

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

William P. Keesley, Successor Circuit Court Judge

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**RECEIVED**

MAR 29 2016

Case No. 2013-CP-32-01272

Case No. 2014-CP-32-00399

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**SC Court of Appeals**

Appellate Case No. 2015-001821

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

WCC Case No. 0506205

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Alexander Guice, Employee, Appellant,

v.

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

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**REPLY TO RETURN TO MOTION TO  
STRIKE RESPONDENTS' INITIAL BRIEF  
AND LEAVE TO STAY**

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Pursuant to Rule 240(f), SCACR, Appellant submits this Reply to  
'Respondents' Return In Opposition To Appellant's Motion To Strike  
Respondents' Initial Brief And Leave To Stay' (Return) dated March 17, 2016  
which was received by Appellant via regular mail on March 22, 2016. Appellant  
contends this Reply is submitted by Appellant in *propria persona*, and should be

considered without regard to technicalities. *Hulsey v. Ownes*, 63 F3d 354 (5<sup>th</sup> Cir 1995). Upon review of the Respondents' Return, Appellant would allege in reply as follows:

#### ARGUMENT

**1. On Return, Respondents' failed to meet their burden to refute that Attorney Hantske engaged in negligent misrepresentation and fraud (3 counts) in the Respondents' Initial Brief.**

In reply, Appellant contends the defense(s) advanced by Attorney Hantske in an effort to resist Appellant's allegation(s) that Attorney Hantske has engaged in negligent misrepresentation and fraud in their Initial Brief, as well as resisting the Respondents' Initial Brief being stricken from record, must be patently rejected by the Court based on several relevant factors.

**First**, with respect to Appellant's first count that Attorney Hantske engaged in intentional/negligent misrepresentation and fraud regarding her intentional failure to disclose all factual medical determinations set forth in the October 27, 2005 Medical Report in their Initial Brief, Attorney Hantske's reliance upon Rule 208, SCACR, for the proposition that "... Appellant is entitled to present the procedural and factual bases in the record that support his claim and Respondents are entitled to do likewise" (Respondents' Return, p. 5) constitutes an intentional misapplication of the rule. Rule 208, SCACR.

Specifically, the October 27, 2005 Medical Report authored by attending physician Dr. Tamadon was never contested by either party, and as such, it is the law of case respective to Appellant's compensable injuries sustained from the admitted work-related accident which occurred on May 05, 2005. "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).

Moreover, with respect to the phrase "shall contain a concise history of the proceedings", as set forth in Rule 208(b)(1)(C), wherein Respondents' shall conform to the same per Rule 208(b)(2), the Court must construe and interpret "concise" as defined in Black's Law Dictionary, 2<sup>nd</sup> Ed. ("The opening should be concise, very distinct and perspicuous. Its use is to enable the judge and jury to direct their attention to the real merits of the case, and the points in issue") to have required Attorney Hantske to disclose all factual medical determinations set forth in the October 27, 2005 Medical Report, which mandated the disclosure of Dr. Tamadon's assignment of permanent lifting restrictions to Appellant and Dr. Tamadon's reporting to the Employer that Appellant could no longer perform the duties of a delivery driver, in Attorney Hantske's Initial Brief on page 1. *Id.* October 27, 2005 Medical Report, ROA; Exhibit "C", Motion for Sum. Judgment, previously filed. Respondents' Initial Brief, pg. 1, previously filed.

Furthermore, Attorney Hantske does not deny Appellant's contention that she is not a physician; the fact that Attorney Hantske never performed a medical examination of Appellant's Back, and therefore Attorney Hantske is neither a medical expert nor qualified to challenge the factual medical determination(s) of Dr. Tamadon's assignment of permanent lifting restrictions to Appellant and Dr. Tamadon's factual medical determination that Appellant could no longer perform the duties of a delivery driver, as "allegations", respective of the aforementioned

Oct. 27, 2005 Medical Report. Motion to Strike, p. 41-42, previously filed.

Return to Motion to Strike. Oct. 27, 2005 Medical Report, previously filed.

Further, it is well settled that our courts have found in limited circumstances that witnesses other than medical doctors may testify as medical experts. However, in these cases the witnesses have had some expertise in the matter in dispute. *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978) (in a personal injury action, chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience); *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (psychologist permitted to give expert opinion concerning diagnosis, prognosis, and causation of plaintiff's mental and emotional condition). Rule 702, SCRE.

