

⑤
In The Court of Appeals

Appeal from Charleston County
Court of Common Pleas


Doyet A . Early, Circuit Court Judge

Order dated: 29 November 2007

Charleston County School District et al,

Respondents;

v.


Mr. Wesley Edward Smith III,

Appellant,

NOTICE AND MOTION TO APPEAL

Wesley Edward Smith III

465 North Nassau Street

Charleston, South Carolina 29403

(843) 723-8598

Pro Se

RECEIVED

JAN 07 2015

SC Court of Appeals

**OPENING APPEAL BRIEF: OF MR. WESLEY EDWARD SMITH III (the ex parte)
inadvertently involved in CASE 2003-CP-10-4751**

QUESTION PRESENTED

Reasonable inference are being drawn to an error of law under rule 56 can the final ruling of this common law court (lower court) ruling be final when the courts or all opposing and dissenting parties of the respondent action taken were legally unfamiliar with the case, without the respondents submission of a complaint or the service of the summons for the person who personally harmed the respondents before the jurisdiction of the appointed legal court?

I. INTRODUCTION

I, Mr. Wesley Edward Smith III based on the lack of service in the process by the State of it delegated and since the State activity involves the court rules, I move to appeal case number 2003-CP-10-4751, as perceive (for perception is based without proof for doing an ct or action, supported by memorandum of law to act or reasons that were beyond doubt) a violation of the state rules and has been mistakenly identified this case as Mr. Wesley Edward Smith III being the only perpetrator, for an unknown act or offensive activity, for which the case or final court ruling fails to provide the "unidentified" elements or the claims for relief the respondent were seeking in its initial complaint or the list of tortuous acts under SC codes 15-178-10 (et seg) personal injuries, that the accident caused the State, the State prosecutor or the State delegated officials who intervned to supposedly represent the Charleston County School District (herein refer to as 'CCSD") were arbitrarily able to collect an rendition of an court decision for Summary Judgment. This was granted without having shown a legal standing, without an element or stated claim for relief. Mr. Wesley Edward Smith III appeals the judgment of the Honorable Doyet A. Early order dated November 29, 2007. Appellant has not officially received written notice of legal rights, but obtained this semblance of an order, by knowledge of entry of this judgment through the inquisitional process. This order on its face gives reason to believe a violation of rule 56 under the South Carolina Rules of Civil Procedure (SCRCP) and continually

denies Mr. Wesley Edward Smith III (state identification No, XXX-XX-3407) right to appeal, to proceed In forma pauperis and the legal right to challenge the respondents acts and test the legal legitimacy of the state aforementioned order.

This order attached for review on appeal, on its face, is perceived as discriminative, for which I oppose to persons that choose to use businesses, to conduct unlawful business practice as it appears. Based on that specific fact, the order clearly states it was "dismissed with prejudice". This alone gives a reason to believe serves as a personal barrier within itself, which a party prefers a more preferred client or customer, but is continually denying Mr. Wesley Edward Smith III of my civil liberties, legal rights to demonstrate a legal genuine issue of material fact remaining and continually being the subject of the state process by preponderance of evidence.

This action produces the holding of me and my family in contempt of its court's without affording an impartial hearing, showing the State supported evidence or supported probable causes. These unrelated matters are truly unknown at this point. Such a harsh and stern assessment of Mr. Wesley Edward Smith III without a fair and liberal review or application of the rules which appears to be violated. Equal justice is supposed to allow both parties to submit claims, cross claims and then counterclaims, by exercising such afforded rights and to be heard without any biases. Holding a person in contempt of court without have even being involved in the court process is unfathomable without affording exercise the entitlements of afforded legal rights or when the legal unfamiliarity with the court and actors actions are not in compliance with the specifics of the State rule under rule 56. I, Mr. Wesley Edward Smith III stated objections are opposed, based on the supported state rules which strictly governs the application

of law and civil process. Such affirmations are to be maintained, as mandated by South Carolina Rules of Civil Procedures (SCRCP). As reason are given to believe based on the rule of law, an independent action in equity with affords a direct verdict independently involving the private actors claims for relief, redress, recovery, remedy restoration, reversal, remand and transfer of court which allows ultimately the enforcement of statutory laws by perpetrators acting upon the court who are the proximate cause who are civilly liable, either severally or collectively that have hindered and infringes the judicial machinery civil liberties from performing in the mannerism for which it operates, and for those violators that have desecrated upon the court alters, as a leisurely pastime, as though this was the honorable men and women way of an acceptable way to conduct business. I object based on the rules and because this act is not an acceptable practice by any farfetched imagination that not in compliance with the expressly written state court rule. By any other means acts should be dismissed as frivolous based on sheer speculations, hearsay and a mere conjecture of law with creates a clime for a moot issue.

Under rule 56, as objectively supported based on the information and belief, and due to the court's order, there is a perception that a legal genuine issue of material fact that remains of which Mr. Wesley Edward Smith III, as the adverse affected Ex parte, and unsuspecting civilized community of citizen should have been warned and or serve notice in accordance to the rules, that before during and after that commencement of the court case, for which my name was being used. This consideration also includes the possibility that even a person mistakenly identified and property illegally or unlawfully seized would automatically be granted to the state its intervening delegated actors in its practice of law process, governing grating Summary Judgment. No warnings of the subsequent follow-up collateral attacks and that

any and all opportunities to raise claims, insert element, assert a defense or appeal in its the court or to its delegated personal will be next to legally impossible and comprehensively unbearable. These interveners work under the state law, receives benefit and draws checks as an employed under the state statutes, laws and rules, but are acting on behalf of the court decision making process, as identified and signs the court records using the court and State identifiers name.

II. ISSUE ON APPEAL

(for the application of law not in correlation to the South Carolina Rules of Civil Procedure Rules as listed herein are perceived and error of the law):

ISSUE 1 Did the court err in not adhering to discovery in accordance with RULE 2 ONE FORM OF ACTION

There shall be one form of action to be known as "civil action."¹

ISSUE 2: Did the court err in not adhering to discovery in accordance with RULE 3 COMMENCEMENT OF ACTION

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

ISSUE 3: Did the court err in not adhering to discovery in accordance with RULE 3(b) (b) Filing *In Forma Pauperis*.

(1) Except as provided in (2) below, a plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

¹ These Rules are the same as Federal Rules 1 and 2 except the name of the State. Rule 81 provides that the Rules will apply also to Magistrate's, Probate and Family Courts where not inconsistent with the rules of those courts. Rule 2 is substantially identical to Code Sections 15-1-80 and 90. This Rule also abolishes the mostly cosmetic differences between "actions" and "special proceedings". A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc.

