

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

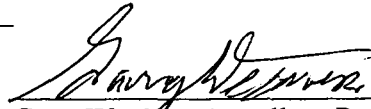
Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is theAppellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPELLANT'S
MOTION FOR REHEARING AND RESCISSION OF COURT ORDER
PURSUANT TO RULES 221(c) AND 240 (i) SCACR**


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SC Court of Appeals

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THE AMERICAN RULE

PROLOGUE

Under the so-called American Rule, the parties in an action pay their own attorney's fees, subject to certain exceptions that have developed in American jurisprudence with the passage of time since the settlement of the Colonies. The origin of the American Rule as developed in South Carolina law, commenced in 1694 and nationally in 1789, as opposed to the ancient English Rule where the losing party pays the attorney's fees. In 1796 the Supreme Court set forth the American Rule in **Arcambel vs.. Wiseman, 2 U.S.305, 306, ((3 Dall) (1796).**

This memorandum is filed in support of Appellant's motion for American Rule and other relief from the lower court's gross abuse of discretion and clear error of fact and law, in a travesty of justice perpetrated at the lower court hearing on November 3, 2009. Biased, prejudiced, impatient, and clearly antagonistic to Appellant, the lower court judge subjectively and summarily denied Appellant application of the American Rule in violation by the court and Respondents of several exceptions to the Rule, and knowing or should have known of the existence of the American Rule.

The lower court's abuse of discretion on this matter involved its abuse of two exceptions that have developed in the courts to the mandatory application of the American Rule in South Carolina: abuse of **Rule 11 (a) SCRCP** and abuse of the state's **Frivolous Civil Proceedings Sanctions Act (FCPSA)**.with the unproven misapplication of the alleged Appellant's frivolous litigation exception in both cases. The lower court's deliberate denial of prior notice and opportunity for Appellant to respond to the allegations in both instances, and other related violations, resulted in the lower court's denial of Appellant's constitutional rights to due process and equal protection of the law now on appeal.

Appellant's plea for relief is supported by the modern view of judicial policy for the American Rule which has been expressed by the U.S. Supreme Court:

“(S)ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents’ counsel....Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney’s fees would pose substantial burdens for judicial administration. See, **Fleishmann Distilling Corp. vs. Maier Brewing Co.**, 386 U.S. 714, 718 (1967).

This memorandum supports Appellant's appeal of the lower court judge's rulings that negligently exceed the judicial limits of gross abuse of discretion and clear errors of fact and law in this case. The lower court's judicial errors on at least four counts encompass deliberate, vindictive and mean spirited judicial violations of the Rule 501 Code of Judicial Conduct, Canons 1 through 4. In one biased, prejudiced and impatient fell swoop, the lower court judge confused and befuddled the facts and issues of the case under review, permitted Respondents to violate case law, the rules of procedure, Rule 11 (a), and FCPSA, the American Rule and Appellant's constitutional rights; not to mention ruling an unwarranted vindictive, vicious threat of incarceration for 90 days in a Dillon jail for Appellant for having the temerity as an amateur individual party pro se, retired, elder professional in ill health, with limited access to local law research libraries, to determinedly litigate a challenge of a multi-billion dollar interstate government protected monopoly electric utility, in an attempt to protect his consumer rights.

Faced with innocuous S.C. Public Service Commission and Office of Regulatory Staff lip service consumer protection by the state regulatory agencies, which are little more than wholly owned subsidiaries of the utilities, Appellant was forced to protect himself against Respondent's abusive regulatory action and litigation and commence defensive litigation, which the lower court incorrectly deemed to be res judicata in a flurry of legal confusion and judicial asperity.

The essential facts of the case on appeal are straight forward: Respondents filed an original lawsuit for collection of a disputed debt (first case); the parties executed a settlement agreement (contract) which Respondents violated. Subsequently, with a “crystal clear” order, the lower court ordered both parties to comply with the contract

within 45 days. Although Appellant had complied, Respondents knowingly and willingly did not comply. Appellant mailed eight letter notices of non compliance to Respondents and subsequently had to file a Notice of Noncompliance with the court, all of which Respondents ignored. Appellant then was forced to file a formal **Complaint** for breach of contract and damages, etc. to protect his consumer interests and rights. (Second case).

Respondents failed to file an answer or counterclaim pursuant to the Rules of Procedure, and 14 months later, two days before the hearing of the case, improperly filed their first and only document, a Rule 12 (b) (4) &(5) SCRCF affirmative defense motion, falsely claiming improper service and jurisdiction of the person.

On November 3, 2009 in a flurry of legal confusion, and misinformation by Respondents' false verbal witness without any documentation, the lower court, *sua sponte*, improperly invoked res judicata (**inter alia, case law says that a trial judge, sua sponte, cannot offer a res judicata or frivolous defense on behalf of a defendant**), improperly invoked alleged frivolous filings by Appellant; thus, violating Rule 11 (a), the FCPSA, the American Rule and Appellant's consumer and constitutional rights on the specious, fallacious grounds of Appellant's alleged "repetitive" and "successive" filings. Adding insult to injury, the court violated case law procedures for invoking Rule 11 (a) and FCPSA against Appellant of which the lower court knew or should have known was improper.

It is respectfully submitted that if relief is not granted with respect to the cited violations of the American Rule, etc, as requested herein, there will remain a chilling effect on future consumers seeking regulatory or court protection for their rights as consumers of electricity in this state, and in dealing with a small army of in-house utility attorneys and the oldest, established, politically and professionally connected law firms under contract, operating with relative impunity and permissiveness before the regulatory agencies and the courts.

Appellant has lived and worked in many countries and been exposed to many different business legal systems. This case is such a patently flagrant travesty of justice occurring in our legally advanced "civilized" society that it should be presented for study to selected universities and media. Accordingly, as a courtesy to the court, it may be of interest to this court to know that Appellant has invited the Law School and Graduate

School of Business of a leading West Coast University to prepare a Joint Case Study of this case. It is still under review and all the data will be made available at the ultimate conclusion of this case including any state or federal appeals that may be necessary. The focus would be on the policy and practice relationships between law, business and government regulation and “politics.”

Respectfully submitted in good faith..

Dated: May 30, 2012, Little Rock, S.C.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPELLANT'S
MOTION FOR REHEARING AND RESCISSION OF COURT ORDER
PURSUANT TO RULES 221(c) AND 240 (i) SCACR**

I. INTRODUCTION

Comes now Gary Weaver, Appellant Pro Se, and files this **Supplemental Memorandum In Support Of Appellant's Motion For Rehearing And Rescission Of Court Order dated March 19, 2012**, pursuant to **Rule 240 (c) (2) SCACR**.

The said motion was filed on May 15, 2012. Paragraphs 7 & 10, (p 2) refers to application of the American Rule for assessment of attorney fees as Appellant applied for in a Motion for Leave to Supplement the Record on Appeal filed on or about February 7, 2012. The latter motion was denied by the Court's order dated March 19, 2012.

The American Rule issue was further discussed in Appellant's letter to the Clerk of Court dated May 10, 2012 which was included as a memorandum in support of Appellant's motion for rehearing noted above. See paragraphs 7, 9 & 10 (p.2). The court's March 19, 2012 order is not entirely clear to Appellant that the application of the American Rule in this case is denied or left in limbo as opposed to the issue of supplementary inclusion in the Record on Appeal.

Therefore, Appellant respectfully submits this Supplemental Memorandum discussing the issue and authorities for consideration of the court in deliberating on Appellant's request for application of the American Rule as related to the issues on appeal and in particular, Appellant's objections to the lower court's unconstitutional and disputed award of attorney's fees to Respondents, as discussed in the Record on Appeal and Appellant's Appeal Briefs.

Most of the doctrinaire academic, professional treatises and cases reviewed relate to whether or not attorneys fees, having been awarded by a court, should be paid by the plaintiff or the defendant's client pursuant to American Rule **exceptions** if any, and cases. Under the traditional American Rule, the parties pay their own legal fees, subject to certain exceptions developed in the modern era of American jurisprudence.

Here we are concerned with whether or not attorney's fees, having been unfairly assessed against the Appellant under objections of record as to the lower court's abuse of

discretion and clear errors of law and fact, should in fact be Respondents responsibility for payment of their own legal bills pursuant to the American Rule as requested by Appellant. Rule exceptions as discussed in this memorandum go against Respondents.

The standards on appeal and the tests for the court's evaluation are not clear from the cases and the facts of this case. The issues to be addressed are of course the lower court's jurisprudence violations as discussed in the Record on Appeal and Appellant's Initial and Final Briefs; application of the American Rule in Federal and South Carolina court cases; whether or not this case qualifies under the established exceptions to the Rule; whether or not this case falls under the exceptions provided by state statutes and court rules of procedure approved by the Legislature.

Accordingly, this Memorandum addresses the issues related to application of the American Rule for assessing attorney fees against the Respondents in this case, as follows:

1. Review of the American Rule Defined.
2. Review of the American Rule historically assessed in American Jurisprudence.
3. Review of American Rule assessed in jurisprudence of Selected States.
4. Review of the American Rule assessed in South Carolina Jurisprudence.
5. Review of the authorities and court practices for application of the American Rule to this case on appeal.
6. Summary
7. Conclusion
8. Relief.

As a final introductory note, it is appreciated that the members of this honorable Court may be conversant and well informed on the American Rule in jurisprudence. Therefore, the content presentation has been designed so that in the interest of court efficiency, the reader may elect to by pass reviewing the first four (4) sections which are included for informational purposes to set the backdrop for Appellant's arguments on the subject, and proceed to review of Items 5-8 dealing directly with application of the American Rule in this case..

II. THE “AMERICAN RULE” DEFINED.

This Memorandum is filed in support of Appellant’s motion for the court to reverse the lower court’s incorrect assessment of attorney’s fees against Appellant, and order the Respondents to bear the cost of their own attorney’s fees, pursuant to the so-called mandatory “American Rule” for shifting fees. Accordingly the starting point for appellant’s motion is to define exactly what the “American Rule” is, and how it is applied in the courts. No analysis of the “American Rule,” per se, would be complete without an understanding of its origins, its rationale, and its exceptions that have developed over the centuries and in the modern era of recent decades. In this regard, there are two levels to be considered, the Federal court practices, and the State court practices, including specifically in South Carolina courts with respect to this appeal.

A. The American Rule Defined.

1. Attorney fees are monetary charges for legal work performed by a lawyer on behalf of a client. Generally speaking, each party to a lawsuit is responsible for paying its own attorney fees, unless a statutory or contractual provision provides otherwise. See, **Fownes vs. Hubbard Broadcasting, Inc., 246 N.W. 2d 700, 702 (Minn. 1976)**. This principle is known as the “American Rule.”

2. By requiring each Party to pay its fees individually, the American Rule seeks to discourage unnecessary litigation, and abuse of the legal system.

3. It also helps ensure that court proceedings are focused on the actual damages at issue in the litigation; the fees being charged by an attorney are not technically a part of a party’s damages.

4. Attorney fee statutes and rules of procedure are an exception to the Common Law American Rule that every litigant pays his own fees.

B. Federal Case Law.

1. Generally, the “American Rule” governs the awarding of attorney’s fees in federal courts. **The “American Rule” provides that each party in a case should bear the cost of its litigation and ordinarily, the prevailing litigant is not entitled to collect reasonable attorney’s fees from the loser.**

2. Congressional authorization by statute may except to the American Rule and permit a court to require one party to pay attorney's fees to the other. A court's authority to enforce its own orders by assessing attorney's fees against a losing party, for the willful violation of a court order, bad faith, oppressive reasons are other exceptions to the American Rule; (as in this case where Respondents ignored a lower court order as noted in the Record and Briefs). See, **Cherry vs. Arendall, 247 B.R. 176, (Bankruptcy E.D.Va. 2000)**. A word search of the U.S. Code revealed there are at least 150 statutory sections scattered throughout the Code that provide for an award of attorney's fees in various circumstances.

3. Notwithstanding the general rule, it has been pointed out that on August 16, 2,000, the Fourth Circuit court restated the American Rule. See, **R. Peyton Mahaffey, "Recovery of Attorney's Fees in Civil Cases in Virginia: "The American Rule" and Its Exceptions," The Virginia Bar Association 111th Annual Meeting, Williamsburg, Virginia, January 20, 2001.(p.1.)**

4. Thus, "... In the United States, each party in a lawsuit bears its own attorney's fees 'unless there is express statutory authorization to the contrary,'" **Kreischer, et al. vs. The Kerrison Dry Goods Company, 229 F.3d 1143 (4th Cir., S.C. 2000), citing Hensley vs. Eckerhart, 461 U.S. 424,429, 76 L.Ed.2d 40, 103 S.Ct 1933 (1983)**. In this case we have submitted that the lower court violated the state statutes and there is no statutory (or rules) authorization for the award of attorney's fees to Respondents, in any case. See, the Record and Briefs.

5. It has been stated with respect to the inherent equitable powers of the federal courts to award attorney fees in the interests of justice:

"Although the traditional American Rule ordinarily disfavors the allowance of attorney's fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. Indeed, the power to award such fees, "is part of the original authority of the Chancellor to do equity in a particular situation,",, and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such recovery." See, **Hall vs.Cole, 412 U.S. 1, 4-5 (1973)**.

6. On the issue of creating or adopting exceptions to the American Rule, the U.S. Supreme Court stated in **Sprague vs. Ticonic Nat'l Bank, 307 U.S.161, 164 (1939)** that:

“(a)s in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.... In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice.’

