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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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

WCC Case No. 0506205

Alexander Guice, Appellant,

v.

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

MOTION FOR SUMMARY JUDGMENT AND STAY PENDING ADJUDICATION

Please take notice, that Alexander Guice, the named and undersigned *pro se* Appellant, submits these pleadings in *propria persona*, wherein pleadings are to be considered without regard to technicalities. *Propria*, pleadings are not held to the same high standards of perfection and expertise as practicing lawyers. 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, SCACR, and other holding authorities, Appellant presents this "Motion for Summary Judgment and Stay pending adjudication", specifically, seeking this Court to grant summary judgment regarding the above-entitled action in favor of Appellant as a matter of law, and staying the processing of the above-entitled action until such time as this Court has issued a judgment regarding this application. In support of this summary judgment application, Appellant would allege as follows:

STANDARD OF REVIEW

"Summary judgment is appropriate when '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.'" *Bruce v. Durney*, 341 S.C. 563, 565, 534 S.E.2d 720, 722 (Ct. App. 2000) (quoting Rule 56(c), SCRCP); see also *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); see also *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); also see *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). This Court will review the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). In ruling on a motion for summary judgment, the evidence and all inferences which can be

reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Id.* The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Bankers Trust of South Carolina v. Benson*, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Regions Bank v. Schmauch*, S.C., 582 S.E.2d 432 (Ct. App. 2003); also see *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); also see *Peterson v. West American Ins. Co.*, 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); see also *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). It is well settled that the non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence in the form of affidavits or otherwise in support of its proposition. *Woodson v. DLI Props., LLC,* 406 S.C. 517, 753 S.E.2d 428 (2014).

In the instant appeal at bar, Appellant contends that (1) there are no

genuine issue(s) as to any material facts in dispute and that Appellant is entitled to a judgment as a matter of law; (2) the disposition of the instant appeal 'does not require the services of a fact finder'; and (3) in viewing the instant appeal 'in a light most favorable to Respondents', summary judgment, in favor of Appellant, remains the appropriate course of action. *Id.*

ARGUMENT

1. The parties in the above-entitled action are bound by the South Carolina Workers' Compensation Act.

Appellant contends the parties are bound by the South Carolina Workers' Compensation Act (hereafter "Act"), in the instant appeal, as set forth in Title 42 of the Code of Laws of South Carolina (as annotated), pursuant to Appellant being hired by employer, namely, US Foodservice, Inc., located at 120 Longs Pond Road Lexington, SC on 10/01/2001 for the position of Delivery (Route) Driver. Redacted Electronic WCC Form 12A, WCC Case No. 0506205, Att. "**A**".

Specifically, S.C. Code Ann. § 42-1-310 (1996) of the Act, **Presumption of acceptance of provisions of title**, provides in relevant part:

> Every employer and employee, except as stated in this chapter, **shall** be presumed to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and **shall** be bound thereby. (Emphasis added). *Id.*

Here, Appellant contends there is no genuine material fact in issue in terms of (1) Appellant being injured by accident arising out of and in the course of employment with employer on May 05, 2005; (2) the mutually agreed upon average weekly wage of $1,161.00; or (3) whether the parties are bound by the provisions as set forth in the Act. *Id.* WCC Form 12, Att. "**A**".

2. This Court has proper subject matter jurisdiction over the parties and the instant appeal to consider granting summary judgment.

Appellant contends jurisdiction is properly conferred upon this Court by way of Appellant's timely filing and service of a Notice of Appeal on August 16, 2015 appealing the Order issued by Successor Circuit Court Judge William P. Keesley ("Judge Keesley"), dated July 17, 2015 in accordance with Rule 203(b)(1), SCACR; S.C. Code Ann. § 1-23-380(Supp. 2008) of the APA; § 14-3-330(1) & (2)(c)(Supp. 2000); and the Court's holding authority as set forth in *Pringle v. Builders Transp.*, 298 S.C. 494, 496, 381 S.E.2d 731, 732 (1989). *Id.* See Appellant's filing of the Notice of Appeal and other relevant required documentation, previously filed and contained within the record.

3. The Commission lacked subject matter jurisdiction over the instant case at the time it considered and approved the Settlement Agreement and Release.

Appellant contends the Commission lacked subject matter jurisdiction over WCC Case No. 0506205 at the time it considered and approved the Settlement Agreement and Release on 01/05/2006 based on several axiomatic grounds.

As an initial matter, the subject matter jurisdiction of a court (or administrative tribunal) is fundamental. "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court." *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001) (citation omitted). The action of a court, regarding a matter as to which it has no jurisdiction, is void. *State v. Funderburk*, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972); also see

Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). "Any action taken outside of its statutory and regulatory power is null and void." *Id.*

I. Unlawful Termination of entitled TTD Compensation Payments by way of Settlement Agreement.

A review of the record, and specifically, the employer-representative-filed WCC Form 18[1] (Periodic Report), confirms Appellant received entitled temporary compensation payments from the employer's representative from 05/06/2005 to 12/04/2005, for approximately 213 consecutive days, including the first 150 days. Redacted WCC Form 18, WCC Case No. 0506205, dated 12/01/2005 stamped received by the Commission on 12/05/2005, Att. "**B**".

Further, on October 27, 2005 the employer-selected attending physician, namely, Alan Tamadon, MD ("Dr. Tamadon"), opined Maximum Medical Improvement (MMI); assigned a five percent impairment rating to the whole person of Appellant; opined permanent lifting restrictions, in particular, "No lifting greater than (>) 25 pounds occasionally" and "No lifting greater than (>) 10 pounds frequently or occasionally"; and reported to employer that claimant could no longer perform the duties of a delivery driver, wherein on October 27, 2005 Appellant had received temporary compensation payments for approximately 175 consecutive days. MMI Medical Report dated October 27, 2005, Att. "**C**".

