

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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SC Court of Appeals

William P. Keesley, Successor Circuit Court Judge

Case No. 2013-CP-32-01272
Case No. 2014-CP-32-00399

Appellate Case No. 2015-001821

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Alexander Guice, Appellant,

v.

US Food Service, Inc., Employer, and
Ace American Insurance Company c/o
Gallagher Bassett Services, Inc., Respondents.

**REPLY TO RETURN TO MOTION TO STRIKE RESPONDENTS' REPLY
TO APPELLANT'S RETURN IN OPPOSITION TO MOTION
FOR CORRECTION AND/OR CLARIFICATION OF
APPELLANT'S DESIGNATION OF MATTER
AND
RETURN IN OPPOSITION TO MOTION TO FILE OUT OF TIME**

Please take notice, that Alexander Guice, the named and undersigned pro se Appellant, submits these pleadings in *propria persona*. See *Haines v. Kerner*, 92 Sct 594; also See *Power* 914 F2d 1459 (11th Cir 1990); also See *Hulsey v. Ownes*, 63 F3d 354 (5th Cir 1995). *Id.* Pursuant to Rule 240(f) & (e), SCACR, appellant presents this "Reply to Return to Motion to Strike Respondents' Reply

to Appellant's Return in Opposition to Motion for Correction and/or Clarification of Appellant's Designation of Matter" ("Reply to Motion to Strike") and "Return in Opposition to Motion to File out of Time" ("Return to Motion to File out of Time"), dated November 03, 2015 and received by appellant via U.S. Regular Mail with service upon the undersigned on November 07, 2015. In support of the same, appellant would allege as follows:

1. **Respondents failed to meet their burden to prove service of Appellant's Return in opposition to Motion for Correction and/or Clarification of Appellant's Designation of matter was perfected upon respondents' counsel via USPS Priority Mail on October 19, 2015.**

Appellant contends respondents' reply failed to establish that they were served with appellant's Return to their Motion for correction/clarification of appellant's designation of matter on October 19, 2015 based on several relevant factors.

First, respondents did not object or deny the validity of the United States Postal Service ("USPS") Track and Confirmation Document submitted by appellant identifying and establishing that 1) Appellant's aforementioned Return in Opposition to Motion for Correction/Clarification was mailed to respondents via USPS Priority Mail on October 14, 2015; and 2) that the USPS confirmed service delivery and availability for pick-up of appellant's Return at respondents official mailing address of record on October 16, 2015 at approximately 10:24 a.m. See Holroyd, 361 S.C. at 60, 603 S.E.2d at 426 ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."). *Id.* See Motion to Strike Reply, USPS Tracking confirmation document verifying date of service and receipt, Exhibit "A"

(previously submitted).

Second, appellant contends the aforementioned USPS Track and Confirm Document and appellant's verified USPS Receipt dated Oct. 14, 2015 constitutes 'relevant evidence' of material and probative value which sufficiently verified service of the aforementioned Return in Opposition to Motion for Correction/Clarification was in fact perfected upon respondents via USPS Priority Mail on October 16, 2015. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

"Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." *State v. Hamilton*, 344 S.C. 344, 354, 543 S.E.2d 586, 591 (Ct. App. 2001); also see *Moore v. Moore*, 360 S.C. 241, 257-58, 599 S.E.2d 467, 476 (Ct. App. 2004). *Id.*

Furthermore, appellant contends the aforementioned USPS Track and Confirm Document and appellant's verified USPS Receipt dated Oct. 14, 2015 constitutes and meets the "preponderance of the evidence" standard as to establishing that respondents were served with the aforementioned Return on Oct. 16 as opposed to Oct. 19. "A 'preponderance of the evidence' is evidence which convinces as to its truth." *Brown v. Brown*, 379 S.C. 271, 278, 665 S.E.2d 174, 178 (Ct. App. 2008). *Id.* It strains credulity to believe the USPS would

confirm delivery of service of any mailing shipped via Priority Mail three (3) days prior to the USPS actually delivering the specific parcel, which is precisely what the respondents would have this Court believe. Respondents' Return to Motion to Strike, p.1 ("Despite Appellant's printouts of postal delivery records, the fact remains that Respondents did not receive Appellant's Return in their office until October 19, 2015"). *Id.*