“The variety of factual circumstances in which this principle (of judicial exception) has been applied indicates the ‘dominating reasons of justice’ has been the guide to its application.” See, **Local No. 149 Int. Union, United Auto'l, Aircraft and Agri'l Implement Manuf'rs of America vs. American Brake Shoe Co., 298 F.2d 212, 214 (4th Cir. 1962), cert.dnd, 369 U.S. 873 (1962)**

7 Notwithstanding the American Rule, a federal court may award attorney's fees through the inherent power of the court. At least four exceptions have been recognized; three by the U.S. Supreme Court, and one by the 4th Circuit Court. **Mahaffey, op cit, p, 2.** Awarding attorney's fees on the basis of exceptions is a two edge sword. Where is the justice when there are no exceptions, or they have been incorrectly applied, as in the conduct of the case as in this appeal, and the lower court awards attorney's fees to the winner as either punishment, or indemnification in violation of statutes and court rules, as is the case in this appeal. On this point federal decisions are directly relevant to Appellant's argument for this State court to exercise its inherent powers in the interest of justice, to over ride the lower court's incorrect award of fees to Respondents in the absence or distortion of applicable exceptions.

8. At least four federal (and S.C. state) exceptions to the America Rule exist, **Ibid.**

In summary:

1. **The “Common Fund Exception:** Where a party's litigation efforts directly benefit others. See, **Kreischer, et al, supra, p 2.**

2. **Where a party willfully disobeyed a court order: Kreischer, ibid**

3. **The “Bad Faith” Exception:** Where a party acts in bad faith, vexatiously or for oppressive reasons, See. **Chambers vs. NASCO, Inc., 501 U.S. 32, 45-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991); Kreischer et al. ibid.**

4. **The “Essential to Equity” Exception:** The 4th circuit court has also recognized an “essential to equity” exception that may apply in exceptional

circumstances. See, **Rolax vs. Atlantic coast Line R.R. co., 186 F/2d 473 (4th cir. 1951).**

9. There is a long list of federal cases where fees have been awarded pursuant to various exceptions to the American Rule. It has been suggested that although these exceptions exist, their status as exceptions must not be forgotten. The Supreme Court cautioned that “because of their very potency, inherent powers must be exercised with restraint and discretion.” **Chambers, 501 U.E. at 44.** The modern view of the policy indulging the American Rule has been expressed by the U.S. Supreme Court”

“(S)ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent’s counsel... also, the time, expense and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney’s fees would pose substantial burdens for judicial administration. See, **Fleishmann Distilling Corp. vs. Maier Brewing Co., 386 U.S. 714m 718 (1967)**

10. It has been suggested that these modern reasons seem to reflect the earlier beliefs about American democracy and individualism. This reverence for the individual and the belief that litigation was a “fair fight” precluded placing any penalties on a losing party. Litigation of basic rights was not to be discouraged by rules that denied access to the courts. These beliefs in American democracy are reflected by the modern views on access to justice. See, **Vargo, Op cit, p. 1635.**

11. As further discussion, Appellant’s Briefs and the Record on Appeal show, the instant case before this Honorable Appeals Court for appeal has been considerably less than “a fair fight;” especially in the lower court which has violated state statutes, rules of procedure, Appellant’s constitutional rights, and the American Rule in that there are no applicable exceptions of record in this case.

III THE AMERICAN RULE IN U.S. NATIONAL JURISPRUDENCE

A. Brief Historical Perspective to the Development of the American Rule.

1. The roots of the development of the American Rule for awarding of attorney fees are the early English courts of equity which allowed the Chancellor to award attorney’s fees to the prevailing party. At common law, the fee awards were based solely on

statutes. In 1278 the Statutes of Gloucester allowed only the victorious plaintiff to recover attorney fees in specified actions. Two centuries later a defendant could recover attorney fees in isolated instances. By 1607 a defendant could recover fees on the same basis as a winning plaintiff. In 1875 the Rules of Court gave English courts the discretion to determine the amounts that could be awarded to a prevailing litigant. The law concerning attorney fee shifting as it developed in England was a creature of statute. In modern practice the English courts adhere to the so-called English Rule which is diametrically opposite the American Rule, apart from exceptions.

For an exhaustive discussion of the development and conduct of the American Rule, see, **John H. Vargo, “The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice,” *The American University Law Review*, Vol 42:1567, pp.1567-1636. Also, see R. Peyton Mahaffey, “Recovery of Attorney’s Fees in Civil Cases in Virginia: “The American Rule” and its Exceptions,” *The Virginia Bar Association, 111th Annual Meeting, Williamsburg, Virginia, January 20, 2001.***

2. According to Vargo, almost all American colonial legislation regarding attorney’s fees reflect an intent to control the amount an attorney could charge the client rather than an intent to shift attorney’s fees as costs to be collected by the prevailing litigant. Several 17th century colonial statutes either totally denied attorney’s fees for services or denied paid attorneys access to the courts, reflecting the desire to control the amount of attorney’s fees. Vargo, **Op cit ,p.1571**. This antagonism reflected the attitudes of the community towards attorneys, not unlike the present day attitudes: (“plus que se change, plus c’est la meme chose.”):

“In every one of the colonies, practically throughout the 17th century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community, the ruling class, where it was the clergy as in New England, or the merchants in New York, Maryland, and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the court; in all they were subjected to the most rigid restrictions as to fees and procedure, **ibid.**

3. As time progressed, attorneys gained greater respect. By the turn of the 18th century, it became common practice to employ an attorney. During this time the colonies developed many attorney fees and cost regulations. Massachusetts, New Hampshire, New

York, and North Carolina set attorney-client fees and cost recovery fees at the same level. Other colonies established fee schedules but no reference to the amount recoverable as a part of the cost of litigation. **Ibid.**

4. In 1694, South Carolina's fee schedule allowed a plaintiff's attorney to receive sixteen shillings for services up to and including the filing of the declaration. See, **Charles t. McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 620, n. 7 (1931)** (discussing collection of attorney's fees and arguing for reform of the American system.). By the 1790s other states set attorney fees: Virginia, Delaware, New Jersey.

5. The fee schedules soon became insufficient recompense for attorneys due to inflation and state legislature's failure to update the amounts. Attorneys attempted to circumvent the restrictions and freely market their services, thus clashing with legislative control with the bar's wish for adequate compensation. One commentator suggests that the resolution of the conflict between the legislatures and the bar, led to the creation of the American Rule. Prof. Leubsdorf concluded that the American Rule evolved as a compromise that permitted lawyers to charge clients high rates, while legislatures could continue to restrict cost recovery from losing parties. See, **John Leubsdorf, Towards a History of the American Rule on Attorney Fee Recovery, Law & Contemp. Probs., Winter, 1984, pp 16-17.**

6. By the beginning of the new Union the new states had adopted a type of fee shifting that benefited the litigation winner. Generally the rules adopted by the colonies did not deviate from the English fee shifting procedure. In both England and the United States, statutes provided the basis for attorney fees shifting. What has been called the American Rule is, in effect the rule established in England. **Vargo, op cit, p.1574.**

The distinction between the English and American rules encompasses not the statutory basis, but the level of compensation that the prevailing party can collect from the losing party. In the United States, courts have followed the statutes, regardless of the size of the fees allowed at nominal rates. **Ibid.**

B. Development of the American Rule

1. As noted, the American Rule took root in colonial America and matured during the 19th century when attorneys freed themselves from legislative constraints on fees.

Attorneys asserted the freedom to contract with clients for legal services. It has been stated that the freedom to market legal services outside of legislative fee schedules, had a great impact on the establishment of the American Rule. See, **Leubsdorf, op cit, p.13**, noting that lawyers did not challenge cost recovery but did challenge what fees they could charge their own clients and their ability to market services freely.

2. In 1789 Congress enacted legislation that authorized federal courts to follow state law concerning attorney's fee awards. This was followed in 1793 by a fee bill for admiralty costs. In 1796 the Supreme Court set forth the American Rule in *Arcambel vs. Wiseman*, 2 U.S.305, 306, ((3 Dall) (1796). The plaintiff received damages and an award of \$1,600 for attorney's fees. The Supreme Court struck the attorney's fees from the judgment by remittitur, stating in part:

“We do not think this charge ought to be allowed. The *general practice* of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute. “**Ibid.**

3. Discussing the legal ramifications of this decision, **Vargo** concludes that whatever reason motivated the court's decision, it is clear that this practice had developed either in colonial times or during the first few years of the Union. **Op cit. p.1576.**

4. The 1789 Act expired by 1800, See, **Alyeska Pipeline Service Co. vs. Wilderness Soc'y, 421 U.S. 240, 248, n. 19 (1975)**, stating that the statutes expired by 1799 and providing a survey of the 1789 Act. Between 1800 and 1853 no federal statute authorized an award of attorney's fees. **Ibid.** During this period the federal courts “borrowed” state law concerning fee awards, and vacillated as to whether attorney's fees should be allowed as costs or as part of the damage award. **Ibid.**

5. In **The Apollon, 22 U.S. 362, (9 Wheat) (1824)**, the U.S. Supreme Court held that attorney's fees could be awarded in admiralty cases and could be given “either in the shape of damages, or as part of the costs.” This 1824 decision made no reference to the earlier 1796 **Arcambel** decision and stated that fees could be awarded at the sound discretion of the court. **Ibid** In 1851, the Supreme Court in **Day vs. Woodworth, 54 U.S. (13 How.) 363, 372-73 (1851)** held that a jury could not include attorney's fees as part of a damages award, stating that only a court to award fees as allowed by a “borrowed” state statute. This decision was inconsistent with the court's earlier decision

in **Center vs. American Insurance Co.**, 28 U.S. (3Pet) 307 (1830), wherein it stated that the law did not limit the power to award such fees but that this authority remained within a court's discretionary powers inherited from the English courts of Chancery.

6. Between **1800 and 1853**, the multitude of State laws and the federal courts' inconsistent approach to costs and attorney's fees, led to many inequities. See, **Alyeska Pipeline Service Co. vs. Wilderness Soc'y**, 421 U.S. 240, 251-52 (1975); discussing lack of uniformity in awarding attorney fees during this period, the need for unifying legislation, and the sources of discrepancies in federal courts re attorney fees. In **1853** Senator Bradbury, stated one of the major complaints about the fee shifting system, which is relevant today (**quoted in Alyeska, ibid.**):

“ The abuses that have grown up in the taxation of attorney's fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed.”

7. Congress enacted the 1853 fee bill to overcome the “unequal, extravagant, and often oppressive system.” **Ibid.** The 1853 bill has not been repealed or modified to date and the winning party in federal litigation can recover only the docket fee absent statutory or judicial exceptions. This act applies only to the federal courts. If the action is solely one of state law in a state court then the Act would not apply. **Act of Feb. 26, 1853 ch. 80, 10 Stat. 161,-62. (codified as emnd. At 28 U.S.C. Sect.1923 (a) (1988).**

C. Federal Exceptions to the American Rule

Following is a brief summary discussion of the exceptions generally pursuant to the Federal courts briefly referred to in the previous section. This is presented as background to a more detailed discussion related to the issues in this appeal included in following sections. The exceptions to the American Rule, which on the whole do not apply to the benefit of Respondents but rather their detriment in this case, may be summarized as follows:

1. **Contracts.** A contract may provide for shifting of attorney's fees should litigation arise from a dispute over it. Courts recognize such agreements as an exception to the American Rule. In the **Alyeska** case, the court noted the general rule that litigants

pay their own attorney's fees absent a statute or enforceable contract. **Op Cit. p.257**
Typical contractual agreements that incorporate fee shifting provisions include promissory notes, bills of sale, mortgage instruments, and insurance contracts. Most such contracts involve pre-litigation agreements, although the courts have also upheld post litigation agreements.

Contractual clauses providing for the payment of attorney's fees are disfavored and unenforceable if they are found to be contrary to public policy. Vargo, Op cit, p.1579 This situation may arise when the more powerful party has drafted the document, such as with "unilateral" insurance agreements of adhesion.

2. As discussed further below, this case involves Respondents willful and knowing violation of the Settlement Agreement (contract) reached by the parties in the lower court, which breach is an issue now on appeal. A settlement agreement is viewed in the courts as a contract. In this case, it was drafted by Respondents' attorney, and did not include a provision for shifting payment of attorney's fees in the event of a party's breach which issue is now on appeal.

3. On the contract exception issue, the lower court's award of attorney's fees to Respondents is in violation of the American Rule, and Respondents cannot take refuge on the basis of a non existent contract stipulation for payment of fees. Moreover, this court itself has raised constitutional questions in similar cases as cited by Appellant in the Initial Brief and herein below.

4. **Common Fund:** The "common fund" doctrine is a commonly used equitable exception to the American Rule. Both federal and state courts employ this exception to compensate parties who create or preserve a common fund for the benefit of others. The doctrine is typically applied in class actions. This exception does not apply in this case.

5. **Substantial Benefits Doctrine:** This doctrine is closely related to the common fund doctrine; both doctrines are based on the equitable principle that non parties benefiting from litigation should share in the legal expenses of the party bringing the action thus avoiding unjustly enriching the absent beneficiaries. The substantial benefits doctrine does not usually apply to cases involving a fund. Here again this exception is unrelated to the issues in this case.

