

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\_\_\_\_\_  
NEXSEN PRUET, LLC  
*Attorneys for Petitioner  
Federal Express Corporation*

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Case No. 2011-CP-23-898

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PETITION FOR WRIT OF CERTIORARI

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**SC Court of Appeals**

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CERTIFICATION BY COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made on March 12, 2013, and finally ruled upon by the Court of Appeals on July 16, 2013.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals erred by denying Appellant's motion to amend the notice of appeal and dismissing the appeal, where the amendment was sought to correct a non-prejudicial clerical error?
- II. Whether the Supreme Court should grant a writ of certiorari because distinguishing clerical errors from jurisdictional errors in a notice of appeal is a question of exceptional importance, and the merits of the appeal involve a novel application of the law?

## STATEMENT OF THE CASE

This writ of certiorari seeks a review of the Court of Appeal's decision denying Appellant's motion to amend its notice of appeal and dismissing the appeal. The underlying case is a workers' compensation case. Respondent Michael Jarrard was exposed to hazardous chemicals during the course of his employment, resulting in lung damage and physical brain injury. In July 2006, Commissioner Childs found Mr. Jarrard permanently disabled and awarded lifetime benefits. (App. p. 2). This award was affirmed by an appellate panel and by the circuit court. Id.

Then, in 2009, Jarrard sought compensation to be paid to his wife for the attendant care services she provides for him. Id. The single commissioner found Jarrard was entitled to these benefits both prospectively and retroactively. In a split decision from the Appellate Panel, the award was affirmed on July 21, 2010. Id. In a separate Form 24, Jarrard also requested a partial lump-sum award to pay attorney's fees and to make repairs to his home. (App. pp. 9-10). The Commissioner granted this request, and the Appellate Panel affirmed on January 7, 2011. Id. Both the attendant-care and lump-sum awards retained the same single case number before the Appellate Panel, WCC No. 0217907.

Both the attendant care and lump-sum orders were appealed to the circuit court and were heard in a single hearing before Judge Edward W. Miller. During the hearing, the parties' arguments focused almost entirely on the propriety of the attendant-care award. (App. pp. 15-47). On November 3, 2011, Judge Miller

issued two orders affirming both awards. (App. pp. 1-14). Even though the cases stemmed from the same injury and had the same case number in the Workers' Compensation Commission (WCC No. 0217907), the case numbers at the circuit court were different: the award affirming the attendant-care benefits had a case number of 2010-CP-23-7077, while the award affirming the partial lump-sum award had a case number of 2011-CP-23-898. Id.

On December 2, 2011, Federal Express served a timely notice of appeal from "the Order of The Honorable Edward W. Miller dated November 3, 2011." (App. pp. 48-55). Federal Express inadvertently listed only case number 2011-CP-23-898. Additionally, when Federal Express filed its notice of appeal, it failed to attach the Order from case number 2011-CP-23-7077.

Prior to filing its initial brief, Federal Express discovered that the notice of appeal lacked case number 2010-CP-23-7077, and that only one order was attached to the notice. Upon recognizing this inadvertent error, Federal Express immediately notified both Jarrard's counsel and the Court of Appeals, so as to admit the error, correct it, and prevent any potential prejudice a delay in correcting the error might cause. On May 9, 2012, Federal Express filed a motion for leave to file amended notice of appeal, which Jarrard opposed. (App. pp. 56-67). On June 11, while it was waiting on the Court to rule on the motion to amend, Federal Express filed its initial brief. (App. pp. 76-98). In that brief, Federal Express challenged the attendant-care order (the order mistakenly omitted from its notice of appeal) but did not challenge the order awarding the

partial lump-sum award.

On June 29, 2012, the Court of Appeals denied the motion to amend. (App. pp. 99-100). On July 16, Federal Express filed a petition for rehearing and suggestion for rehearing *en banc*. (App. pp. 101-08). On February 25, 2013, the Court of Appeals again denied the motion to amend. (App. pp. 118-122). Because "Federal Express has no intention of pursuing an appeal of issues arising out of the lump-sum order," the Court of Appeals also dismissed the appeal. *Id.* On March 12, Federal Express filed a petition for rehearing and suggestion for rehearing *en banc*, because the Court of Appeals' order effectively dismissed the primary issue raised in Federal Express' appeal. (App. pp. 123-29). The Court of Appeals denied this petition on July 16, 2013. (App. p. 130).