Additionally, Attorney Hantske cannot have it both ways. Specifically, Attorney Hantske cannot disclose material factual medical determinations set forth in the October 27, 2005 Medical Report which Attorney Hantske may perceive to be beneficial to her clients (i.e. opining MMI and assigning the five percent impairment rating) on the one hand, and on the other hand knowingly and willfully fail to disclose other material factual medical determinations set forth in the aforementioned Oct. 27, 2005 Medical Report Attorney Hantske may perceive to be adverse to her clients. Non-disclosure is **fraudulent** when there is a duty to speak. *Manning v. Dial*, 271 S.C. 79, 83, 245 S.E.2d 120, 122 (1978).

Still further, if the Court were to accept Attorney Hantske's clearly erroneous interpretation of Rule 208, SCACR, then Rule 3.3(a)(1), RPC, Rule 407, SCACR ("(a) A lawyer shall not knowingly:(1) make a false statement of fact

or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”) and Rule 4.1, RPC, Rule 407, SCACR (“In the course of representing a client a lawyer **shall not knowingly**: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6” (Emphasis added)) would not be necessary and have no construed effect. *Id.* An attorney would have the legal authority to knowingly and willfully fail to disclose material facts in their written communications to the Court and opposing parties, as well as make knowingly false statements of material facts to the Court and opposing parties which Appellant contends Attorney Hantske has engaged in per the Respondents’ Initial Brief and Attorney Hantske’s Return to the Motion to Strike. *Id.*

Accordingly, the Court should patently reject Attorney Hantske’s reliance upon Rule 208, SCACR, with respect to her failure to disclose all factual medical determinations from the October 27, 2005 Medical Report in their Initial Brief. *Id.*

**Second**, with respect to Appellant’s second count that Attorney Hantske engaged in intentional/negligent misrepresentation and fraud regarding her intentional failure to disclose that US Foods terminated Appellant for cause on November 02, 2005 in their Initial Brief, a review of the Respondents’ Return indicates that Attorney Hantske has advanced the proposition that: **“The circumstances under which Appellant ceased working for US Foods have not been stipulated”** (Respondents’ Return, p. 2)(Emphasis added). However,

this statement must be patently rejected by the Court as meritless.

Specifically, the Court needs to look no further than the Employer's Termination Notice dated 11/02/2005, and specifically, in Section "1" where under the heading "Action(s)", it states "**Termination**"; under the heading "Reason(s)", it states "**Permanent Lifting restrictions**" and (hand written) "**109 – No Position Available**"; and in Section "2" under the heading "Comments/Special Processing", it states, "**Termination of Employment- Released from Doctor with permanent lifting restrictions not comparable with job duties**" (Emphasis Added)<sup>1</sup>. Employer Termination Notice, dated Nov. 02, 2005. ROA; Exhibit "Q", Reply to Return to Motion for Summary Judgment, previously filed.

Furthermore, the Court must consider Attorney Hantske's own contradictory statement which certainly appears to provide the circumstances with which Appellant's employment with US Foods ceased, upon review of Respondents' Initial Brief, p. 34, where Attorney Hantske states:

**"Furthermore, Respondents deny Appellant's allegation that he was fired in retaliation for filing a workers' compensation claim; instead, even the evidence he relies on indicates his employment was terminated because US Foods could not accommodate his permanent lifting restriction"** (Emphasis added). *Id.*

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<sup>1</sup> For the record, Appellant asserts the only physician(s) the undersigned was under the medical treatment and care of from on or around May 05, 2005 to on or around October 27, 2005 was the employer-selected workers' compensation physicians, which includes treating/attending physician Dr. Alan Tamadon. Further, subsequent the Oct. 27, 2005 Medical Report, US Foods never offered the injured Appellant suitable employment to accommodate Appellant's compensable permanent lifting restrictions prior to terminating the Appellant for cause (for permanent lifting restrictions) approximately **five (5) days later** on Nov. 2, 2005. "A condition which is induced by a physical injury, is thereby causally related to that injury." *State v. Craig*, 161 S.C. 232, 159 S.E. 559 (1931) (defining cause as that which produces an effect).

Accordingly, the Court should patently reject Attorney Hantske's rationale defending her failure to disclose that the Employer terminated Appellant for cause on 11/02/2005 on page 1 of their Initial Brief.

**Third**, with respect to Appellant's third count that Attorney Hantske engaged in intentional/negligent misrepresentation and fraud regarding her decision to continuing advancing the validity of the aforementioned Settlement Agreement and Release although the Employer terminated Appellant on grounds of permanent lifting restrictions – the same permanent lifting restrictions assigned to Appellant by treating physician Dr. Tamadon just five prior to the termination, a review of the Respondents' Return indicates that Attorney Hantske has advanced the defense that, "Finally, the factual allegations that Appellant asserts Respondents omitted from their brief are not determinative or relevant to the issue of whether the Settlement Agreement can be challenged nearly six years after it was approved by the Commission as a final and binding order" (Respondents' Return, p. 5); however, this argument must be patently rejected by the Court as meritless.

