

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-3665

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SC Court of Appeals

William. F. Tomz and Francis W. Tomz, Individually and as Class Representatives,
..... Respondents,

v.

Capital Investment Funding, LLC, and Arthur M. Field, Defendants,
Of Whom Arthur M. Field is the Appellant,
And Capital Investment Funding, LLC is a Respondent.

APPELLANT'S FINAL BRIEF

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February 2, 2016

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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court abuse its discretion in finding Dr. Field to be in contempt because there was no clear and convincing evidence of willful failure to comply with any court order and the lower court ruling is without evidentiary support?
- II. Did the lower court abuse its discretion in ruling Dr. Field in contempt when there was no clear and convincing evidence demonstrating there were relevant documents Dr. Field had failed to produce?
- III. Did the lower court abuse its discretion in finding Dr. Field in contempt when there was no clear and convincing evidence Dr. Field had documents in his possession that he willfully had not produced?
- IV. The lower court abused its discretion in finding Dr. Field in contempt for failing to produce original documents to the Receiver when the MGSA Order did not require production of original documents?
- V. Did the lower court abuse its discretion in finding Dr. Field in contempt for failing to produce documents when the evidence established that the Receiver actually had the documents in his possession?
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- VII. Did the lower court abuse its discretion in finding Dr. Field in contempt of the Production Order and the Privilege Order when this finding is without evidentiary support?
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- IX. Did the lower court abuse its discretion when the Order dated October 10, 2011 (Privilege Order) required no compliance obligation from Dr. Field?
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- XI. Did the lower court abuse its discretion in finding Dr. Field had made "misrepresentations" to the New Jersey trial court?

- XII. Did the lower court have jurisdiction to make findings related to proceedings in the New Jersey litigation?
- XIII. Did the lower court abuse its discretion in finding Dr. Field “misrepresented” the terms of the MGSA Order to the New Jersey court when the record demonstrates the New Jersey court relied on its own interpretation of the MGSA?
- XIV. Did the lower court abuse its discretion in finding that Dr. Field asserted authority over and attempted to make decisions for CIF that constituted contempt?
- XV. Did the lower court err in finding it had jurisdiction to hear the Rule to Show Cause?
- XVI. Did the lower court lack jurisdiction where Dr. Field was not a party to the underlying action?
- XVII. Did the lower court lack jurisdiction because the MGSA Order left open only the issue of protecting Dr. Field from having documents released without protecting Dr. Field’s constitutional rights?
- XVIII. Did the lower court lack personal jurisdiction over Dr. Field because the Rule to Show Cause was not validly served on Dr. Field?
- XIX. Did the lower court judge abuse his discretion in not recusing himself from ruling on the Rule to Show Cause, where impermissible bias was shown?
- XX. Did the lower court judge abuse his discretion by not including Appellant’s proffered affidavits in the Record?

STATEMENT OF THE CASE

Appellant, Dr. Arthur M. Field, was the founder and Manager of Capital Investment Funding, LLC (“CIF”) which was in the business of selling promissory notes and using the proceeds to make customer loans secured by real estate. Dr. Field publicly announced the winding down of CIF and several investors (“Note Holders”) filed legal actions¹ in 2008 against CIF, Dr. Field, and others for alleged securities law violations.

An extended mediation of the four lawsuits was conducted by H. Samuel Stilwell, retired judge of the South Carolina Court of Appeals, resulting in a Mediated Global Settlement Agreement and Order Approving Settlement (“MGSA Order”), signed by the lower court on August 24, 2009. The MGSA Order appointed a Receiver and required Dr. Field to produce copies of documents that supported the Receiver’s right to collect CIF’s customer loans.² It also required him to offer truthful testimony and cooperate in any proceeding to include depositions.³ The MGSA Order dismissed Dr. Field from the four cases, two without prejudice.⁴ The MGSA Order allowed Respondents to reinstate the cases within the time limit imposed by law or court rule.⁵

The Receiver filed a Status Report filed November 12, 2009, which stated that Dr. Field met several times with him and delivered certain records, including the customer loan files.⁶ This Status Report stated that the Receiver reviewed the files for general content and organized,

¹ The instant case is *Tomz v. Capital Investment Funding, LLC*, 2008-CP-23-3665. Three similar lawsuits were filed: *Roberts v. Capital Investment Funding, LLC*, 2008-CP-23-5514; *Bridges v. Capital Investment Funding, LLC*, 2008-CP-23-7457; and *Lee v. Bradford Financial Group, LLC*, 2008-CP-39-1184.

² MGSA Order, R. p. 1.

³ R. p. 4.

⁴ MGSA Order, R. p. 3, 8, 11, 13.

⁵ *Id.*

⁶ Receiver Status Report, filed November 12, 2009, R. p. 85.

labeled, and inventoried the files.⁷ The Receiver also reported meeting with the Manager of Cosimo, LLC, a wholly owned CIF subsidiary, and that Dr. Field provided the Cosimo loan files received from its Manager, and that the Receiver reviewed, organized, labeled and inventoried the Cosimo files.⁸ The Receiver also reported that Dr. Field traveled with the Receiver in upstate South Carolina and to Newark, New Jersey, where they inspected the 10 most significant real properties and Dr. Field introduced the Receiver to various persons connected with the properties.⁹

On June 29, 2010, the Receiver sought and obtained a court order compelling production against some of the original defendants who had not complied with the MGSA Order. (June 29, 2010 Order, hereafter the “Production Order.”) The Production Order specifically listed the “Individuals” being compelled and Dr. Field was not named.¹⁰ The Production Order also required specified entities, collectively referred to as “Business Associates,” to produce certain documents, once they were served with a proper request to produce.¹¹ A Request to Produce was never served on Dr. Field as an alleged “Business Associate.”¹²

More than a year later, an Order dated October 10, 2011 was entered that explicitly preserved privileges held by Dr. Field (October 10, 2011 Order, hereafter the “Privilege Order”). The Privilege Order contained no finding that Dr. Field’s production under the MGSA Order was in any way incomplete, and it did not require any additional documents from Appellant.

⁷ R. p. 85.

⁸ R. p. 86.

⁹ R. p. 87.

¹⁰ Order dated June 29, 2010, R. p. 26.

¹¹ R. p. 25.

¹² Testimony of Saad, R. p. 559, ll. 2-14.

On November 28, 2011, a “Request for Production of Records” was hand delivered to Dr. Field by the Receiver’s counsel.¹³ No subpoena *duces tecum* was served on Appellant.¹⁴ Dr. Field was never made the subject of a Motion to Compel. Six months later, a Rule to Show Cause was signed by the lower court on June 5, 2012, ordering Dr. Field to show cause why he had not performed “pursuant to Rule 34 of the South Carolina Rules of Civil Procedure.” On June 13, 2012, Dr. Field filed (*pro se*) a Motion to Recuse the lower court judge.¹⁵ No hearing was ever held on the Rule or the Motion to Recuse. The Receiver did not reinstate any of the dismissed South Carolina cases. On behalf of CIF, the Receiver brought suit against Dr. Field in the Superior Court of New Jersey.¹⁶

On April 8 and 9, 2013 Appellant filed with the lower court a copy of two letters (hereafter the “April 2013 Production Summaries”) he had delivered to attorney Stan Case, legal counsel to the Class of Note Holders (hereafter “Class Counsel”), setting forth a summary of Appellant’s previously made production of documents and examples of his cooperation. On February 15, 2013, the Superior Court of New Jersey dismissed Dr. Field, with prejudice, from the New Jersey litigation. The New Jersey trial court subsequently denied CIF’s Motion for Reconsideration and second Motion for Reconsideration.

More than four years after the MGSA Order, the lower court signed a Rule to Show Cause on August 19, 2013. On September 12, 2013, Dr. Field filed a Motion for Continuance

¹³ Request for Production of Records dated November 28, 2011, R. p. 40; Saad testimony, R. p. 560, ll. 22 –p. 561, l. 5.

¹⁴ The Receiver could have issued a Subpoena, having been given subpoena power under the Court’s August 24, 2009 Order. Neither did Receiver’s counsel issue a Subpoena, nor request the lower court to issue a Subpoena. Appellant was concerned about preserving his rights against self-incrimination and repeatedly advised the Receiver he needed a Subpoena in order to preserve these rights. R. p. 670, ll. 17-23.

¹⁵ Motion to Recuse dated June 13, 2012, R. pp. 96-114.

¹⁶ See R. pp. 470-488, Order of Dismissal and Rider to Order, dated February 15, 2013 from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. BER-L 3790-2, dismissing that lawsuit.

and a Motion to Quash. On September 19, 2013, Appellant filed a Return to the Rule to Show Cause. Both motions were denied at the hearing on September 17, 2013.

At the conclusion of the hearing, the lower court ruled that Appellant was in contempt of prior orders and commanded Appellant to turn over “everything” (the “Oral Order”) R. p. 710, ll. 14-17. Appellant filed a Response to the Oral Order (“Response”) on September 20, 2013, identifying records that had been delivered in compliance with the Oral Order. The Response stated that **all items being produced had already been produced previously, and stated that Appellant’s personal computer was in his attorney’s custody and available for inspection once an appropriate protective order and computer forensic protocol was in place.**¹⁷ An Order dated October 1, 2013 denied Appellant’s Motions for Continuance and to Quash, and found Appellant in contempt. (R. pp. 66-76).

Dr. Field filed a Motion for Reconsideration on October 14, 2013, which was denied by Order dated November 7, 2013 (received on November 12, 2013). Appellant filed a Notice of Intent to Appeal on December 11, 2013. The Court of Appeals issued an Order filed July 18, 2014 remanding this case to the lower court to hold a hearing to settle the record on appeal. At that hearing Appellant sought to have the Record on Appeal include the affidavits in support of the Motion to recuse. Appellant also offered evidence of errors in the transcript. The lower court denied the Motion to add the affidavits, but granted the request that the errors be corrected. The Corrected Transcript of Record was received on May 5, 2015.

¹⁷ Response to Oral Order, R. pp. 489-496.

STATEMENT OF THE FACTS

What was Dr. Field required to do?