(2) Where a party is represented in a civil action by an attorney working on behalf of or under the auspices of a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by funds appropriated by the United States Government or the General Assembly of the State of South Carolina, which has as its primary purpose the furnishing of legal services to indigent persons, or the South Carolina Bar Pro Bono Program, fees related to the filing of the action shall be waived without the necessity of a motion and court approval. Before the filing fees will be waived, the attorney representing the party must file with the clerk a written certification that representation is being provided on behalf of or under the auspices of the society, organization or program, and that the party is unable to pay the filing fees.

ISSUE 4: Did the court err in not adhering to discovery in accordance with rule RULE 4 PROCESS

(a) **Summons: Issuance.** The summons shall be issued by plaintiff or plaintiff's attorney. Copies of the original summons shall be served upon each defendant.

(b) **Same: Form.** The summons shall be signed by the plaintiff or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) **By Whom Served.** Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement officer or by any person designated by the court who is not less than eighteen (18) years of age and not an attorney in or a party to the action, except that a subpoena may be served as provided in Rule 45.

(d) **Summons: Personal Service.** The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows: of persons imprisoned, and patients in a state hospital or similar institution, personal service of process may be made by the superintendent of the institution or by the director of the prison system or by assistants duly designated by the superintendent or the director in writing for the purpose of making service of process, instead of the sheriff. The superintendent or the director or their designated assistants shall not be entitled to any costs therefore. Service on confined or imprisoned persons shall also conform to the provisions of § 15-9-510, S.C. Code, 1976.

**ISSUE 5: Did the court err in not adhering to discovery in accordance with rule 26
RULE 26**

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other

purposes; physical and mental examinations; and requests for admissions. The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this Rule.

III. LEGAL ARGUMENT WITH MEMORANDUM OF LAW UNDER RULE 56 TO SUPPORT SPECIFIC OBJECTIONS

A. Standard of Review Under rule 56, as objectively supported, this is based on the inconsistencies of the court order and corresponding rules that conflicted with the application of law. Based on the information and belief, and due to the court's order, there is a perception that a legal genuine issue of material fact that remains of which Mr. Wesley Edward Smith III, as the adverse affected Ex parte, should have been granted any and all opportunities to appeal the court or its delegated personal acting on behalf of the court making decisions on the record, but I am continually being denied as of this date.

Based on information and belief, the appellate court reviews a lower court's decision impartially, and applies the same standards employed by the lower court. To prevail on a motion for Summary Judgment under rule 56(c) of the South Carolina Rules of Civil Procedures (SCRCP) the moving party must demonstrate: (1) there is no genuine issue of material facts; and (2) the party is entitled to judgment as a matter of law.

SPECIFIC OBJECTIONS: Absent the fact that Mr. Wesley Edward Smith III is being held in contempt of this court, not afforded, as governed by the rules, any and all opportunities to raise specific objections to the court order or point out in such rulings that there is an absence of evidence by which the non-movant can prove his case or due to the court not

allowing me of my civil liberties to demonstrate specific, material and admissible facts exist which gives rise to a genuine issue is absent.

Did the court err in not adhering to discovery in accordance with rule 56. As supported
RULE 56
SUMMARY JUDGMENT

RULE 56 fact that the case are absent admissible item as identified below

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

IV In Summary; Based on rule 56, Under rule 56, as objectively supported based on the information and belief, and due to the court's order, there is a perception that a legal genuine issue of material fact that remains of which Mr. Wesley Edward Smith III, as the adverse affected Ex party, should have been granted any and all opportunities to appeal the court or its delegated personal acting on behalf of the court making decisions on the record, but I am continually being denied as of this date.

THEREFORE how can the court legal justify or point out in its ruling not to have shown preferential treatment to the more preferred client, or that such ruling on record strictly adheres to the aforementioned rules and the supported the legality of the respondents complaint in this court's ruling(s). When such perception and an act exist, all opportunities to raise stated and specific objections must be were not allowed based on the information, allows the challenging of the respondents state evidence and supporting corroborating statement of facts from its listed eye witnesses who claim to have attested (but not in a official court of law) the same facts without having objectionable question being raised and inference of state law conflict still remaining. Where was it presented that Mr. Wesley Edward Smith III was afforded his legal rights, before, during and after being sanctioned by

the court of common pleas and the appointed adjudicator (s)in the rulings, directly related to case number 2003-CP-10-4751?

The error of law and printed the signed court ruling has not allowed not afford this citizens, regardless or previous forms of personal servitude the state accomplished in recent past, should have accepted the respondent claims judicial fairness or the that Mr. Wesley Edward Smith III inquisitional process into you the finalized and "dismissed with prejudice" or further declared agency action as "untimely" by assertion of a the state defense of the longstanding enacted At will law (as cosigned back into existence in this day and age of modernization).

Under rule 56, as clearly understood as written in the English language, when a genuine issue of material fact remains, or legally unfamiliar, the parties has the right to contest the uncontested issues while having all opportunities afforded to do so without constraints or barriers. This afford the parties to raise objections or point out in the court record such perceived violation of law or contradiction of fact. If the respondents presented evidence, a rebuttal of stated facts by the state witness or delegated official statements. This allows the specific objections in the record, with the potential potentially cause and error of law fact, unequal application of justice under the law or procedural unfairness. Strict adherence and compliance to the established written rules are necessary via personal ideology or party institutionalization affiliation is mandatory, as aforementioned herein. Parties without a legal standing, or the first hand knowledge, foremost, common sense should kick in and would have been more acceptable to the courts to approach or allow these

laws to be more liberally construed, if found the actor and its acts were indecent or were not allowed here, which encompasses summarily dismissal. Each perpetrator under the guise of law, is liable and held responsible for the proximate cause under justice. Those citizen who are non related to the legal proponents of all areas of justice law actions, can quickly give the relationship of this court, not to be in conformance with such written rules, to become more legally unfamiliar with the actual courts process and abuse the power of the courts that prevent the judicial machinery from performing in judicial efficiency . Allowing any citizen, i e, who jobs is the State prosecutor, to arbitrarily call another citizen or a laymen for practice is quite unnecessary and very unprofessional (state prosecutors personally referencing another citizen as such). By not allowing the adversely affected, aggrieve and dissatisfied party to raise issues in this court of common pleas, as here narrowly tailors seems to raise reason for the hastiness of the rulings. The State and the state prosecutor intervention would have prevented this implied infraction for the error of law in violation of rule 56 and foremost perceived as a continual violation of denying the citizen of recognizable civil liberties entitled to Mr. Wesley Edward Smith III. Proof required and needed.