### ARGUMENT

#### **I. THE COURT OF APPEALS ERRED BY DISMISSING APPELLANT'S APPEAL OF THE ATTENDANT-CARE ORDER BASED ON A NON-PREJUDICIAL CLERICAL ERROR.**

Before the appellate courts may consider an appeal, an appellant must serve a notice of appeal to establish the jurisdiction of the appellate courts. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). "While this Court has consistently held service of the notice of appeal is a jurisdictional requirement, non-prejudicial clerical errors in the notice are not detrimental to the appeal." State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701-702 (2002). Provided the respondent is actually served with a timely notice of appeal, the appellate courts will generously allow corrections to the notice. See, e.g., Id. at

587, 571 S.E.2d at 701-02 (forgiving State's error in filing notice of appeal filed with the clerk of the wrong county); Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435-36 (Ct. App. 1995) (forgiving appellant's error in neglecting to appeal one of a series of cases tried together and holding that a non-prejudicial clerical error is not fatal to an appeal); see also Moody v. Dickerson, 54 S.C. 526, 531, 32 S.E. 563, 565 (1899) (allowing the amendment of a notice of appeal to add additional respondents where the amendment was filed soon after the error was discovered and there was no evidence the additional parties were misled or prejudiced); Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct. App. 2000) (finding the failure to reference the order on appeal was not fatal where the order was attached to the notice).

Indeed, the clerk's office at the Court of Appeals routinely sends letters to parties allowing them an opportunity to correct errors such as the failure to list a lower-court case number, the failure to reveal the lower-court judge and date of the order, the failure to attach the lower-court order, the failure to include a certificate of service, the failure to correctly caption the appeal, the failure to timely file a notice of appeal, and many others. In fact, the Court does not limit its leniency to notices with only one or two of these errors, but allows the appellant to correct notices even when the defects are numerous.

In this case, Federal Express's error was clerical and not jurisdictional. Federal Express served Jarrard with a notice of appeal, listing the correct hearing

date and the judge. Although the notice listed the incorrect caption and attached the wrong order, the attendant-care and lump-sum orders arose out of a single Workers' Compensation Commission Case, bearing case number WCC No. 0217907. Both orders were likewise entered by the circuit court on the same day, and the first page of each order is virtually identical to the other. Both orders followed a hearing that was held on a single day, July 25, 2011. Because the proper party was timely served with the appeal, the issue is not whether the appellate courts have jurisdiction, but instead whether Jarrard would have been prejudiced by allowing Federal Express to amend its notice of appeal.

Here, Jarrard would suffer no prejudice from the amendment. Jarrard should have reasonably known that Federal Express has always intended to appeal the attendant-care order. During the hearing at the circuit court, the parties spent the bulk of their time arguing the attendant-care award. (App. pp. 15-47). The attendant-care order awarded Jarrard benefits for the work performed by his wife at 20 hours per day, 7 days a week, and 52 weeks a year. In other words, he was compensated for his wife working 7,280 hours a year at \$12.00 an hour, for a total of \$87,360 a year. The award was retroactive to November 14, 2002 and would be in effect until his death or until further order of the Commission. As of last November, Federal Express owed ten years of back payments (\$873,600) based on this award. Comparatively, the partial lump-sum award totaled only \$185,561.

Based on the amount at stake and the time and energy devoted by Federal Express arguing against the attendant-care award, Jarrard could not have been surprised by Federal Express' motion to amend its notice of appeal. On the contrary, he would have been surprised if Federal Express had *not* tried to appeal the attendant-care award. Further, Jarrard has suffered no prejudice, because he has a full and fair opportunity to brief the issue of the attendant-care award. Unlike a party who was never served with a notice of appeal, Jarrard was served with the notice, knew he would have to draft a response brief, and knew his opportunity to respond would come after the initial brief was filed. He learned of Federal Express' clerical error before Federal Express had filed its initial brief, and before his lawyers had to spend time drafting a response brief. At no time has Jarrard argued that he would be prejudiced if Federal Express were allowed to amend its notice of appeal.