The MGSA Order required Dr. Field to provide “copies of all records, emails, reports, letters, documents, mortgages, notes and any other materials which shall support the receiver’s right to collect from any individual or corporation which has been loaned any monies by Capital Investment Funding, LLC or its related companies.” (MGSA Order, R. pp. 4-5) (emphasis added). The MGSA Order also required Dr. Field to “also offer **truthful** testimony, [and] shall agree to cooperate in any proceeding in state or federal court... and such cooperation shall include testimony and/or depositions....” MGSA Order R. p. 4 (emphasis added).

Did Dr. Field Comply?

Appellant’s counsel renewed the previously filed Motion to Recuse during the hearing, which was denied.¹⁸ Testimony was taken at the hearing, but Appellant’s counsel was not permitted to cross-examine the Plaintiff’s witnesses on all issues relevant in a contempt hearing, nor complete his examination of Appellant.¹⁹ The lower court ruled from the bench that Appellant was in contempt for violating the MGSA Order, the Production Order, Privilege Order, and for other conduct, including Dr. Field’s actions while defending himself *pro se* in the New Jersey litigation, in which the New Jersey trial court had found in favor of Dr. Field based on New Jersey’s “first filed” doctrine, which the New Jersey court had raised *sua sponte*. A review of the New Jersey hearing order makes clear the trial judge reviewed the MGSA Order and did not rely on Dr. Field’s opinion of its interpretation.²⁰

¹⁸ R. p. 553 ll. 3-6.

¹⁹ R. p. 638, ll. 4-15; p. 641, ll. 23-23, p. 643, ll. 3-4

²⁰ R. p. 473-484.

Dr. Field complied with the MGSA Order. He provided the Receiver with copies of all the loan files he had,²¹ flash drives prepared by a commercial copy service containing CIF's Quick Book records (R. p. 674, l. 20-23), and copies of all the loan files he possessed or had control over. (R. p. 665, l. 24-p. 666, l. 2). The flash drives held the contents of ninety-six (96) boxes of Note Holder files. Appellant also provided electronic copies to the Receiver. (R. p. 595, ll. 19-23). The document production and cooperation by Appellant is documented in two letters²² sent to class counsel by Appellant and filed with the lower court. These letters contain the proof of Dr. Field's voluminously documented compliance. (R. p. 668, l.6 – p. 672, l.6).

Thus, the record in this case is well-documented that Dr. Field has complied with his MGSA Order obligations.²³ In fact, the level of cooperation and proactive assistance he gave the Receiver went beyond what the MGSA Order required. By any objective examination of the documentary evidence, voluminous relevant documents required by the MGSA Order were timely produced by Dr. Field. Requests arose later when the Receiver could not locate certain records, and Dr. Field produced copies of these documents **again**, providing some documents multiple times, and without complaint. (R. p.670, ll. 22-25).

The only "cooperation" obligation specified in the MGSA Order was to provide any requested testimony.²⁴ Appellant was never requested to provide testimony. The New Jersey attorney working on the Receiver's behalf testified in cross examination:

²¹R. p. 665 l. 24 – p. 666 l. 3. See also MGSA Order:

"Prior to, and outside of the mediation, [CIF] made certain financial records available to the Class Plaintiff's expert accountant for review.... [CIF] also made the Independent Fraud Examiner's Report available to Class Counsel, in addition to the documents previously provided... R. p. 3.

²² Defendant Exhibits 6 and 7, Contempt Hearing, September 17, 2013, R. pp. 755-821; pp. 822-878.

²³ See Status Report of the Receiver dated November 12, 2009, where the Receiver himself reported Dr. Field's cooperation and production. R. pp. 85, 86, 87, 88 and 89.

²⁴ MGSA Order, R. p. 4.

Q. “Isn’t it true you’ve never called him as a witness, you’ve never subpoenaed him, you’ve never asked him to take a deposition...”

A. “No, I did not call him as a witness because I have not had the opportunity yet.”

(R. p. 562, ll. 11-17.)

Dr. Field spent many hours with the Receiver reviewing documents and even traveled out of state to assist the Receiver’s work²⁵ by inspecting properties and introducing him to persons who had knowledge of the properties. Dr. Field obtained documents from third parties for the Receiver.²⁶ He estimates he provided in excess of 115,000 documents to the Receiver,²⁷ and by any fair and impartial review has actually exceeded his legally mandated obligation.

The Request to Produce

In November 2011, Dr. Field was handed a “Request to Produce”²⁸ by counsel for the Receiver. The Request did not contend that Appellant was a “Business Associate” as defined in the Production Order. The Request was not for records to “enable collection of loan payments” owed to CIF, which were the only records Appellant was required by the MGSA Order to provide.²⁹ No subpoena was issued with or subsequent to the Request to Produce, and no Motion to Compel was ever filed. Appellant was not a party and a Rule 34 Request to Produce had no authority to command any action by a non-party. The Receiver or Class Counsel could have

²⁵ See Status Report of the Receiver dated November 12, 2009, R. pp. 85 and 87.

²⁶ R. p. 668, ll. 8-10.

²⁷ R. p. 703, ll. 2-9.

²⁸ The Request sought documents related to the “organization of CIF,” “sale of CIF securities,” “the use of proceeds of such sales,” “correspondence between CIF and legal counsel related to CIF loans,” and “related to the direct or indirect transfer of any property of CIF . . . to any . . . Entities or individuals including Field or any person related to Field.” R. pp. 41-42.

²⁹ Rather these were the types of documents one would use to gather information regarding new lawsuits that had been filed against Dr. Field. See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922) (finding the orders requiring the unincorporated labor unions and their officers to produce their books and documents, for the purpose of proving the officers and members of these unions guilty of the alleged criminal conspiracy, were a violation of their rights under the Fourth and Fifth Amendments). *American Banana Co. v. United Fruit Co.*, 153 F. 943 (S.D.N.Y. 1907).

made Dr. Field a party by reinstating the dismissed the South Carolina lawsuits within the applicable statutes of limitation as the MGSA Order permitted, but the cases were never reinstated.

The New Jersey Action

The Receiver did decide to sue Dr. Field in New Jersey. In 2006, Dr. Field was sole member and manager of a South Carolina limited liability company, Trazom, LLC. CIF had loaned money to Trazom in 2006 to enable Trazom to purchase the chose in action on a promissory note secured by real property in Wyckoff, New Jersey. Trazom assigned that asset to CIF in 2007 in full satisfaction of the loan obligation. In May 2008, Dr. Field retained New Jersey attorney Christopher Westrick to obtain title to the real property for CIF. In the course of that representation, Dr. Field disclosed confidential information to Westrick. The Receiver later hired Westrick to sue Dr. Field and other defendants in New Jersey. Dr. Field sought Westrick's removal on the grounds that Westrick would be called as a witness and he had a confidential relationship with Dr. Field arising out of Westrick's representation in the earlier matter. Dr. Field represented himself *pro se* in the New Jersey matter. Judge Friscia found that under New Jersey's first-filed doctrine, the claims against Dr. Field should be dismissed because they involved many of the same parties and the same alleged conduct which was (or could have been) addressed in the South Carolina litigation that was dismissed by the MGSA Order.³⁰

Rule to Show Cause

The lower court signed a Rule to Show Cause dated on August 19, 2013, directing Dr. Field to appear for a hearing on the Receiver's assertions that Dr. Field had not produced all documents. On August 22, 2013, a process server went to Dr. Field's house to serve him with

³⁰ Order of New Jersey hearing, R. pp. 476-484.

the Rule to Show Cause. (Aff. of Carl Stanley, ¶ 4 R. p. 176). The process server spoke with Carl Stanley, a family friend, who answered the door and informed the process server that he (Stanley) did not reside there. (Aff. of Carl Stanley, ¶¶ 3-5 R. p. 176). Instead of asking if any resident of the house was home, the process server threw the papers in the garage and a portion of the document was later found on the lawn of the residence. (Aff. of Carl Stanley, ¶¶ 6-7 R. p. 176; Aff. of Arthur Field, ¶ 5 R. p. 177).

During the four-year period that the Receiver had been filing reports with the Note Holders and the Court, he did not assert that he was unable to perform his duties because the document production by Appellant was not adequate.³¹ The Receiver had been in charge of marshalling CIF's assets for four years without prosecuting an action claiming he lacked relevant documents or cooperation from Dr. Field.

The Receiver's hearing testimony focused on three categories: (1) vague documents he believed must exist that he did not believe he possessed; 2) documents related to: Trazom, Lancaster and other delinquent loans, a videotape, uncashed check; and 3) Appellant's alleged improper acts while defending himself in the New Jersey lawsuit filed by the Receiver.

ARGUMENTS

I. THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DR. FIELD TO BE IN CONTEMPT BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE OF WILLFUL FAILURE TO COMPLY WITH ANY COURT ORDER AND THE LOWER COURT RULING IS WITHOUT EVIDENTIARY SUPPORT. [I]

Standard of Review for Contempt

Civil contempt must be proven by clear and convincing evidence. *United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed. 2d 642 (1994) (burden of proof

³¹ Reports from the Receiver of November 12, 2009, January 26, 2011, January 15, 2012, R. pp. 84-95, 352- 469.

in civil contempt proceeding is clear and convincing); *In re General Motors Corp.*, supra (civil contempt must be proven by clear and convincing evidence); 17 Am. Jur.2d Contempt §207; see also *Moseley v. Mozier*, 279 S.C. 348, 306 S.E.2d 624 (1983) (willfulness of the violation must be shown by clear and specific acts or conduct); *Curlee v. Howle*, supra (before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based).

“A fundamental legal principle is that contempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted.” *Tracy v. Tracy*, 384 S.C. 91, 97, 682 S.E.2d 14, 17 (Ct.App.2009) (quoting *Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct.App.2004)). The decision of a lower court finding contempt shall be reversed on appeal if the finding is unsupported by the evidence, or the judge abused his discretion. *DiMarco v. DiMarco*, 393 S.C. 604, 713 S.E.2d 631 (2011) (citing *Durlach v. Durlach*, 359 S.C. 64, 596 S.E.2d 908 (2004)). “An abuse of discretion occurs when the trial court’s ruling is based upon factual conclusions that are without evidentiary support or when the trial court’s decision is based upon an error of law.” *Ex parte Bland*, 380 S.C. 1, 13, 667 S.E.2d 540, 546 (2008) (citing *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987)). For the lower court to find contempt against Dr. Field, under a record that is replete with extensive production and cooperation, is reversible error.