WHEREAS based on the following reason to believe as respondent act imply the violation of civil liberties (criminal intent as applied requesting transfer court) and deprivation of legal right, a restatement of rights absent false claims redress criminal intent, redress cross civil claims, restoration, recovery of economical monetarily relief and equitable independent judgments remedies are respectfully demanded by declared, order, declaration, affirmation and concurrences for the applicable court or afforded agencies,

WHEREAS without the disclosure of the respondent complaint or summon on very pertinent and time sensitive matters, which is the substantive evidence, required, that governs the

respondents acceptance to the court alter as granted is perceived an error of law based on information and belief because the respondent have not complied with the civil rule of law rule 3 that requires the court process to initially open its gates, to any and all complaining parties but first done so by first filing a complaint and then the service of a summons on the party(s) with the substantive evidence of the enforcement agency supporting memorandum, specifically citing the personal or legal injury sustained. The case ruling of selection order 2003-CP-10-4751, so **THEREFORE** the respectful request for this court review deals with the issues of the state court ruling in review is believe a mere presumption of what happened, pure conjecture of law without the supporting memorandum of law the respondent relied upon to be granted was not legally ripe for the judicial process legal sustained, this coupled with not being able to contest review based on the lack of following the process and the most recent rulings, to any citizen not be considered an injustice, with the supporting fact based on the state court adjudicators acts of Honorable R. Markely Dennis order filed dated 20 March 2006 (granting part one (1) of the respondents acts and the close legal business by order finalizing ruling part two (2) of the Honorable Doyet A. Early 29 November 2007 (herein contesting legal familiarity in accordance with the applied rules) which appears to considered procedurally unfair, substantially unfounded, denies civil liberty, while violating civil rights and governing all opportunities to seek relief and redress that equal legal due process afford are continually offensive

Reversal remand and recovery is lawfully in order due to the lack of service of process of a complaint summons or any other designated intent devised of the state which allowed acts of enforcements as implied, to use my name, business, partners or associates for the use of a civil process [criminal]. I do not condone the state or its delegated elected parties by affiliation interests or like other, did not imply nor authorized the waiving of any state right afforded to me in any process of law or indifference. I reserve all other rights KNOWN and UNKNOWN at this time, do this customary and traditional common practice of the law of things and on the bulling, harassment and torturing of citizens and their family members

January 3, 2015

Respectfully Submitted



Mr. Wesley Edward Smith III

**PROOF OF SERVICE
In The Court of Appeals**

Appeal from Charleston County
Court of Common Pleas

Doyet A . Early, Circuit Court Judge

Order dated: 29 November 2007

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JAN 07 2015

SC Court of Appeals

Charleston County School District et al, Respondents;
v.

Mr. Wesley Edward Smith III, Appellant,

PROOF OF SERVICE

I, Wesley Edward Smith III, certify that on January 3, 2015 as an Ex parte privy to the listed suite, submit's The notice and motion to appeal the common pleas ruling is dissented to with the supporting law memorandum, which also serves notice to file and leave with the court a complaint for criminal gross misconduct or contributory negligence, motion for an extension of time and Complaint ot leave to file for Summary Judgment or direct verdict independent action in equity while proceeding In forma Pauperis and the investigating agency Supplement to the Complaint with additional notices for a hearing, and Rely brief in support Affidavit, Motion to for allegedly being deprived legal civil right while sustaining personal injuries in this private matter sent by First Class Mail via United States Mail on all parties listed in this action to the following:

To: Mr. Daniel F. Blanchard, III ESQ
151 Meeting Street 4th Floor
Charleston, Sc 29403

NOTICE TO PERSON OF INTEREST

Governor's Office of South Carolina
Governor Nikkie Haley
1205 Pendleton Street
Columbia, SC 29201

Mr. Ashley Able III, ESQ
One Liberty Square
55 Beattie Place Suite 800
Greenville, SC 29601

Ms. Cynthia D Blair, ESQ
220 Executive Center Dr
Suite 200
Columbia, SC 29201

January 3, 2015

Respectfully Submitted

Mr. Wesley Edward Smith III

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2003-CP-10- 4751

Daniel F Blanchard as personal representative for the
Charleston County School District

Respondent

v

Mr. Wesley Edward Smith III, Appellant

Mr. Wesley Edward Smith III appeals the judgment of the Honorable Doyet A. Early order dated November 29, 2007. Appellant has not officially received written notice of legal rights, but obtained this semblance of an order, by knowledge of entry of this judgment through the inquisitional process. This order on its face gives reason to believe a violation of rule 56 under the South Carolina Rules of Civil Procedure (SCRCP) and continually denies Mr. Wesley Edward Smith III (state identification No, XXX-XX-3407) right to appeal, to proceed In forma pauperis and the legal right to challenge the respondents acts and test the legal legitimacy of the state aforementioned order.

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SC Court of Appeals

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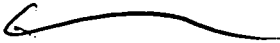
January 3, 2015

Other Counsel of Record
Appellant pro Se

Ms, Alice F Paylor

151 Meeting Street 4th Floor

Charleston, South Carolina 29403 Attorney for Respondent


Mr. Wesley Edward Smith III
465 North Nassau Street
Charleston, South Carolina 29403

Wesley E. Smith III
465 North Nassau Street
Charleston, South Carolina 29403
(843)723-8598

January 3, 2015

MEMORANDUM TO THIS COURT OF RECORDS

CLERK

Honorable Julie Armstrong
100 Broad Street Suite 106
Charleston, S.C. 29403


RE: Mr. Wesley Edward Smith, III Petitioner. v State, INC, et al

Dear Honorable Julie J. Armstrong;

This serves notice to this court and delegated personnel to appeal this court's decision to The State of South Carolina Court of Appeals, as designated Case number 2003-CP-10-4751 of the Honorable Doyet A. Early.

Thanking you all in advance

Sincerely,


Mr. Wesley Edward Smith, III

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JAN 07 2015

SC Court of Appeals

COPY TO: Governors Office of South Carolina, Governor Nikkie Haley
Attorney General of South Carolina, Attorney General Alan Wilson

EXHIBIT "A"

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JAN 07 2015

SC Court of Appeals

SPECIFIC OBJECTIONS
RAISED TO COURT ORDER
RULING(s)

REF: Case of 2003-CP-10-4751
Charleston County School District (CCSD) Respondent
v
Mr. Wesley Edward Smith III Appellant
DATE of Appeal: January 3 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 WESLEY SMITH,)
)
 Plaintiff,)
)
 -vs)
)
 CHARLESTON COUNTY SCHOOL)
 DISTRICT and MR. TOWNSEND,)
)
 Defendants.)

THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO. 03-CP-10-4751

ORDER

FILED
 2007 NOV 29 PM 3:39
 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter came before this Court for a hearing on November 9, 2007, involving the Motion for Sanctions filed on October 10, 2007 by the Defendants Charleston County School District (hereinafter "CCSD") and Anderson Townsend (hereinafter "Townsend") pursuant to S.C. R. CIV. PRO. 11(a) and S.C. CODE ANN. §§ 15-36-10 *et seq.* (South Carolina Frivolous Civil Proceedings Sanctions Act).

Daniel F. Blanchard, III of Rosen, Rosen & Hagood, LLC appeared for the Defendants. Plaintiff Wesley Smith appeared *pro se*. After considering the arguments and submissions of the parties, this Court hereby makes the following findings of fact and/or conclusions of law:

PROCEDURAL & FACTUAL BACKGROUND

1. This lawsuit arises out of Plaintiff Wesley Smith's (hereinafter "Smith") termination from employment with the CCSD on November 29, 2001. The CCSD had hired Mr. Smith for the 2001-02 school year to work as a tactical officer at the Military Magnet School. Anderson Townsend was the principal at the school and was Mr. Smith's direct supervisor.

2. Following his termination, Mr. Smith initiated this lawsuit on November 14, 2003 through his legal counsel (Chalmers Johnson, Esquire and Bonnie Hunt, Esquire). His original

AE #1

Complaint against the CCSD¹ included, *inter alia*, claims for slander, intentional infliction of emotional distress, and punitive damages against the CCSD. The CCSD filed a Motion to Dismiss on December 15, 2003 asserting that the claims for slander, intentional infliction of emotional distress, and punitive damages against the CCSD are barred as a matter of law under the South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-110 *et seq.*

3. By Consent Order filed on June 14, 2004, Mr. Smith voluntarily withdrew his claims for slander, intentional infliction of emotional distress, and punitive damages against the CCSD and agreed to submit an Amended Complaint removing those claims. On June 23, 2004, Mr. Smith filed an Amended Complaint asserting four causes of action: (1) intentional infliction of emotional distress against Mr. Townsend; (2) breach of contract accompanied by fraudulent intent against the CCSD; (3) breach of contract against the CCSD; and (4) third party interference with a contract against Mr. Townsend.

4. By Order filed on March 20, 2006, Circuit Judge R. Markley Dennis, Jr. granted partial summary judgment in favor of the Defendants as to Mr. Smith's first, second, and fourth causes of action of the Amended Complaint. However, Judge Dennis denied the motion as to the third cause of action for breach of contract against the CCSD on the grounds that it would be premature to dismiss that claim at that point in time, but also granted the CCSD leave to refile the motion after additional discovery was conducted.

5. On May 3, 2006, after conducting additional discovery, the CCSD filed a Renewed Motion for Summary Judgment seeking dismissal of Mr. Smith's single remaining cause of action for breach of contract against the CCSD.

6. On July 19, 2006, without objection from Mr. Smith, Mr. Smith's legal counsel

¹ Although the caption of the original Complaint referred to "Mr. Townsend" as a named defendant, Mr. Smith never served Mr. Townsend with the original Complaint. Mr. Townsend did not answer or respond to the original Complaint.

(Mr. Johnson and Ms. Hunt) were relieved from the case. Mr. Smith did not obtain new counsel, but continued *pro se*.

7. On January 10, 2007, without a hearing, Circuit Judge Perry Buckner granted Mr. Smith's *ex parte* Motion to Proceed *in forma pauperis*.

8. By Order filed on March 27, 2007, Circuit Judge Deadra L. Jefferson granted the CCSD's Renewed Motion for Summary Judgment and dismissed Mr. Smith's only remaining cause of action for breach of contract against the CCSD.

9. On April 11, 2007, Mr. Smith filed a Motion for Reconsideration involving Judge Jefferson's Order.

10. By Order filed on July 2, 2007, Judge Jefferson denied Mr. Smith's Motion for Reconsideration, thereby ending his claims in the Circuit Court.

11. On July 3, 2007, Mr. Smith filed a Motion to Proceed *in forma pauperis* and a Notice of Appeal with the South Carolina Court of Appeals.

12. On July 18, 2007, Judge Jasper Cureton of the South Carolina Court of Appeals filed an Order denying the Mr. Smith's Motion to Proceed *in forma pauperis*. Additionally, the Clerk of the Court of Appeals wrote Mr. Smith on July 18, 2007 advising him as follows: "The appellant is notified that he must provide an Amended Notice of Appeal, with Proof of Service on opposing counsel, and the One Hundred (\$100.00) dollar Notice of Appeal filing fee within ten (10) days of the date of this letter or it may result in the dismissal of your appeal." Mr. Smith thereafter failed to comply with the Clerk of Court's letter.

13. On August 2, 2007, the Court of Appeals filed an Order dismissing Mr. Smith's appeal. Mr. Smith did not appeal this Order or file a petition to reinstate his appeal.

14. On August 21, 2007, the Court of Appeals filed an Order of Remittitur stating in

part: "No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated August 2, 2007, IT IS SO ORDERED that the above appeal be and hereby is dismissed and REMITTED to the Clerk of Court for Charleston County." This Order was filed with the Circuit Court on August 23, 2007. Mr. Smith did not appeal this Order.

15. Following the dismissal of Mr. Smith's claims in the Circuit Court and the dismissal of his appeal in the Court of Appeals, Mr. Smith has filed numerous pleadings and documents in the Circuit Court in which he attempts to relitigate his same claims against the Defendants. These documents include, but are not limited to, a "Notice of Appeal," "Affidavit of Wesley Edward Smith III," and "Introduction and Plaintiff's Supporting Memorandum" filed on October 2, 2007; an "Amended Certificate of Service" and purported subpoenas *duces tecum* addressed to Mr. Townsend and Dr. Ronald McWhirt (Superintendent of the CCSD) filed on October 4, 2007; a "Motion for New Trial" filed on October 15, 2007; a "Plaintiff's Amended Certificate of Service (Modification)" filed on October 19, 2007; a "Plaintiff's Request: Motion for Subpoena Production of Documents (duces tecum) to Support Plaintiff's Motion for New Trial" filed on November 1, 2007; a "Plaintiff's Notice of Motion for Monetary Relief of Summary Judgment Order Against Defendant and Sanctions with Memorandum and Law Argument to Support Plaintiff's Motion for New Trial" dated November 5, 2007; and a "Plaintiff's Supporting Memorandum to the Record for Sanction Levied Against the Defense in this Action" dated November 8, 2007.