Specifically, Respondents' rely on our Supreme Court's holding in *McCreery*, 303 S.C. at 273, 400 S.E.2d at 131, holding that "once the Commission approves a compensation agreement, the factual issue of liability under the act is final adjudicated and cannot be retried on collateral attack". *Id.* However, our Supreme Court's holding authority in *McCreery* was specifically directed at the Employer/Carrier, not the injured worker. In our Supreme Court's holding in *McCreery*, they (further) opine:

"It is settled law that an **employer** wishing to raise the exclusivity of the Commission's jurisdiction as a defense to an action in circuit court must plead facts raising it as an affirmative defense or it is waived. *Googe v. Speaks*, 194 S.C. 206, 9 S.E.2d 439 (1940); *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986). Similarly, an **employer** must raise to the Commission the factual issue whether the Act confers jurisdiction. Failure to do so constitutes a waiver of the issue." (Emphasis added). *Id.*

Here, it is the injured worker and undersigned Appellant, not the Respondent-Employer, who is raising the issue of the Commission's lack of subject matter jurisdiction, wherein Attorney Hantske's reliance and focus on a twenty-five (25) word phrase out of our Supreme Court's holding authority in *McCreery* is improper, wherein the entire opinion must be read in its entirety. "The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of judgment itself." *City of North Myrtle Beach*, 397 S.C. at 503, 725 S.E.2d at 679. If the undersigned Appellant was the Employer/Carrier in the instant appeal, then Attorney Hantske's reliance upon *McCreery* would be plausible; however, as the Appellant is the injured worker, our Supreme Court's holding in *McCreery*, as advanced and relied upon by Attorney Hantske, is inapposite to the instant appeal. *Id.*

Still further, the Supreme Court's holding authority in *McCreery* is also inapposite to the instant appeal because Appellant has raised the issue of fraud alleged to have been committed by the Employer and Insurance Carrier by way of the Employer's former and current Representatives; and the Appellant's former Representative, whereas in *McCreery*, the Supreme Court held, "Fraud is not an issue here." (see Footnote 1 in *McCreery*), which should be construed and suggested that if fraud had been an issue, the *McCreery* opinion would have

been different. *Id.* Motion to Strike, p. 10-34, previously filed.

Additionally, if the Court agrees with Appellant and determines that Dr. Tamadon's 10/27/2005 compensable and medically-diagnosed assignment of permanent lifting restrictions to Appellant was an "essential material fact in issue", which Appellant contends is the proper determination, then the failure of the parties to have a "meeting of the minds" regarding the compensable injury of permanent lifting restrictions wherein the compensable injury of permanent lifting restrictions was not included as an "essential material fact in issue" in the aforementioned Settlement Agreement which was approved by the Commission on Jan. 05, 2006, wherein the aforesaid agreement failed to comprehensively comply with the requirements set forth in Reg. 67-803(A)(2)(2005)("If the parties agree to the terms of a settlement by entering into an Agreement and Final Release, the document **shall** include the following: (2) A statement of the facts at issue...")(emphasis added), then the Court would have no choice but to deem said agreement approved by the Commission on Jan. 05, 2006 null and void ab initio. *Id. 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."). *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."). *Patricia Grand Hotel*, 372 S.C. at 638-39, 643 S.E.2d at 694-95 (discussing *Ozyagcilar v. Davis*, 701 F.3d 306 (4th Cir. 1989) wherein the appellate court reversed the district court's enforcement of a settlement agreement upon a party's request when there was

no meeting of the minds as to the specifics of the settlement agreement)).  
October 27, 2005 Medical Report. Employer Termination Notice. Settlement Agreement and Release dated Jan. 05, 2006, ROA; Exhibit "D", Motion for Summary Judgment, previously submitted.

Accordingly, the Court should patently reject Attorney Hantske's defense as to the continued advancement of the validity of the aforementioned settlement agreement.

**Fourth**, Attorney Hantske's contention, as set forth on page 1 of their Return, and specifically, "Although Appellant's lengthy Motion to Strike ostensibly seeks to strike Respondents' Initial Brief on the basis of Rule 269, SCACR, Appellant provides no grounds that would justify such action" (Respondents' Return, p. 1, 6), is short, conclusory, and fails to favor the Court with a required citation of authority, and as such, should be deemed abandoned. *First Sav. Bank supra*.

Further, the Court must construe Rule 269, SCACR, the same way the Court construe statutes, in terms of giving effect to every word, phrase, and sentence contained within a Rule. See *Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." (quotation marks omitted)). "Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276,

285, 711 S.E.2d 912, 917 (2011).