Third, the evidence submitted by respondents to support their assertion that they received the aforementioned Return on October 19, 2015 is insufficient and of diminished material value. Specifically, respondents alleged that they had a "date-stamp of receipt of Appellant's Return" to establish when respondents were served with the Return (Return to Motion to Strike, p. 2). However, a review of the respondents' evidentiary submission of appellant's return confirms that 1) none of the pages of appellant's Return, or the Oct. 14 Cover Letter has a date-stamp of Oct. 19, 2015 on them; and 2) there is a blank page added to appellant's Return by respondents where "OCT 19 2015" appears in the bottom-right corner of the blank page; and 3) two (2) black vertical lines appear on the right side of every page of respondents submission of appellant's Return, when in fact no vertical lines were present on any of the pages of the Return submitted to respondents by appellant (Att. "A" of Respondents' Return to Motion to Strike).

In fact, appellant contends respondents' evidentiary submission of appellant's Return with an additional blank page bearing the date Oct. 19, 2015 is at best, circumstantial evidence, wherein separate facts can certainly be inferred. See *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

"Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." *Id.* at 586, 720 S.E.2d at 50.

Thus, appellant would contend it is entirely plausible to reach a separate fact, based on respondents' evidentiary submission, that respondents' received the aforementioned Return dated Oct. 14, 2015 on Oct. 16, 2015, as confirmed by the USPS Verified Track and Confirm documentation, and respondents' counsel simply placed a blank page with the date Oct. 19, 2015 with appellant's Return to support their inference that service of said Return was not received by respondents' until Oct. 19; wherein appellant would contend respondents' inference is neither "reasonable" nor "genuine" to assist the trier of fact in the issue as to when service of the same (Return) was perfected. "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)¹. *Id.*

Finally, appellant contends respondents' "office" is not their official mailing address of record. Specifically, appellant perfected service of the aforementioned Return on respondents at "**P.O. Box 650007 Mt. Pleasant, SC 29465**". This address is a Post Office Box at the USPS Facility located in Mt. Pleasant, South Carolina. If respondents did not receive the aforementioned

¹ Appellant contends the reason appellant files and serves all pleadings and other papers via USPS Priority Mail and/or Certified Mail as opposed to USPS Regular Mail in ALL legal matters is to have the ability to track and confirm service or delivery of said legal papers due to the strict time limit requirements placed on filing and service of papers in legal proceedings by this Court and all other Courts pursuant to procedural rules which are jurisdictional in nature.

Return at their “office”, which was not their official mailing address of record utilized by appellant (and the Commission, the Circuit Court and this Court), until October 19, 2015, then appellant would contend that it does not mean that service of the aforementioned Return was not perfected at respondents’ official mailing address of record, namely, their Post Office Box, on October 16, 2015. As such, the Court should grant appellant’s motion to strike in terms of striking respondents’ Reply from the record pursuant to respondents’ failure to comply with the five (5) day filing and service requirements as set forth in Rule 240(f), SCACR. *Id.*

2. The respondents’ ‘Motion to file out of time’ is without merit.

Appellant contends respondents’ ‘Motion to file out of time’ is without merit based on several relevant factors.

First, respondents’ ‘motion to file out of time’ is not supported by any authority, which is required, and therefore should be deemed abandoned by the Court. See *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when [respondent] fails to provide arguments or supporting authority for his assertion); see also *State v. Colf*, 332 S.C. 313, 321, 504 S.E.2d 360, 364 (Ct. App. 1998) (holding that an issue is deemed abandoned if argument in brief is merely conclusory); See also *R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). *Id.*

Second, appellant contends respondents cannot “unring the bell” in terms of their failure to timely file the “Motion to file out of time” in conjunction with filing

their 'Reply to Return to Motion for Correction/Clarification' with respect to filing the aforementioned 'motion to file out time' approximately ten (10) days *post facto*. See *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir.1962)("After the thrust of the saber it is difficult to forget the wound"). *Id.* Here, respondents had no intentions of seeking this Court's permission and relief to allow respondents to file their Reply dated October 24, 2015 out of time until after appellant filed the Motion to Strike their Reply dated October 27, 2015 on the grounds of untimeliness. Now, 10 days later, "and solely out of an abundance of caution" (Motion to File out of Time, p. 2), respondents seek permission and relief, after the fact, from this Court, on **November 03, 2015** to accept their previously-filed **October 24, 2015** Reply as timely, wherein respondents' protected fundamental due process right to be timely heard by this Court was not infringed upon. See *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002)("A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). *Id.*