6. **Contempt:** In *Toledo Scale Co., vs. Computing Scale Co.*, 261 U.S. 399 (1923), the U.S. Supreme Court held that a party who seeks to enforce a final judgment through contempt of court proceedings, may recover attorney's fees for enforcement of the contempt order. This equitable exception was expanded to the American Rule to include instances where a party's procedural rights had been violated prior to final judgment. See, *In Re Federal Skywalk Cases*, 97 F.R.D. 370, 378 (W.D. Mo 1983) As a general rule, the willfulness of the contempt is a relevant factor in determining whether fees will be awarded and the amount of such fees. See, *Crane vs. Gas Screw Happy Pappy*, 367 F.2d 771, 775 (7th Cir 1966)

7. In this case, Respondents willfully violated the Lower Court Order requiring them to comply with the Settlement Agreement within 45 days of the date of the Order. Respondents did not comply and were in contempt of court. See discussion below.

8. **Bad Faith:** The bad faith exception applies to conduct exhibited by a party or a party's attorney, and the fees may be assessed against either the party or the attorney. See, *Thomen vs. Jenkins*, 517 F.2d 3, 7-8 (4th Cir. 1975); *Selfridge vs. Gynecol, Inc.*, 564 F.Supp. 57, 58-59 (D. Mass.1983) stating that in cases where the attorney demonstrates "appalling degree of irresponsibility" the award of attorney's fees should be paid by counsel rather than defendant.

9. The bad faith exception is not reserved only for the unsuccessful litigant; attorney's fees may also be assessed against a successful litigant who acts in bad faith which may include conduct that is found to be in contempt of court, such as Respondents herein as discussed above. However the bad faith exception is much broader than the contempt exception. Courts use the rule on the need to punish parties who abuse the judicial process, as Respondents have done on a regular basis since the commencement of the suit in the lower court. Because of the punitive nature of the bad faith exception it may give rise to punitive damages. Bad faith can occur before suit is brought and courts have awarded fees in such pre-litigation conduct as fraud and failure to abide by the clear dictates of a law. *Vargo, Op cit, p 1585*. These conditions apply to Respondents performance in these proceedings from the outset.

10. The bad faith rule does not apply to conduct that gives rise to the substantive claim itself. Thus it is often difficult to determine whether bad faith conduct is part of the

substantive claim or part of actionable pre-litigation conduct that forces a party to bring suit. **Vargo, Ibid.** For example, Respondents breached the Settlement Agreement in the lower court, did not comply with the court Order that they comply within 45 days in contempt of court and engaged in procedural irregularities related to filing of their motions, and including fraud (paragraph 5) in the Settlement Agreement. Did such pre-litigation conduct constitute bad faith on the part of Respondents, warranting the litigation now on appeal because of the lower court's abuse of discretion, and errors of fact and law?.

11. A court may also award a bad faith fee against a party for asserting non meritorious claims, defenses or motions or for other Bad faith conduct such as assertion of patently frivolous defenses such as the recent Motion to Dismiss filed by Respondents who knew and should have known of the existence of the Supplemental Record duly filed by Appellant on or about February 7^M 2012, . **Vargo, Ibid.** The record shows that Respondents engaged in all of these bad faith actions.

12. The bad faith exception is of particular interest in several instances related to the issues on appeal and application of the American Rule requiring Respondents to pay their own legal expenses. Respondents' attorney engaged in bad faith and fraud (para.5) in the preparation of the Settlement Agreement in the lower court now on appeal. They engaged in bad faith in non compliance with the court Order that they comply with the Settlement Agreement within 45 days. In violation of the SCRCPP, it took three efforts in the lower court case filed by Respondents for them to file the Appendix A detailing the account for the verification of account process which never was notarized. They engaged in bad faith by arguing a motion that was not properly before the lower court; not addressing the motion that was before the lower court; not answering the questions put to them by the court; they failed to file an Answer or counterclaim in the lower court Case, and instead filed an untimely incorrect Rule 12 (b) (4)&(5) SCRCPP motion claiming incorrect service and lack of personal jurisdiction that was entirely irrelevant, two days before a hearing on a weekend.. More recently they engaged in bad faith and frivolity in filing the Motion to Dismiss, when they knew and should have known that Appellant had duly and timely filed the Supplemental Record on Appeal on February 7^m 2012, of which Respondents received a copy.

13. **Statutes and Rules of Procedure**: The final exception to the American Rule is based on Statutes and the sanctioning provisions of Court Rules of Procedure. **There are over 200 federal statutes, and some 2,000 state statutes that provide for shifting of attorney's fees.** Thus if the American Rule is defined as prohibiting fee shifting, the definition is riddled with exceptions. **Vargo. Ibid.** The major purpose of State fee-shifting legislation is to compensate the prevailing plaintiff, promote public interest legislation, punish or deter the losing party for misconduct, or prevent abuse of the judicial process (Respondents in this case). The most notable fee shifting legislation is what is generally called "public interest" litigation. Congress has opted to rely on private enforcement to implement public policy. While not directly relevant to the deliberations in this case, we note the following two cases of interest that shed light on federal practice related to state involvement, private enforcement of public policy and the impact and role of the American Rule in society's affairs:

A. F.D. Rich Co. Inc., vs. Industrial Lumber Co., 417 U.S. 116 (1974)

Certiorari to the U.S. Court of Appeals, for the 9th Circuit., May 28, 1974.

In summary, Rich and Co was the prime contractor on a federal housing project in California and South Carolina, with two separate contracts with Cerpac Co., for the supply of materials and to undertake millwork and related services. Following defaults on payments by Cerpac to Industrial Lumber, suit for payment was brought in the Federal District Court for the Eastern District of California where the California project was located, and it was deemed the venue for suit on the South Carolina project, under 40 U.S.C. Sect. 270b(b). There was no showing of prejudice resulting from the South Carolina case being heard in California, and considerations of judicial economy and convenience supported venue in the court where all respondent's claims could be adjudicated in a single proceeding. **417 U.S. 124-126.**

The District Court granted judgment for the Respondent for the amount due on unpaid invoices for materials, etc, but **denied claims for attorney's fees.** The court of appeals affirmed in large part but held that **attorney's fees should be awarded respondent.**

The federal court of appeals held that the court of appeals erred in construing the Miller Act to require the award by reference to the "public policy" of the State in which

suit was brought, since the Act provides a federal cause of action, and there is no evidence of any congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorney's fees. **Ibid ,pp 127-128.**

The provision of the Miller Act in **40 USC Sect. 270b(a)** that claimants should recover the "sums justly due" does not require the award of attorney's fees on the asserted ground that, without such fee-shifting, claimants would not be fully compensated. **To hold otherwise would amount to judicial obviation of the "American Rule" that attorney fees are not ordinarily recoverable in federal litigation in the absence of a statute or contract providing therefor, in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable, 417 U.S. 128-131.**

The court held that attorney's fees were improperly awarded respondent. **Ibid pp 16-131.**

B. Recoverability of Attorney Fees As Costs Under CERCLA,

See, Robert A. Mullins, S.C. Environmental Law Journal, Winter, 1993. University of South Carolina.

Under the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA) private parties may sue Potentially Responsible Parties (PRPs) who are third parties often unwilling or unable to contribute to cleanup efforts. In such actions the question arises: Does CERCLA authorize the award of attorney fees in private party response actions?

According to Miller, (p.1) courts addressing this issue are divided. Courts in the Fourth, Sixth, Seventh, Eighth, and Tenth circuits have held that that attorney fees are recoverable in private party response actions. However, Courts in the First, Second, Third, Sixth and Ninth Circuits have held that attorney fees are not recoverable. The most compelling argument supporting the award of attorney fees relies on the policy implications of supporting such an award. The most compelling argument against the award of attorney fees, is the lack of explicit statutory language providing for an award of attorney fees. **Ibid, p. 2,para 2.**

The statutory definition of "response" does not include any language which explicitly states that private parties may recover attorney fees. In denying attorney fees,

courts point out that the absence of such language conclusively indicates that attorney fees are not recoverable. Merely stating that response actions include “enforcement activities”, is not the equivalent of stating that attorney fees are recoverable.

According to the **Alyeska case, supra**, opinion espousing the American Rule, attorney’s fees are not recoverable absent express congressional authorization. In **Alyeska**, the Wilderness Society, the Environmental Defense Fund and the Friends of the Earth sued the Secretary of the Interior under Section 28 of the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969, to prevent the issuance of construction permits for the trans-Alaska oil pipeline. Subsequently the State of Alaska and Alyeska Pipeline Service Co., were allowed to intervene. The Court of Appeals for the D.C. Circuit awarded attorney fees to the respondents against petitioner Alyeska, **based upon the court’s equitable powers and the theory that the respondents were entitled to attorney fees because they were performing services of a “private attorney general.”** *Id.* p.2

The U.S. Supreme Court reversed the D.C. Circuit court holding that in the absence of statutory authority, the **American Rule** is not subject to an exception based on the federal court’s equitable powers, or on the theory that the plaintiffs were performing the services of a “private attorney general”. The court found that equity is insufficient to overcome the absence of explicit language; therefore courts cannot overcome this deficiency by relying on their equitable powers. **Ibid.**

CERCLA contains no explicit language providing for the recovery of attorney’s fees in private party response actions. Some courts have found the policy implications sufficient to overcome the lack of explicit language authorizing attorney fees in private party response actions. The courts must consider the legislature’s intent and purposes and policy implications weigh in favor of awarding attorney fees. On the other hand, courts holding attorney fees are not recoverable assert that even if the statutory language is ambiguous, the **American Rule constrains** courts in their analysis of legislative intent and policy implications. Thus courts are precluded from implying that attorney fees are recoverable because under the **Alyeska** opinion of the U.S. Supreme Court, the **American Rule** requires Congress to explicitly authorize awarding attorney fees, **Ibid.**

The policy argument in favor of attorney fees is strong but the result is uncertain in light of the **American Rule**.

Because this court is familiar with the sanction provisions of the Federal and State Rules of Civil Procedure these fee shifting procedures will not be addressed here, but are referred to in following discussion..

14. **One Way Shift System**: In this system, the legislatures or the courts have determined that fees are to be shifted in favor of only one party. Thus, if the plaintiff were the chosen beneficiary, a successful plaintiff would recover attorney's fees, while a successful defendant would not.

15. **Two Way Shift System**: This is the loser-pays rule commonly attributed to the English system. In this system, the loser, whether plaintiff or defendant, must pay the winner's attorney's fees. The professional literature on the subject shows that the vast majority of legislation in the United States has adopted a one-way shift in favor of the plaintiff. South Carolina adheres to the American Rule subject to Statutes and the Rules of Procedure and other exceptions. None of the statutes or the rules except Rule 11 (a) SCRPC if properly administered by the court, impact on this case argument as exceptions for application of the American Rule where the parties pay their own legal fees. See below discussion on application of Rule 11 (a) SCRPC by the lower court in this case.

16. **Fraud Exception**: It has been stated that in a fraud suit, a chancellor in the exercise of his discretion, may award attorney's fees to a defrauded party. When deciding whether to award attorney's fees, the chancellor must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party. See, **Prospect Development Co. vs. Bershader, 258 Va. 75, 92, 515 S.E. 2d 291, 300 (1999)**. A circuit court judge observed that the **Prospect case** "broke new ground" by ruling in a fraud suit that a chancellor in his discretion may award attorney's fees to a defrauded party. See, **Arthur vs. Warner, 2000 Va.Circuit, Lexis 197, Circuit court, Isle of Wight County, Va.** On fraud cases it has been stated that the Court's equitable powers permit an award of attorney's fees in a fraud case. 'Equity deals with the substance and not the form, and will grant such relief as far as possible by allowing

compensation for the damages sustained by reason of the fraud.’ See, **Miller Co. vs. Augusta Corp., 140 Va. 409, 421 (1924)**1 **Anderson vs. Sharma, 38 Va.Cir. 22 (1995)**

17. Finally one commentator states that the American Rule is not a blanket prohibition against the award of attorney’s fees absent a contractual or statutory provision, it is rather a general rule or guide which must be construed consistently with the court’s equitable powers and the rule of complete relief; i.e. that a plaintiff is entitled to be restored to the position he enjoyed but for defendant’s fraud. That is why the “American Rule” is not violated by the recovery of attorney’s fees in a fraud case.

Mahaffey, op cit p.3

18. Courts of equity have the power to devise an unlimited variety of remedies to fit the circumstances of every case and the complex relations of the parties. **Id.** In this case, Plaintiff/Appellant claimed Defendant/Respondents committed fraud, fraudulent inducement, and a fraudulent act in executing the Settlement Agreement (paragraph 5), as professionals in the business, by agreeing to a change of electric providers when they knew or should have known it was not possible under the government franchise system of protected monopoly markets. Pursuant to the American Rule this situation must be decided in favor of Appellant.

IV. **THE AMERICAN RULE IN JURISPRUDENCE OF SELECTED STATES**

Introduction

We have seen that the American Rule is a rule controlling the assessment of attorney’s fees arising out of litigation between opposing parties. The American Rule provides that each party is responsible for paying its own attorney fees, unless specific authority granted by statute or contract and other exceptions created by the courts, allows the assessment of those fees against the other party. See, **Alyeska Pipeline Service Co. vs. Wilderness Society, 421 U.S. 240.** Under the American Rule every party, even the prevailing party, must pay its own attorney’s fees. The rule contrasts with the so-called English Rule under which the losing party pays the prevailing party’s attorney’s fees.