In terms of statutorily interpreting Rule 269, SCACR, the Court must consider the phrase "or is not in compliance with these Rules", which must be constructed to include the parties, and specifically, attorneys required compliance with all provisions set forth in the South Carolina Appellate Court Rules, which would include compliance with the Rules of Professional Conduct as set forth in Rule 407, SCACR. *Id. Sweat supra.*

Thus, if the Court agrees that Attorney Hantske failed to comply with *inter alia* Rule 208, SCACR; Rule 3.3, RPC, Rule 407, SCACR; Rule 4.1, RPC, Rule 407, SCACR; and holding authorities as previously cited in Appellant's Motion to Strike in terms of intentionally failing to disclose material facts; making intentional false statements of material facts; and engaging in negligent misrepresentation and fraud, then more than sufficient grounds would exist to justify this Court granting the relief sought by Appellant pursuant to Rule 269, SCACR. *Id.* Respondents' Initial Brief. October 27, 2005 Medical Report. Employers' Termination Notice. Settlement Agreement and Release. Respondents' Return. Motion to Strike.

**Finally**, Appellant contends that if the Court determines that the elements to negligent misrepresentation and/or fraud of any one (or all) of the three counts of negligent misrepresentation and/or fraud against Attorney Hantske as alleged have been met, then said acceptance would be sufficient to strike Attorney Hantske's Initial Brief (and Designation) and grant all relief sought by Appellant. *Regions supra. Sauner supra.* As such, and by reference, the Court should

patently reject the defenses advanced by Attorney Hantske as contained in their Return and grant Appellant's Rule 269 strike application. Motion to Strike, p. 24-34, previously filed.

**2. On Return, Respondents' failed to meet their burden in terms of disputing Appellant's contention that this Court has proper subject matter jurisdiction over the parties and the instant appeal to consider Appellant's Rule 269 motion to strike.**

In reply, Appellant contends Respondents failed to meet their burden to establish that this Court lack subject matter jurisdiction to consider Appellant's Rule 269 motion to strike. A review of the Respondents' seven (7) page Return indicates that Respondents failed to affirm or deny Appellant's contentions that this Court has proper jurisdiction over the parties and the case; and that Appellant's Rule 269 motion to strike was timely filed before this Court within ten days after the Court denied Appellant's Motion for Summary Judgment in a non-dispositional order dated March 03, 2016. Respondents' Return, previously filed.

Furthermore, because Appellant alleges that Respondents' Initial Brief filed in this matter constitutes intentional negligent misrepresentation; fraud; violations of Rule 4.1; RPC, Rule 407, SCACR; Rule 402(k), SCACR; and well-settled laws, respectively, the Court should reject Respondents' contention that their Initial Brief is not controlled by Rule 269, SCACR. *Id.* Motion to Strike Respondents' Initial Brief, p. 29-34, previously filed.

Finally, Appellant had a legal right to raise the issue of whether the Commission lacked subject matter jurisdiction at the time it approved the Settlement Agreement and Release in this matter on Jan. 05, 2006, at any time, to include raising the issue in Appellant's Rule 269 strike application, pursuant to

this Appellate Court's jurisdiction over the parties and instant appeal. *Harden v. S.C. State Highway Dept.*, 266 S.C. 119, 221 S.E. (2d) 851 (1976). *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001)("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.")(Emphasis added).

**3. On return, Respondents' failed to meet their burden to dispute stipulated facts mutually agreed upon by the parties.**

In reply, Respondents' failed to meet their burden to dispute stipulated facts mutually agreed upon by the parties based on several factors.

First, Respondents' states that "the facts are not uncontested" (Respondents' Return, p. 2); however, with the exception of Respondents contention that Appellant's average weekly wage (AWW) was \$1,154.00 instead of \$1,161.00, wherein Appellant utilized the WCC Form 12, as advanced to the Commission by the Respondents, to establish that the AWW was \$1,161.00 (See Form 12 dated 05/21/2005, ROA; Exhibit "A" Motion for Summary Judgment, previously filed), it appears Respondents' based their calculation of \$1,154.00 per week solely on the Settlement Agreement and Release entered into by the parties on 12/22/2005 which Appellant contends should be deemed invalid.

Second, because this appeal is a Workers' Compensation Case, the employment relationship, and in particular, how and when the employment relationship ceased to exist is material to the instant workers' compensation appeal<sup>2-3</sup>. *Hon. Jean Hoefler Toal et al.*, Appellate Practice in South Carolina 170 (2d ed.2002). *Id.*

Third, as the Court can confirm, both the Oct. 28, 2005 Medical Report by

Case Manager Cathy Dayton, RN, and the October 27, 2005 Medical Report by Dr. Tamadon clearly establishes that it was attending physician Dr.