Based on the 213 consecutive days Appellant received temporary

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1 Appellant points out that to date, Respondents have never objected to or opposed the validity of the aforementioned WCC Form 18 affidavit, and has summarily waived their right to do so on appeal. See *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) ("Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

compensation, including the first 150 days, as well as the fact that the employer-selected attending physician's unchallenged MMI medical report dated October 27, 2005 opined a permanent impairment (i. e. "permanent lifting restrictions") and reported to the employer that appellant could no longer perform the duties of a delivery driver, suspension, reduction, or termination of TTD benefits were exclusively controlled by §42-9-260(F)(supp. 1996), which provides:

> *After the one-hundred-fifty-day period has expired, the commission **shall** provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but the regulation **must** provide for an evidentiary hearing and commission approval **prior** to termination or suspension unless such prior hearing is expressly waived in writing by the recipient or the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present. Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due.* (Emphasis added). *Id.*

AND S.C. Reg. 67-506(D)&(E)(Supp.1997), which provides:

> *D. After the one hundred fifty day period, when the claimant is receiving temporary compensation and the authorized health care provider assigns an impairment rating and reports the claimant is unable to return to work at the same or other suitable job, the employer's representative **must** continue payment of temporary compensation until the Commission finds the employer's representative may terminate temporary compensation.*
> *E. To request a hearing for permission to terminate temporary compensation, the employer's representative **shall** file a Form 21 with the Judicial Department.*
> *(1) The employer's representative **shall** serve a copy of the Form 21 on the claimant according to R.67-211.*
> *(2) The employer's representative **shall** certify temporary compensation is current or no hearing will be set.* (Emphasis added). *Id.*

Still further, S.C. Code Ann. § 42-1-620 (1962), ***Agreements of employee to waive rights invalid***, provides in pertinent part: "**No agreement by an employee to waive his rights to compensation under this title shall be valid**". (Emphasis added). *Id.* "Under the rules of statutory interpretation, use of

words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See *South Carolina Police Officers Retirement Sys. v. Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990). *Id.*

Furthermore, Appellant did not expressly waive his right to the Form 21 Hearing per section 42-9-260(F), particularly wherein the employer's representative unlawfully withheld entitled TTD benefit payments from Appellant from on or around **October 27, 2005** until after Appellant entered into the aforementioned agreement on **December 22, 2005**, wherein at the time Appellant entered into said agreement, Appellant was homeless and sleeping in Appellant's personally owned vehicle since **December 13, 2005**. Last three compensation check receipts dated 12/01/2005 and 12/02/2005, Att. "**B**".

In the instant appeal at bar, Respondents, by way of the employer's representative, failed to terminate entitled TTD disability benefit payments in accordance with the proper procedure for doing so as outlined by section 42-9-260 and regulation 67-506, wherein the procedure utilized to terminate entitled TTD disability benefits reflects a "substantial deviation" from the statutory procedure (See *Martin v. Rapid Plumbing*, Opinion No. 4114 (Ct. App. 2006)); the parties were explicitly prohibited from entering into an agreement to waive entitled TTD disability benefit payments pursuant to section 42-1-620; and the Commission lacked jurisdiction to approve a settlement agreement to resolve entitled TTD disability benefit payments pursuant to sections 42-1-620; 42-9-260; and regulation 67-506(D) & (E) of the Act. *Id.* See *Triska*. "Any action taken outside of its statutory and regulatory power is null and void." *Id.*

II. Open Material Terms of Compensable Injury of 'Permanent Lifting Restrictions'.

A review of the record, and specifically, Appellant's Medical Reports, confirms that Appellant's injury of "permanent lifting restrictions" arose out of and in the course and scope of the performance of Appellant's official duties and as a proximate cause of the admitted work-related accident which occurred on May 05, 2005. Medical Reports, WCC Case No. 0506205, dated 10/28/2005; 10/27/2005; 10/19/2005; and 10/06/2005, Att. "**C**". See *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987); also see S.C. Code Ann. § 42-1-160 (Supp. 2005); also see *Oliver v. South Carolina Dep't of Hwys. & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992); also see *Sigmon v. Dayco Corp.*, 316 S.C. 260, 262, 449 S.E.2d 497, 498 (Ct. App. 1994) (recognizing that "an injury by accident" does not necessarily require a causative event and stating "the unexpected result or industrial injury is itself considered the compensable accident"). *Id.*

However, a review of the record, and specifically, the settlement agreement and release entered into by the parties on December 22, 2005 and subsequently approved by the Commission on January 05, 2006, confirms that no reference to Appellant's compensable injury of permanent lifting restrictions, an "essential fact in issue" was contained within the aforementioned agreement. Settlement Agreement and Release, WCC Case No. 0506205, Att. "**D**".

It is well settled that the Commission has a statutory duty to make a finding fact for all essential factual issues, which it failed to do in approving the aforementioned agreement with respect to Appellant's compensable injury of

permanent lifting restrictions. See *Airco, Inc. v. Hollington*, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977) (finding that the commission has a statutory duty to make a finding of fact for all "essential factual issues."); also see S.C. Reg. 67-803(A)(2)(2005). *Id.*

Thus, because Appellant's compensable injury of permanent lifting restrictions was neither referenced nor resolved in the aforementioned agreement, the Commission lacked subject matter jurisdiction at the time it approved the settlement agreement and release, and the open material terms of permanent lifting restrictions renders said agreement unenforceable, null and void. See *Aperm Of South Carolina v. Alvin R. Roof*, 290 S.C.442 351 S.E.2d 171 (Ct. App. 1986)("regardless of intent, an agreement which leaves open material terms is unenforceable."); also see *Triska. Id.*

III. The Commission failed to consider the medical reports prior to approving the Settlement Agreement and Release.

A review of the Settlement Agreement and Release entered into by the parties on December 22, 2005 reflects that the parties agreed that "**full and complete medical reports are on file with the South Carolina Workers' Compensation Commission and these are duly considered by it in approving this Settlement Agreement and Release**". (Emphasis added). Settlement Agreement and Release, p. 4, (Att. "**D**").

However, a review of the record, and specifically, the December 30, 2005 correspondence submitted by the employer's representative to the Commission, confirms that while the proposed settlement agreement and release was filed with the Commission, Respondents' failed to file any of Appellant's medical

reports with the Commission for mandatory consideration. December 30, 2005 correspondence from Respondents' to the Commission, Att. "**E**". In fact, the record contains no evidence that any of Appellant's medical reports, and specifically, the **MMI** Medical Report dated 10/27/2005 were ever filed in this action with the Commission by the Respondents' counsel, which was required pursuant to S.C. Reg. 67-1301(B)(2005) and the terms and conditions set forth in the aforementioned agreement. S.C. Reg. 67-1301(B)(2005). Settlement Agreement and Release, p. 4, (Att. "**D**").