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16. In the above-referenced pleadings and documents, Mr. Smith attempts to relitigate claims based on the same facts and events at issue in his Amended Complaint, which was previously dismissed, and further attempts to assert multiple new causes of action or legal theories against the CCSD based on the same events and factual allegations at issue in Mr.

Smith's original claims. As examples, the pleadings entitled "Introduction and Plaintiff's Supporting Memorandum," "Motion for New Trial," and "Plaintiff's Amended Certificate of Service (Modification)" request a judgment against the CCSD for monetary damages in the amount of ~~\$3.5 million for alleged defamation~~, damages in the amount of ~~\$600,000.00~~ under the South Carolina Tort Claims Act, and punitive damages ~~of \$3.5 million based on~~ events surrounding his termination from the CCSD.

17. On October 10, 2007, the Defendants filed a Motion for Sanctions pursuant to S.C. R. CIV. PRO. 11(a) and S.C. CODE ANN. §§ 15-36-10 *et seq.* and also filed an Affidavit of Counsel in Support of Award of Sanctions.

18. As reflected above, Mr. Smith has continued to file pleadings attempting to relitigate his claims even after service of the Defendants' Motion for Sanctions.

LAW & ANALYSIS

19. "Where there has been an appeal, 'final disposition of the case' occurs when the remittitur is filed in the circuit court." McDowell v. S.C. Dept' of Soc. Serv., 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989); *see* Christy v. Christy, 317 S.C. 145 452 S.E.2d 1 (Ct. App. 1994) ("The final disposition of a case occurs when the remittitur is returned by the clerk of the appellate court and filed in the lower court. Until that time, the case is pending on appeal.").

20. By virtue of the Court of Appeals's Order dismissing Mr. Smith's appeal and the remittitur sending the case back to the Circuit Court, the prior Circuit Court Orders granting summary judgment in favor of the Defendants as to all of Mr. Smith's causes of action are final and the case has been finally disposed of. Mr. Smith's claims against the Defendants have been ended and are final.

21. "Matters decided by the appellate court cannot be reheard, reconsidered, or

~~relitigated in the trial court, even under the guise of a different form"~~ Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996). "The decision of the appellate court is final as to all questions decided" and "[i]t is the duty of the trial court to follow the decision of the appellate court." Id.

22. Although Mr. Smith is *pro se*, this is not an excuse for filing frivolous pleadings with the Court and continuing a frivolous action. Goodson v. American Bankers Ins. Co., 295 S.C. 400, 368 S.E.2d 687, 689 (Ct. App. 1988) (~~"Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney."~~); McCall v. A-T-O Inc., 276 S.C. 143, 276 S.E.2d 529, 530 (1981) (The South Carolina Supreme Court "has never held laymen to a lesser standard than attorneys.").

23. S.C. R. CIV. PRO. 11(a) provides that "[t]he signature of an attorney or party [on a pleading] constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Rule 11(a) further states that "[i]f a pleading, motion or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

24. S.C. CODE ANN. § 15-36-10(A)(4) of the South Carolina Frivolous Civil Proceedings Sanctions Act also states as follows:

(A)(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

- (i) the person has not read the frivolous pleading, motion, or document;
- (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
- (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

25. S.C. CODE ANN. §§ 15-36-10(B) & (G) of the Act further state in relevant part:

(B)(1) If a document . . . does not otherwise comply with this section, it must be stricken unless it is . . . amended to comply with this section after the omission is called to the attention of the attorney or the party.

(2) If . . . an attorney or pro se litigant has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.

(G) Sanctions may include:

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and

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any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;

(2) an order for the attorney to pay a reasonable fine to the court; or

(3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

26. This Court finds that, by virtue of Mr. Smith's filing of the above-referenced pleadings and documents with this Court following the dismissal of his appeal, Mr. Smith has improperly attempted to relitigate claims based on the same facts and events at issue in his Amended Complaint, which was previously dismissed, and has further attempted to assert multiple new causes of action or legal theories against the CCSD based on the same operative events and factual allegations that were raised in his previous claims.

27. Additionally, this Court finds that Mr. Smith has attempted to relitigate claims for slander, intentional infliction of emotional distress, and punitive damages against the CCSD in direction contravention of the Consent Order filed on June 14, 2004 (in which Mr. Smith withdrew the exact same claims from this case) and when such claims are clearly barred as a matter of law under the provisions of the South Carolina Tort Claims Act.

28. This Court further finds that Mr. Smith has asserted and continued to assert claims that are frivolous, baseless, and which are clearly barred under existing law, are not warranted under existing law, are not supported by the facts or the law, and are not supported by good grounds. This Court further finds that Mr. Smith has continued to pursue these baseless and frivolous claims against the Defendants without a good ground for doing so; for the purpose of harassing or injuring the Defendants; for the purpose of delay; and/or for a purpose other than that of securing proper discovery, joinder of parties, or adjudication of the claim.

29. This Court finds that, as a direct result of Mr. Smith's actions and these frivolous

proceedings, the Defendants have incurred attorney's fees and litigation costs in defending against the claims. Defendants have submitted an affidavit of counsel supporting an award of \$1,480.00 in attorney's fees and \$25.00 in court costs, or a total of \$1,505.00.

30. Based on the factors enumerated in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989), and this Court's review of the file in this litigation, the difficulty of the services rendered, the time necessarily expended, the result accomplished, the professional standing of counsel, and fees customarily charged in this area for similar legal services, this Court finds that an award of \$1,505.00 in attorney's fees and costs is reasonable and appropriate.

31. As observed in the unpublished opinion in Gobbi v. SunTrust Mortgage, Op. No. 2006-UP-243 (S.C. Ct. App. filed May 16, 2006), and based on S.C. R. CIV. PRO. 63, this Court has jurisdiction to review and reverse Judge Buckner's prior Order filed on January 10, 2007 granting Mr. Smith's *ex parte* Motion to Proceed *in forma pauperis*. Judge Buckner is no longer assigned to this judicial circuit.