A. The Lower Court Abused its Discretion in Ruling Dr. Field in Contempt When There Was No Clear and Convincing Evidence Demonstrating There Were Relevant Documents Dr. Field had Failed to Produce. [II]

The first category of documents the Receiver claimed to have not received were unknown documents he thought might exist.³² The Receiver made vague statements that he *believed* there were additional documents that he *thought* Dr. Field had in his possession and that he *did not remember* having received previously. (R. p. 560, ll. 5-7; p. 581, ll. 21-24; p. 603, ll. 3-7; p. 623, ll. 19-23). When asked what documents had not been produced by Dr. Field, the Receiver responded that he could not know what documents Dr. Field had in his possession that had not been produced. *Id.* When asked by his own counsel what type of records he was looking for, the Receiver stated that “there were some loan files and some other document files, documentation. I don’t recall exactly right now which other files we were looking for.” (R. p. 561, ll. 9-14). The Receiver was merely speculating that additional documents might possibly exist—he did not really know—and speculating that Dr. Field might possess some such unspecified documents. Such imprecise claims are not proper grounds for a contempt Order. In *Brandt v. Vulcan, Inc.*, a contempt ruling was denied where vague claims were the basis for attempting to hold a person in contempt for noncompliance. The court dismissed a motion to compel that was based on the statement: “Plaintiff believes that the Defendant has the information requested” (emphasis added) 30 F.3d 752, 754 (7th Cir. Ill. 1994).

To analyze whether the lower court’s finding of contempt was reversible error, the first determination must be precisely the obligations Dr. Field was required to fulfill. Under the MGSA Order, Dr. Field was obligated to provide:

³² R. p. 603, ll. 24 – p. 604, l. 1.

copies of all records, emails, reports, letters, documents, mortgages, notes and any other materials which shall support the receiver's right to collect from any individual or corporation which has been loaned any monies by Capital Investment Funding, LLC or its related companies. (MGSA Order, R. pp. 4-5).

Also, Dr. Field agreed he would offer truthful testimony by deposition or if requested to testify in court:

"It is further agreed that ... Arthur Field shall also offer truthful testimony, shall agree to cooperate in any proceeding in state or federal court... and such cooperation shall include testimony and/or depositions" (MGSA Order, ¶2 R. p. 4).

The second issue is to determine whether Dr. Field *failed* to fulfill his obligations to the extent such failure constitutes contempt. To properly conclude there was contempt proven by clear and convincing evidence, the lower court had to make findings explicitly demonstrating deficiency to an extent as to impose the extreme measure of contempt.

The record in this case is so replete with documented proof of compliance that the lower court's contempt ruling, not supported by clear and convincing evidence, was an abuse of discretion. Dr. Field provided the Receiver with all loan documents in his possession.³³ He provided information, assistance, and responded promptly to requests from the Receiver.³⁴ The Receiver made written reports to the Note Holders, and none of them claim inability to obtain relevant documents or cooperation from Dr. Field (Receiver Reports: November 12, 2009; January 26, 2011; and January 15, 2012, R. pp. 84 – 95, 352 - 392). The Receiver appeared at a June 24, 2010 status conference (R. p. 20) and made no claim that Dr. Field had not provided the documents required by MGSA Order. Some additional documents had been provided more than

³³ R. p. 665, ll. 25 – p. 666, ll. 1-10; p. 667, ll. 6-9.

³⁴ R. p. 640, ll. 21-25.

once, when the Receiver indicated he could not find certain documents.³⁵ Eventually Appellant realized, after the Receiver became very adversarial by suing Dr. Field outside of South Carolina, that he needed to protect himself from the Receiver's attempts to deflect attention from the Receiver's deleterious performance. Thus, Appellant sent two letters to Class Counsel, and filed them with the lower court, to document in detail exactly what Dr. Field had done to fulfill his obligations under the MGSA Order.³⁶

Dr. Field was wise to document his compliance, because in August 2013, the Receiver and Class Counsel convinced the lower court to issue a Rule to Show Cause, asserting Dr. Field had not complied with his obligations. It had been *four years* since Dr. Field had provided flash drives, the Receiver had the keys to CIF's office with its contents, and Dr. Field had advised the Receiver that 96 boxes of files (from which the flash drive scans were created) were in the copier company's possession. As one court expressed: "To tell Defendants that their efforts were not good enough years after not advising them of any compliance issues is disingenuous and is highly relevant to the inquiry into whether Defendants should have done something different in the first instance."). *See FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 591 (3d Cir. 2010).

The lower court's Contempt Order found that "certain paper records" Dr. Field "informed the Receiver were in his possession" were not produced. Nowhere does the court make a finding by clear and convincing evidence, of a willful failure to produce the records at issue, or *what* these "certain paper records" consist of, or what these "certain paper records" constitutes records to enable the Receiver to collect CIF loans, which are the records Appellant is directed by the MGSA Order to produce. Dr. Field testified he does not know what the Receiver is referring to.

³⁵ R. p. 671, ll. 23-25; p. 672, ll.9-10.

³⁶ Letters dated April 8 and April 9, 2013 to Stan Case from Arthur Field. Defendant's Exhibits 6 and 7, Contempt Hearing dated September 17, 2013. R. pp. 755-821, 822-878.

Dr. Field substantiated his massive production of documents, testifying it includes “everything,”³⁷ thus including whatever are those unknown “certain paper records.” (Order of Oct. 1, 2013, R. p. 69). Dr. Field cannot be found in contempt for allegedly not producing unidentified “certain paper records”: “If the actions of the alleged contemnor do not violate a clearly defined duty imposed upon him or her by a court’s decree, the alleged contemnor’s actions do not constitute contempt.” *Wilson v. Collins*, 499 S.E.2d 560, 566 (Va. Ct. App. 1998).

Dr. Field has been subjected to ongoing but unsubstantiated accusations by the Receiver. As was the situation in *In re Gates* matter, *In re Gates*, 600 F.3d 333 (4th Cir. 2010), Appellant could not have responded to contempt charges for unspecified conduct occurring at unspecified times. The Receiver’s testimony did not provide the necessary clear and convincing evidence to support the lower court’s finding that Dr. Field was in contempt. The lower court’s finding that Dr. Field did not produce unspecified documents does not warrant the extreme measure of ruling Dr. Field to be in contempt.

B. The Lower Court Abused its Discretion in Finding Dr. Field in Contempt When There Was No Clear and Convincing Evidence Dr. Field Had Documents in His Possession That He Willfully Had Not Produced. [III]

Dr. Field cannot be in contempt for failing to produce documents not in his possession or control. (R. p. 593, l. 7) The Receiver admitted that Dr. Field did not have possession of certain documents but said he *thought* Dr. Field knew where documents were located or had control over persons who had documents. (R. p. 636, ll. 11-12). However, the Receiver could not be specific about what he had in mind, and his claim was merely speculation. With vague, unspecified *documents* being the Receiver’s first category of allegedly unproduced documents,³⁸ the second

³⁷ R. p. 680, l. 2; p. 703, ll. 15-17.

³⁸ Rule to Show Cause, Saad Affidavit ¶ 3 R. p. 44.

category consisted of records related to specific items, but as to each Dr. Field had either already provided documents or an accurate response.

CIF Computers

The Receiver claimed not to have the CIF computers and their hard drives (Tr. p. 76). However, the only evidence in the record concerning the location of the CIF computers is that they were in the CIF office at the time the Receiver took control over the CIF office and the Receiver himself took possession of them (R. p. 684, ll. 17-18). Dr. Field testified he had actually seen the CIF computers in the Receiver's warehouse. (R. p. 684, ll. 16-19). Dr. Field further testified, concerning his personal computer (which was not a CIF computer):³⁹ "The only thing I have on my computer is Word drafts of the blank documents when the lawyer courteously sent me a copy and I have given those to them." (R. p. 670, ll. 1-4). Therefore, even draft documents on his personal computer had been given to the Receiver.

Note Holder Files—Hard Copies

The Receiver said he did not have hard copies of the Note Holder files (R. p. 603). All 96 boxes of files, which included all Note Holder files, were the contents of the flash drives produced to the Receiver. Prior to the Receiver's appointment, the hard copies in the 96 boxes were placed in the custody of a commercial copier service, for scanning onto flash drives.⁴⁰ The Receiver admitted that he received the flash drives from Dr. Field, and that the Receiver paid the copier company for these services. Under the contract, the 96 boxes were to be retrieved by a certain date.⁴¹ Dr. Field no longer had any rights over the boxes, as the MGSA Order transferred

³⁹ Dr. Field has made his personal computer available, R. p. 489, 499.

⁴⁰ Empire Contract, R. p. 349 items 16 and 17.

⁴¹ Empire Contract, R. p. 347 item 1.

this control to the Receiver,⁴² Dr. Field told the Receiver and later reminded him that if he needed the hard copies, he needed to timely claim the 96 boxes from storage.⁴³ A reasonable inference is that the Receiver was satisfied with the flash drives containing scans of all the documents and did not need the 96 boxes of hard paper files.

Records Related to Other Companies

The Receiver said he did not have unspecified records for Bradford Financial Corp and York Mortgage. (R. p. 603). This is another example of speculation that there were additional documents in existence, but the Receiver could not describe any particular documents he did not have. (R. p. 603, l. 24 – p. 604, l. 1) Dr. Field testified he gave the Receiver the only Bradford and York documents he possessed, which were in the Quick Books records (R. p. 692, l. 9-15; p. 692, l. 16-19).

The Receiver testified he did not have the “correspondence files” and *original* documents for Lancaster Mortgage Bankers (R. p. 637) or files on the Lancaster Resources, Inc. (“LRI”) settlement. (R. p. 634). The only evidence on this issue before the lower court was that Dr. Field did not have the *original* LRI documents, but was able to obtain copies from CIF’s New Jersey attorney, which he provided the Receiver. (R. p. 692, l. 22 – p. 693, l. 4) Dr. Field believed he had even given an LRI “presentation book” to the Receiver (R. p. 692, l. 21-p. 693, l. 11), although that item was not an item necessary for the collection of CIF’s assets. Dr. Field testified that there may have been documents, if he ever did possess them, they were received under seal and he was prohibited from disclosing.⁴⁴

⁴² MGSA Order, R. p. 7 ¶ 5.