In fact, appellant contends that the timing of respondents' filing of the aforementioned 'Motion to file out of time' indicates that respondents have engaged in a last-minute effort to create a genuine issue of material fact to prevent their Reply to Return to Motion for Correction/Clarification being stricken from the record by the Court. See *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 476 (8th Cir.2006)("The timing of the affidavit indicate[s] that the [plaintiff] engaged in a last-minute effort to create a genuine issue of material fact to prevent the entry of summary judgment in [the defendant]'s favor.")(quoting

McMaster v. Dewitt, and Carolina Psychiatric Services, P.A., Case No. 2013-00717, Opinion No. 5282 issued on December 3, 2014 (Ct. App. 2014)). *Id.*

Third, respondents failed to show good cause for failing to file their reply out of time. Specifically, appellant contends the reason advanced by respondents for the Court to consider in terms of accepting their untimely filing of their Reply, and in particular, “solely out of an abundance of caution” (Motion to File out of Time, p. 2), fails to provide a reasonable explanation or good cause as to why respondents’ counsel failed to comply with Rule 240(f), SCACR. *Id.*

Fourth, respondents are “blow[ing] both hot and cold” in their Return to Appellant’s Motion to Strike and Motion to file out of time. Specifically, respondents continue to argue that they received appellant’s Return in Opposition to Motion for Correction/Clarification on October 19, 2015 and timely filed their Return; however, respondents simultaneously are moving the Court to grant permission to accept their previously-filed Reply out of the time limits set forth in Rule 240(f) within the same pleading, which is not proper. See Return to ‘Appellant’s Motion to Strike and/or in the alternative, Motion to File Out of Time’ previously filed. “A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant [respondents] cannot “blow both hot and cold.”” See *McDaniels v. Gen. Ins. Co. of Am.*, 36 P.2d 829, 832 (Cal. Dist. Ct. App. 1934)(quoting from *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997)). *Id.*

To put it in another way, **either** respondents timely filed their Reply **or** they filed their Reply untimely. Respondents cannot have it both ways.

Finally, Appellant would contend that if respondents' motion to file out of time is granted, such action would clearly constitute unfair prejudicial treatment in favor of the respondents. See *Kennedy v. Griffin*, 358 S.C. 122, 127, 595 S.E.2d 248, 250 (Ct. App. 2004) (quoting Rule 403, SCRE). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (quoting *State v. Owens*, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001)). *Id.*

3. Appellant contends respondents' second "request" seeking the Court to hold in abeyance the time limits for respondent to file their Initial Brief should be deemed abandoned.

Appellant contends respondents' second "request" as set forth in the 'Conclusion' section of their 'Return to Motion to Strike and Motion to file out of time', and specifically, "In addition, Respondents request that the deadline for filing their Initial Brief be suspended until this Court rules on these motions" (Return to Motion to Strike and Motion to File out of Time, p. 2), is short, conclusory, unsupported by authority, and therefore should be deemed abandoned. See *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); also see *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue."). *Id.*

Because respondents' second request to suspend the tolling of this action was not supported by authority and therefore should be deemed abandoned, as well as the fact respondents' was duly served with a true copy of appellant's

initial brief and designation of matter on September 17, 2015, appellant contends the Court should consider barring respondents from filing an initial brief in this matter, as respondents have failed to comply with the filing and time limits as set forth in Rule 208(a)(2), SCACR. *Id.* See *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994)(“When the terms of a statute are clear, the court must apply those terms according to their literal meaning.”); also see *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599 (1914)(“[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”); also see *South Carolina Dep’t of Soc. Servs. v. Gamble*, 337 S.C. 428, 523 S.E.2d 477 (Ct. App. 1999)(“When construing a statute, courts should consider the words of the statute in conjunction with the purpose of the whole statute and the policy of the law”). *Id.*