Tamadon who, (i) assigned permanent lifting restrictions to the Appellant; and (ii) reported to the Employer that Appellant could no longer perform the duties of a Delivery Driver, in addition to opining MMI and assigning a five (5) percent impairment rating to the whole person of the Appellant. October 28, 2005 Medical Report; ROA, October 27, 2005 MMI Medical Report, ROA; Exhibit "C", Motion for Summary Judgment, previously filed.

Fourth, the **175** consecutive days Appellant received temporary

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2 South Carolina jurisprudence, particularly within the realm of workers' compensation law, indicates that this Court must recognize the natural motivations that may be at play here, wherein the employer terminates the injured worker's employment for cause; the employer's representative OFFERS to settle the injured worker's compensation claim after the employer terminated the injured worker for cause; AND the natural motivations that may be at play from the injured worker's former attorney, who took no legal action on behalf of the injured worker to seek the reinstatement of employment by filing a § 41-1-80 Complaint with the Circuit Court, wherein the Act has provided injured workers' attorneys' the legal right to retain up to 33.3% of a Commission-approved settlement as attorney fees. Regulation 67-1205 (1992). To that end, Commission-promulgated Regulation 67-801(B) (2005), which Appellant contends substantially alters and amends U.S. Const. amend. XIV, § 5; S.C. Const. art. I, § 22; §42-9-260(F); and well settled authorities which establishes that a hearing must be convened before the Commission prior to Commission-approval of a settlement agreement and release which would dispose of a compensation claim, serves as a bridge to connect the natural motivations of the employer; insurance carrier; employers' representative; and the undersigned injured worker's former representative, to the clear detriment and harm which has been sustained to the injured worker and his family. *Id. Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940)(holding "Due process requires notice of issues to be heard"). *Last v. MSI Const. Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991). *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

**3 Appellant points out that Reg. 67-801(B)(2005) substantially alters and amends § 42-9-390 (2005). Specifically, nowhere in § 42-9-390 did our legislature authorize the Commission jurisdictional authority to waive the hearing prior to approval of a settlement agreement award if the injured worker is represented by counsel. *Id. 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."). E-Mail Correspondence from Commission Agent Eugenia Hollmon, dated 11/15/2012, ROA; enclosed herein as Exhibit "V". *Ham supra. Jasper Cnty. supra.***

compensation payments, to include the first 150 days, from 05/06/2005 to 10/27/2005, is based on the Respondents' own WCC Form 18 it filed with the Commission dated 12/01/2005. WCC Form 18 dated 12/01/2005, ROA; Exhibit "B" Motion for Summary Judgment, previously filed. §42-9-260(F). Reg. 67-506(D).

Finally, the term "Fact" is defined as: "...A circumstance, event or occurrence as it actually takes or took place; **a physical object** or appearance, as it actually exists or existed. **An actual and absolute reality**, as distinguished from mere supposition or opinion; **a truth, as distinguished from fiction or error...**" (Emphasis added). Black's Law Dictionary, 2<sup>nd</sup> Ed.

As such, this Court should accept the facts as advanced by the Appellant as stipulated on the basis of the Respondents' WCC Form 12 dated 05/21/2005; Respondents' WCC Form 18 dated 12/01/2005; Respondents' Employee Termination Notice dated 11/02/2005; the Respondents' own statement as set forth in Respondents' Initial Brief on pg. 34; the Medical Report dated 10/27/2005; and the Medical Report dated 10/28/2005, particularly wherein Respondents' have never challenged the validity of the same. *Id. 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.").

4. **On return, Respondents' failed to meet their burden to establish that the Commission had subject matter jurisdiction over the parties and the claim at the time it approved the Settlement Agreement and Release on Jan. 05, 2006 because the Employer terminated the Appellant for cause on Nov. 02, 2005.**

In reply, Appellant contends Respondents failed to meet their burden to establish that the Commission had proper subject matter jurisdiction at the time it approved the Settlement Agreement and Release on Jan. 05, 2006 because the Employer terminated the Appellant for cause on Nov. 02, 2005.

First, the Employer cannot have it both ways. Specifically, the Employer cannot terminate an injured worker for cause, which affords the Employer the legal right to depart from complying with the provisions set forth in the Act pursuant to our Supreme Court's holding in *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 747 S.E. 2d 430 (2013), and then after termination for cause, utilize an isolated and Commission-promulgated provision (Reg. 67-801), within the Act, to secure a release from the injured worker's claim, without an evidentiary hearing or informing the Commission that the injured worker was previously terminated for cause and is unemployed, which is exactly what transpired in the instant appeal. *Id.* Settlement Agreement. Correspondence from Commission Agent Eugenia Hollmon dated 11/15/2012, ROA; Ex. "V".