The American Rule is merely a default rule, not the blanket rule in the United States. Many statutes at both the federal and state levels allow the winner to recover reasonable attorney fees and there are two major exceptions in federal case law, contracts and statutes.

A number of states have exceptions to the American Rule in both statutes and case law. For example, in **California**, the Consumers Legal Remedies Act allows plaintiffs to recover attorney's fees (see, **California Civil Code, Sect. 1789 (e)**), and in insurance bad faith cases, a policyholder may be able to recover attorney's fees as a separate component of damages. See, **Brandt vs. Superior Court, 37 Cal 3d 813 (1985)**. **Nevada Rules of Civil Procedure 68** is unique in that a party who declines a pretrial offer of judgment, (essentially a settlement offer) and fails to obtain a better result at trial is liable for all reasonable attorney's fees and costs incurred by the offeror after the time the offer was given. Following is a discussion of application of the American Rule in selected Eastern states relevant to South Carolina.

1. **The American Rule in Virginia.**

1. The general rule in the Commonwealth of Virginia is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party. The American Rule forbids an award of attorney's fees absent a contractual, statutory or **equitable basis** for it:

“We have repeatedly stated that the general rule in this commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party.” See, **Prospect Development Co. vs. Bershader, 258 Va. 75, 92, 515 S.E. 2d 291, 300 (1999)**; **Gilmore vs. Basic Industries, Inc., 233 Va 485, 357 S.E. 2d 514 (1987)**.

2. Thus, Virginia follows the majority rule that the recovery of attorney's fees is permitted **where provided by statute or contract**. An amount specified in a contract, unless unreasonable or unconscionable, is considered a part of the contract, just as a provision for principal and interest. The plaintiff seeking the recovery of fees has the burden of establishing that the attorney's fees charged are reasonable and necessary, even if the amount is specified in the contract, because the law closely polices attorney-client relationships. See, **Seyfarth vs. Lake Fairfax Seven Ltd. P'ship, 480 S.E. 2d 471 (1997)**

3. If each side prevails on some issues and loses on others, the trial judge may refrain from making an award. However if the contract allows both parties to recover their attorney's fees, it is possible for both sides to recover attorney's fees for issues on which they prevail. See, **Chawla vs, Burgerbuster, 499 SE 2d 829 (1998)**

4. Selected Virginia Statutory Authority for Recovery of Attorney's Fees:

The following statutes currently allow for recovery of attorney's fees:

Sect. 2.1-346 Proceedings for enforcement of chapter for violation of the Freedom of Information Act; a complainant may recover attorney's fees.

Sect. 2.1-725 Causes of action not created: employees suing employer for violations of the Virginia Human rights Act may recover attorney's fees

Sect. 4.1-410 Title 4.1 Alcoholic Beverage Control Act violations.

Sect. 59.1-207 violations of Lemon Law

2. The American Rule in Minnesota

1. The State of Minnesota recognizes the American Rule in its jurisprudence. See, **Matt Gehring, Attorney Fee Awards in Minnesota Statutes, Research Dept. Minnesota House of Representatives, St. Paul Minnesota, December 2011.**

2. A recent survey of state statutes in the State of Minnesota reveals that there are some forty pages listing statutes that provide statutory exceptions to the American Rule. **Ibid, p.4.** See **Exhibit A** hereto which is an example of the state statute exemptions. The chart summarizes attorney fee provisions in Minnesota statutes through 2011. Note the citation whether the statute **mandates or permits** the court to award fees, limits on fees, etc. A statute is considered to "mandate" an award if the text directs a court to award fees or indicates that a party is entitled to fees; a statute is considered "permissive" if it grants the court the discretion to determine on a case-by-case basis whether an award of fees is appropriate. **Ibid.**

3. Minnesota statutory provisions are more likely to authorize rather than require the court to award the fees, thus leaving the final decision in individual cases up to the court. However, nearly half of the statutes mandate an award in specified situations.

4. The amount of attorney fees that can be awarded is sometimes limited in the statutes by use of the term "reasonable". Sometimes the statutes specify a fee formula or an actual maximum dollar amount or hourly rate that may be awarded as attorney's fees. Some statutes do not provide any guidance on the appropriate amount of fees to award. Except when a specific amount or formula is provided the usual practice is for the court to review the statements submitted by the attorney and decide whether the amount

requested is reasonable given the complexity of the case, the amount of damages at issue and the result, the actual amount of work required, the experience, reputation, and ability of the attorney, and the customary fee charged for similar services. See, **State by Head vs. Paulson**, 188 N.W. 2d 424 (Minn. 1971)

5. A statutory provision that sets a specific limit or rigid fee formula is at risk of being held unconstitutional under the state separation of powers doctrine. Under this doctrine the Minnesota Supreme Court in its role as the branch of government responsible for regulating attorneys, reserves final authority over attorney fee determinations. See, **Gehring, citing Irwin vs. Surdyk's Liquor, et al**, 599 N.W. 2d 132,141 (Minn. 1999), *op cit*, p. 2, A specific limit or formula is most likely to be upheld if it includes the possibility of judicial review and departure from the limit or formula where the amount would not otherwise adequately compensate the attorney. *Id.*

3. **The American Rule in Delaware**

1. The general rule in Delaware is that a party is responsible for the payment of its own attorney's fees unless a statute or contract provides otherwise. See, **Great American Indemnity Co. vs. State ex rel Mills**, 88 A.2d 426 (Del Supr. 1952.) Delaware courts have considered and rejected arguments that contractual attorney's fees provisions violate public policy. It has been stated: "with respects to contracts, it is settled that a provision by which one party undertakes to pay counsel fees on the other in the event of his own breach, is not void as against public policy." See, **Res. & Trad'g Corp. vs. Pfuhl**, 1992 WL 345465 (Del. Ch. 1992).

2. Case law in Delaware reveals that application of the American Rule in that state is alive and well. In **Claybrook vs. Autozone Texas, L.P.**, 2011 Bankr. Lexis 2808 (Bankr.D. Del. July 28, 2011), the Delaware Bankruptcy Court awarded costs to the defendant based in part on the court's finding that the plaintiff trustee failed to demonstrate a viable basis for his claims against the defendants and employed tactics that amounted to a "bad faith discovery campaign." The court granted defendant's request under 11 U.S.C. 1927 and Fed. R. Bankr.P.7054 (b) for the award of costs allowed under 28 U.S.C. 1920, namely, fees of the clerk and costs for transcripts witnesses and copies. **The court however, declined to award attorney's fees relying on the American Rule "that all parties must pay their own way."**

4. The American Rule in Tennessee

1. Tennessee follows the general rule that attorney's fees can only be recovered by the prevailing party if there is a statute or rule of court allowing for the recovery of attorney's fees, or there is a written agreement between the parties allowing for such recovery. See, **Goings vs. Aetna Cas. & Sur., Co., 491 S.W. 2d 847 (Tenn. 1972); O'Fallin vs. Smith, 1989 WL 5092 (Tenn. Ct. App.)**

2. Where there is neither a statute nor a contractual agreement between the parties, the award of attorney's fees is improper and against the public policy of Tennessee. See, **Gray vs. Boyle Inv. Co., 803 SW 2d 678 (Tenn. Ct. App. 1990)**. "The parties are entitled to have their contract enforced according to the express terms." See, **Wilson Mgt. Co., vs. Star Distr's Co., 745 SW 2d 870 *Tenn. 1988**). However the amount awarded attorney's fees must be reasonable as determined by the court, regardless of whether the contract specifies recovery of a reasonable attorney's fee or a stated percentage of the amount owed. The party seeking attorney's fees has the burden of proving that the amount sought is reasonable. **Ibid.**

5. The American Rule in New York

1. The general rule in New York is that attorney's fees may be awarded to the prevailing party if authorized by statute, by contract or by court rule. See, **A.G. Ship Maint. Corp. vs. Lezak, 503 N.E. 2d 681, 683 (N.Y. 1986)**.

2. Contractual provisions for the payment of attorney's fees are strictly construed based on the notion that the payment of attorney's fees is in derogation of the normal presumption that each party should bear its own fees and costs. See, **Kleinberg vs. Radian Group, Inc., 2003 WL 22420501 (S.D. N.Y. 2003)**. New York courts typically deny a request for an award of attorney's fees unless the claim at issue is explicitly encompassed by the contractual provision authorizing the recovery of such fees. See, **Hooper Assoc.Ltd. vs. AGS Computers, Inc., 74 N.Y.S 2d 487 (N.Y. App Div.)** When a party is under no legal duty to indemnify, a contractual attorney's fees provision providing for indemnification must be strictly construed to avoid reading into it a duty which the parties did not intend. **Ibid.**

3. Any award of attorney's fees in New York must be reasonable as determined under the facts and circumstances test. Once the right to recover attorney's fees is established, unless a contractual ambiguity creates an issue of fact, for the jury, the court determines the amount of attorney's fees to be awarded, even if the right to have a jury determine the amount of fees is provided by statute or by contract See, **Kleinber, supra,**

4. **In this case, there was no legal duty of Appellant to indemnify, nor any contractual duty to Respondents, or any statutes or rules calling for Appellant to pay attorney's fees, except where the court ruled an exception. Inter alia, one question before this court is whether or not the lower court imposed fees in violation of statutes, as a mis guided punishment for a mis guided ruling of a non existent res judicata nd non existent frivolous filings.**

6. **The American Rule in North Carolina**

1. The North Carolina Supreme Court has confirmed the American Rule applies in that state: It has held:

“ Thus, the general rule in North Carolina has long obtained that a successful litigant may not recover attorney's fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. Even in the face of a carefully drafted contractual provision indemnifying a party for such attorney's fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor.”

See, **Stillwell Inc. vs. Interstate Equip.Co., 300 N.C. 286, 289, 266 SE 2d 814-815 (1980)**

2. The traditional rationale for this rule was based on the public policy objective of protecting parties with less bargaining power or a lower level of sophistication. Ibid, at 289, discussing the policy rationale in Tinsley vs. Hoskins, 111 N.C. 340, 16 S.E. 325 (1892). However, it has been stated that the historic result of application of the general rule has not necessarily supported that rationale. **Op cit.**

3. Here in this case, the lower court unilaterally, with bias and prejudice, incorrectly awarded attorney's fees to Respondents either as punishment, in violation of constitutional rights, statutes and rules and no contractual provisions. Appellant is an amateur, retired elder in ill health, of limited financial means, and no bargaining power

other than litigation vis a' vis Respondents, a multi billion dollar out of state monopoly public electric utility. Respondents have the infinite resources to retain contract law firms and maintain a small army of in-house attorneys to protect their interests. It is Appellant's experience that the SC. Public Service Commission and Office of Regulatory Staff supposed to regulate the utilities, are virtually wholly owned subsidiaries of the utilities when it comes to protecting consumer rights. The conduct of this case before the lower court from the outset reflects this situation in every respect.

4. The general rule in breach of contract cases in North Carolina is that attorney's fees are not awarded to a prevailing party unless such an award is authorized by statute, **even if** the contract expressly provides for the recovery of attorney's fees.

5. Finally, the North Carolina rule that a prevailing party may not recover attorney's fees unless authorized by statute, is a minority rule. The majority rule is that a prevailing party may recover attorney's fees if provided either by statute or by contract. See, generally **17 A.L. R. 2d 288 (2004)**

V. THE AMERICAN RULE IN SOUTH CAROLINA JURISPRUDENCE

1. South Carolina follows the American Rule. Attorney fees are not recoverable unless authorized by contract, statute or rules of procedure. See, **Bloomberg vs. Nealco, Inc, 310 S.C. 492, 427 S.E. 2d659 (1993)** (lease providing for recovery of attorney fees). South Carolina common law did not provide for recovery of attorney fees by a successful litigant. See, **Collins vs. Collins, 239 S.C. 170, 122 S.E. 2d. 1 (1961)**.

2. S.C. Statutes: Numerous South Carolina statutes provide recovery of attorney fees. See, for example, attorney fees for frivolous proceedings, **S.C. Code Ann. 15-36-10**; attorney fees in state-initiated actions, **S.C. Ann. 15-77-300**; sanctions under S.C. Tort claims Act for frivolous pleadings, **S.C. Code Ann. 15-78-120 (c)**; suit money in divorce actions, **S.C. Code Ann. 20-3-120**; actions to enforcement liens on real estate, **S.C. Code Ann. 27-1-15**; actions against landlords, **SC. Code Ann. Tit 27, ch.40**; derivative actions against business organizations, **S.C. Code Ann.33-42-1840**; consumer credit sales or leases, **S.C. Code Ann. 37-2-413**; unfair trade practices, **S.C. Code Ann. 39-5-140**; failure to pay wages by employers, **S.C. Code Ann. 41-10-80**; motor vehicle manufacturers, distributors and dealers, **S.C. Code Ann. 56-15-110**.

3. **SCRCP:** The S.C. Rules of Civil Procedure also provide for recovery of attorney fees. See, **Rule 11 (a)** (signing of pleadings); Rule 30 (depositions); Rule 37 (failure to make or cooperate in discovery); Rule 45 (subpoenas); Rule 56 (summary judgment).