32. In Gobbi, the Court of Appeals held that a judge may deny a party *in forma pauperis* status based on a specific finding that the party has repeatedly filed abusive and frivolous pleadings. See also In re Maxton, 325 S.C. 3, 478 S.E.2d 679, 679 (1996). This Court finds that Mr. Smith has repeatedly filed pleadings and documents in this Court involving the same matters that are frivolous, non-meritorious, and abusive of the litigation process. Accordingly, this Court finds that Judge Buckner's prior Order granting *in forma pauperis* status to Mr. Smith should be reversed and rescinded because of Mr. Smith's repetitive filings that are frivolous, non-meritorious, and abusive.

133 Further, as held in Judge Cureton's Order filed on July 18, 2007, which denied Mr. Smith's motion to proceed *in forma pauperis* in the Court of Appeals, Mr. Smith has the

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burden of showing that his right to proceed *in forma pauperis* rests upon a statute or a fundamental constitutional right. No such right exists in this case. Therefore, this Court finds that Mr. Smith has failed to demonstrate the necessary prerequisites for proceeding *in forma pauperis*. See *Ex parte: Martin v. State*, 321 S.C. 533, 471 S.E.2d 134 (1995) (motions to proceed *in forma pauperis* may be granted only when specifically authorized by statute or required by constitutional provisions).

CONCLUSION

Based on the above findings of fact and/or conclusions of law, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Defendants' Motion for Sanctions filed on October 10, 2007 is hereby GRANTED; and

FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Wesley Smith is hereby ordered to pay \$1,505.00 to the Defendant Charleston County School District as a monetary sanction for filing frivolous pleadings and documents with this Court; and

~~FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Wesley Smith's frivolous pleadings are hereby stricken and dismissed with prejudice, including the "Notice of Appeal," "Affidavit of Wesley Edward Smith III," and "Introduction and Plaintiff's Supporting Memorandum" filed on October 2, 2007; the "Amended Certificate of Service" and purported subpoenas *duces tecum* filed on October 4, 2007; the "Motion for New Trial" filed on October 15, 2007; the "Plaintiff's Amended Certificate of Service (Modification)" filed on October 19, 2007; the "Plaintiff's Request Motion for Subpoena Production of Documents (*duces tecum*) to Support Plaintiff's Motion for New Trial" filed on November 1, 2007; the "Plaintiff's Notice of Motion for Monetary Relief of Summary Judgment Order Against Defendant and Sanctions with Memorandum and Law Argument to Support Plaintiff's Motion for New Trial" dated November~~

5, 2007; the "Plaintiff's Supporting Memorandum to the Record for Sanction Levied Against the Defense in this Action" dated November 8, 2007; and any other pleadings filed after the dismissal of the Plaintiff's claims that attempt to relitigate the same facts, events, or claims; and

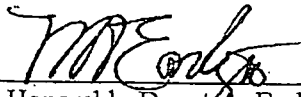
FURTHER ORDERED, ADJUDGED, AND DECREED that the prior Order filed in this Court on January 10, 2007, which granted Plaintiff ~~Wesley Smith's Motion to Proceed in forma pauperis, is hereby rescinded and canceled; and~~

FURTHER ORDERED, ADJUDGED, AND DECREED ~~that Plaintiff Wesley Smith is hereby enjoined, restrained, and prohibited from filing any new or further lawsuits, complaints, pleadings, motions, petitions, writs, or other similar documents in this Court that seek money damages or other legal or equitable relief arising from the same facts or events referenced in the Complaint filed in this case on November 14, 2003, or in the Amended Complaint filed in this case on June 23, 2004; and~~

FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk of Court shall serve a copy of this Order upon all parties to this action and shall note or record in the file of this case that Plaintiff Wesley Smith's claims have been disposed of and are final; and

FURTHER ORDERED, ADJUDGED, AND DECREED that willful disobedience of the non-monetary requirements of this Order by any party to this action shall constitute contempt of Court subjecting the offending party to an appropriate penalty or punishment; and

AND IT IS SO ORDERED!


The Honorable Doyet A. Early, III
Presiding Circuit Court Judge

Bamberg, South Carolina.

This 20th day of November 2007.

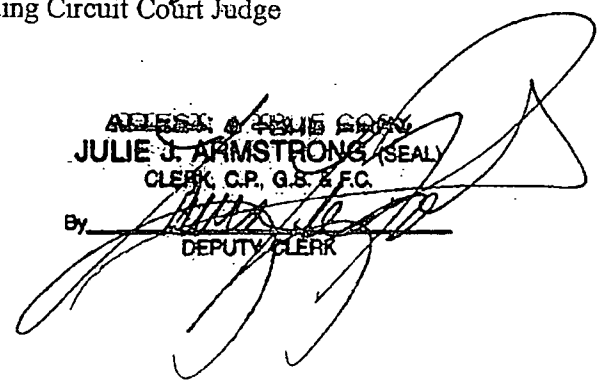

JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By _____
DEPUTY CLERK

EXHIBIT “B”

SOUTH CAROLINA RULES OF CIVIL PROCEDURES (SCRCP) OBJECTIONABLE RULES APPLICABLE TO ACTS AND RULINGS 1-5/26/27/56

Charleston County School District (CCSD) Respondent

v

Mr. Wesley Edward Smith III Appellant

REF: In Case of 2003-CP-10-4751

DATE of Appeal: January 3 2015

**RULE 1
SCOPE OF RULES**

These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

**RULE 2
ONE FORM OF ACTION**

There shall be one form of action to be known as "civil action."

Note:

These Rules are the same as Federal Rules 1 and 2 except the name of the State. Rule 81 provides that the Rules will apply also to Magistrate's, Probate and Family Courts where not inconsistent with the rules of those courts. Rule 2 is substantially identical to Code Sections 15-1-80 and 90. This Rule also abolishes the mostly cosmetic differences between "actions" and "special proceedings". A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc.

**RULE 3
COMMENCEMENT OF ACTION**

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(b) Filing *In Forma Pauperis*.

- Except as provided in (2) below, a plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.
- (2) Where a party is represented in a civil action by an attorney working on behalf of or under the auspices of a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by funds appropriated by the United States Government or the General Assembly of the State of South Carolina, which has as its primary purpose the furnishing of legal services to indigent persons, or the South Carolina Bar Pro Bono Program, fees related to the filing of the action shall be waived without the necessity of a motion and court approval. Before the filing fees will be waived, the attorney representing the party must file with the clerk a written certification that representation is being provided on behalf of or under the auspices of the society, organization or program, and that the party is unable to pay the filing fees.