⁴³ R. p. 669, ll. 12-16.

⁴⁴ Dr. Field was provided certain documents by the South Carolina Attorney General’s office, *under seal*, and was prohibited from producing those documents to anyone.

Based upon insufficient evidence that Dr. Field was in possession of relevant documents under the MGSA Order that he did not produce, the lower court's finding that Dr. Field was in contempt is not supported by clear and convincing evidence.

C. **The Lower Court Abused its Discretion in Finding Dr. Field in Contempt for Failing to Produce Original Documents to the Receiver When No MGSA Order Required Production of Original Documents.** [IV]

The MGSA Order required that *copies*⁴⁵ of documents be produced. Nowhere in the MGSA Order is production of "originals" required. Dr. Field's evidence was that the Receiver was provided flash drives having the contents of 96 boxes of documents; he informed the Receiver where the boxes were in storage (with a deadline for retrieval); and the Receiver had complete control of CIF's offices. **The Contempt Order does not dispute these facts.** Instead, the lower court's Contempt Order finds that Dr. Field did not turn over the *originals*. First, Dr. Field was under no requirement to produce originals. Second, Dr. Field **could not** turn over originals as he did not have them. (R. p.677, ll. 1-3). The MSGA Order *acknowledged* that fact by requiring *only* copies be produced.⁴⁶

The lower court's Contempt Order erroneously found Dr. Field in contempt for not providing the *original* Trazom loan file (Order of October 1, 2013, R. pp. 69-70), but the MGSA Order only required Dr. Field to provide *copies*, which he did. There is no evidence in the record that Dr. Field was in possession of the original Trazom loan file. Dr. Field's testimony was that he had never had the original Trazom loan file. (R. p. 685, l. 12). The Receiver admitted that he

⁴⁵ R. p. 4.

⁴⁶ The MGSA required Dr. Field to provide "**copies** of all records, . . . documents, . . . and any other materials which shall support the receiver's right to collect from any individual or corporation which has been loaned any monies by Capital Investment Funding, LLC or its related companies." (emphasis added, MGSA, ¶ 2, R. p. 4).

had copies of the Trazom loan file.⁴⁷ Dr. Field's obligation under the MGSA Order was to provide *copies*, not the originals.

The Video

Dr. Field was found in contempt for not producing a videotape of a CIF board meeting. (Order of Court, R. p. 710, ll. 6-8). There is no evidence in the record that the videotape is a document that supports "the receiver's right to collect from any individual or corporation which has been loaned any monies by Capital Investment Funding, LLC or its related companies."

Further, the Receiver's Request for Production did not list the videotape as an item sought. (Request for Production, dated November 28, 2011, R. pp. 40-42). Even the Receiver's own Affidavit does not claim the video was requested from Dr. Field (*See* Aff. of Saad, R. pp. 44-45). The Receiver admitted at the hearing, on cross-examination, that he did not ask Dr. Field to produce *anything* after the date the Request for Production was served (November 28, 2011) (R. p. 562, ll. 12-16). Yet months later, Dr. Field was ruled into Court for alleged contempt.

The only evidence in the record regarding the video of a CIF Board Meeting is that Dr. Field had mentioned the video. There is no showing this video was ever in Dr. Field's possession. (R. p. 560, ll. 10-12). Dr. Field cannot be held in contempt for not producing a video where there is no evidence he had or has possession of it.

Lancaster Resources Loans

The Receiver's claims that he believed there may be unproduced documents of the delinquent loans cannot form the basis of a contempt finding against Dr. Field. Written reports Dr. Field made to the Receiver and Class Counsel dated July 25, 2008 and January 29, 2009,

⁴⁷ R. p. 633, ll. 19-20: "A. I made that statement in my affidavit but I'm not saying I don't have that as a document that we're trying to produce. I do have that document and I'm not say that"

with all loan status information, show his cooperation and providing information to collect the assets. The Receiver admitted receiving a full copy of the QuickBooks. (R. p. 622, l. 24 – p. 623, l. 6), which Dr. Field testified were the only LRI records. Thus, the Receiver's unsupported belief there may be other LRI documents is not clear and convincing evidence that would support a finding of contempt. No willfulness is shown, nor was any found by the court.

CIF's loans with Lancaster Resources, Inc. ("LRI") LBM, Lion, and Monmouth were uncollectable.⁴⁸ The record shows that Dr. Field early on had disclosed the status of all outstanding loans, including delinquent and uncollectible loans. The Receiver's own report to Note Holders acknowledged that: (1) LRI was in bankruptcy and therefore any notes with LRI were not collectible⁴⁹; (2) LMB filed for Chapter 7 Bankruptcy in August 2007, was liquidated, and any notes with LMB were not collectible; (3) Lion was insolvent and all of the cash it held was delivered to CIF in October of 2009; and (4) the Receiver's Report to Note Holders dated January 26, 2011 does not list Monmouth as an outstanding loan owed to CIF nor is York listed as an outstanding loan owed to CIF.⁵⁰

The alleged failure to produce records related to defaulted loans that were not collectible and, by the Receiver's own admission, the Receiver was not attempting to collect is an insufficient basis to find Appellant was in contempt.

⁴⁸ Defendant's Exhibits 6 and 7 have attachments detailing the loans, R. pp. 755-770, 778-878.

⁴⁹ Report of Receiver, January 26, 2011, R. pp. 360-361.

⁵⁰ R. p. 692, ll. 16-19: "A. York was an independent company. It had one loan from CIF for \$350,000 fully repaid. It's in the CIF Quick Books. There is nothing else. It was repaid in 2004, I believe." (Testimony of Dr. Field).

D. The Lower Court Abused its Discretion in Finding Dr. Field in Contempt for Failing to Produce Documents When the Evidence Established that the Receiver Actually Had the Documents in His Possession.⁵¹ [V]

At the time of the Rule to Show Cause, the evidence before the lower court was that the Receiver or his counsel had possession of the information regarding collection of CIF loans.

The MGSA Order itself acknowledges that Dr. Field provided a full report on outstanding CIF loans to the Receiver and Class Counsel on March 6, 2009, five months before the MGSA Order was executed.⁵² Dr. Field's early and ongoing diligence in providing documents and information is well documented:

- Between March 2009 and August 2009, Dr. Field provided Class Counsel and/or the Receiver with the items in Table I,⁵³

⁵¹ As set forth below, the lower court refused to allow Dr. Field to present evidence regarding documents he had provided to the Receiver or to allow a complete cross-examination of the Receiver on these issues. (R. p.684, ll. 2-5; p. 687, ll. 19-23). Substantial compliance is a recognized defense to civil contempt. *United States v. Rylander*, 460, U.S. 752, 757 (1983). See *Consolidated Coal Co. v. International Union, United Mine Workers of America*, 537 F.2d 1226 (4th Cir. 1976) (good faith attempt by local officials to comply with a court's back to work order can be a defense to a civil contempt order, even if those attempts were ineffective). The lower court held the record open at the end of the hearing of September 17, 2013, and Dr. Field submitted a brief along with supporting documentation for the lower court's consideration, which set forth the meticulous detail all of Dr. Field's efforts to provide not only documents, but the hours and hours he spent assisting the Receiver, even traveling out of state with the Receiver in pursuit of information and documents that were neither in Dr. Field's possession or control.

⁵² Between January 2009 and March 2009, Dr. Field provided Connell and Saad with all financial information regarding CIF. R. p. 84. On March 6, 2009, Dr. Field provided all Counsel and Saad with an Excel Spread Sheet containing information as to each Note Holder of CIF. R. p. 758, items 20-22. This Spread Sheet provided everything the Class needed to know about every Note and consisted of 689 separate lines of data. Dr. Field had previously provided Connell with a similar list immediately after the class was certified in July of 2008. The MGSA recognized Dr. Field's prompt cooperation and multiple occasions of meeting to provide information:

... Capital Investment Funding, LLC made certain financial records available to the Class Plaintiff's expert accountant for review, and met with the Class Plaintiffs' Attorneys and accountant on several occasions to answer questions regarding the financial condition of the Company. Capital Investment Funding also made the Independent Fraud Examiner's Report available to Class Counsel, in addition to the documents previously provided, under seal, to Class Counsel pursuant to Order of the Honorable Edward Miller. (MGSA, R. p. 3.).

⁵³ R. pp. 755 - 878, April 8th and 9th letters to Stan Case, Defendant's Exhibits 6 and 7.

- By the time the MGSA Order was signed, the Receiver had actual physical control of the CIF offices and all documents in the CIF offices, including all paper and electronic files.⁵⁴
- In addition, the Receiver admits he received documents from Dr. Field in 2009⁵⁵ including the scans on flash drives of the 96 boxes containing Note Holder files;⁵⁶
- The Receiver admits that Dr. Field even located documents that Dr. Field did not have in his possession, and provided these documents to the Receiver;⁵⁷
- The Receiver conceded that Dr. Field answered questions for *years* after the MGSA Order was executed.⁵⁸ At the Rule to Show Cause hearing the Receiver testified:

⁵⁴ (R. p. 669, ll. 24 - p. 670, l. 5). Receiver's status report of November 12, 2009, R. pp. 84-95.

⁵⁵ Dr. Field provided all QuickBooks and financial records to the Receiver in 2009 as shown by the Receiver's November 12, 2009 Report to Note Holders, provided to the Lower Court by the Receiver in 2009:

Arthur Field met with me several times during the month and delivered certain records, including the official electronic accounting financial records files (QuickBooks), bank account checkbooks, bank statements, and banking documents, active customer loan files and unpaid trade payable invoices. Files were reviewed for general content, organized, labeled and inventoried. (R. p. 85, Receiver Report to Note Holders dated November 12, 2009).

Scott Pfeiffer, attorney for and manager of Cosimo, LLC, now wholly owned subsidiary of Capital Investment Funding, LLC, met with me and delivered the official electronic accounting financial records file (QuickBooks) and unpaid trade payable invoices. Mr. Pfeiffer also delivered to Arthur Field certain Cosimo loan files and Arthur allowed me to inspect those files. Files were reviewed for general content, organized, labeled and inventoried. (R. p. 86, Receiver Report to Note Holders dated November 12, 2009).