4. In the present case on appeal, the lower court award of attorney fees to Respondents was incorrectly based on Appellant's alleged unproven violation of the FCPSA statute providing for recovery of attorney fees in the event of frivolous litigation and subject to certain statutory conditions of notice and response. Violation of Rule 11 (a) SCRCP by a party does not specifically provide for payment of attorney fees for a frivolous filing, except by process of case law. Here again there are the same conditions as in the FCPSA which has even more to be met by the lower court, than Rule 11, (a). see below.

5. **In this case, the lower court violated the conditions in both instances by failing to provide notice of intent to award sanctions and not providing an opportunity for response, and violated the constitutional rights of Appellant. See below. Thus these abuses of discretion and errors of fact and law nullified the application of both the rule and the statute, an enabled the mandatory application of the American Rule in this case..**

6. Violation of Rule 11 (a) applies to attorneys and parties, specifically. As the record shows, it is not clear if the award of attorney fees to Respondents (defendants) in this case was made for punitive or indemnification reasons as discussed in Appellant's Initial Brief and discussed by this court in several cases questioning the constitutionality of the award. See below discussion and **Poston vs. Poston, 441 S.C. 106, 502 S.E. 2d 86 (1998)**.

7. It is Respondents who violated statutes and rules as discussed herein; bad faith and frivolous filings as the recent motion to dismiss presently before the court for deliberation.

8. Notwithstanding the issue of the American Rule application, there is a question as to the reasonableness of the attorney fees awarded in this case, as defined by the court. See, **Jackson vs. Speed, 326 SC 289, 386 SE 2d 750 (1997)** where the court held that when determining the reasonableness of attorney's fees under a statute, mandating the award of attorney fees, it will consider six factors (not reported here) s discussed herein.

VI. THE AMERICAN RULE APPLIED TO THE CASE ON APPEAL

Introduction

1. The foregoing discussion reviewed comparable laws related to the American Rule of Federal courts, selected States of the Union, and in South Carolina. The purpose is to provide comparative legal background and references for the discussion of the law, policies and procedures applied to this proposed application of the American Rule for the benefit of Appellant in this case on appeal in South Carolina.

2. The above discussion does not address issues related to the American Rule in cases with unrelated issues; for example, such as international sales contracts (see, *Zapata Hermanos Sucesores, S.A. vs. Hearthside Baking Co, Inc.*, 2001 U.S. Dist. Lexus 15191), insurance contracts (*Mighty Midgets vs. Continental Ins. Co.*, 47 N.Y.2d12, 416 N.Y. S.2d 559 389 N.E.2d 1080 (1979)); class action suits (*Basset vs. KMA*, Pa Sup. Ct. ___, ___, Dec. 5, 2011); arbitration contracts (*Grobert File Co. of Am. Inc., vs. RTC systems, Inc.*, 524 N.E. 2d 404,406, (Mass. App. Ct. 1988)), and definitional issues such as exist in Texas cases related to oral and written contracts as an exception (See, *Ganz vs. Lyon's P'ship L.P* 173 F.R.D.173,176 (N.D.)

3. With respect to this case on appeal and the requested application of the American Rule, South Carolina follows the majority rule and also allows litigants to recover attorney' fees if authorized by contract or statute and other related exceptions.

4. As discussed herein below, the facts of this case reveal that the presiding judge in the lower court, abused discretion and incorrectly assessed attorney's fees against Appellant in favor of Respondents (under threat of 90 days incarceration in Dillon jail) by inappropriately invoking Rule 11 (a) SCRCPP for sanctions. The biased and prejudiced impatient lower court rushed to judgment proclaiming res judicata against the facts and the law, completely disregarded any thought of the American Rule, and in violation of Rule 11 (a), state statutes and cases, itself. The standards for review related to American Rule violations in this state have not been revealed from the cases. Common sense suggests abuse of discretion, abuse of the court's inherent powers, clear errors of fact and law, and court bias and prejudice, all of which apply to the case herein on appeal.

Therefore, in arguing for application of the American Rule in favor of Appellant, certain questions and issues arise for analysis:

Some Questions Related to Application of the American Rule in This Case

1. Was the American Rule, where the parties pay their own attorney's fees and costs, applicable in this case?
2. If so, why was it not applied?
3. If not, what were the reasons?
4. Was there a contractual exception to application of the Rule?
5. Was there a statutory exception?
6. Were there other exceptions such as frivolous, bad faith, contempt, etc?
7. If there were exceptions to the Rule, were they in favor or against Appellant or Respondents and ignored by the court?
8. Notwithstanding the question of the existence of exceptions to the Rule, were the assessed attorney's fees "reasonable" given the six factors used by the South Carolina Courts in deciding this issue, and did the lower court decide the assessment to Respondents on the basis of an analysis of the six factors
9. Were the attorney's fees assessed against Appellant as indemnification as discussed by this court in Poston vs Poston etc, etc.
10. Alternatively, were the attorney's fees assessed against Appellant as punitive by the biased, prejudiced aggressive impatient lower court judge, as discussed by this court in Poston vs,Poston etc, etc.
11. Last but not least, did the lower court violate any statutes, rules and cases in ruling sanctions including incarceration, against Appellant.

Observations

1. In considering these questions, it is to be noted that in the absence of any exceptions to the American Rule in this case, that each party is to pay their own legal costs. Conversely, if there are exceptions that may adhere to this case, were they incorrectly or inappropriately applied by the lower court in favor of Respondents and to the prejudice of Appellant?
2. If there are no exceptions to the rule adhering to Appellant, or they have been incorrectly applied to Appellant, then the question is why did the lower court ignore the

existence of the American Rule and assess fees and incarceration against Appellant, in favor of Respondents? As a professional, experienced judge, the lower court knew or should have known of the American Rule as to assessment of attorney fees.

3. If the lower court judge knew of the Rule and did not impose it, then his motives may reasonably be questioned. Professional negligence is the first claim. Additionally, Appellant respectfully submits that it was bias, prejudice and impatience visibly demonstrated during the hearing against Appellant as a pro se party in the case. Moreover, Appellant submits that the lower court judge was confused about the case, and entirely ignorant of the issues involved, and permitted Respondents to violate the rules of procedure. Further, Appellant submits that the assessment of the award of fees to Respondent was punishment rather than indemnification, because the court added a threatened sentence of ninety days in jail for Appellant.

4. If the lower court did not know of the American Rule, then he was negligent in the conduct of his duties.

5. If there are exceptions existing in this case, then the question is, which party or are both parties in violation of the American Rule? In fact, the record shows very clearly that there are no American rule exceptions against Appellant. The court's application of Rule 11 (a) SCRCF for Appellant's alleged frivolous filings are entirely inappropriate and an abuse of discretion and clear error of fact and law. See below.

6. There are American rule exemptions against Respondents: contract, statute, bad faith, contempt of court, etc. Notwithstanding, an American Rule award of attorney's fees to Appellant would be a moot issue because a party pro se cannot receive attorney fees, but can receive costs. The unwarranted award of attorney's fees to Respondents must be reasonable, and Appellant has objected on the record to the amount approved by the lower court.

The Exceptions to the American Rule Applied in This Case.

1. The exceptions to the American Rule where the parties pay their own attorney's fees, have been addressed to varying degrees in preceding sections of this memorandum. In summary the exceptions may be listed as follows:

1. An enforceable contract (settlement agreement) may shift payment of attorney's fees.

2. Statutes and Rules of Procedure may provide for shifting of attorney fees.
 3. Contempt of court may result in a shift of fees.
 4. Frivolous and Bad faith filings may result in a shift of fees.
 5. Fraud can result in a shift of fees.
 6. Common Fund cases can shift fee payments.
 7. The Substantial Benefit Doctrine can shift fee payments.
2. For this case we have noted that S.C. state statutes that provide for recovery of attorney's fees do not apply, except for the Frivolous Suit Act which is discussed further herein below. It appears that state Rules of Civil Procedure that provide specifically for shifting of fees do not apply in this case with the exception of Rule 11 (a) SCRPC incorrectly applied against Appellant by the lower court. Contempt, bad faith, and fraud exceptions have been addressed above with further references to these exceptions in following discussion. The Common Fund and Substantive Benefit Doctrine are not applicable to this case.

The Lower Court's Order on Appeal

1. The starting point for analysis of the American Rule and exceptions applied in this case is the Court Order filed in the lower court on November 25, 2009. See, **Record on Appeal, pp. 10-14, (hereafter referred to as "R. p ____").** The following analysis explores the lower court's egregious, gross abuse of discretion, clear errors of fact and law, the Court's violations of a State statute, procedures and especially Rule 11 (a) SCRPC, case law, Canons and related matters. It also explores Respondents procedural violations as exceptions to the American Rule. The purpose is rebuttal in support of this application for Appellant to benefit from the American Rule, and to support Appellant's Motion for a Rehearing and Rescission of the Court's Order of Dismissal dated March 19, 2012, recently filed.
2. The said court order is so full of errors of fact and law, and abuse of discretion, that the only logical conclusion one can draw is that the presiding judge was negligent as a result of his palpable bias, prejudice and impatience during conduct of the November 3, 2009 Hearing when he denied Appellant the right to be properly heard and perpetrated the violations of the law and cases Appellant submits that based on the court's comments and attitude, the lower court judge was also totally confused about the two (first and

second) cases under consideration, the actual content of the two court orders in question by other judges in the cases, the previous regulatory and court actions dating back several years and erroneously referred to by respondents irrelevant and immaterial verbal historical presentation during the hearing..

3. As discussed in Appellant's briefs, the "first case" 2004-17-CP-232 dealt with Respondents' as Plaintiffs, claim for a disputed debt for services rendered Appellant (and spouse) as Defendants. This case was settled out of court and the merits were never heard by any court at any time, and the Settlement Agreement (Mutual Release) dated September 27, 2007 (**R.pp.74-75**) was subsequently breached by Respondents, who were in contempt of court in non compliance with the court order to comply within 45 days (**R.p.4**).

4. Subsequently, Appellant filed an "**Eighth Notice of Mutual Release Default**" with Respondents on February 19, 2008 (**R. p.121**), a **Notice of Non Compliance** with the court dated April 14, 2008, (**R.pp.144-147**) and finally a **Complaint**, the "second case" 2008-17-C-180 dated May 30, 2008 for Respondents' breach of the agreement, non compliance and contempt of court, etc. (**R.pp 20- 53**). All of the 18 counts were directly related to Respondents breach of the settlement agreement and the several damages incurred by the plaintiffs/appellant herein. None of the 18 counts were indirectly or directly related to the counts contained in Respondents first case relating to a disputed amount. **Contrary to the presiding judge's order, at no time was the second case, the subject of this appeal, ever dismissed by any judge at any time. See, R. pp.3-8.**

5. See the lower court's completely incorrect statement in the Order: " Case No, 2008-CP-17-180 (second case) and all of the allegations contained therein have previously been addressed in Case No 2004-CP-17- 232 (first case). That case has ended and the matters alleged in this case are res judicata. The plaintiff (appellant) continued to pursue these matters at the trial level in direct contravention of the court's orders." **See R. Item 1, p.4 and below discussion.**

6. That incorrect and mistaken statement is the commencement of the abuse of discretion and clear error of fact and law perpetrated by the lower court, now on appeal. It is also the root of the exceptions to the American Rule denied to Appellant.

7. First, contrary to the order, none of the allegations contained in the second case here on appeal, were previously addressed by anyone in the first case. The two cases addressed two completely unrelated subjects and cases: respectively, collection of a disputed debt (first), and breach of agreement and contempt of court (second). The allegations in each case are not remotely related and certainly were not addressed by any court at any time. At the hearing, Respondents produced no evidence or exhibits to support that contention. The presiding judge in the lower court simply took counsel for Respondent's word that was the case and neglected to hear the only motion properly before the court.. Appellant was denied an opportunity to rebut the misleading verbal allegations.

8. Second, it is true that the first case "has ended" as stated. But the record shows that the second case now on appeal was never ended at any time by any judge.

9. Third, "the matters alleged in this case are res judicata" is an incorrect ruling by the judge because as stated, none of the allegations in the second case now on appeal, were ever addressed in the first case which was ended. On that point, for example, the issue of emotional stress can be created as the result of a demand for payment of an account (first case), or created as the damages incurred as a result of a breach of a settlement agreement (second case). Same issue, two different facts, law and cases!

10. Fourth, the court states that Appellant "continued to pursue these matters at the trial level." **This court order issued at a hearing on November 3, 2009, not a trial by jury which was requested and denied Appellant.**

11. Fifth, the hearing was supposed to be on Respondents Motion to Dismiss for a Rule 12 (b) (4)& (5) SCRCPP relating to alleged lack of proper service and personal jurisdiction.. Not having filed an Answer or Counterclaim for some 14 months after service of the compliant, in violation of Rule 7 (a) and Rule 13 SCRCPP, the said motion was filed by Respondents just two days before the previous hearing on or about August 10, 2009, which was continued to November 3, 2009. Filed in violation of Rule 12 (b) SCRCPP, Respondents' counsel knew and should have known the motion was frivolous having been improperly served in accordance with the rules of procedure. At the subsequent hearing on November 3, 2009 the said Respondents' Rule 12 (b) motion was ignored and not heard by the court, and Respondents proceeded to present a verbal

argument without documentation claiming the (second) case had ended. In fact it had not. See, **Appellant's Brief, R. Item VI, p.36.**

12. The only case that had ended was the first case **2004-CP-17-232** by order of Judge Lockemy (**R.p.6 & Supp.R.p.70**) who deferred to Judge Burch's previous orders (**R.p. 4, & R.p.5**) on the first case (**Supp. R..69, Item 9**) which dealt with the first case only, 2004-CP-17-232, not this case on appeal 2008-17-CP-180. The court accepted Respondents verbal presentation and ruled, sui sponte, for res judicata. Appellant was denied the opportunity to rebut by the judge who was in a hurry to end the session.