Note to 2004 Amendment:

This amendment rewrote subsection (a), deleted subsection (b), and renumbered subsection (c) as subsection (b). These changes are intended to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S.C. Act No. 281, § 1.

Note to 2011 Amendment:

This amendment added the language of (b)(2) which allows for the waiver of the

filing fees for an action when a party is represented by an attorney working on behalf of or under the auspices of a legal aid society, a legal services or other nonprofit organization, or the South Carolina Pro Bono Program.

RULE 4 PROCESS

(a) Summons: Issuance. The summons shall be issued by plaintiff or plaintiff's attorney. Copies of the original summons shall be served upon each defendant.

(b) Same: Form. The summons shall be signed by the plaintiff or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

(c) By Whom Served. Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement officer or by any person designated by the court who is not less than eighteen (18) years of age and not an attorney in or a party to the action, except that a subpoena may be served as provided in Rule 45.

(d) Summons: Personal Service. The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows:

Note:

This Rule 4(a) differs from the Federal Rule by continuing the present State practice of the plaintiff or his attorney issuing the summons, rather than having it issued by the Clerk of Court. The second sentence requires only copies of the original summons to be served with the complaint on each defendant. Rule 4(b) is substantially identical to the Federal Rule, being modified only to conform to State practice as set out in Rule 4(a). The first sentence of Rule 4(c) continues present State practice. The second sentence makes more definite the requirement of Code § 15-9-1030 that an official person must serve all other process such as rules and orders, except subpoenas. Rule 4(d) conforms to present State and Federal Practice, and states specifically, as does Code § 15-9-70, that voluntary appearance is equivalent to personal service. It also preserves Circuit Rule 17 as to notice of appearance.

Note to 1986 Amendment:

Rule 4(c), as originally adopted, could be construed to broaden the definition of "process" and unduly restrict those who could serve process and other orders. These amendments conform to prior practice which permitted other law enforcement officials, and those appointed by the court to serve process. Orders which are not necessary to establish jurisdiction of person or property, including temporary restraining orders, are not required to be served by the sheriff unless ordered by the court. The age requirement is changed to conform to similar language in Rule 45(c).

(d)(1) Individuals. Upon an individual other than a minor under the age of 14 years or an

incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

Note:

Rules 4(d)(1) through 4(d)(8) conform to the present State practice and the Federal practice, which refers matters of service of process generally to local State practice.

Rule 4(d)(1) preserves the requirements of Code § 15-9-520.

(d)(2) Minors, Incompetents and Persons Confined. Upon a minor under the age of 14 years, a person judicially declared incapable of conducting his own affairs, or an incompetent person by delivering a copy of the summons and complaint to such minor, or incompetent personally and also a copy to (a) the guardian or committee of such person, or if there be none such within the State upon (b) a parent or other person having the care and control of such person, or (c) any competent person with whom he resides or (d) in whose service he is employed. If the individual upon whom service is made is a minor between the ages of 14 and 18, who lives with a parent or guardian, a copy of the summons and complaint shall likewise be served upon said parent or guardian, if said parent or guardian resides within the State. Service on imprisoned persons or persons confined in a state hospital or similar institution, in or out of this State, shall be made by delivering a copy of the summons and complaint to the confined person personally; and service shall be made by the sheriff of the county in which the person is imprisoned or confined. In cases of persons imprisoned, and patients in a state hospital or similar institution, personal service of process may be made by the superintendent of the institution or by the director of the prison system or by assistants duly designated by the superintendent or the director in writing for the purpose of making service of process, instead of the sheriff. The superintendent or the director or their designated assistants shall not be entitled to any costs therefore. Service on confined or imprisoned persons shall also conform to the provisions of § 15-9-510, S.C. Code, 1976.

Note:

Rule 4(d)(2) preserves and conforms to present practice under Code §§ 15-9-480 and 15-9-490. Service on persons confined in State penal or mental facilities will continue to conform also to Code §§ 15-9-500 and 15-9-510.

Note to 1986 Amendment:

In Rule 4(d)(2), the reference to Sec. 15-9-500 is deleted because that provision has been repealed.

Note to 1995 Amendment:

Rule 4(d)(2) is amended to add a provision for the service of the summons and complaint on persons confined in a prison or state hospital. The language is drawn from S.C. Code Ann. § 15-9-500 (1976) (repealed) which governed this situation prior to the adoption of the Rules of Civil Procedure in 1985.

(d)(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Note:

This rule 4(d)(3) conforms to both the Federal Rule and preserves and supplements Code §§ 15-9-210 through 15-9-330. Rules 4(d)(7) and 4(d)(8) preserve other forms of statutory service on particular classes of defendants, such as non-resident motorists.

(d)(4) State of South Carolina.

(A) When State a Party. Upon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General, or when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) When Unconstitutionality of Statute Is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General.

(d)(5) State Officer or Agency. Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(d)(6) Governmental Subdivision. Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant.

Note:

RULE 5

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

Note:

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for

admissions. The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this Rule.

Note:

This is the language of Federal Rule 26(a) as amended August 1, 1983. The second part was added to address the problem of duplicative, redundant, and excessive discovery by encouraging judges to identify instances of needless discovery and to limit the uses of the various discovery devices accordingly. This rule changes State procedure by permitting discovery by deposition upon written questions and also mental and physical examinations.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Note:

This is the language of Federal Rule 26(b). It is substantially equivalent to the language of Circuit Court Rule 87B with minor editorial changes. In particular it has the same scope of discovery--"relevant to the subject matter."

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

Note:

This is the language of the Federal Rule 26(b)(2) and authorizes discovery of insurance agreements by any discovery method. Circuit Court Rule 90(e) presently authorizes an interrogatory to discover the names and addresses of all insurance companies which have liability insurance relating to the claim and the numbers and amounts of the policies. Thus, this language does not produce any significant change in existing State practice.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for the trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Note:

This is the language of Federal Rule 26(b)(3). There is no equivalent Circuit Court Rule on this subject although there is existing common law providing similar protection. This provision is added to clarify and standardize the law on the issue. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Note:

This is a continuation of paragraph (b)(3), of the Federal Rule and provides for the discovery of statements by parties and witnesses. This is comparable to Circuit Court Rule 90(e)(1) which provides for the discovery of the existence of statements taken from witnesses.