⁵⁶ Empire Document Service entered into a scanning contract with CIF on May 22, 2009. (CIF Agreement with Empire Document Service, R. pp. 347-350). The Agreement stated "Upon completion of the work, all files will be transferred back to CIF or stored in a designated location and CIF shall assume the cost of such storage thereafter and CIF shall be fully responsible for all costs involved in transporting such boxes to any new facility." (CIF Agreement with Empire Document Service, ¶ 18, R. p. 349).

⁵⁷ On March 27, 2011, the Receiver reiterated with the bankruptcy counsel that Dr. Field was happy to provide any CIF records needed. (R. p.226). On March 27, 2011, the Receiver again informed Robert Pohl with the Cooper Law Firm that Dr. Field was glad to provide any records needed to prepare for the civil litigation in New Jersey. (R. p. 226).

⁵⁸ Aff. of Saad, ¶ 6, R. p. 57.

A. I'm going to make this statement in the hopes that maybe we can simplify the whole issue of whether I received the records or not. Mr. Field gave me a flash drive, a magnetic medium, that had tens of thousands of documents in the flash drive and he also gave me many boxes of information. (R. p. 31, ll. 4-9)

In November 2011, the Receiver admitted that Dr. Field notified him that Dr. Field's personal computer had caught fire.⁵⁹ The Receiver admitted that Dr. Field had already sent him 74 emails he had found, and then sent him additional emails even after the computer fire. (Aff. of Saad, ¶ 8, R. p. 57).⁶⁰ The email exchanges between Dr. Field and the Receiver show detailed and prompt assistance by Dr. Field, for which the Receiver thanked him.⁶¹ For the Receiver to claim two years later that Dr. Field had so seriously failed to cooperate as to be in contempt of court is disingenuous.

The Uncashed Check

The lower court ruled that Dr. Field did not turn over a copy of a check related to a Wyckoff, New Jersey property (R. p. 183, ll. 7-9). However, the Receiver admitted, during cross examination that he *had* received a copy of the check, after stating under oath in his filed Affidavit that he had not.⁶²

Cosimo

The lower court erred in finding that Dr. Field failed to produce Cosimo records. (Order of Oct. 1, 2013, R. pp. 69 - 70). Dr. Field testified he delivered 15 to 20 boxes of Cosimo records to the Receiver (R. p. 703, ll. 1-5), and the Receiver's 2009 Report expressly

⁵⁹ On November 28, 2011, Dr. Field emailed 52 separate files to the Receiver. (R. pp. 278-279, 286-288. Table III). On November 29, 2011, Dr. Field was able to retrieve an additional 39 emails and forward them to the Receiver. (R. pp. 280-282, Table IV). Dr. Field had immediately sought help from a computer repair service that was able to recover the files, which Dr. Field then promptly sent to the Receiver.

⁶⁰ Dr. Field testified that immediately after the computer fire, he took the computer to a computer store to try to salvage what was on the computer. R. p. 671, ll. 10 – p. 672, l. 6; p. 702, ll. 7 – 20.

⁶¹ Attachments to Return to Rule to Show Cause (R. pp. 203-345, 390-468).

⁶² R. p. 633, ll. 19-20.

acknowledged he had been given access to the Cosimo records that he “reviewed, organized, labeled and inventoried. (Report from Receiver of November 12, 2009, R. p. 86).

II. THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DR. FIELD IN CONTEMPT OF A “REQUEST FOR PRODUCTION” WHEN HE WAS NEVER SERVED WITH A RULE 45 SUBPOENA OR A MOTION TO COMPEL. [VI]

Receiver’s counsel handed Dr. Field a “Request for Production” purportedly under SCRCF Rule 34, dated November 28, 2011, despite the facts that Dr. Field was dismissed as a party in this case by the MGSA Order. (MGSA Order, R. pp. 3, 8, 11, 13). The Request reached significantly beyond the requirements of the MGSA Order. It requested documents related to: the “organization of CIF,” “sale of CIF securities,” “the use of proceeds of such sales,” “correspondence between CIF and legal counsel related to CIF loans,” and “related to the direct or indirect transfer of any property of CIF . . . to any . . . Entities or individuals including Field or any person related to Field.”⁶³ Rule 34(c) provides: **PRODUCTION OF DOCUMENTS**

(c) Persons not Parties. A person not a party may be compelled to produce documents... only as provided in Rule 45....

SCRCF, Rule 45(c)(1), requires a party or an attorney responsible for the issuance and service of a subpoena to “take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” Dr. Field has now been subjected to an undue burden over the course of seven years by being asked repeatedly to produce documents he has long ago produced *multiple* times (R. p. 675, ll. 14-18; p. 675, ll. 20-23; p. 677, ll. 14-19) and by being asked to produce documents not in his possession or within his control. It is undisputed that a Rule 45 subpoena was never issued to Dr. Field. (R. p. 590, ll. 15-22).

⁶³ On January 9, 2012, the attorney for the Receiver, informed Dr. Field that his communication with the Receiver would not be considered privileged, effectively chilling Dr. Field from his extensive cooperation and indicating that the Request for Production was simply an attempt to make an end-run around the MGSA. (R. p. 204).

Rule 37(a)(2) requires the filing of a Motion to Compel prior to the filing of a Rule to

Show Cause alleging contempt:

If . . . a party, in response to a request for inspection [of documents] submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request.

As no Motion to Compel was ever filed, there is no lower court order under which Dr. Field could be held in contempt. At the very most, the lower court should have addressed the allegations against Dr. Field as a Motion to Compel. Thus, this Court should hold that the lower court's Contempt Order was an abuse of discretion because it fails to provide equal protection and due process of law by ignoring the requirements of SCRCP 34 and 37.

III. THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DR. FIELD IN CONTEMPT OF THE PRODUCTION ORDER AND THE PRIVILEGE ORDER. [VII]

A court may rule a person to be in contempt only when a previous order has been violated. *Henderson v. Puckett*, 316 S.C. 171, 447 S.E.2d 871 (Ct.App.1994). The previous order must be clear in what a person is ordered to do. The Contempt Order found that Dr. Field violated the Production Order and the Privilege Order and thereafter was in contempt. Dr. Field was not ordered to do anything in either of those orders, therefore, he could not have violated and have been in contempt of either of them.

A. The Order Dated June 29, 2010 (Production Order) Requires No Other Compliance Obligation from Dr. Field. [VIII]

The June 29, 2010 Order (hereafter "Production Order") required "Individuals", explicitly defined as Gene Hopper, Chuck Pinion, David Gantt, Scott Pfeiffer, Joshua Ward and Anthony Edgar, to produce certain documents. The name "Arthur Field" is *not* among the list of

persons to which the order is directed, therefore, Arthur Field was not required to produce documents under that order, and cannot be in violation of that order.

The Production Order also required “Business Associates” to produce certain documents, after being served with a proper request. Under this order, “Business Associates” were defined as person’s associated in a business capacity with WE3 Company, SD Trust, LLC, Big Deal Land Company, LLC, or Rolling Hills Land Co., LLC. Dr. Field had no business association with any of these specified entities, nor did the Receiver offer any evidence that Dr. Field did. Thus, Dr. Field is not subject to the June 29, 2010 Order, and cannot be in violation of it. His status of having satisfied the MGSA Order obligations was confirmed by the fact that his name was not included in this Order.

B. The Order Dated October 10, 2011 (Privilege Order) Requires No Other Compliance Obligation from Dr. Field. [IX]

The October 10, 2011 Order (“Privilege Order”) preserved the individual privileges held by Dr. Field⁶⁴, and did not require Dr. Field to take any action, nor restrain him from any particular actions.⁶⁵ As the Privilege Order does not require or prohibit anything of Dr. Field, there can be no failure to produce documents under the Privilege Order, nor any contempt under it. It is manifest error for a court to find a person has violated orders that, on their face, make no requirement of that person.

C. The Receiver Had No Legal Authority to Issue a “Request for Production” to Dr. Field as a Non Party Without Affording Him the Protection of a Subpoena. [X]

The Receiver’s attorney handed a “Request for Production” to Dr. Field during a meeting on November 28, 2011. Dr. Field was a non-party, thus a Rule 34 Request for Production

⁶⁴ October 10, 2011 Order, R. p. 30-32.

⁶⁵ *Id.*

carried no authority unless a Rule 45 subpoena was issued. (See SCRCP, Rule 34(c)). The Receiver admitted under oath that no subpoena was served on Dr. Field. (R. p. 590, ll. 15-22). Dr. Field was informed that his communications with the Receiver would not be treated as protected under the MGSA Order for purposes of the Fifth Amendment, (Order of October 10, 2011, R. pp. 30-32), which showed that the “Request to Produce” was an attempt to pursue new lawsuits against Dr. Field, rather than an allegedly legitimate claim that documents still had not been provided as required by the MGSA Order. Because some criminal charges against Dr. Field were pending, he could not disclose any information outside the protection of the MGSA Order without having to waive his Fifth Amendment right against self-incrimination. Dr. Field wished to preserve this constitutionally protected privilege, therefore, he asked for the protection of a Rule 45 subpoena. Rules 34 and 45 make it clear that Dr. Field cannot be in contempt of the fatally defective “Request for Production.”

IV. THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DR. FIELD HAD MADE “MISREPRESENTATIONS” TO THE NEW JERSEY TRIAL COURT. [XI]

A. The Lower Court Did Not Have Jurisdiction to make Findings Related to Proceedings in New Jersey Litigation. [XII]

The Receiver decided to sue Dr. Field in New Jersey Superior Court. The New Jersey trial court dismissed Dr. Field from the case and also disqualified attorney Christopher Westrick from acting as counsel for CIF as pertains to Dr. Field, making both of these issues *res judicata*,⁶⁶ and precluding their re-litigation in the Rule to Show Cause hearing in the South Carolina lower court. The lower court allowed the New Jersey lawyer⁶⁷ to testify about the New

⁶⁶ Rule 12(b)(8), SCRCP.

⁶⁷ Westrick’s bias can be inferred, as he was ordered disqualified. By testifying in the instant action, Westrick violated attorney-client privilege, as the New Jersey court has found him at this point that Westrick did have a confidential relationship with Dr. Field.