13. Sixth, the lower court's last order incorrectly claimed Appellant continued to pursue the matters in the second case on appeal, "in direct contravention of the court's orders". We have seen above that the only Case ended by the courts was the first case, not the second case now on appeal. With respect to the Settlement Agreement claims and matters, during the hearing on the first case on June 3, 2008, Judge Lockemy expressly stated: "**These matters are not properly before me as they had been previously addressed by Judge Burch in the hearing on January 30, 2008 and his Orders of February 28, 2008 and March 24, 2008**" which orders had nothing to do with this case on appeal, the second case. (**Supp. R.69, Item 9; R.p. 4, & R.p.5**)

14. In conclusion, this brief discussion on the lower court's order now on appeal, is intended to set the stage for further discussion on the exceptions to the American Rule and Appellant's right to enjoy the benefits thereof.

The Frivolous Issue

1. The lower court ordered that Case No.2008-CP-17-180 on appeal is dismissed, and that Appellant's "continued pursuit of these matters constitutes repetitive and frivolous filings." (**R.p. 13, Item 2**). It is not clear from the ambiguous language if the court means further filings following the incorrect dismissal of the case, or as a result of the alleged previous filings before the order of dismissal was promulgated. On balance it may be assumed that the court is referring to Appellant's filing of the Complaint on May 30, 2008 and subsequent filings.

2. Citing **Rule 11 (a) SCRC**P, the court sanctioned Appellant to pay reasonable attorney fees to respondents, "that were necessitated by Plaintiff's (Appellant) filing of this successive action from May 30, 2008 through the date of this order." (**R.13, Item 2.**)

Apparently the court deems that “successive action” is frivolous, notwithstanding a legitimate serious purpose.

Frivolous Defined:

3. In attacking the court order, first we must define the legal term “frivolous.” as used by the court and pursuant to Rule 11 (a) SCRCPC cited in the order. According to the legal authority **Black**, any pleading is called “frivolous” when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent; frivolous pleas are those which are so clearly and palpably bad as to require no argument to convince the court thereof, and which would be pronounced by the court indicative of bad faith in the pleader on a mere inspection; a frivolous demurrer has been defined to be one which is so clearly untenable, or its insufficiency so manifest upon a bare inspection of the pleadings, that its character may be determined without argument or research, **Black’s Law Dictionary, Revised 4th Edition, p.796, (citations omitted)**.

4. We have discussed above that the filings in this case were anything, but repetitive successive and frivolous as defined by **Black**. See, **Appellant’s Brief, Item VII, p.39 for full discussion of this issue**. Moreover, the court based this assumption on the basis of Respondents’ verbal representations without any documentation by Respondents’ counsel at the November 3, 2009 hearing supposedly on Respondents’ bogus Rule 12 (b) (4)&(5) SCRCPC frivolous motion, not at trial on the merits of the case.

5. A subsequent order by the lower court reiterated its anticipated defensive, self serving findings in support of its first order, stating the “litigation to be successive, vexatious, and directly violative of previous court orders, finding the issues raised in the lawsuit to be res judicata.” (**R. p.19**). We have discredited these rulings in that the record shows very clearly there was no violation of any previous orders at any time by Appellant, and the issues raised were not successive or vexatious, **since they were in response to the documented violations of Respondents in their knowing and deliberate breach of the Settlement Agreement for a prolonged period of seven months, contempt of court, and violation of procedures notwithstanding Appellant’s good faith efforts to resolve the issues by contacting Respondents at least eight times about the breach of the agreement. (R.p121)**

Appellant's Alleged Repetitive and Frivolous Filings.

6. As noted above, following the execution of the settlement agreement (Mutual Release) contract and Respondents' initial failure to meet the terms and conditions contained therein, Appellant submitted no less than eight (8) letter notices to Respondents that they were in violation of the Settlement Agreement, all of which were ignored by Respondents.

7. Following the last letter notice dated February 19, 2008 (**R.p.121**), Appellant filed a Notice of Non Compliance on April 14, 2008 (**R. p.144**), and the Complaint on May 30, 2008 (**R.p.20**). There followed several motions and letters in the normal course of litigation related to the Complaint. These filings were Appellant's good faith efforts to resolve the matters in accordance with **Rule 11 (a) SCRCP**, and contrary to the assertion of Respondents and the lower court that this was "successive action" that "constitutes repetitive and frivolous filings," especially measured against the definitions of "frivolous filings" provided by **Black. Op cit**. Moreover Appellant's filings were filed to the best of Appellant's knowledge, information and belief, that there were good grounds to support the filings pursuant to Rule 11 (a) SCRCP, and were not interposed for delay, but for seeking justice.

8. It is difficult to see how these normal and customary filings in a lawsuit relating to documented breach of a settlement agreement (contract) can be considered to be frivolous (as defined), and repetitive, calling for an award of attorneys fees for "Plaintiff's (Appellant) limited filings of this "successive" action from May 30, 2008 (the date the complaint was filed), to the date of the court order" of January 10, 2010. During this period there were several filings adjudicated by the lower court dealing with the first case 200-CP-17-232; viz., June 27, 2008; July 25, 2008; August 10 and 12, 2009. The hearing on November 3, 2009 was to hear the invalid Rule 12 (b)(4)&(5) SCRCP motion filed by Respondents related to the second case now on appeal which was continued from a previous hearing, which was confirmed by order on November 25, 2009 by the lower court judge. None of the issues heard in these filings were repetitive or successive warranting an arbitrary finding of res judicata and Rule 11 (a) sanctions for alleged frivolity and threatened incarceration of Appellant...

9. The lower court confused the issues related to a current contractual breach by Respondents with “red herring” issues in regulatory and court cases dating back several years alleged by Respondents, none of which were germane directly or indirectly with the current case, and certainly were not res judicata issues..

The Lower Court’s Violations Related to Rule 11 (a) SCRCF

1. We have noted above that Rule 11(a) SCRCF requiring litigation “attempted in good faith to resolve the matter(s),” and frivolous filings, provide exceptions to the application of the American Rule. Further, that in this case, the lower court judge incorrectly invoked Rule 11 (a) SCRCF as an exception justifying a ruling of res judicata, and for ruling that Appellant’s filings in the complaint before the court were “frivolous.” Rule 11 (a) provides that if court papers are “...signed in violation of this rule.” the court may impose “...an appropriate sanction which may include an order to pay... reasonable expenses ... including reasonable attorney’s fees.” Thus instead of applying the American Rule, pursuant to Rule 11 (a) SCRCF the lower court judge inappropriately (based on the record) imposed sanctions on Appellant awarding attorney’s fees to Respondents (vulnerable to application of exceptions based on the record) and threatening a 90 day jail sentence for Appellant.

2. Close examination of Rule 11 (a) SCRCF does not reveal any reference to “bad faith”, “frivolous filings” or the threatening jail sentences as an exception to the American Rule and an approved sanction. The references in that regard are to “good faith” requirements for filing of documents, and “good grounds to support” filings.

Therefore three questions arise: (1) What is Rule 11 (a) SCRCF authority for imposing alleged frivolous filings as an exception to the American Rule and awarding attorney’s fees and jail sentences as sanctions; (2) What is the correct procedure for the lower court to invoke the authority of Rule 11 (a) SCRCF in this case, and (3) What recourse or remedy does a party have if the lower court violates Rule 11 (a) SCRCF with an incorrect application to a case and a related statute?

Case law holds the answers. See Appellant’s Initial Brief, Item VII, R.pp.39-43; Pool vs. Pool, 329 S.C. 324, 494 SE 2d 820 (SC 1998). The FCPSA does not allow a judge to invoke its provisions sua sponte; it clearly requires a proper motion to be made by the aggrieved person not the judge as in this case. Ibid. In Pool, no argument was

made by the aggrieved party of a frivolous claim and the frivolous claim was brought up by the judge in this case; and there was no mention by anyone of the FCPSA as required notice. **Ibid.** Both Rule 11 (a) and the FCPSA require the court to give Appellant proper advance notice of proposed sanctions and an opportunity to respond. This was not done.

3. **Sanctions:** The standard for sanctions under Rule 11 (a) is essentially the same as that under the Frivolous Civil Proceedings Sanctions Act. (FCPSA). **Father vs. S.C. Dept. of Soc. Services. (S.C. 2003) 353 S.C. 254, 578 S.E. 2d.11. See, further discussion on the FCPSA.** If Appellant's filings were filed with Appellant's reasonable belief of good grounds to support them, then Rule 11 (a) sanctions do not apply. **See discussion in Hiott vs. State (S.C. 2009) 381 S.C. 622, 674 S.E. 2d 491.**

4. **Frivolous Claims:** Under Rule 11 (a) a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion or other paper, or for making frivolous arguments. **Runyon vs. Wright (S.C. 1996) 322 S.C. 15, 471 S.E. 2d 160.** The question to be answered is what constitutes a frivolous pleading, etc, and a frivolous argument. In this case, are alleged "successive" and "alleged "repetitive" papers, frivolous or filed in bad faith? We have shown conclusively in the Briefs and above that preponderance of the evidence and the court's rule violations are not the case and the lower court has abused its discretion on this matter.

It has been stated that if claims and evidence worthy of being submitted to a jury, the claims cannot be frivolous within the meaning of the Act. (FCPSA). **Hanahan vs. Simpson. 326 S.C. 140, 485 SE 2d. 903 (1997).** None of the three tests applied for determination of whether Appellant's filings were frivolous, as provided in **Subsect. C (1) (a)(b) & (c) of FCPSA.** Neither the court nor Respondents filed a motion seeking sanctions in violation of **FCPSA Subsect. B.2.**

5. **Court Failure to Provide Notice:** Here we find the lower court in direct violation of Case law and guilty of abuse of discretion and clear error of law by denying Appellant his due process rights, and equal protection of the law in relation to the Court's imposing sanctions in this case, pursuant to Rule 11 (a) as an exception to the American Rule. As noted above, the court, sui sponte made its ruling and imposed sanctions on Appellant without notice or opportunity to respond, essentially in accord with the notice requirements of the **FCPSA.**

6, It has been ruled that a trial court abused its discretion by imposing Rule 11 sanctions on a plaintiff without affording plaintiff's counsel notice or opportunity to respond. See, **Burns vs. Universal Health Services, Inc., (S.C. App.2000) 340 S.C. 509, 532 S.E. 2d 6, on subsequent appeal, 361 S.C. 221, 603 S.E. 2d 605.** A signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11. U.S.CA. Const. Amend. 14; Burns, op cit.

7. **The American Rule Applied Under Rule 11 (a):** We have discussed that Rule 11 SCRPC is an exception to the American Rule. That means attorney's fees can be recovered in the event Rule 11 applies as in a frivolous case brought in bad faith as defined. However, it has been held that the Rules of Civil Procedure did not authorize the award of attorney fees as sanctions against a party for nonpayment of a settlement agreement between parties ending earlier litigation. See, **Harris-Jenkins vs, Nissan Car Mart., Inc., (S.C. App. 2001) 348 S.C. 171, 557 S.E.2d 708.** In the present case before the court, with respect to attorney's fees, Appellant is not claiming sanctions against Respondents for payment of fees, but application of the American rule where the parties pay their own fees. Rule 11 (a) sanctions against Appellant are inappropriate and should be reversed.

8. **Appellate Review of the Lower Court's Decision:** For appellate review it has been said that the imposition of sanctions under Rule 11 SCRPC will not be disturbed on appeal absent a clear abuse of discretion. **Runyon vs. Wright (S.C. 1996) 322 S.C. 15, 471 S.E. 2d 160** Further, an abuse of discretion may be found where the trial judge's conclusion had no reasonable factual support, resulted in prejudice to the right of Appellant and therefore amounted to an error of law. **Culbertson vs. Clemens, (S.C. 1996) 322 S.C. 320, 471 S.E. 2d 163.** We have shown conclusively that the lower court has abused discretion and is in clear error of fact and law in imposing unwarranted sanctions on Appellant who has acted in good faith in prosecuting this case. The lower court judge ruling had no reasonable factual support for a finding of res judicata, and frivolous filings as a Rule 11 (a) exception to the American Rule relating to fees. Appellant was prejudiced to the right to benefit from the American Rule, and avoidance of unwarranted sanctions including the malicious, vindictive threat of incarceration for 90 days without any justification

Respondents' Contempt of Court.