Thus, because Respondents' failed to file the medical reports with the Commission, wherein the Commission was required to review the medical reports as a binding open material term set forth in the proposed settlement agreement and release prior to approval, and failed to do so, the Commission lacked subject matter jurisdiction at the time it approved the agreement on January 05, 2006 and said agreement must be deemed unenforceable, null and void. See *Aperm Of South Carolina*; also see *Triska. Id.*

Here, Appellant has met the initial burden of demonstrating the absence of a genuine issue of material fact with respect that the Commission lacked subject matter jurisdiction, based on three (3) separate axiomatic grounds, at the time it approved the aforementioned settlement agreement and release, as set forth in Rule 56, SCRCP, wherein the evidence submitted; proper application of law; and well settled authorities establishes that there is no requirement for the services of a fact finder[2]. See *Regions Bank*; also see *Carolina Alliance for Fair Employment*; also see *Bankers Trust of South* Carolina. *Id.*

In reviewing the above argument "in a light most favorable" to Respondents', Appellant contends in order for Respondents' to resist summary judgment, Respondents' would be required, in "good faith", to produce evidentiary affidavits establishing that prior to approval of the settlement agreement and release, (**1**) that entitled TTD disability benefit payments were lawfully terminated pursuant to the statutory procedures as outlined by section 42-9-260(F) and regulation 67-506 (D) & (E) of the Act, by way of (**a**) Respondents' representative filing a WCC Form 21 with the Commission, and Appellant's then Counsel of record, requesting a Stop Payment Hearing; (**b**) a Form 21 Stop Payment Hearing being convened before the Commission, and (**c**) the Commission issuing an Order on the Form 21 Stop Payment Hearing granting permission for Respondents' counsel to terminate entitled TTD benefit payments to Appellant; (**2**) Respondents' submission of a different settlement agreement and release, where Appellant's compensable injury of "permanent lifting restrictions" was referenced as an essential fact in issue and resolved by the parties; and (**3**) verifiable proof that Appellant's medical reports were duly filed with and considered by the Commission prior to approval of the settlement agreement and release, which Appellant contends is not possible, absent 'bad faith' actions by Respondents' or their Counsel. *Id.*

As such, Appellant is entitled to summary judgment in this action, as a matter of law, to include this Court ordering the immediate setting aside of the

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2 The Court must consider the genuine material fact that it was Attorney Bacon, Appellant's former counsel of record, as evidenced in the "Attorney's Certificate" contained within the aforesaid Settlement Agreement and Release (Att. "**D**"), who advised Appellant to enter into the unlawful and explicitly-prohibited agreement.

settlement agreement and release; setting aside all subsequent Commission and Court Orders issued in this matter, and ordering Respondents' counsel to immediately release all unlawfully withheld TTD disability compensation payments, at the mutually agreed average weekly wage of $1,161.00, plus the twenty five percent interest penalty on the unlawfully withheld TTD disability payments per S.C. Code Ann. § 42-9-260(G), from December 04, 2005 to date, as a matter of law. S.C. Code Ann. § 42-9-260(G). See *Triska*; also see *Aperm Of South Carolina*; also see *Bruce. Id.*

4. Respondents' failed to preserve any issues for review or reconsideration by the successor Circuit Court or this Court in their Rule 59(e) Motion to Alter or Amend subsequent the September 25, 2014 Circuit Court Order.

Appellant contends summary judgment is proper in this matter on grounds that Respondents' failed to preserve any issues for review or reconsideration by either the successor Circuit Court or this Court subsequent the Circuit Court Order dated September 25, 2014 based on several axiomatic factors.

As an initial matter, Appellant prevailed in the instant appeal, when the Circuit Court, by way of former presiding Circuit Judge Brian M. Gibbons ("Judge Gibbons"), issued the "Order Granting Appellant/Claimant's Motion for New Trial and Order of Recusal" on September 25, 2014 wherein the Circuit Court opined, "Appellant/Claimant's Motion for New Trial is GRANTED as to all particulars set forth in his motion..." Order Granting Appellant/Claimant's Motion for New Trial and Order of Recusal, Att. "**F**". Motion for New Trial, exhibits excluded, Att. "**G**". Answer to Reply to Motion for New Trial, exhibits excluded, Att. "**H**".

Furthermore, in granting "all particulars" set forth in Appellant's 'Motion for

New Trial', the Circuit Court *inter alia* GRANTED the following issues on appeal, to include, but not limited to:

A. Appellate Panel's Final Order dated July 17, 2013 VACATED.

In granting all particulars set forth in Appellant's Motion for New Trial, the Circuit Court granted Appellant's reliance upon *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E. 2d 313 (S.C. 1984) ("a regulation. ..must fall when it alters or adds to a statute"), in terms of Appellant's proposition that § 42-1-620 controlled the Appellate Panel's holding of regulation 67-801 affirming the Single Commissioner's Order dated February 22, 2013. Answer to Reply to Motion for New Trial, p. 25-26, Att. "**H**".

B. Ineffective assistance of counsel and intentional misrepresentation afforded to Appellant by Attorney Robert G. Bacon, Esq.

In granting all particulars set forth in Appellant's Motion for New Trial, the Circuit Court granted Appellant's reliance upon the two-prong test as set forth in *Martinez v. State*, 403 S.E. (2d) 113, 114 (1991); and *Butler v. State*, 286 S.C. 441, 334 S.E. (2d) 813 (1985), cert. denied, 474 U.S. 1094, 106 S. Ct. 869, 88 L. Ed. (2d) 908 (1986), in terms that Appellant was afforded ineffective assistance of counsel and intentional misrepresentation by Attorney Robert G. Bacon, from on or around May 2005 to on or around December 2012. Answer to Reply to Motion for New Trial, p. 20, Att. "**H**"

C. The Settlement Agreement and Release dated January 05, 2006 deemed INVALID.

In granting all particulars set forth in Appellant's Motion for New Trial, the Circuit Court granted Appellant's reliance upon section 42-1-620; § 42-9-260(F);

and regulation 67-506 (D), in terms that the settlement agreement and release did not serve as a lawful means to terminate Appellant's entitled TTD disability payments and was therefore invalid. Motion for New Trial, p. 22-26, Att. "**G**".

D. Wrongful Termination of Employment (Retaliatory Discharge) by Employer.

In granting all particulars set forth in Appellant's Motion for New Trial, the Circuit Court granted Appellant's argument that employer wrongfully discharged Appellant on November 02, 2005. Motion for New Trial, p. 16-17, Att. "**G**"; Answer to Reply to Motion for New Trial, p. 16-18; 31, Att. "**H**"

E. Unlawful termination of TTD Benefit Payments by Employer's Representative.

In granting all particulars set forth in Appellant's Motion for New Trial, the Circuit Court granted Appellant's argument that Respondents unlawfully terminated entitled TTD disability benefits in violation of section 42-1-620; section 42-9-260(F) and regulation 67-506(D) of the Act. Motion for New Trial, exhibits excluded, p. 18-19, Att. "**G**"; Answer to Reply to Motion for New Trial, p. 30-31, Att. "**H**".