The Court of Appeals seemingly relied on Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) in dismissing the appeal, but that case further demonstrates why Federal Express's error should be forgiven. In that case, the plaintiff sued the City of Forest Acres and two individuals. After the circuit court entered a single order granting summary judgment in favor of all three defendants, Conner filed a notice of appeal naming only the City of Forest Acres as respondent. Conner failed to name the individual defendants and failed to serve them with the notice of appeal. And after receiving a letter from the Court of Appeals advising her to correct the caption to reflect a single respondent,

Conner failed to correct the error. Conner did not attempt to amend the notice of appeal until the Court of Appeals finally noticed the error.

This Court held that Conner's failure to serve the individual defendants with *any* notice of appeal was not a "clerical error." Id. at 461, 560 S.E.2d at 609. The Court contrasted Conner's error to that of Moody, wherein the Court allowed an appellant to correct his notice of appeal to add parties because the appellant's motion to amend was prompt and the opposing parties were not misled. 54 S.C. at 531, 32 S.E. at 565. The Court ultimately held that Conner should have noticed and corrected the mistake earlier, and that her failure had misled the individual defendants and caused them prejudice. Conner, 348 S.C. at 462, 560 S.E.2d at 610.

Here, in contrast, Federal Express timely served Respondent with the notice of appeal. Federal Express recognized the error in its notice of appeal while preparing its initial brief, and promptly filed a motion to amend before the initial brief had been filed. Jarrard has not suffered any prejudice and did not argue otherwise in his return to the motion to amend. Further, as stated above, Jarrard must have been aware that Federal Express desired to appeal the attendant-care award, which was worth at least \$600,000 more than the lump-sum award at the time of appeal *and* continues to accrue during Jarrard's lifetime. In fact, Jarrard may have never have even noticed the technical error had Federal Express not attempted to correct it in good faith.

**II. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE DISTINGUISHING CLERICAL ERRORS FROM JURISDICTIONAL ERRORS IS A QUESTION OF EXCEPTIONAL IMPORTANCE, AND THE MERITS OF THE APPEAL INVOLVE A NOVEL APPLICATION OF THE LAW.**

Under Rule 242, SCACR, this Court has discretion to grant a writ of certiorari for “special and important reasons.” In this case, a determination about which errors are un-amendable and fatal is a question of exceptional importance to the appellate process. This issue is important not only for the parties, but also to future litigants and the clerk’s office at the Court of Appeals, which must often decide when to send letters seeking corrections to clerical errors.

Further, the attendant-care award is a novel application of the law. As the circuit court noted, “South Carolina appellate courts have never decided a case regarding the payment of back benefits for attendant care[.]” (App. p. 6). The award is large in both amount and scope, and assumes Jarrard’s wife would care for him by working 20 hours per day for each day of the year. Therefore, whether attendant-care awards may be awarded for back benefits is a novel issue, and this Court should grant Federal Express’ writ of certiorari so that it may have a chance to contest the attendant-care award on the merits.

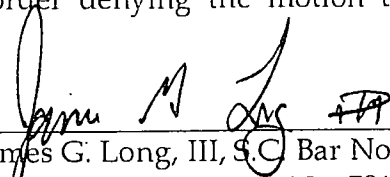
**CONCLUSION**

Federal Express timely served a notice of appeal that correctly listed the names of the parties, the name of the lower court, the name of the trial court judge, and the date of the order. Federal Express, however, failed to list the case

number associated with the attendant-care award and failed to attach the correct order.

But Federal Express' error was clerical and non-prejudicial. Based on the amount of time and effort spent fighting the award and the amount at stake, Jarrard should have reasonably known that Federal Express intended to appeal that award. Already served with a notice of appeal, Jarrard would suffer no prejudice from allowing Federal Express to amend its appeal. If this writ of certiorari is granted and the Court of Appeals is reversed, he will still have an opportunity to defend the award on the merits.

Federal Express, therefore, asks this Court to grant its writ of certiorari and review the Court of Appeals' order denying the motion to amend and dismissing the appeal.



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