1. The preceding section discussing the American Rule in National Jurisdiction noted the U.S. Supreme Court rule that a party may recover attorney's fees for enforcement of a contempt order; this was expanded to the American Rule where a party's procedural rights were violated prior to final judgment; and willfulness of the contempt is the relevant factor in deciding attorney fee payments. .
- 2.. In this case, we are concerned with two sets of contempt of court, one actual act of contempt in the first case documented against Respondents, and the other alleged in the second case against Appellant for a possible future act.
3. Respondents willfully violated the "crystal clear" Lower Court Order requiring them to comply with the Settlement Agreement within 45 days of the date of the Order. **(R.p.4)** Respondents did not comply and Appellant filed eight (8) letter notices of non compliance **(R.p.121)**, a formal legal Notice of Non Compliance in the lower court **(R. p. 144)**, followed by the Complaint (R.p.20) now under review of this court for breach of agreement, non compliance with a court order, and contempt of court authority.
4. Court Order dated February 28, 2008 **(R.p.4)** stated that the parties were to comply within 45 days of the order to comply with the terms of the settlement agreement. "Failure to comply shall subject the parties to the contempt powers of the court." **Ibid.** The record shows that Appellant duly and timely complied with all the terms of the settlement agreement and the court order; and that Respondents did not, and were in contempt of a court order and court authority. **(R. p. 144)**
5. In a gross, arbitrary and biased abuse of discretion, and clear error of law and fact, the lower court decision now on appeal completely ignored those contempt and other issues at the November 3, 2009 hearing. Without argument or motion from Respondents, sui sponte, the lower court ruled res judicata based on a misconception of two entirely different law suits, and completely ignored Respondent's only improper motion properly before the court for hearing.
6. **Respondents' Bad Faith:** Contempt of court is an element of bad faith exception. Under the American Rule, attorney's fees may also be assessed against a successful litigant who acts in bad faith which may include conduct that is found to be in contempt of court, such as Respondents herein as discussed above. However the bad faith

exception is much broader than the contempt exception. Courts use the rule on the need to punish parties who abuse the judicial process, as Respondents have done on a regular basis since the commencement of the suit in the lower court.

6. The Bad Faith exception to the American Rule is discussed at length in the above section discussing the American Rule in U, S, National Jurisprudence, paragraphs 8 through 12. **Respondents cannot seek refuge from the American Rule on the contempt of court exception which does not apply to Appellant, but to Respondents.**

Summary and Conclusion.

1. Respondents did not file a motion seeking sanctions for frivolous filing in the lower courts required under FCPSA and the American Rule.
2. Respondents did not file a written or oral motion seeking sanctions for Appellant's alleged violation of the FCPSA in violation of FCPSA and the American Rule..
3. The lower court incorrectly ruled sua sponte on erroneous grounds and violated the FCPSA and American Rule.
4. No oral or written notice was given to Appellant by the lower court or Respondents, who did not have 30 days and an opportunity to respond in mitigation.
5. The FCPSA does not allow a judge to invoke the provisions of the FCPSA sua sponte; it clearly requires a proper motion to be made by the aggrieved party.
6. The three tests under Subsect. C of FCPSA provided for deciding a frivolous filing did not apply to Appellant's filings.
7. The lower court never applied any of the factors provided under Subsect E. of FCPSA to the evaluation in determining if Appellant's Complaint was frivolous.
8. Last but not least, there is the question that Respondents violated the FCPSA as well as laches, by their filing and unilateral abandonment of the Rule 12 (b)(4)(5) motion to dismiss and the delayed argument for res judicata.
9. The court cannot raise sua sponte the defense of res judicata for Respondents.
10. Finally, it may be reasonably concluded that the Respondents' and the lower court's negligence and violations render the Rule 11 (a) SCRCP and FCPSA exceptions to the American Rule, to be moot as applied to Appellant, on the issues of frivolous claims, sanctions, bad faith, and contempt of court. Thus application of the American

Rule in favor of Appellant is appropriate; the lower court's ruling of sanctions cancelled and the parties pay their own attorney fees, and the threat of Appellant's 90 day incarceration declared null and void.

11. The lower court's sua sponte ruling to dismiss the suit as frivolous litigation and to impose improper sanctions, was barred by the preponderance of evidence, and the lower court's violation of the Rule 11 (a) SCRPC and FCPSA procedural requirements under S.C. law.

The Lower Court Sanction for Appellant's Alleged "Future" Contempt of Court

1. The second contempt of court issue is cited above as an exception to application of the American Rule. It relates to the lower court's unbridled judicial attack on Appellant at the November 3, 2009 hearing that was supposed to hear Respondent's bogus Rule 12 (b) SCRPC motion, but did not. See **detailed discussion, Appellant's Brief, Item VIII, pp. 43-46.**

2. Instead, as noted above, the lower court erred in ruling a "hybrid" civil/criminal contempt of court finding with sanctions denying constitutional rights against Appellant, given the preponderance of the evidence, leading to reversible error. The lower court has criminalized a civil action with a contempt of court charge and imposing an unwarranted excessive and punitive ninety day prison sentence against Appellant.

3. The main question here is whether the unconditional contempt of court threatened by the lower court, is a civil or criminal contempt, or a "hybrid" as determined in other cases. Thus, if Appellant does not pay the legal fees assessed against him by a runaway judge, is that to be deemed a civil or criminal contempt involving Appellant's constitutional rights including the right to trial by jury if criminal charges are to be imposed.

4. With respect to application for an award of costs as an exception under the American Rule, it is probably immaterial whether an alleged act of contempt of court is civil or criminal Here the issue is whether or not a party pays the ordered sanction, not whether the failure to comply is civil or criminal. Either way, an act of contempt of court remains an exception to the American Rule.

5. For the purpose of this memorandum, the relevance of the issue here is the relationship to the lower court's abuse of discretion, and clear errors of fact and law

calling for reversals by this court, particularly as to the need for any sanctions. The evidence suggests that Respondents should be sanctioned on several issues as discussed in Appellant's Briefs.

6. Note that it is the lower court's violative ruling **sua sponte**, for res judicata, sanctions for alleged frivolous filings, and a prison term of 90 days as exceptions to the American Rule justifying sanctions. The Respondents did not file any written or oral motions requesting those rulings before, or in open court at the hearing. **Thus Respondents are not a complainant seeking redress on those issues, but are the beneficiary of the lower court's sua sponte rulings.**

7. **Poston vs. Poston, 441 S.C. 106, 502 S.E. 2d 86 (1998)** seems to be a seminal case relating to the issue of civil/criminal or "hybrid" contempt of court. The major factor in determining whether a contempt is civil or criminal, is the purpose for which the court's power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. **17 Am. Jur. 2d. Contempt. Sect. 9. (1990)**. The purpose of civil contempt is to coerce the defendant to do the thing required by the order, for the benefit of the complainant. **Poston. Op cit., p.2**. In this case we have a court order to pay fees to an attorney who was not a complainant, but the beneficiary of the court's sua sponte rulings.

8. The primary purposes of criminal contempt are to preserve the court's authority, and to punish for disobedience of its orders. **Ibid . p 3**. Civil contempt must be proven by clear and convincing evidence. Criminal contempt the burden of proof is beyond a reasonable doubt. **Ibid., p.6**. In civil contempt proceedings an award of attorney's fees is not a punishment, but an indemnification to the party who initiated the contempt proceedings. **Ibid**. In this case the award may be considered as punishment rather than indemnification since Respondents did not seek attorney's fees which were awarded sua sponte, by the court.

9. Based on the argument in the **Poston** case, it is impossible to determine whether the contempt sanction in this case, is criminal or civil. The contempt order is not clear. It is a so-called "hybrid" case because the sanctions have characteristics of both civil and criminal contempt. The lower court order is explicit as to its punitive intent. **Transcript, R. p. 71**. Thus the purpose of the contempt sanction is to coerce Appellant to comply

with the order, and to punish Appellant if he violates the order in the future. This is both civil and criminal contempt as defined by the courts.

10. By punishing Appellant for future violations without first holding a hearing to determine if Appellant willfully violated the order, the court could potentially violate Appellant's due process rights under the **14th Amendment of the U. S. Constitution, and Article 1, Sect. 3 of the S.C. Constitution. See, Poston, op cit. p.14, citing Bloom vs. Illinois, 391 U.S. 194, 88 S.Ct. 1477 (1968).**

11. Further constitutional questions exist in this case. Criminal penalties may not be imposed on someone who has not been afforded the protections that the US. Const. requires for such proceedings. **Poston. op cit, p. 14. citing Hicks vs, Feiok, 485 U.S. at 632, 18 S. Ct. at 1429/30.** Due process requires a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding order can be made affecting his right to life, liberty and property. **State vs. Brown, 178 S.C. 294, 182 SE 838 (1935).**

12. Due process requires notice and an opportunity to be heard. **See, 16A Am.Jur. 2d Constit. Law, Sect. 812, (1979).** We have shown that the lower court violated this due process requirement by not providing notice and an opportunity to be heard pursuant to **Rule 11 (a) SCRPC and FCPSA** in violation of the American Rule against Appellant. Appellant cannot be punished for violating the lower court order in the future, unless the willfulness of the violation is shown by clear and specific acts or conduct.

13. If this is a criminal contempt case as indicated by the punishment factor declared by the lower court, then the case should be set for jury trial as originally requested by Appellant, if such is necessary at all, given the other issues and relief raised herein. See, **Ex Parte Griffin, 682 S.W. 2d 261 (Tex 1984)**

14. **Conclusion:** The facts of this case do not warrant the award of attorney's fees to Respondents pursuant to the contempt of court and other cited exceptions of the American Rule. In fact there should be sanctions imposed on Respondents. It is not clear where the "hybrid" civil/criminal contempt issue falls within the scope of the American Rule. The award of fees in this case is punitive rather than indemnification to counsel or Respondents who were not the party complainant seeking sanctions or hwo instigated the contempt proceedings. The burden of proof in a criminal contempt proceeding is on the

State (plaintiff) to prove the contempt beyond a reasonable doubt. **State vs. Bowers, 270 S.C. 124, 241 SE 2d. 409 (1978)**. Finally, abuse of discretion is the standard for reviewing the decision to award sanctions and the specific sanctions awarded under the (FCPSC) Act. **Horry County vs. Parbel, 378 S.C. 253, 5662 SE 2d. 466 (S.C. Ct. App. 2008)**.

VII SUMMARY

1. The American Rule as used in the nation's jurisprudence requires the parties to litigation to pay their own attorney's fees, irrespective of which party was the "winner" or the "loser" in the case. This is diametrically opposite the so-called "English Rule" where the "loser" pays attorney's fees. The American Rule is well encased in the nation's legal system. The Rule was established in South Carolina in 1694 and by the U.S. Supreme Court in 1796 in the *Arcambel* case, in 1824 the *Apollen* Case, in 1975 the *Alyeska* case, a modern era seminal case, and in 1967 the benefits to society of the American Rule was re-stated by the U.S. Supreme Court in *Fleishmann Distilling Corp. vs. Maier Brewing Co., 386 U.S. 714m 718 (1967)*. Congress recognized the American Rule with the Congressional Act in 1853, re-stated in 1988.
2. With the passage of time since colonial days, the American Rule was employed with the development of **exceptions** to the rule by the Federal and State Legislatures and courts. If an exception is proven to exist in a case then the American Rule may not apply, usually at the discretion of the court. The standards on appeal are normally abuse of discretion and clear error of fact and law, although clear and convincing evidence, preponderance of the evidence and with criminal contempt cases, beyond a reasonable doubt is the standard.
3. The Rule exceptions normally are pre and post contractual agreement disputes although frowned upon by the courts, exceptions included in statutes and rules of procedure that provide for payment of fees, and related issues considered at the discretion of the courts such as frivolous suits, civil/criminal contempt of court, sanctions, bad faith, equitable situations, etc.
4. In this case, the exceptions to the American Rule incorrectly employed by the lower court judge in an abject abuse of discretion, were Appellant's alleged, unproven

frivolous litigation violations of Rule 11 (a) SCRPC, and the Frivolous Civil Procedures Sanctions Act (FCPSA).

5. The lower court inexplicably overlooked Respondents abuse of procedural rules including their abandonment without notice of their only improper Rule 12 (b) SCRPC motion, the only motion of record before the court for hearing on November 3, 2009, and the court ruled sua sponte without any requests, verbal or written motions or documentation from Respondents, for res judicata and frivolous litigation against Appellant who was denied the opportunity to offer testimony, evidence and the right to a trial of the case on its merits.

6. The lower court abused its discretion by invoking and judiciously violating Rule 11 (a) SCRPC and FCPSA. Both authorities provide for sanctions as exceptions to the American Rule, at the discretion of the court. Both authorities require advance notice to a party of the intent to impose sanctions, and both are required to provide the party the opportunity to respond and defend against the proposed sanctions. Inter alia, these provisions were violated by the lower court in this case.

7. This documented lower court abuse of discretion and clear error of fact and law alone, require this court to vacate and set aside the lower court's rulings imposing sanctions against Appellant, and dismissing the case on specious and unconstitutional grounds.

8. The lower court threatened Appellant with ninety (90) days unconditional incarceration in jail in the event of a future civil/criminal/"hybrid" contempt of court for non payment of the attorney fee sanction. Based on cases before this court, this ruling and the other incorrect exceptions to the American Rule violated by the lower court, violates Appellant's constitutional rights. Additionally, it is a matter of court record, that Appellant is an elder, retired professional in ill health. In the event of 90 days unconditional incarceration in Dillon jail, it is likely he would not survive. See, **Exhibits B and C** hereto and made part hereof. There is also the constitutional issue of excessive, cruel and unusual punishment for a disputed case of alleged frivolous litigation.