F. Relief set forth in Appellant's Motion for New Trial implicitly granted.

In granting all particulars set forth in appellant's motion for new trial, the Circuit Court implicitly granted the relief sought by appellant as clearly stated in the aforementioned motion. Further, it strains the limits of credulity and reason that the Circuit Court would grant Appellant's claim that employer wrongfully discharged Appellant and employer's representative unlawfully terminated entitled TTD benefits and not require respondents to immediately take remedial

actions to comply with the law in terms of reinstatement of employment and release of unlawfully withheld TTD benefits and the twenty five percent interest penalty on the unlawfully withheld TTD benefits. See *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal]."); also see *In re Grossinger's Assocs.*, 184 B.R. at 434 ("The doctrine applies to all issues decided expressly or by **necessary implication**."). (Emphasis added). *Id.* Motion for New Trial, Att. "**G**"

G. Remaining issues set forth in Case No. 2013-CP-32-01272 became dispositive.

In granting "all particulars" set forth in Appellant's motion for new trial, the remaining issue regarding Appellate Case No. 2013-CP-32-01272 with respect as to whether Commission Executive Director Gary M. Cannon lacked jurisdiction when he issued the March 27, 2013 Decision denying Appellant's "Motion for Reinstatement of Employment and Release of Temporary Total Compensation Payments" became a dispositive issue. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal). *Id.*

A review of the record, and in particular, Respondents' Rule 59(e) "Motion to Alter/Amend Circuit Court Order Dated September 25, 2014" ("Motion to Alter/Amend", Att. "**I**"), confirms Respondents' failure to preserve any issues for review or reconsideration by the successor Circuit Court or the Court of Appeals.

Specifically, in point No. "7" of Respondents' Motion to Alter/Amend,

Respondents' states:

> Defendants respectfully request clarification of that particular Finding of Fact [Appellant/Claimant's Motion for new trial or hearing is GRANTED as to all particulars set forth in his Motion and that my Order of July 30, 2014 be and hereby is VACATED] as we subsequently received correspondence from the Claimant asserting that this finding entitles the Claimant to the relief sought and not merely the new trial. Specifically, the Claimant asserts that all previous Decision and Orders, including but not limited to, the Settlement Agreement and Final Release dated January 5, 2006, the Order from Commissioner Susan Barden dated February 22, 2013, and the Decision and Order of the Appellate Panel dated July 17, 2013, are all set aside. Furthermore, he [Appellant] asserts that Judge Gibbons granted the relief he requested including "reinstate[ment of] Appellant's employment and release [of] the unlawfully withheld temporary total compensation payments, as well as 25% interest penalty assessed" (Motion to Alter/Amend, p. 2-3, Att. "**J**").

However, Appellant contends Respondents' aforementioned argument, and in fact, Respondents' entire Rule 59(e) application, failed to cite any authorities in support of their clarification request, or raise any issues to be preserved for review and/or reconsideration. Motion to Alter/Amend, Att. "**J**".

It is well settled that under the rules of issue preservation that short, conclusory arguments not supported by authority should be deemed abandoned and will not be addressed 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 a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); also see *Wilder Corp v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); see also *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (stating short,

conclusory arguments unsupported by authority are deemed abandoned); also see *Noisette v. Ismail*, where our Supreme Court held issues not raised to and ruled on by the trial judge were not preserved for review by an appellate court. Id. at 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). *Id.*

Finally, appellant contends pursuant to the Law of the Case Doctrine, wherein Respondents' Rule 59(e) Motion to Alter/Amend must be deemed abandoned due to Respondents' failure to cite any authority in support of their clarification request; the September 25, 2014 Circuit Court Order declining to rule on any issues or authorities raised and set forth in Respondents' Reply to Motion for New Trial; and wherein Respondents' have failed to preserve a single issue for review, this Court must affirm the September 25, 2014 Circuit Court Order as a matter of law. See *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010) ("An unappealed ruling is the law of the case and requires affirmance."); also see *Wilder Corp.*; see also *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (finding an unchallenged ruling, "right or wrong, [was] the law of th[e] case"). *Id.*

"The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (internal quotations marks omitted). The law of the case doctrine applies to issues explicitly decided and issues necessarily [implicitly] decided in the former case. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011). *Id.*

Here, Appellant has met the initial burden of demonstrating the absence of

a genuine issue of material fact with respect that Respondents' failed to preserve any issues for review or reconsideration by either the successor Circuit Court or this Court, as well as the fact that Respondents' Rule 59(e) Motion to Alter/Amend must be deemed abandoned, wherein the evidence submitted; proper application of law; and well settled authorities establishes that services of fact finder is not required. See *Regions Bank*; also see *Carolina Alliance for Fair Employment*; also see *Bankers Trust of South* Carolina. *Id.*

Further, there is no favorable light the Court can view Respondents' Rule 59(e) Motion to Alter/Amend wherein Respondents' would have the legal ability to resist summary judgment. See *First Sav. Bank v. McLean;* also see *Wilder Corp.;* see also *Glasscock, Inc.;* see also *Transp. Ins. Co. & Flagstar Corp.;* also see *Shirley's Iron Works, Inc. Id.*

As such, Appellant is entitled to summary judgment in this action, as a matter of law, to include this Court opining that Respondents' failed to preserve any issues for review or reconsideration in their Rule 59(e) Motion to Alter/Amend, and affirming the Circuit Court Order dated September 25, 2014 under the Law of Case Doctrine, to include ordering the immediate setting aside of the settlement agreement and release; setting aside of all subsequent Commission and Court Orders issued in this matter, and ordering Respondents' counsel to immediately release all unlawfully withheld TTD disability compensation payments, at the mutually agreed average weekly wage of $1,161.00, plus the twenty five percent interest penalty on the unlawfully withheld TTD disability payments per § 42-9-260(G), from December 04, 2005 to date,

and ordering the immediate reinstatement of Appellant's employment. *Id.* See *Transp. Ins. Co. & Flagstar Corp.;* also see *Wilson;* also see *Bruce. Id.*

5. All *sua sponte* Administrative Orders, to include the Circuit Court Order on appeal, issued by successor Circuit Judge William P. Keesley, must be deemed "null and void *ab initio*" and vacated by this Court.

Appellant contends summary judgment is proper in this matter on grounds that the Circuit Court Order on appeal, to include all seven (7) *sua sponte* Administrative Orders issued by the Circuit Court, and by way of successor Judge Keesley, were issued without subject matter jurisdiction and therefore must be deemed null and void *ab initio* based on axiomatic grounds.