(4)(A) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

(C) Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a

party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Note:

Rule 26(b)(4) is based upon the comparable Federal Rule. The language is changed to permit discovery of an expert expected to testify at trial by any means and without any special showing of need. There is also a requirement that the party is not required to disclose an expert casually or informally consulted or one consulted but not specially employed. This is similar to the result reached under the federal rules and its Advisory Notes to 26(b)(4)(B). 26(b)(4)(C) is changed to require a party producing an expert for deposition to do so in this state. The discovering party is specifically made responsible for reasonable fees and expenses incurred in traveling to this state, as well as the time spent in responding to the discovery.

Note to 1986 Admendment:

This amendment to Rule 26(b)(4)(C) replaces the "manifest injustice" standard with that of "good cause shown" to conform to similar references to the standard for controlling discovery practice in other Rules.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved.

Note to 1996 Amendment:

Rule 26 is amended to add paragraph (b)(5) requiring a party to notify the other parties that it is withholding information otherwise discoverable on grounds of privilege or work product. The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. The rule does not specify the detail required which will depend upon the

facts of each case. The rule applies to material otherwise discoverable, and does not require disclosure of information that is privileged. A motion challenging the claim of privilege or work product normally is decided by the court after an in camera inspection of the materials. Non-parties have a similar obligation when responding to a subpoena under Rule 45(d)(2), SCRPC, and there is similar language in the comparable federal rules.

Note to 2011 Amendment:

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

(6) Electronically Stored Information.

(A) A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery, including allocation of expenses associated with discovery of the electronically stored information.

(B) On motion or on its own motion, the court shall limit the frequency or extent of discovery otherwise allowed by these rules if the court determines that:

- (i)** the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii)** the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii)** the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

Note to 2011 Amendment:

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a

means for facilitating a just and cost-effective resolution of disputes.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Note:

This is the language of Federal Rule 26(c). Exactly the same language was recently adopted as Circuit Court Rule 96.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Note:

This is the language of Federal Rule 26(d). There is no equivalent in the Circuit Court Rules. The purpose of the paragraph is to prevent the idea of "priority" in the taking of discovery, resulting in delay. The court however retains power to set the order of discovery if necessary.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except that requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party.

In addition, a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Note:

This Rule 26(e) is the language of Federal Rule 26(e). A like duty to supplement the

special interrogatories permitted under present Circuit Court Rule 90 is imposed by that rule and is substantially the same as the Federal Rule. In these discovery Rules the Federal language is adopted for all discovery except Rule 33(b) standard interrogatories. The Circuit Court Rule 90 provision is retained as to answers to those special interrogatories because the interrogatories are limited in number, the continuing duty to update them is not burdensome, and it preserves the existing State practice.

Note to 1996 Amendment:

Rule 26(e) is amended to make applicable the language of Rule 33(b) on the duty to supplement the standard interrogatories to discovery requests under Rule 31 Depositions Upon Written Questions, Rule 33 Interrogatories to Parties, Rule 34 Production of Documents and Tangible Things, and Rule 36 Request for Admission. Discovery requests under these rules are deemed to be continuing and the responding party must update the answers promptly when new information comes to the attention of the party, a representative of the party or counsel. This duty to supplement does not apply to discovery under Rule 30 Depositions Upon Oral Examination. However, there is an additional duty to provide supplemental information on expert witnesses and witnesses with knowledge of the facts of the case regardless of the form of the discovery request. The obligation to supplement prior discovery responses includes the duty to amend or supplement answers which are found to be incorrect or misleading so former subparagraph (e)(2) has been deleted, as has former subparagraph (e)(3) which is now redundant.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery;
- (5) A statement of any issues relating to discovery of electronically stored information, including the form or forms in which it should be produced;
- (6) A statement of any issues relating to claims of privilege or of protection as trial preparation material, including – if the parties agree on a procedure to assert such claims after production – whether the parties wish to have the court include their agreement in an order; and
- (7) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order

may be altered or amended whenever justice so requires. Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial hearing authorized by Rule 16.

Note:

This is the language of Federal Rule 26(f). Its purpose is to prevent discovery abuse by encouraging the court to intervene when abuse occurs, or when an attorney has failed to obtain the cooperation of opposing counsel and should have the assistance of the court. Routine matters should be resolved by Rule 26(c) Motions for protective orders or Rule 37 Motions to compel. The discovery conference is discretionary with the court, and may be combined with a pretrial hearing.

Note to 2011 Amendment:

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification in accordance with Rule 11.

Note:

This language is drawn from the first three sentences of Federal Rule 26(g) and has been slightly modified to incorporate reference to Rule 11. The more strict standard of the Federal Rules contained in Rules 11, 16 and 26 has not been adopted.

(1) Filing, Service and Custody. Except as provided in Rule 30(h), the party requesting discovery shall serve the request on other counsel or parties, but not file the notice or materials or matters discovered. The requesting party shall retain the originals and shall file the originals with the clerk of court when the same are to be used at a hearing or at trial.

(2) Destruction. One year after the final termination of an action in which discovery other than depositions has been taken, the party taking the other discovery or the clerk of court, as the case may be, may destroy or otherwise dispose of the original discovery requests and responses.

Note:

This paragraph conforms to Circuit Court Rule 97 and provides that, except for videotaped depositions under Rule 30(h), the requesting party retains the original discovery request and response until it is needed for a motion or trial, then it is filed with the court.

RULE 27

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the State may file a verified petition in the court in the Circuit of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1. that the petitioner expects to be a party to an action cognizable in a court of the State but is presently unable to bring it or cause it to be brought; 2. the subject matter of the expected action and his interest therein; 3. the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; 4. the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and 5. the names or a description of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the circuit or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this

State in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the circuit court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

RULE 56 SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in

good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Note:

This is the language of Federal Rule 56. Present Circuit Court Rule 44, Summary Judgment, is substantially the same as the Federal Rule except for the following:

Rule 56(d) Case Not Fully Adjudicated on Motion, does not appear in the present Circuit Court Rule. This Rule makes the findings of uncontested facts discretionary with the court rather than mandatory; but is valuable in disposing of uncontested issues at trial.

Present Circuit Court Rule 44 has minor textual matters that do not appear in the Federal Rule. Paragraphs (a) and (b) of the Circuit Court Rule have the concluding phrase, "notice of motion shall state the grounds for the motion", which is rendered unnecessary by Rule 7(b). The second sentence of Rule 56(e) permits other relevant materials to be considered by the court, and is a needed addition.

Note to 1986 Amendment:

This change conforms the time for serving affidavits in opposition to a motion for summary judgment with the general standard in Rule 6(d).