9. According to the legal authorities cited herein above, Appellant's constitutional rights are in the balance in this case related to the lower court's violations of the exceptions to the American Rule. By punishing Appellant for future violations without

first holding a hearing to determine if Appellant willfully violated the order, in addition to the existing Rule 11 (a) SCRCF and FCPSA constitutional violations, the court could potentially violate Appellant's due process rights under the **14th Amendment of the U. S. Constitution, and Article 1, Sect. 3 of the S.C. Constitution**. Criminal penalties may not be imposed on someone who has not been afforded the protections that the US. Constitution requires for such proceedings. Due process requires a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding order can be made affecting his right to life, liberty and property. Due process requires notice and an opportunity to be heard. See, **16A Am.Jur. 2d Const. Law, Sect. 812, (1979)**.

10. We have shown that the lower court violated this due process requirement by not providing notice and an opportunity to be heard pursuant to **Rule 11 (a) SCRCF** and **FCPSA** in violation of the American Rule against Appellant. Appellant cannot be punished for violating the lower court order in the future, unless the willfulness of the violation is shown by clear and specific acts or conduct.

11 If this is a criminal contempt case as indicated by the punishment factor declared by the lower court in violation of the American Rule exceptions as cited, then the case should be set for jury trial as originally requested by Appellant, if such is necessary at all, given the other issues and relief raised herein.

VIII. CONCLUSION

1. The rationale for the American Rule is that people should not be discouraged from seeking redress for perceived wrongs in court or from trying to extend coverage of the law. The rationale continues that society would suffer if a person was unwilling to pursue a meritorious claim merely because that person would have to pay the defendant's expenses if they lost.

2. This rationale supports Appellant's contention that the American Rule applies in this case on appeal before this court. Here we have a retired individual consumer of electricity with limited resources forced to enter into litigation to defend his consumer rights and interests against a multi-billion dollar, government protected, interstate for profit, monopoly electric utility company with unlimited legal resources comprised of a

small army of in-house attorneys and staff, and old, established local private law firms under contract to protect their corporate interests.

3. Appellant was forced to litigate consumer protection for two reasons: First, it has been his experience that there is an absence of any real, substantial regulatory consumer protection from the two innocuous state regulatory agencies, the S.C. Public Service Commission (PSC) and the Office of Regulatory Staff (ORS), both of which are treated and act as wholly owned subsidiaries by the utilities.. Second, Respondents' first initiated the legal action in the lower court against Appellant for an alleged disputed debt. The case was settled with a Mutual Release (contract), which Respondents' then refused to comply with for seven months, until Appellant formally objected and had to file a complaint in the lower court. There followed litigation in the normal course of court procedures.

4. Subsequently the uninformed and prejudiced lower court precipitated abusive rulings in violation of the cited exceptions to the American Rule as discussed herein. So here we have an individual consumer trying to protect his consumer rights against a major corporation armed to the teeth with lawyers, being victimized by a lower court entirely ignorant of the facts and apparently the law as well, and ordering ridiculous, unwarranted, excessive sanctions of payment of attorney's fees and a 90 day jail sentence to a consumer for his attempts at law to protect his consumer and constitutional rights as they developed during the conduct of the case..

5. Moreover, the lower court was anything but partial in its conduct of the court hearing on November 3, 2009. Denying Appellant the right to testify on the issues raised sua sponte, by the court, the court was permissive to Respondents counsel who violated the rules of procedure as discussed herein above.

6. In this case we have the lower court egregiously violating the exceptions to the American Rule. Notwithstanding, the contractual, statutory and related exceptions recognized in Federal, selected state and South Carolina case law have certainly not "overwhelmed" or "swallowed" the application of American Rule in the courts. Nevertheless, there is a proliferation of statutory provisions which allow for the recovery of attorney's fees including South Carolina.. This rise supports the argument that the historical factors and justifications giving rise to the American Rule are becoming less

important and that the Rule itself has receded relative to other legal doctrines of equal or arguably greater dignity in the courts. For example, the authority of a chancellor in equity to grant complete relief; putting parties in the position they would have been in but for the fraud as the full and proper measure of damages in case of actual fraud, and depending on the circumstances. The fraud in this case is Respondents' fraudulent execution of the Settlement Agreement (contract) terms which is an exception to the American Rule in Appellant's favor..

7. One conclusion is clear. The above review of the American Rule used in selected states reveals the general acceptance of the American Rule in their respective legal systems and jurisprudence. Without exception, with some modifications, the states impose the American Rule subject to certain exceptions including statutes, rules, and cases governing the recovery and imposition of attorney's fees. The discretion of the court in allowing recovery of fees to the "winner" or "loser" in litigation is also prevalent, with or without a jury.

8. Thus, any exploration of the American Rule application to a specific case such as this case, must be directed at the lower court's selection and violations of any of the exceptions to the American Rule as developed by the federal and state courts. **In the absence of any of the exceptions in the case, or if a lower court demonstrably violates those exceptions as in this case, application of the American Rule is mandatory, and the lower court's abuse of discretion and clear errors of fact and law, must be set aside and vacated by the appeals court.**

9. Accordingly based on the facts and law of this case, the lower court's rulings must be vacated and the American Rule for recovery of attorney's fees embraced by the court in favor of Appellant.

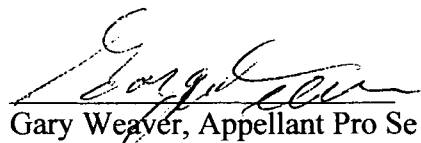
IX. RELIEF

1. The purpose of this Appeal is to seek a reversal of the serious travesty of justice perpetrated by the lower court's abuse of discretion, errors of fact and law, bias and prejudice in the adjudication of this case.

2. Wherefore, for good cause, having set forth the factual and legal grounds for filing this supplemental memorandum, Appellant respectfully moves this Honorable Court for relief as a matter of law and the American Rule.
3. The bases for this memorandum are the above discussion of the American Rule as practiced in this country and state, the facts and records, case files, cited law and rules of procedure that justify Appellant's claim for relief, and such other and further oral and/or documentary evidence and supplementary argument as may be presented or demanded.
4. Appellant respectfully requests an Order to set aside or vacate the lower court's judgments and order on appeal, in toto.
5. Grant the relief sought in appellant's complaint; or alternatively remand for a trial; and order the imposition of the American Rule as to the disposition of costs and fees.
6. Pursuant to Rules 8 (d), 12 (b) (6) or Rule 56 SCRPC, grant the relief requested in Appellant's Initial Brief.
7. Denial of relief claimed by Respondents' in their Initial Brief.
8. Such other relief deemed appropriate by the Court.

Respectfully submitted.

DATED: Little Rock S.C. May 30, 2012


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S.C. 29567
Ph: 843 841 1606; Fx: 843 774 2050

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Attorney for Respondents
Progress Energy Carolinas, Inc

*40 pages
 Minnesota
 20 July*

Attorney Fee Provisions in Minnesota Statutes

EXHIBIT A

Statute Section	Type of Action	Mandatory (M) or Permissive (P)	Who Gets Fees	Limit on Fees
Actions Involving Government				
3.736, subd. 9	Settlement of tort claims against the state	M	Employee who incurred attorney fees defending a tort in the scope of employment	Reasonable
3.7365	Defense of criminal charges against a state officer or state employee in the course of employment	P	State officer or employee	Reasonable
13.08, subds. 1 and 4	Government Data Practices Act: actions for damages or to compel compliance	P	Aggrieved person or representative of a dead person who was damaged; government entity if court determines claim is frivolous	Reasonable
13.085, subd. 6	Compelling compliance with Government Data Practices Act through the Office of Administrative Hearings	P/M	Substantially prevailing complainant	Reasonable, not to exceed \$5,000
13.82, subd. 14	Government Data Practices Act: withholding public data	P	Any person from whom data was unreasonably withheld	None
13D.06, subd. 4	Open meeting law violation	M/P, depending on circumstances at issue	Prevailing party, except a defendant can recover only if the plaintiff's action was frivolous	Reasonable, with a \$13,000 maximum
15.471-15.474	Civil action or contested case brought by or against the state	M	Prevailing party other than the state if the state's position was not substantially justified and special circumstances do not make an award unjust	None
15C.12	Minnesota False Claims Act (claims against the state)	P	Prevailing party, except the state or a political subdivision may not be required to pay fees	Reasonable
15C.14	Minnesota False Claims Act; action against employers who punish employees for providing information regarding false claims against the state	M	Employee	Reasonable
16A.124, subd. 5	Vendor seeking prompt payment of state agency bills	M	Any vendor who prevails in a civil action against a state agency	None

Alexandr "Sasha" Federer, Ph.D.
 Licensed Clinical Psychologist
 SC License No. 569

PSYCHOTHERAPY

Individual, Family
 Group

Psychological
 Neuropsychological
FORENSIC EVALUATIONS

323 S. McQueen Street
 Florence, South Carolina 29501
 (843)673-0727 Fax (843)667-1549

January 28, 2010

Re: Gary William Weaver
 DOB: November 11th, 1939

To Whom It May Concern;

Approximately three years ago, I became acquainted with Mr. Weaver, while I treated his wife, Ms. Beatrice Weaver, for Depression. It came to my attention that Mr. Weaver is facing three months in jail in the event that he is unable to pay a court ordered payment to a law firm.

To the best of my knowledge, Mr. Weaver suffers from high blood pressure, Diabetes, Asthma, Depression, and the possible early onset of Dementia. He has had a head injury resulting from a beating during an armed robbery on December 7th, 2009. Given Mr. Weaver's age and physical and mental status, I doubt that he would be able to survive three months in jail. Also, Mrs. Weaver, who is a cancer survivor and in poor health, depends on her husband as her only primary caretaker.

During my Forensic Evaluations I became well acquainted with the jail population, which adds to my doubt that Mr. Weaver would be able to survive the jail sentence. I would deeply appreciate your consideration in this matter, in hopes that it would prevent a tragedy.

Sincerely,

Alexandr "Sasha" Federer, Ph.D.
 Licensed Clinical Psychologist
 SC License No. 569
 EIN: 48-1261679
 NPI: 1700896453

EXHIBIT B.

DILLON INTERNAL MEDICINE ASSOCIATES, P.A.

MCLEOD-DILLON PROFESSIONAL BUILDING

705 NORTH 8TH AVENUE ~ SUITE 1A

DILLON, SC 29536

PHONE: 843-774-2478 FAX: 843-774-1826

PatientID: 20130GW

Patient Name: GARY W WEAVER

Date of Birth: 11/11/1933

Date of Service: 01/07/2010

January 7, 2010

To Whom It May Concern

RE: Gary Weaver

Mr. Weaver is my patient at Dillon Internal Medicine Associates. I am writing on his behalf to request that his impending incarceration be postponed. Mr. Weaver is of advanced age and suffers from diabetes, hypertension, hyperlipidemia, and asthma. A prolonged incarceration may be potentially detrimental to his mental and physical well being. I strongly urge you to reconsider his legal disposition.

Please feel free to call me with questions or concerns.

Sincerely,



Clifford Medina, MD.

EXHIBIT C

SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is theAppellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

**NOTICE OF APPELLANT'S RETURN TO RESPONDENT'S MOTION TO
DISMISS APPEAL**

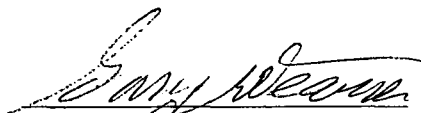
TO:
Mark W. Buyck, III
I.D. No. 011902
P.O Box 1909, Florence S.C. 29503-1909
Ph: 843 662 3258; Fx: 843 662 1342
Attorney for Respondents
Progress Energy Carolinas, Inc

Notice is hereby given that the above-identified Appellant's Supplemental Memorandum In Support Of Appellant's Motion For Rehearing And Rescission Of Court Order Pursuant To Rules 221(C) And 240 (I) SCACR, was filed with the above entitled court on or about June 15, 2012.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a notice and copy of the foregoing Appellant's Supplemental Memorandum In Support Of Appellant's Motion For Rehearing And Rescission of Court Order Pursuant To Rules 221(C) And 240 (I) SCACR, was served upon the above identified counsel at the stated address by means of United States regular mail, on or before June 15, 2012.

DATED: Little Rock S.C. June 12, 2012



Gary Weaver, Appellant Pro Se
P.O. Box 539, Little Rock
S.C. 29567
Ph: 843 841 1606
Fx: 843 774 2050

P.O. Box 539
Little Rock S.C.
29567

June 10, 2012

Ms. Tanya A. Gee, Clerk
S.C. Court of Appeals
P.O. Box 11629
Colombia S.C. 29211
Ph: 1 803 734 1890
Fx: 1 803 734 1839

Attention: Deputy Clerk V.C. Allen

Dear Ms. Gee:


Ref: Weaver vs. Progress Energy: 2010151966
Case No. 2008-CP-17-0180

Subject: Transmittal of Appellant's Supplemental Memorandum In Support Of
Appellant's Motion For Rehearing And Rescission Of Court Order
Pursuant To Rules 221(C) And 240 (I) SCACR,

Enclosed please find the following:

1. Original unbound copy of the subject documents.
2. Six (6) copies of the subject document.
3. One copy for recordation and return.
4. Self addressed envelope for return
5. Notice and Certificate of Service.

Respectfully submitted.


Gary Weaver, Appellant Pro Se:

Copy to:

Willcox, Buyck, & Williams, P.A.
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I.D. No. 011902
P.O.Box 1909
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Ph: 843 662 3258
Fx: 843 662 1342
Email: mb3@WillcoxLaw.com
Attorney for Respondents
Progress Energy Carolinas, Inc

RECEIVED
JUN 13 2012
SC Court of Appeals