Jersey court proceedings, where the lawyer characterized Dr. Field's defense of himself in New Jersey as "misrepresentations." The New Jersey trial court heard all the evidence and was the proper tribunal to determine the meaning of the MGSA Order. Dr. Field prevailed in New Jersey. To allow the losing New Jersey lawyer to characterize the New Jersey proceedings during a hearing in South Carolina violates the principle of *res judicata* and the Appellant's due process rights.

The lower court then compounded the error by not allowing Dr. Field's counsel to fully examine Westrick regarding the confidential nature of his representation of CIF, which Dr. Field acted on behalf of in a prior matter in New Jersey. (R. p. 658, ll. 1-22) Dr. Field's counsel attempted to refute Westrick's claims that Dr. Field made "misrepresentations" in the New Jersey proceedings, but these efforts were disallowed by the lower court, which would not allow Appellant to proffer evidence on this critical issue:

MR. MARTIN: Well, Your Honor, there is no way my man can defend himself, since he's (Westrick's) been allowed to testify as to what happened in New Jersey, if we can't go into the facts. If you're not going to let me go into the facts, I guess I need to proper [sic] those somehow.

THE COURT: Not in this proceeding. . . . (R. p. 632, ll. 5-10).

Dr. Field's evidence would have established that the New Jersey court dismissed Dr. Field, denied Westrick's Motion for Reconsideration, disqualified Westrick, and then denied yet another Motion by Westrick for Reconsideration. The New Jersey court based these findings on its review of the MGSA Order, which Westrick had entered into evidence in New Jersey. A transcript of the New Jersey hearing submitted by the Receiver does show that the New Jersey trial court read and decided for itself the meaning of the MGSA Order, in Dr. Field's favor.⁶⁸

⁶⁸ The Order of the New Jersey Superior Court of the Hearing on Dr. Field's Motion to Dismiss clearly shows that the New Jersey trial court reviewed and interpreted the MGSA Order, raising the "first filed doctrine" *sua sponte*, and did not simply base its decision on Dr. Field's opinion of the interpretation of the MGSA Order, R. pp. 476-478.

For the lower court to allow Westrick to exact “loser’s revenge” against Dr. Field and blatantly mischaracterize what transpired in the New Jersey proceedings is a miscarriage of justice against Dr. Field.

B. The Lower Court Abused its Discretion in Finding Dr. Field “Misrepresented” the Terms of the MGSA Order to the New Jersey Courts. [XIII]

The Receiver, not Dr. Field, chose to sue in New Jersey. Therefore, it was the province of the New Jersey trial court, with the benefit of all the evidence and testimony before it, to determine the truthfulness of any statements before it, and the outcome of that case. (Order of the Honorable Lisa Perez Friscia, filed February 15, 2013, R. pp .470-488).

The lower court found that Dr. Field “misrepresented” the terms of the MGSA Order by claiming to the New Jersey tribunal that the MGSA Order: 1) “disposed of all claims that were or could be brought by” CIF against Dr. Field⁶⁹; 2) “specifically included any dispute regarding” the Wyckoff (N.J.) real property⁷⁰, and 3) that the South Carolina court retained all jurisdiction over claims of CIF against Dr. Field.⁷¹ The lower court found these three alleged “misrepresentations” violated Appellant’s “duty to cooperate” under the MGSA Order.⁷² An examination of the MGSA Order reveals, however, that Dr. Field’s “duty to cooperate” is limited to **one thing** only: to provide testimony if requested by the Receiver or class counsel.

The plain language of the MGSA Order stated “[e]ach of the parties participated in a two-day mediation of **all issues** in these related cases (2008-CP-23-3665, 2008-CP-2305514, 2008-CP-23-7457, 2008-CP-39-1184) with the Honorable H. Samuel Stilwell acting as Mediator” (R.

⁶⁹ Contempt Order p.5, section 1.a. (R. p. 70).

⁷⁰ Contempt Order p.5 section 1.b. (R. p. 70).

⁷¹ Contempt Order p.5 section 1.c. (R. p. 70).

⁷² Contempt Order p.6 section 2. (R. p. 71).

p. 2, emphasis added). The MGSA Order further stated: “There has been no appeal from the Order and **the matter is res judicata and binding on all parties.**” (emphasis added.)

The New Jersey court had the MGSA Order before it, entered into evidence by CIF’s counsel. The New Jersey real property at issue had been sold prior to the MGSA Order, and the New Jersey Superior Court found the MGSA Order and resolution of the South Carolina civil litigation included the sale of the Wyckoff property *as it related to Dr. Field*.⁷³

The lower court found, based on what allegedly occurred in the New Jersey proceedings:

Arthur M. Field made misrepresentations of fact to a New Jersey Court designed to disqualify Capital Investment Funding, LLC’s New Jersey counsel and, therefore, frustrate the purposes of Capital Investment Funding, LLC’s Receiver, including:

Misrepresenting that counsel for Capital Investment Funding, LLC also represented Arthur M. Field personally. (Order of Oct. 1, 2013, R. pp. 71-72).

However, the New Jersey trial court disqualified Westrick from representing CIF against Dr. Field, finding that when a company employee plays a substantial role in directing the company’s legal response, that employee (Dr. Field) is protected by the attorney-client privilege⁷⁴.

Despite previous requests from Dr. Field that attorney Westrick recuse himself,⁷⁵ Dr. Field was forced to take steps to remove him. (R. p. 706, l. 22 – p. 707, l. 6). The New Jersey trial court found that even if Dr. Field was not considered Westrick’s “client,” Westrick nonetheless had to be disqualified pursuant to New Jersey RPC 3.7 because Westrick was likely to be a substantive witness⁷⁶. Thus, Dr. Field’s efforts to disqualify Westrick were sound and not

⁷³ Order of the Honorable Lisa Perez Friscia, filed February 15, 2013, R. p. 483 (emphasis added).

⁷⁴ R. p.470, 485 - 488.

⁷⁵ R. p.897 - 900.

⁷⁶ R. p. 486 - 487.

evidence of contempt. Dr. Field had informed Westrick early on, that due to Westrick needing to be a witness in the case, Westrick should recuse himself, but Westrick would not do so.⁷⁷

The lower court also found Dr. Field in contempt for:

b. Misrepresenting that counsel for Capital Investment Funding, LLC performed services that he did not perform. (Order of Oct. 1, 2013, p. 7).

The lower court did not specify the “services” that Dr. Field allegedly “misrepresented,” and therefore there is insufficient evidence in the record on which the lower court could have made a finding of contempt.

Finally, the lower court stated:

Arthur M. Field’s misrepresentations concerning Capital Investment Funding, LLC’s New Jersey counsel have caused Capital Investment Funding, LLC to expend substantial sums of money unnecessarily. (Order of Oct. 1, 2013, R. p. 72).

The evidence in the record is that Westrick’s actions, not those of the Dr. Field, caused CIF to expend funds unnecessarily. Clearly Dr. Field had the right to defend himself in the New Jersey litigation. CIF sued Dr. Field in a New Jersey court. What response did the Receiver expect after suing Dr. Field? Westrick filed a Motion to Reconsider *68 days* beyond the deadline for filing such a Motion. This was clearly improper and a waste of CIF’s resources. (R. p. 689, ll. 9-11). Judge Friscia denied Westrick’s Motion to Reconsider twice. (R. p. 690, ll. 16-25).

Determination of which court had jurisdiction over the claim filed against Dr. Field in New Jersey was properly to be resolved by the New Jersey court. New Jersey’s “first-filed doctrine” provides that when competing lawsuits are filed in different courts that relate to the same parties or issues, then generally, the lawsuit that is filed first should have priority, and the

⁷⁷ Westrick’s financial interest in remaining as legal counsel in the case cannot be ignored. R. p. 907.

other lawsuit should be dismissed. *Sensient Colors, Inc. v. Allstate Ins. Co.*, 939 A.2d 767 (N.J. 2008). Judge Friscia found New Jersey's first-filed doctrine required the claims against Dr. Field be dismissed because:

The actions in South Carolina and the subject New Jersey action involve many of the same parties and alleged conduct of Mr. Field for the same period which were, or could have been addressed in the South Carolina litigation. (Order of the Honorable Lisa Perez Friscia, filed February 15, 2013 R. p. 470-488).

Judge Friscia made her decision based on the MGSA Order and other evidence that was before her. There is absolutely no evidence that Judge Friscia made her findings based on Dr. Field's testimony rather than on her reading of the MGSA Order itself, and application of the "first-filed doctrine." Further, Dr. Field as a defendant and appearing *pro se* had every right to offer his understanding of the meaning of the MGSA Order. Dr. Field had every right to present a defense when sued in New Jersey, and the lower court's characterization of Dr. Field's defense of himself as "misrepresentation" violates the due process rights of Dr. Field.

The lower court additionally found:

By misrepresenting the terms of the Global Settlement Order, Arthur M. Field has violated his duty to cooperate under the Global Settlement Order. (Order of Oct. 1, 2013, p. 71)⁷⁸.

Dr. Field informed the New Jersey court of what he believed was the effect of the MGSA Order on the New Jersey lawsuit pending against him. The New Jersey court had before it the MGSA Order for review, and agreed with Dr. Field's view. The lower court's finding was an abuse of discretion.

⁷⁸ Note that the *only* evidence that Dr. Field "misrepresented" anything in the New Jersey case was that this was the "characterization" offered by attorney Westrick, who is far from a disinterested. Westrick was paid for handling the New Jersey case, and that even though Dr. Field was successful in persuading the New Jersey court that Westrick had a conflict of interest and also was a witness and thus must be recused, through ongoing appeals, Westrick has been able to stay in the New Jersey case and collect fees.

Dr. Field's obligation to cooperate with the Receiver did not deprive him of his right to fully defend himself in a lawsuit brought against him in New Jersey, yet this is the improper result of the lower court's finding appellant in contempt for what he put forth as his defense against the New Jersey litigation. Dr. Field's having defended himself—successfully—in New Jersey has been transformed by the lower court into contempt of court in South Carolina.