Second, Respondents' reliance on *McCreery v. Covenant Pres. Church*, 303 S.C. 271, 400 S.E.2d 130 (1990), is misplaced as advanced in Issue No. "1" above. See Issue No. 1 above.

Third, in *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 92 S.E. (2d) 673 (1956), Employee Hart meritoriously raised the issue of the N.C. Industrial Commission's lack of subject matter jurisdiction over the parties after an agreement was executed and approved by the Commission on grounds that Hart disputed his status as an employee after the agreement was entered, whereupon

the Sup. Ct. of North Carolina held,

*The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel... However, the doctrine has been announced that one who procures or gives consent to a decree, even though it is void as beyond the powers of the court to pronounce, is estopped to question its validity, at least where he has obtained a benefit from the act of the court. Dean v. Dean, 136 Or. 694, 300 P. 1027, 86 A.L.R. 79; 19 Am.Jur., Estoppel, sec. 77. The basis of this doctrine is that whether the court had jurisdiction either of the subject matter of the action or of the parties is not important, but that such practice **will not be tolerated**... **A decision of the Industrial Commission is only conclusive when it is acting within its jurisdiction**... The Commission **cannot** enlarge its jurisdiction, or prevent a challenge to its jurisdiction over the subject matter, **by one of its rules. Its limited jurisdiction is fixed by the Act**... *Id.* (Emphasis added).<sup>4</sup>*

Fourth, Respondents' failed to cite a single authority wherein the Commission retained subject matter jurisdiction over the parties or the claim after the prior termination of the injured worker's employment for cause by the employer. Instead, Respondents cite authorities for the proposition that the employment relationship existed at the time of the injury, which is inapposite to the argument and legal theory advanced by Appellant. Respondents' Return, p. 3-4, previously filed.

Finally, Respondents' contention, "Even [if the Commission] it if did not [have subject matter jurisdiction], which Respondents do not concede, the

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<sup>4</sup> See *Spoone v. Newsome Chevrolet-Buick*, 309 S.C. 432, 434, 424 S.E.2d 489, 490 (1992) ("Because South Carolina adopted large portions of the North Carolina Workers' Compensation legislation, we rely on North Carolina precedent in Workers' Compensation cases."); also see *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 405, 211 S.E.2d 220, 222-23 (1975) ("the opinions of the Supreme Court of North Carolina construing [the Workers' Compensation A]ct are entitled to great weight"). *Id.*

holding in McCreery confirms that the Settlement Agreement is final and binding and cannot be “retried on collateral attack.”” (Respondents’ Return, p. 4), should be patently rejected by this Court based on the North Carolina Supreme Court’s holding authority as set forth in *Hart supra*, and the accurate interpretation which renders inapposite our Supreme Court’s decision in *McCreery supra. Id. See Caughman v. Columbia YMCA*, 212 S.C. 337, 47 S.E.2d 788 (1948).

As such, because US Foods terminated the injured Appellant for cause on Nov. 02, 2005 wherein the employment relationship ceased to exist, which divested the Commission of subject matter jurisdiction over the parties and the claim, the Court should deem the aforementioned Settlement Agreement and Release approved by the Commission on Jan. 05, 2006 null and void *ab initio*. *Turner v. Malone*, 24 S.C. 398, 401-02 (1885).

**5. On return, Respondents’ failed to meet their burden to refute that Attorney Barefoot and Attorney Bacon engaged in a conspiracy to commit insurance fraud; fraud; and intentional/negligent misrepresentation.**

In reply, Respondents’ failed to meet its burden in terms of overcoming Appellant’s well pled contentions that Attorney Bacon, Appellant’s former counsel of record in the instant appeal, and Attorney Barefoot, the Respondents’ former counsel of record, engaged in a conspiracy to commit insurance fraud; fraud; and intentional negligent misrepresentation in the instant appeal, based on several factors.

First, Respondents present a general denial to the Appellant’s contentions (Respondents’ Return, p. 2-3); however, it is well settled in workers’ compensation cases that when a presumption shifts the burden of production to

the opposing party, that party must present substantial evidence in order to rebut the presumption. 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."). Accordingly, the Respondents' general denial should be rejected by the Court.