H. All *sua sponte* Administrative Orders issued by the Circuit Court and by way of successor Judge Keesley were issued untimely and without jurisdiction.

A review of the record, and specifically, the seven *sua sponte* Administrative Orders issued by successor Judge Keesley subsequent the September 25, 2014 Circuit Court Order issued by Judge Gibbons, confirms that said *sua sponte* Administrative Orders were issued AFTER THE EXPIRATION OF TEN DAYS from the entry of the September 25, 2014 Circuit Court Order issued by Judge Gibbons and therefore said *sua sponte* orders issued without jurisdiction. All 7 *sua sponte* Administrative Orders issued by successor Judge Keesley dated 10/23/2014; 12/09/2014; and 03/03/2015, respectively, Att. "**J**".

Appellant contends it is 'axiomatic' that a circuit court judge lacks subject matter jurisdiction or authority to issue a *sua sponte* judgment altering or amending a previous judgment once the judgment is more than ten days old. See *Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001); also see

Citizens & S. Nat'l Bank of South Carolina v. Easton, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993) (holding "trial court was without authority to order a new trial beyond 10 days after entry of judgment, regardless of the pendency of the Rule 50(b) motion"); also see Rule 59(d), SCRCP. *Id.*

Appellant contends in issuing the untimely *sua sponte* administrative orders significantly altering and amending the September 25, 2014 Circuit Court Order of Judge Gibbons, the Circuit Court, by way of successor Judge Keesley, violated Appellant's constitutional due process rights. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn-Matthews*, 332 S.C. at 562, 505 S.E.2d at 603; see also *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); also see S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . ."). *Id.*

Because the *sua sponte* Administrative Orders were issued by successor Judge Keesley after the expiration of ten days after entry of judgment of the September 25, 2014 Circuit Court Order of former presiding Circuit Judge Gibbons while within the same circuit, this Court must deem all aforesaid untimely *sua sponte* administrative orders null and void *ab initio*, to include vacating all actions which derived from the erroneous *sua sponte* administrative orders, to include vacating the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on Appeal, as a matter of law. See *Turner v. Malone*, 24 S.C. 398, 401-02 (1885) ("[J]udicial proceedings are void, when the court, in

which they are taken, is acting without jurisdiction . . . . If the jurisdictional defect appears in the record itself . . . the judgment may be disregarded as a nullity whenever and wherever it is encountered, in any proceeding direct or collateral . . . ."). *Id.*

I. Successor Judge Keesley lacked subject matter jurisdiction when he granted a *de novo* hearing to reconsider Respondents' Motion to Dismiss based on grounds opined *sua sponte.*

A review of the record, and specifically, the March 03, 2015 *sua sponte* Administrative Order confirms that the Circuit Court, by way of successor Judge Keesley, granted a *de novo* hearing to reconsider Respondents' Motion to Dismiss based on grounds raised by successor Judge Keesley *sua sponte.*

Specifically, successor Judge Keesley opined,

> *If Judge Gibbons did not have the record from the Workers Compensation Commission before him at the time he heard the employer's/carrier's motion to dismiss, and if he only had one of the two files that have been generated in circuit court, he has dealt with any issue of not having necessary files by vacating his order dismissing the case...* March 03, 2015 *sua sponte* Administrative Order, Att. "**J**".

Further, a review of Respondents' Rule 59(e) Motion to Alter/Amend (Att. "**I**") confirms Respondents' failed to preserve any issues for review, including the particular issue that the clerk failed to obtain the transmittal of WCC Case File No. 0506205 from the Commission or that Judge Gibbons did not have said Commission file no. 0506205 before him at the time he issued the September 25, 2014 Circuit Court Order vacating his previous July 21, 2014 dismissal order. Motion to Alter/Amend, Att. "**I**".

Appellant contends successor Judge Keesley lacked jurisdiction to grant a *de novo* hearing to reconsider the respondents' motion to dismiss based on

grounds successor Judge Keesley raised *sua sponte*. Specifically, South Carolina jurisprudence indicates that a moving party must raise the objectionable issue at the appropriate time during trial; thus, unobjected to trial error cannot be advanced as grounds for a new trial. See *State v. Dicapua*, 383 S.C. 394, 398–99, 680 S.E.2d 292, 294 (2009) (finding a trial court cannot *sua sponte* grant a new trial on a ground not raised by a party and reversing the trial court's grant of a new trial based on the admission of an unobjected to videotape); also see *S. Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 216, 329 S.E.2d 736, 737–38 (1985) (finding party waived its right to claim an omitted jury charge was error by not objecting to its omission at the trial level and reversing the trial court's grant of a new trial on that ground); also see *Smith v. Phillips*, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (concluding that the court erred in *sua sponte* raising an issue concerning the propriety of a jury verdict in a nuisance claim finding liability but no damages). *Id.*

In granting an *de novo* hearing to reconsider Respondents' Motion to Dismiss on grounds raised and relied upon by successor Judge Keesley *sua sponte*, Appellant contends the Circuit Court, by way of successor Judge Keesley, violated Appellant's constitutional due process rights. See *Ogburn-Matthews*; see also *Mullane*; also see S.C. Const. art. I, § 22. *Id.*

Because successor Circuit Judge Keesley lacked jurisdiction at the time he granted a *de novo* hearing to reconsider the respondents' motion to dismiss on *sua sponte* grounds, to include the genuine material fact that on appeal, successor Judge Keesley granted dismissal for Respondents on unraised and

improper grounds, wherein the Circuit Court, via successor Judge Keesley, violated well settled law and violated Appellant's constitutional due process rights, this Court must VACATE the March 03, 2015 *sua sponte* Administrative Order granting of the same (See *State v. Dicapua*), to include vacating all actions which derived from the improper March 03, 2015 *sua sponte* administrative order, to include vacating the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on Appeal, *ab initio*, as a matter of law. See *Turner;* also see *Griffin v. Capital Cash*, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992) (citation omitted)("It is an error of law for a court to decide a case on a ground not before it.")); also see *Smith. Id.*

J. Successor Judge Keesley lacked subject matter jurisdiction at the time he convened the appellate hearing in this matter on March 27, 2015.

A review of the record, and specifically, the *sua sponte* Administrative Order dated March 03, 2015 confirms that the Circuit Court, by way of successor Judge Keesley, *sua-sponte*-set the appellate hearing in this matter for March 27, 2015, which was subsequently convened on March 27, 2015. *Sua Sponte* Administrative Order dated March 03, 2015, Att. "**J**". Transcript, Appellate Hearing convened on March 27, 2015, Att. "**K**".