C. The Lower Court Abused its Discretion in Finding that Dr. Field Asserted Authority Over And Attempted to Make Decisions for CIF that Constituted Contempt. [XIV]

The Contempt Order found that Appellant had written a letter to CIF's New Jersey counsel, "purporting to exercise control over (CIF), to discharge New Jersey counsel, and to discharge Jerry Saad as "acting manager".⁷⁹ However, the letter Dr. Field wrote never resulted in the removal of Saad as "acting manager" of CIF. The lower court failed to distinguish between the role of Receiver and of "acting manager". Only the lower court can relieve the Receiver and Dr. Field did not attempt to do this. Dr. Field, with the lower court's approval, acted in his capacity as Manager of CIF up to August 25, 2009.⁸⁰ He continues to have a 90% ownership interest in CIF. (R. p. 700, ll. 8-15). The lower court ignored the right of CIF's owners to appoint a new manager, in accordance with CIF's Operating Agreement. That was all Dr. Field was attempting to do. Even the lower court's Production Order carefully distinguished between the role of Receiver and that of Manager.

The Contempt Order also found that Dr. Field "attempted to file legal claims that can only belong to (CIF) and/or its noteholders." The lower court failed to specify the legal claims that belong to CIF only or to its noteholders. Dr. Field, as CIF's 90 percent owner, had rights to

⁷⁹ Contempt Order, R. p. 71.

⁸⁰ MGSA, R. p. 8, section 8.

initiate a derivative action under S.C. Code. Ann. § 33-44-1101 and § 33-44-1102. No order of the lower court deprives Dr. Field of this right. Dr. Field also has the right, under due process principles, to defend himself in litigation, including the right to bring cross claims and counter claims. The Appellant's Contempt Order concluded that "assertions of authority over (CIF) and efforts to make decisions on its behalf having directly interfered with the ability of (CIF's) Receiver to execute his responsibilities."⁸¹

This startling conclusion was a leap from the contents of an irrelevant letter to a conclusion the Receiver was being prevented from carrying out his responsibilities, when the Receiver could point to no facts from which such a conclusion could be reached. (R. p. 642, l. 25-p. 643, l. 22). No witness asserted that Dr. Field had attempted to make decisions on the winding up of CIF, the collection of loan payments owed to CIF, or any of the Receiver's other responsibilities. No evidence was before the lower court that the Receiver was not able to carry out his responsibilities because of defenses Dr. Field pursued in the New Jersey litigation. Dr. Field's testimony was that that he provided discovery and documents as requested in the New Jersey case.⁸²

The Contempt Order found that Appellant had "taken other actions specifically designed to interfere with Jerry Saad's ability to perform his duties as Receiver, including participating in attempts to file frivolous legal claims against Mr. Saad and numerous attorneys retained by

⁸¹ Contempt Order p. 6, section 4, R. p. 71.

⁸² R. p. 691, l. 23- p. 692, l. 5: "FIELD: I never interfered with Mr. Westrick's ability to sue the other client. I gave discovery when it was requested. I gave admissions when it was requested and if they would call me to testify in a deposition, I would gladly do so. I provided copies of all the contracts I had. I provided copies of all the documents. I have no objection whatsoever to them bringing the action (against other parties)." On the date of the hearing on the Rule to Show Cause, the action in New Jersey was still pending as to all defendants except Dr. Field, appeals were still pending, and Westrick still continued to represent CIF.

(CIF), accusing these individuals of illegal and conspiratorial conduct associated with the execution of their professional responsibilities.”

Other than the bald assertions of the Receiver, the lower court did not have before it any evidence regarding any such other “claims.” The lower court would not allow testimony by Dr. Field on this issue.⁸³ Clearly, the lower court had no proper basis to determine whether or not the “claims,” referred to in a general fashion by the court, were “frivolous.”

Dr. Field filed third party claims in response to lawsuits *filed against him* as a defendant, (R. p. 573, ll. 12-15), which he is entitled to do. There is no evidence that these third party claims were designed to “interfere” with the Receiver’s performance of his duties rather than being assertions of colorable causes of action belonging to Dr. Field. Whether Dr. Field’s asserted third party claims were non-frivolous is a matter to be properly determined by the tribunal before which those claims were made, not by the Receiver’s personal opinion, or by the lower court in a Rule to Show Cause hearing without allowing Appellant to respond with evidence to refute these assertions. Dr. Field was not prevented by the MGSA Order or any order of the lower court from responding to the lawsuit filed against him in New Jersey or any other court.⁸⁴ For the Receiver and the lower court to mischaracterize Dr. Field’s availing himself of his due process rights to defend himself in civil litigation filed against him as an “obstruction of justice” is unjust and reflects negatively on our system of civil justice. An “unpopular” person must be afforded the same due process protections of our civil justice system as other persons. Dr. Field did not prevent the Receiver from performing his duties, and unsupported assertions cannot form the basis of a finding of contempt.

⁸³ Although the lower court itself, brought up to Dr. Field the fact he had filed a grievance against Judge Miller, and cross-examined him about this. This fact alone calls for Judge Miller’s recusal. Dr. Field, if he believed he was aggrieved, had the right to file a judicial ethics complaint. R. p. 694, l. 7 – p. 695, l. 10.

⁸⁴ Dr. Field was also subjected to Federal Court lawsuits in South Carolina. R. p. 571, ll. 1 – 5.

Furthermore, to the extent Dr. Field filed a motion to be able to file a Third Party Complaint but did not actually file the claims, there certainly can be no contempt. *Glanz v. Mendelson*, 538 S.E.2d 348 (Va. Ct. App. 2000). In a Virginia case in which a litigant was held in contempt, the lower court found contempt based on taking an appeal. The Appellate court found that even assuming the party could properly be held in contempt for appealing an order, the record established that by doing so, the party did not violate the court order because although he filed a notice of intent to appeal, no petition was filed; and filing of the notice, alone, did not constitute an action that impeded the Special Receiver in that case.

The Contempt Order found that Dr. Field's "interference with the Receiver's execution of his responsibilities has caused (CIF) to expend substantial sums of money unnecessarily." There is no evidence CIF has spent money due to Dr. Field's alleged "interference" with the Receiver's carrying out of his responsibilities. It was the Receiver who chose to sue Dr. Field in New Jersey. The Receiver also chose to hire the same legal counsel that had previously entered into a confidential relationship with Dr. Field⁸⁵. Further, no allegation in the New Jersey litigation was made by Receiver that Dr. Field had interfered with the Receiver's performance of his duties.

Additional Errors

The lower court's Contempt Order also made several other errors, including holding open the matter to consider whether the lower court should require Dr. Field to pay Westrick's invoices. In light of the New Jersey Superior Court's finding that the case against Dr. Field should be dismissed, it was improper for the lower court to intimidate Dr. Field in this manner. The lower court prohibited cross-examination of Westrick and proof of evidence to show that

⁸⁵ CIF also chose to file suit against Dr. Field in U.S. District Court in South Carolina, even though this was improper—frivolous—under the MGSA

sums were expended by CIF, not because of Dr. Field's so-called "obstruction", but because New Jersey counsel *wrongfully* sued Dr. Field, had an obvious conflict of interest, and has continued to file appeals that the New Jersey court has denied.⁸⁶

Further, the lower court erred in finding that Dr. Field's testimony at the hearing "generally misconstrued and misstated facts to benefit his position," as the Order does not state any facts that were "misconstrued" or "misstated." Dr. Field's testimony on its face demonstrates the great lengths to which Dr. Field has gone to meet his obligations under the MGSA Order, and the obviously suspect nature of the Receiver's claim of documents existing. Following almost two years of *silence*, to claim that Dr. Field has failed to comply with the MGSA Order and should be held in contempt is specious. The lower court's finding is not supported by the record.

V. THE LOWER COURT ERRED IN FINDING IT HAD JURISDICTION TO HEAR THE RULE TO SHOW CAUSE. [XV]

A. Dr. Field was Not a Party to the Underlying Action [XVI]

The MGSA Order dismissed Dr. Field (without prejudice) in 2009. The MGSA Order allowed class counsel to reinstate the lawsuits "within the time limit imposed by law or court rule." (MGSA Order, ¶ 9, R. p. 8), but the suits were never reinstated. Dr. Field is not a party to this case.

B. The MGSA Order, Settling Four Separate Cases by its Explicit Terms, Left Open Only the Issue of Protecting Dr. Field From Having Documents Released Without Protecting Dr. Field's Constitutional Rights. [XVII]

The MGSA Order was divided into four sections dealing with each case.

The lower court's jurisdiction was explicitly retained for one issue only:

⁸⁶ New Jersey Order, R. p. 471, pp. 485-488.

The Court also Orders, by approval of this settlement, that the Receiver is working for the Court and that neither the Receiver, Class Counsel nor agent or employee of the Receiver or Class Counsel **shall allow any person or entity to have or to have access to the documents turned over to the Receiver at any time by Dr. Field** except upon written Order from Judge Miller. The Honorable Edward W. Miller retains jurisdiction over this matter to ensure compliance with **this Order** (emphasis added) (MGSA, ¶ 2, R. p. 5).

The language of the MGSA Order in Paragraph 2 makes it clear when the various orders specific to each of the four cases are being addressed collectively: “Further the court makes **these Orders**. . .” (R. p. 5); “. . . I find that the **Orders** . . .” (R. p. 5); “. . .the Receiver must have the documents as soon as is possible so that he may begin marshaling the assets of Capital Investment Funding, LLC and without **these Orders**” (R. p. 6) (emphasis added). The lower court clearly only retained jurisdiction over the single Order that prohibited access to the documents turned over to the Receiver by Dr. Field. This discreet issue is the only matter for which the lower court retained jurisdiction, to determine whether documents could be released by anyone, in light of Dr. Field’s constitutional rights that were to be protected.

C. The Lower Court Did Not Have Personal Jurisdiction Over Dr. Field Because the Rule to Show Cause Was Not Validly Served on Dr. Field [XVIII]

Dr. Field was not validly served the Rule to Show Cause, therefore, the lower court lacked jurisdiction over him. See Rule 12(b)(5), SCRCF; *Jensen v. Doe*, 292 S.C. 592, 594, 358 S.E.2d 148, 148-49 (Ct.App.1987) (plaintiff has the burden of proving that the court has personal jurisdiction over defendant). The process server’s testimony at the Rule to Show Cause hearing revealed that what the process server actually did was throw the legal process papers into the garage, which became known only because Dr. Field later found a portion of the papers on his front lawn. (Stanley Aff. ¶¶ 6-7, R. p. 176; Field Aff. ¶ 5 R. p. 177). The process server spoke with only one person that day, Carl Stanley, who answered the door and explicitly informed her that he was not a resident of Dr. Field’s household. Therefore, the process server could not

accomplish valid service by throwing the papers on the lawn or into the garage in the presence of a random visitor to the house. (Aff. Carl Stanley, R. p. 176). Rule 5(b)(1), SCRCF requires that the personal service at a person's dwelling place be made by handing the document to the actual person to be served or handing it to a person of suitable age and discretion *then residing there*.