Second, Respondents' statement "Appellant's substantive arguments alleging civil conspiracy, fraud, and insurance fraud between and by his own prior counsel, Attorney Bacon, and Respondents' prior and current counsel, Attorneys Barefoot and Hantske, are incorrect, unsupported and irrelevant to his Motion to Strike" (Respondents' Return, p. 4) is a short, conclusory statement which Respondents' declined to favor the Court with any cited authority, wherein the Court must deem said rebuttal abandoned. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting 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). *Id.*

Finally, Respondents' statement(s) "Respondents and their counsel did not and do not owe Appellant the fiduciary obligations he alleges. Neither State v. Scott, 330 S.C. 125, 497 S.E.2d 735 (Ct. App. 1998) nor the other cases cited by Appellant in his Motion to Strike hold otherwise" (Respondents' Return, p. 4-5) is also short, conclusory statement(s) without any cited authority, wherein the Court must also deem said rebuttal abandoned. *First Sav. Bank supra.*

Accordingly, and by reference, this Court should accept Appellant's well pled argument(s) and established element(s) that Attorney Barefoot and Attorney

Bacon engaged in a conspiracy to commit insurance fraud; fraud; and intentional/negligent misrepresentation based on the arguments, evidence and holding authorities advanced and relied upon by Appellant. Motion to Strike, p. 10-24, previously filed.

**6. On Return, the Respondents' request that the Court impose sanctions upon Appellant is without merit.**

In reply, Appellant contends the Court should patently reject the Respondents' request that Appellant be cautioned and/or sanctioned for filing frivolous motions based on several pertinent factors.

First, a review of the record indicates that to date, and including this Rule 269 strike application, Appellant has only filed four (4) motions: 1) a Motion for Leave to Proceed *in forma pauperis*; 2) a Motion to Strike Respondents' Reply to Respondents Motion to Correct Appellant's Designation of Matter (for alleged time limit non-compliance with Rule 240(f), SCACR); 3) A Motion for Summary Judgment; and 4) the current and pending Rule 269 strike application. Record.

Second, none of the non-dispositional orders issued by the Court in the instant appeal has cautioned or admonished Appellant for filing a frivolous motion. See Non-dispositional Orders dated 10/20/2015; 12/18/2015; and 03/03/2016, contained within the record.

Third, all motions filed by Appellant have been verified; filed and served in good faith in accordance with Rule 240, SCACR, wherein Appellant truly believes that the Court should presume that Appellant's initiation or continuation of proceedings have been advanced and acted upon with a "proper purpose" and "valid under existing law". *Id. Hanahan*, 326 S.C. at 156, 485 S.E.2d at 912

(quoting S.C. Code Ann. § 15-36-20(1)(Supp. 1995) (“Section 15-36-20 creates a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose ‘if he reasonably believes in the existence of facts upon which his claim is based’ and . . . reasonably believes under the facts that his claim may be valid under existing or developing law.”).

Fourth, Appellant contends Respondents failed to establish (or cite) the required seven elements as set forth in §15-36-10(E)(1-7)(2005), to support the Court considering the imposition of sanctions upon Appellant, wherein Respondents’ request for the imposition of sanctions against Appellant should be deemed abandoned. *Id.* Respondents Return. *First Sav. Bank supra.*

Finally, it is improper for Respondents’ to utilize and rely upon the July 17, 2015 Circuit Court Order on appeal<sup>5</sup> as grounds to support their request that the Court impose sanctions upon Appellant, pursuant to Rule 241(a), SCACR (“**General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the

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<sup>5</sup> Appellant points out that Attorney Hantske prepared the proposed Circuit Court Order on appeal, just as she prepared the Appellate Panel’s July 17, 2013 Decision and Order, AND the Hon. William P. Keesley, the successor Circuit Court Judge, added an additional fifteen (15) pages of narrative in the July 17, 2015 Circuit Court Order on appeal which was not provided to or reviewed by the undersigned self-represented Appellant per Rule 5(b)(3), SCRPC, prior to verification by Judge Keesley. *Luhr Bros.*, 157 F.3d 333, 338 (5th Cir. 1998) (“[I]n cases such as the instant one, where the district court’s Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party’s proposed findings and conclusions, with minimal revision, we should approach such findings with ‘caution.’”). *Id.*

administrative tribunal, appellate court, or judge or justice of the appellate court.”). *Id.* Accordingly, the Court should patently reject Respondents’ request that the Court impose sanctions, caution or admonish Appellant as meritless.

**7. On Return, Respondents’ declined to provide an answer to several issues raised by Appellant and said unanswered issues should be accepted by the Court without objection.**

In reply, Respondents’ declined to provide answers to all issues set forth in Appellant’s Rule 269 strike application (“Respondents do not address every argument or assertion raised in Appellant’s 49-page Motion to Strike)

(Respondents’ Return, p.2), and as such, Appellant moves the Court to accept the well pled contentions, by reference, as set forth in Issue’s “7”, “8” and “9” of Appellant’s Motion to Strike, without objection, pursuant to well settled law.

100A C.J.S. *Workers’ Compensation* § 1029 (2013). Motion to Strike.