Appellant contends the South Carolina Administrative Procedures Act ("APA"), as set forth in Title 1, Chapter 23 of the South Carolina Code of Laws, as annotated, establishes and governs the procedures and process regarding judicial review of decisions from the South Carolina Workers' Compensation Commission, and the Circuit Court was sitting in its appellate capacity with

respect to the instant appeal. See *Al-Shabbaz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) ("In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court."); also see *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013) ("The Administrative Procedures Act governs judicial review of decisions of the commission."); also see *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); also see *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002) (citing *Gibson v. Spartanburg Sch. Dist. No. 3*, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). *Id.*

Appellant contends pursuant to section 1-23-320(A)(Supp. 2008), of the APA, all parties in a contested case on appeal must be afforded an opportunity for hearing after notice of not less than thirty days. See § 1-23-320(A)(Supp. 2008)("In a contested case, all parties **must** be afforded an opportunity for hearing after notice of not less than thirty days..." (Emphasis added)). *Id.* "Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See *South Carolina Police Officers Retirement Sys. Id.*

In the instant appeal, a review of the record indicates that on March 03, 2015 the Circuit Court *sua-sponte-set* the appellate hearing in this matter on March 27, 2015 and proceeded to convene aforesaid appellate hearing in this matter, with Appellant not present due to *inter alia* financial circumstances, on March 27, 2015 which afforded the parties approximately twenty-four (24) days prior notice, which was less than the mandatory 30 days' prior notice, in clear violation of section 1-23-320 of the APA. *Id.* See Att. "**J**" & "**K**".

Appellant contends in failing to afford the parties the mandatory 30 days prior notice before the convening the March 27, 2015 appellate hearing pursuant to section 1-23-320 of the APA, that the Circuit Court, by way of successor Judge Keesley, violated both parties' constitutional due process rights. See *Ogburn-Matthews*; see also *Mullane*; also see S.C. Const. art. I, § 22. *Id.*

Because the Circuit Court, by way of successor Judge Keesley, failed to afford the parties the required 30 days' prior notice before convening the aforementioned March 27, 2015 appellate hearing, Judge Keesley lacked jurisdiction at the time the March 27, 2015 appeal hearing was convened, and this Court must vacate the March 03, 2015 *sua sponte* Administrative Order, to include vacating all actions which derived from the erroneous administrative order, to include vacating the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on appeal, *ab initio*, as a matter of law. See *Turner. Id.*

K. Successor Judge Keesley lacked subject matter jurisdiction when he made *sua sponte* impermissible findings of facts exclusively reserved to the Appellate Panel of the Commission.

Appellant contends the Circuit Court, by way of successor Judge Keesley, erred and lacked jurisdiction when it made impermissible findings of facts exclusively reserved for the Appellate Panel of the Commission based on axiomatic grounds.

Specifically, a review of page "2" of the Circuit Court Order on appeal finds,

> "*Appellant signed this settlement, which was approved by the Commission pursuant to S.C. Code Ann. §42-9-390, and the Commission's order was filed on January 5, 2006...The Commission's approval of the settlement was not timely appealed.*" July 17, 2015 Circuit Court Order on Appeal,

previously submitted, Att. "**L**".

However, Appellant contends the Final Order issued by the Appellate Panel did not make findings that the Settlement Agreement and Release was an Order; that the Settlement Agreement and Release was confirmed pursuant to S.C. Code Ann. §42-9-390; or that Appellant failed to timely appeal the Settlement Agreement and Release. Specifically, the July 17, 2013 Appellate Panel Final Order finds,

> *Pursuant to S.C. Reg. 67-801, Claimant settled his claim (WCC No. 0506205) through a Full and Final Settlement Agreement which was approved by the South Carolina Workers Compensation Commission on January 5, 2006...Pursuant to S.C. Code Reg. 67-801(E), the Employer and the Insurance Carrier are relieved from any further responsibility for payment of compensation or medical expenses...*" July 17, 2013 Final Order of Appellate Panel, Att. "**M**".

Furthermore, Appellant contends a review of the settlement agreement and release makes no reference to §42-9-390. Settlement Agreement and Release, Att. "**D**".

Still further, Appellant contends the aforementioned impermissible findings as contained within the Circuit Court Order on appeal were not preserved for review or reconsideration either by the successor Circuit Court or by the Court of Appeals, based on the fact Respondents' failed to raise and preserve aforesaid impermissible findings as issues in their Rule 59(e) Motion to Alter/Amend. Motion to Alter/Amend, Att. "**I**".

South Carolina jurisprudence indicates that neither the circuit court, sitting in its appellate capacity, nor the Court of Appeals, may engage in fact finding in Workers' Compensation Commission cases. See *Sigmon v. Dayco Corp.*, 316

S.C. 260, 262-63, 449 S.E.2d 497, 498-99 (Ct. App. 1994) (vacating circuit court's order and remanding to Full Commission where Full Commission did not make findings of fact and circuit court improperly made its own findings of fact with regard to claimant's injury); also see *Baldwin v. James River Corp.*, 304 S.C. at 487, 405 S.E.2d at 423 (Ct. App. 1991) (vacating circuit court's order and remanding case to Full Commission to make definite and detailed findings of fact on present record where Full Commission's findings of fact were conclusory as to claimant's award); also see *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)("[T]he circuit court, sitting in its appellate capacity, may not engage in fact finding."); also see *City of Greer v. Humble*, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013); see also *Rogers v. State*, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004). *Id.*

"In workers' compensation cases, this [c]ourt, as well as the circuit court, serves only to review the factual findings of the Appellate Panel and to determine whether the substantial evidence of record supports those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.,* 383 S.C. 270, 285, 678 S.E.2d 825, 833 (Ct. App. 2009); also see S.C. Code Ann. § 1-23-380(5) (Supp. 2013) ("The court may not substitute its judgment for the judgment of the [Panel] as to the weight of the evidence on questions of fact."). *Id.*

Appellant contends that in making the aforementioned impermissible Findings of Facts, and specifically, Finding that Appellant failed to timely appeal the Commission's "Order", wherein said impermissible Findings served to deprive Appellant of a substantial appellate right, the Circuit Court, by way of successor

Judge Keesley, violated Appellant's constitutional due process rights. See *Ogburn-Matthews*; see also *Mullane*; also see S.C. Const. art. I, § 22. *Id.*

Because the Circuit Court, by way of successor Judge Keesley, lacked jurisdiction when it made impermissible findings of facts that (1) the settlement agreement and release was approved by the Commission pursuant to S.C. Code Ann. §42-9-390; (2) the settlement agreement and release was on order by the Commission; and (3) Appellant failed to timely appeal the settlement agreement and release, this Court must vacate the July 17, 2015 Circuit Court Order on appeal, *ab initio*, as a matter of law. See *Turner;* also see *Sigmon*; see also *Baldwin*; also see *Rogers*; see also *Mullane*. *Id.*

L. Successor Judge Keesley lacked subject matter jurisdiction when he *sua sponte* vacated the September 25, 2014 Circuit Court Order issued by former presiding Circuit Judge Gibbons within the same Circuit.