Finally, as the above-entitled action reflects an appeal from the Workers’ Compensation Commission, appellant contends the same is entitled to “sure swift recovery regarding work place injuries”, and therefore moves the Court to consider expediting the processing and adjudication of the instant appeal². See *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (“Workers’ compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault.”); also see *Parker v. Williams & Madjanik*,

² Appellant respectfully points out that due to the Court’s October 20, 2015 Order which required appellant to pay the \$100.00 appeal filing fee and subsequently pay the \$25.00 motion filing fee for appellant’s Rule 269 Strike application, which appellant promptly complied with, appellant has no money to pay for food or other monthly maintenance needs until appellant receives his entitled U.S. Dept. of Veterans Affairs Disability Compensation Benefits on or around **December 1, 2015**.

Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) ("The employee receives the right to swift and sure compensation; the employer receives immunity from tort actions by the employee."); also see Rule 74, SCRPC ("... priority shall be given to the hearing and disposition of such appeals in accordance with law."). *Id.*


CONCLUSION

Accordingly, based on the foregoing reasons, appellant moves the Court to deny respondents' Motion for Correction/clarification as the same is without merit or justification and to grant appellant's Motion to Strike respondents Reply for failing to meet the filing and service time requirements as set forth in Rule 240(f), SCACR. Further, appellant moves the Court to bar respondents' from filing an initial brief or designation in this matter based on respondents abandoned request to stay the filing and service requirements as set forth within Rule 208(a)(2), SCACR, as a matter of law.


VERIFICATION

I, **Alexander Guice**, the named and undersigned self-represented appellant in this matter, do hereby swear, under penalty of perjury, that I prepared, read and reviewed the information contained herein and believe it to be true and correct to the best of my knowledge and ability.

Respectfully submitted,

By: 
Alexander Guice
Post Office Box 13281
Tampa, FL 33681
(813) 562-0547
alguice@hotmail.com
Appellant, Pro Se

Sworn to before me this
7th day of November, 2015


Notary Public of Florida
My commission expires 5/18/19

November 7th, 2015



RUSHELLE SAVAGE
NOTARY PUBLIC
STATE OF FLORIDA
Comm# FF232257
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APPEAL FROM LEXINGTON COUNTY
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Appellate Case No. 2015-001821

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

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US Food Service, Inc., Employer, and
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Gallagher Bassett Services, Inc., Respondents.

PROOF OF SERVICE

I hereby certify that the Respondents, through counsel, were provided a true copy of a cover letter to the Clerk; a 'Reply to Return to Motion to Strike Reply to Return in opposition to Motion for Correction and/or Clarification of Appellant's Designation of Matter and Return in Opposition to Motion to File Out of Time' and a proof of service, by depositing the same in the US Postal Service, via Priority Mail, and addressed to: **Erin L. Hantske, Esq., P.O. Box 650007 Mt. Pleasant, SC 29465** on this 7th day of November, 2015.



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November 7, 2015

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November 7, 2015

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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Alexander Guice v. U.S. Foodservice, Inc., et al
Appellate Case No. 2015-001821

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of a 'Reply to Return to Motion to Strike Reply to Return in opposition to Motion for Correction and/or Clarification of Appellant's Designation of Matter and Return in Opposition to Motion to File Out of Time' and a proof of service in regards to the above referenced appeal. Please forward to the appropriate personnel for processing, and please return clocked copies of the same to the undersigned in the pre-paid self-addressed envelope enclosed for your convenience.

By copy of this correspondence, Erin L. Hantske, Esq., the respondents' counsel of record, has been provided a copy of the same via priority mail with enclosures.

Should you have any questions, please do not hesitate to contact me. Thank you for your assistance in this matter.

Very truly yours,



Alexander Guice
Appellant, pro se

/ag

Enclosures: As stated

cc: Erin L. Hantske, Esquire

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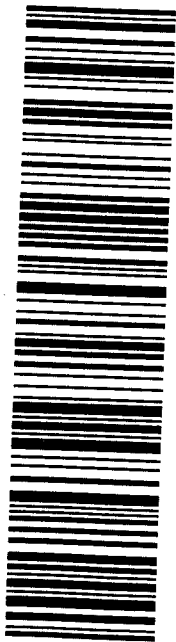
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