The process server signed an Affidavit swearing that she personally served Arthur Field, but admitted, under cross examination at the hearing, that the description of the person she attested to serving did not match the description of Dr. Field. (R. p. 542, l. 3 – p. 543, l. 11). The Affidavit of Service described the person served as 5 feet 6 inches to 6 feet tall and weighing 150 to 200 pounds, when in fact Dr. Field is 5 feet 2 inches tall and weighs 120 pounds. (R. p. 543, ll. 9-13). The individual the process server swore under oath had been served clearly was not Dr. Field. When this glaring discrepancy was elicited upon cross examination, the process server claimed, for the first time that she saw Dr. Field inside the house. She then admitted that she served him by throwing the Rule to Show Cause into the open garage. (R. p. 539, l. 12). Even if this were true, it is not valid service of process, and did not give the lower court jurisdiction over Dr. Field, a non-party in this case. Thus, the lower court was without power to issue the Contempt Order against Dr. Field.

**VI. THE LOWER COURT JUDGE ERRED IN NOT RECUSING HIMSELF
FROM RULING ON THE RULE TO SHOW CAUSE, WHERE
IMPERMISSIBLE BIAS WAS SHOWN. [XIX]**

Standard of Review

Regarding recusal, “[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party.” *Koon v. Fares*, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008). “Under South Carolina law, if there is no evidence of judicial prejudice, a judge’s failure to

disqualify himself will not be reversed on appeal.” *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citing *Roche v. Young Bros., Inc.*, 332 S.C. 75, 504 S.E.2d 311 (1998)).

In 2012, Dr. Field filed a (pro se) Motion to Recuse,⁸⁷ which had never been heard. At the contempt hearing, Appellant’s counsel renewed the Motion to Recuse when the judge stated in open court: “So let me get this straight, your client stole forty million dollars and now he’s the victim?”⁸⁸ By this time, the judge had already denied the Motion for Continuance and to Quash. (R. p. 530, l. 22). The South Carolina Court of Appeals has stated, the “better practice suggests disposition of any motion to recuse prior to the resolution of other pending matters.” *Brailsford v. Brailsford*, 380 S.C. 443, 453, 669 S.E.2d 342 (Ct.App.2008).

The lower court abused its discretion by failing to address or apply the precedent of *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004) in that the Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) has found that the Due Process Clause of the 14th Amendment of the United States Constitution requires the application of an objective standard of the appearance of partiality, rather than requiring evidence of actual prejudice.

The comments before members of the public by the Lower Court Judge during the hearing revealed he had developed a strong bias against Dr. Field, as his repeated improper statements amply demonstrate:

- a. The lower court improperly accused Arthur Field of stealing, saying, “So let me get this straight, your client stole forty million dollars and now he’s the victim?” (R, p. 534);
- b. The lower court’s Contempt Order improperly took judicial notice of criminal proceedings involving Arthur Field related to securities violations (not stealing) that were irrelevant and highly prejudicial to the issues before the lower court; (R. p. 537, ll. 5-8);

⁸⁷ Motion to Recuse dated June 13, 2012, R. pp. 96-113.

⁸⁸ R. p. 534, ll. 7-9.

- c. The lower court raised the issue *sua sponte* that Field had filed a grievance against Judge Miller, indicating a bias against Appellant (R. p. 694, l. 7 – p. 695, l.1);
- d. The lower court did not afford a full hearing to Field (Tr. p. 164, ll. 6-23) while allowing the Receiver and class counsel all the time they wanted, even offering to adjourn for them until the next day (R. p. 698, ll. 14-20); and
- e. The lower court assisted Plaintiff's counsel in the prosecution of their case, interjected his personal opinion and arbitrarily limited cross examination, thus depriving Arthur Field of a fair and impartial adjudication.

Most shocking was that the court indicated it had already decided the case against Dr. Field prior to hearing all the evidence:

- i. "We [sic] been living with this case for four years, five years. All your client has to do is turn over what he agreed to turn over and that's all he's got to do" (R. p. 530, ll. 22-25);
- ii. "So let me get this straight, your client stole forty million dollars and now he's the victim?" (R. p. 534);
- iii. "He has not given the Receiver everything that he asked for."
MR. MARTIN: "How can you say that, Your Honor. You do not have the evidence before you."
THE COURT: "I've got Mr. Saad's affidavit." (R. p. 552, l. 3)
(This statement made before any testimony was taken from the Receiver or Field);
- iv. "The Receiver has been trying pursuant to this global mediated settlement to recover the funds. Your client signed a court order and specifically agreed in that court order to cooperate and to turn over all the documents. He has not done that." (R. p. 552) (This statement made before any testimony was taken from the Receiver or Field);
- v. "This is an action at this time, as I understand it, of Mr. Field obstructionist activity prohibiting the receiver from pursuing the collection of the assets of the receivership." (R. p. 571);
- vi. "Are you talking about the history of the transaction? He wants the records, that's what we're here for. If your client would turn it over or had turned it over as he agreed to do in a court order that he consented to, we wouldn't be here." (R. p. 607);
- vii. MR. CASE: Your Honor, we would object to the line of questioning getting into litigation in this proceeding about this particular note. MR. MARTIN: And they have brought up every single litigation in this proceeding. THE COURT: And it goes to show that your client was not cooperating, that was the purpose.

We're not going to litigate these other matters in this hearing. (R. p. 617, ll. 6-13);

- viii. "This is about your client's failure to cooperate pursuant to the global mediated settlement." (R. p. 632) (after refusing to allow Field to proffer evidence to refute statements made about the litigation in New Jersey);
- ix. "And it's the receiver trying to marshal the assets and it's your client not complying with the global mediated settlement agreement and cooperating with the receiver to collect the assets for the 688 or 689 people who lost a lot of money and for the record note that Mr. Field has pled guilty to criminal enterprise with respect to that. (R. p. 645, ll. 18-24).

Judge Miller's issuance of two prior Rules to Show Cause never brought to a hearing, also demonstrate his bias against Dr. Field. (R. p. 35, 49).

A. **The Lower Court's Denial of Appellant's Proffered Affidavits to be Added to the Record of the Hearing was Abuse of Discretion and the Court of Appeals Should Consider the Affidavits in Determining the Bias of the Lower Court Judge. [XX]**

Prior to the start of the Contempt Hearing, the lower court made several comments from the bench that evidence impermissible bias against Appellant. Appellant contends that the official transcript begins subsequent to the lower court's improper and biased comments, and offered Affidavits from individuals present in the courtroom that day to establish the lower court's statements, which showed bias, and which require the lower court judge to recuse himself. Appellant proffers these Affidavits to support reversal by this Court of the lower court's denial of Appellant's Motion to Recuse.⁸⁹

The sworn affidavits of these hearing observers revealed inappropriate statements by the lower court. One observer said: "...the Judge... ..stated Arthur was a criminal and that he had

⁸⁹ Exhibits F, G, H, and I, Hearing on October 27, 2014 to reconstruct the Record, R. pp. 921-943.

stolen \$40 million from victims. These statements happened at the beginning of the hearing, before any of the lawyers had spoken. “I had never seen a judge act in such a way.”⁹⁰

Another observer said: “I was appalled at the judge’s comments and behavior, and it seemed to me that the judge was in an adversarial relationship with Arthur, rather than being an impartial judge.”⁹¹ A third observer said: “Soon after the judge entered the courtroom, he said a number of disparaging remarks regarding Mr. Field. These included referring to Mr. Field as a criminal and that he had stolen millions of dollars from his note holders. The exchange between the judge and the defense attorney was very surprising and appeared to be biased.”⁹²

CONCLUSION

The Receiver has had in his possession or within his control copies of all relevant documents necessary to collect CIF’s assets for years. A finger needs to be pointed at someone. The lower court has chosen to point that finger at Dr. Arthur Field, rather than calling upon the Receiver to account for his unreasonably lengthy efforts in marshalling CIF’s assets. For all of the reasons discussed above, the lower court’s Contempt Order should be reversed based upon abuse of discretion and no clear and convincing evidence of willful failure to comply with specific requirements of court orders. The Court of Appeals should make a finding based on the record before it and the standard of review, that Dr. Field has fulfilled his production and cooperation obligations under the MGSA Order and all other orders, and he should not be subjected to any further efforts by the Receiver or Class Counsel to seek a ruling of contempt against Dr. Field.

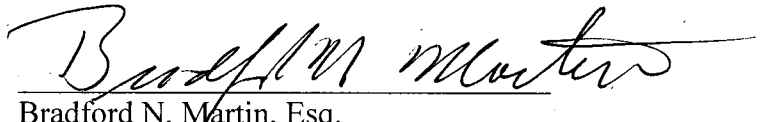
⁹⁰ *Id.* Exhibit G, R. p. 941.

⁹¹ *Id.* Exhibit H, R. p. 942.

⁹² *Id.* Exhibit I, R. p. 943.

Respectfully submitted,

February 2, 2016

A handwritten signature in cursive script, reading "Bradford N. Martin". The signature is written in dark ink and is positioned above the printed name and address.

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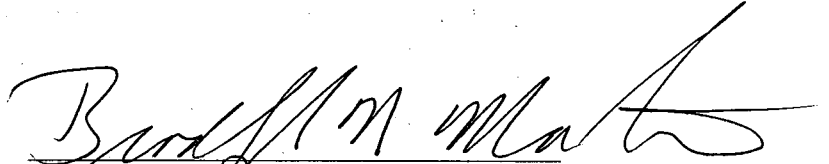
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**ATTORNEYS FOR APPELLANT ARTHUR M.
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ATTORNEY CERTIFICATION

The undersigned, attorneys for Appellant, hereby certify that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

February 2, 2016



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