Appellant contends the Circuit Court, by way of successor Judge Keesley, erred and lacked jurisdiction when he *sua-sponte-vacated* the September 25, 2014 Circuit Court Order issued by former presiding Circuit Judge Gibbons while within the same Circuit, based on axiomatic grounds.

A review of the record indicates that former presiding Circuit Judge Gibbons issued an Order in this matter on September 25, 2014 wherein the Circuit Court vacated its previous July 21, 2014 Order dismissing Appellate Case No. 2014-CP-32-00399 and "granted all particulars" set forth in Appellant's Motion for New Trial. Sept. 25, 2014 Circuit Court Order, Att. "**F**".

Subsequent the September 25, 2014 Circuit Court Order, neither party filed a Rule 60, SCRCP, application seeking to set aside or vacate the Sept. 25

Order. On July 17, 2015 the Circuit Court, via successor Judge Keesley, issued an Order wherein it opined, "*Judge Gibbons' order was vacated at the Appellant's request. The Respondents agree that any motion concerning Judge Gibbons' order is moot as that order was subsequently vacated*". (Emphasis added). Circuit Court Order dated July 17, 2015, Att. "**L**".

Further, at the March 27, 2015 appellate hearing, successor Judge Keesley opines,

> "*There is one phrase in the* [September 25, 2014] *order that is very broad, but Judge Gibbons' order has now been vacated....There is no basis for a determination that what Judge Gibbons did was what Mr. Guice interpreted in that regard...The order has been vacated now...*" (Emphasis added). Transcript from March 27, 2015 appellate hearing, p. 20-21 Att. "**K**".

Appellant contends South Carolina jurisprudence indicates it is well settled that one judge may not overrule another judge within the same court or circuit. *Charleston County Dep't of Social Services v. Father, Stepmother, and Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995); see also *Tisdale v. American Life Ins. Co.*, 216 S.C. 10, 13, 56 S.E.2d 580, 581 (1949) (holding that it is "axiomatic" that a Circuit Judge does not have the power to reverse the ruling of another Circuit Judge); also see *Dinkins v. Robbins*, 203 S.C. 199, 202, 26 S.E.2d 689, 690 (1943) ("The rule is well settled that the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge"); see also *Dinkins*, 203 S.C. at 203, 26 S.E.2d at 690 (reversing order of Circuit Judge because it substantially altered a previous order of another Circuit Judge despite finding that the order would have otherwise been "fully warranted"); see also *Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 487, 334 S.E.2d 528, 529 (Ct.

App. 1985) (holding that one circuit judge does not have the power to review, modify, affirm, or reverse findings of another circuit court judge). *Id.*

Appellant contends that in *sua-sponte-vacating* the September 25, 2014 Circuit Court Order issued by former presiding Judge Gibbons, wherein Appellant prevailed in the instant appeal wherein the Circuit Court, by way of Judge Gibbons, GRANTED "all particulars" set forth in Appellant's Motion for New Trial, the Circuit Court, by way of successor Judge Keesley, violated Appellant's constitutional due process rights in terms of Appellant's right to Equal Protection of Law. See *Ogburn-Matthews*; see also *Mullane*; also see S.C. Const. art. I, § 22. *Id.*

Because successor Circuit Judge Keesley lacked jurisdiction to review, modify or vacate the September 25, 2014 Order issued by former presiding Circuit Judge Gibbons within the same circuit, Appellant contends the Court must deem the July 17, 2015 Circuit Court Order on appeal null and void *ab initio*. See *Turner*; also see *Charleston County Dep't of Social Services*; also see *Tisdale*; also see *Dinkins*; see also *Medlock*. *Id.*

M. Successor Judge Keesley lacked subject matter jurisdiction when he *sua-sponte* denied Appellant's unopposed Motion for Sanctions.

Appellant contends the Circuit Court, by way of successor Judge Keesley, erred and lacked jurisdiction when he *sua-sponte*-denied Appellant's un-opposed Motion for Sanctions, based on axiomatic grounds.

A review of the record indicates that subsequent the entry of judgment of the September 25, 2014 Circuit Court Order, Appellant served Respondents', through counsel, with a Notice of Demand seeking that Respondents'

immediately comply with the aforesaid Sept. 25, 2014 Order in terms immediately releasing all unlawfully withheld TTD Benefit payments, from December 04, 2005 to date, at the average weekly wage of $1,161.00, plus the 25 percent interest penalty assessed on the unlawfully withheld TTD Benefit payments, and immediately reinstate Appellant's employment. Notice of Demand dated October 08, 2015, Att. "**N**".

After Respondents' failed to respond to the aforementioned Notice of Demand or comply with the Sept. 25, 2014 Court Order, on October 20, 2014 Appellant duly filed and served a 'Motion for Sanctions' with the Circuit Court. Motion for Sanctions, exhibits excluded, Att. "**O**". Respondents' declined to file a responsive pleading to oppose the Motion for Sanctions. In the July 17, 2015 Circuit Court Order on appeal, successor Judge Keesley *sua-sponte* denied Appellant's Motion for Sanctions. Circuit Order on Appeal, Att. "**L**".

With respect to Respondents' failure to file a responsive pleading opposing Appellant's Motion for Sanctions, Appellant contends when a presumption shifts the burden of production to the opposing party, that party must present substantial evidence in order to rebut the presumption. See 100A *C.J.S. Workers' Compensation* § 1029 (2013) ("Because a fact must be proved with substantial evidence in a workers' compensation proceeding, a rebuttable presumption **must** be met with substantial evidence."). (Emphasis added). *Id.*

Furthermore, South Carolina jurisprudence indicates that it is axiomatic that a party may not receive relief not contemplated in his or her pleadings, and the failure to plead an affirmative defense is deemed a waiver of the right to

assert it. See *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001) ("It is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings."); also see *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) ("[T]he failure to plead an affirmative defense is deemed a waiver of the right to assert it."). *Id.*

Finally, based on the jurisdictional error(s) of law by successor Judge Keesley, as outlined in Point(s) "5 H-L" above, in vacating the July 17, 2015 Circuit Court Order on appeal *ab initio,* successor Judge Keesley's erroneous *sua sponte* denial of Appellant's unopposed Motion for Sanctions must be vacated as well. See *Heins*; also see *Collins Entertainment, Inc.*; also see *Turner*. *Id.*

Here, Appellant has met the initial burden of demonstrating the absence of a genuine issue of material fact with respect to the undisputed six (6) jurisdictional errors of law by the Circuit Court, and by way of successor Circuit Judge Keesley, wherein the evidence submitted, proper application of law and well settled authorities establishes that all *sua sponte* Administrative Orders and the Circuit Court Order on appeal must be vacated, and there is no requirement for the services of a fact finder. See *Regions Bank*; also see *Carolina Alliance for Fair Employment*; also see *Bankers Trust of South* Carolina. *Id.*

In fact, in considering the actions and conduct of successor Judge Keesley in the instant appeal, from a constitutionality perspective, wherein successor Judge Keesley's out-of-jurisdiction *sua sponte* administrative orders, the convening of the March 27, 2015 appellate hearing out of jurisdiction, and the

clearly erroneous Circuit Court Order on appeal wherein *inter alia* successor Judge Keesley *sua sponte* vacated Judge Gibbons Sept. 25, 2014 Order while within the same circuit, Appellant contends it would appear that successor Judge Keesley has clearly and repeatedly departed from well settled authorities, the rule of law, and in fact, has legislated from bench in the instant appeal, in clear violation of the separation of powers between the judicial and legislative branches, as set forth in both the U.S. and South Carolina Constitutions, respectively.

Specifically, The South Carolina Constitution vests the legislative power of the State within the General Assembly and the judicial power within the courts. S.C. Const. arts. III, § 1; V, § 1. Thus, our constitutional construct directs that judges must "refrain from scaling the walls that separate law making from judging, for '[w]ere the power of judging joined with the legislative . . . *the judge* would then be *the legislator.*'" *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (alteration and omission in original) (quoting *The Federalist No. 47*, at 303 (James Madison) (Clinton Rossiter ed. 1961)). *Id.*

"Notwithstanding our personal dedication to education and our appreciation of its significance in the lives of people of all ages, it is clearly our duty to determine the law, not to make the law." *Id.* at 57 (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)); also see *Abbeville County,* 335 S.C. 69, 515 S.E.2d 541 ("We do not intend by this opinion to suggest to any party that we will usurp the authority of that [Legislative] branch to determine the way in which educational opportunities are delivered to the children of our State. We do not

intend the Courts of this State to become super-legislatures or super school boards."); also see *The Federalist, No. 78*, at 579 (Alexander Hamilton) (John Hamilton ed., 1866)("[i]t can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."). *Id.*

Further, there is no favorable light the Court can view the *sua sponte* administrative orders or the circuit court order on appeal wherein Respondents' would have the legal ability to resist summary judgment. See *Heins;* also see *Transp. Ins. Co. & Flagstar Corp.;* also see *Citizens & S. Nat'l Bank of South Carolina;* also see *S. Railway Co.*; § 1-23-320(A)(Supp. 2008); also see *City of Greer*; also see *Dinkins*; see also *Collins Entertainment, Inc. Id.*

As such, Appellant is entitled to summary judgment in this action, as a matter of law, to include this Court deeming all *sua sponte* administrative orders, the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on appeal null and void *ab initio*, to include ordering the immediate setting aside of the settlement agreement and release; setting aside of all subsequent Commission and Court Orders issued in this matter, ordering Respondents' counsel to immediately release all unlawfully withheld TTD disability compensation payments, at the mutually agreed average weekly wage of $1,161.00, plus the twenty five percent interest penalty on the unlawfully withheld TTD disability payments per S.C. Code Ann. § 42-9-260(G), from December 04, 2005 to date, ordering the immediate reinstatement of Appellant's employment and REMANDING the Motion for Sanctions to the Circuit Court with the directive

to impose reasonable sanctions upon Respondents. See *Transp. Ins. Co. & Flagstar Corp.;* also see *Wilson*; also see *Turner. Id.*

6. Staying the processing and administration of the instant appeal pending the adjudication of this summary judgment application is reasonable and appropriate.

Appellant contends granting a stay in the instant appeal until such time as the Court has adjudicated Appellant's summary judgment application is both just and reasonable. Appellant moves the Court to stay this action pending adjudication of the summary judgment application pursuant to Rule 240, SCACR, and/or other applicable laws. Rule 240, SCACR.

Further, Appellant contends it would be proper to stay the proceedings before the Court pending adjudication of this summary judgment application because if Appellant prevails, the requirement of Respondents to file and serve an Initial Brief and Designation, as well as the requirement for the parties to proceed any further in the instant appeal, shall become a moot point. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy." See *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). *Id.* As such, Appellant moves the Court to stay the pendency of this action until such time as the Court has adjudicated this summary judgment application.

CONCLUSION

Accordingly, based on the foregoing, Appellant moves the Court, by way of summary judgment, for the issuance of an appropriate OPINION; 1) that the Circuit Court Order on appeal be VACATED; 2) that all *sua sponte* Administrative

Orders issued by the successor Circuit Judge be VACATED; 3) that the September 25, 2014 Circuit Court Order be reinstated with its full weighted force and effect; 4) that Appellant's unopposed and previously *sua sponte* denied Motion for Sanctions be REVERSED and REMANDED to the Circuit Court with the directive that the Circuit Court impose reasonable sanctions upon Respondents or Respondents' Counsel; 5) that Respondents' un-adjudicated Motion to Alter/Amend be REMANDED to the Circuit Court, with the directive to deem the motion ABANDONED; and 6) that this Court provide explicit language compelling Respondents to comply with the September 25, 2014 Circuit Court Order in terms of the immediate release of unlawfully withheld TTD benefits, to include the 25% interest penalty on the unlawfully withheld TTD benefits, and immediate reinstatement of Appellant's employment.

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: _____

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Appellant, Pro Se

January 3, 2016

Sworn to before me this
3rd day of January, 2016

Notary Public of Florida
My commission expires 10/14/16

AYOCAH GRANT
NOTARY PUBLIC
STATE OF FLORIDA
Comm# EE843251
Expires 10/14/2016