**8. On Return, Respondents’ contention and defense that the issue of the retaliatory discharge against Employer was not raised in the Circuit Court was not supported by authority and should be deemed abandoned.**

In reply, a review of the Respondents’ Return on page 3 indicates that Respondents’ contend, “Respondents continue to maintain their position that Appellant’s employment retaliation/reinstatement claims are completely without basis, the Commission has no jurisdiction to consider such claims and, on this appeal from the Commission, neither does this Court” (Respondents’ Return, p. 3). However, Respondents contention is short, conclusory, and as it appears to be a pattern, Respondents failed to favor the Court with a required citation of authority, wherein said contention should be deemed abandoned by the Court.

*First Sav. Bank supra.*

Further, Respondents' failed to defend or answer any of the additional well pled supporting contentions regarding the issue of Appellant's claim of a retaliatory discharge as raised and set forth in Issue No. "6", p. 34-42 of Appellant's Rule 269 strike application. By reference, Appellant moves the Court to accept the well pled contentions as set forth in Appellant's Rule 269 strike application, without objection, as a matter of law. Motion to Strike. 100A C.J.S. *Workers' Compensation* § 1029 (2013).

9. **On Return, Respondents contention that evidence advanced by the Appellant, and specifically, Appellant's Social Security Income Statement and the documents relative to the pre-existing compensable injury sustained to Appellant's Back on May 27, 2004 are not preserved for consideration on appeal, was not supported by citation of authority, and should be deemed abandoned.**

In reply, a review of Respondents' Return on page 6 indicates that Respondents contend, "Appellant's Exhibit "R" [Social Security Income Statement] dated September 21, 2015, and Exhibit "U" [documents pertaining to the pre-existing compensable injury sustained to Appellant's Back on May 27, 2004] are improperly before this Court, as they were not submitted to the Commission in the underlying proceeding. Furthermore, Appellant's arguments based on "Exhibit "U," found on pages 38-39 of his Motion to Strike, have never been presented to any tribunal below and, therefore, are not preserved for appeal" (Respondents' Return, p. 6).

However, the above referenced contention as advanced by Respondents is short, conclusory, and as it appears to be a repeating pattern, Respondents failed to favor the Court with a required citation of authority, wherein said contention should be deemed abandoned by the Court. *First Sav. Bank supra.*

Further, the Court should consider that the Respondents did not deny the validity of the aforementioned documents confirming Appellant was subjected to the May 27, 2004 pre-existing compensable injury sustained to Appellant's Back less than a year prior to the subsequent compensable injury sustained to Appellant's Back on May 05, 2005; **the intentional failure of Respondents to report the May 27, 2004 compensable injury to the Commission**; or the more than fourteen (14) months in delayed entitled compensatory payments to Appellant. Respondents cannot complain of an error which their own conduct created. Respondents Return. *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984)(holding a party cannot complain of an error which his own conduct created); see also *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996).

Moreover, it strains credulity that the Respondents would seek that the Court not consider Appellant's redacted Social Security Income Statement, when it only confirms what the Appellant has alleged and swore to under penalty of perjury all along: the Appellant has been unemployed and unable to obtain gainful employment since Appellant was terminated by US Foods for "permanent lifting restrictions" and "no position available" on November 02, 2005. Social Security Income Statement. Employer's Termination Notice.

Still further, as it specifically relates to the aggravation of Appellant's May 27, 2004 pre-existing compensable Back Injury from the May 05, 2005 compensable tractor-trailer accident, in *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct.App.1995), this Court provided what can only be described as an excellent and straight-forward analysis of Workers'

Compensation law as it directly relates to the aggravation of a pre-existing compensable injury, wherein this Court opined:

**“Our courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable.”** (Emphasis added). *Id.*

*Whitfield v. Daniel Constr. Co.*, 226 S.C. 37, 83 S.E.2d 460 (1954).

Finally, how Attorney Hantske, who is duly informed and aware of Appellant's pre-existing compensable injury sustained to his Back on May 27, 2004 less than a year prior to the subsequent May 05, 2005 compensable injury also sustained to Appellant's Back and the failure of the Employer's former representative to report to the same to the Commission, can continue to defend the termination of Appellant's employment by US Foods on November 02, 2005 as justified, where there was no independent intervening cause, and in good faith, is, respectfully, unconscionable. Evidentiary documents related to compensable injury sustained to Appellant's Back on May 27, 2004, Exhibit "U", previously filed. WCC Form 12A dated May 21, 2005, ROA; Exhibit "A", Motion for Summary Judgment, previously filed. Employer's Termination Notice, dated November 02, 2005. Respondents Return. Lawyers Oath, Rule 402(k), SCACR (**"I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land."**)(Emphasis added).

#### CONCLUSION

In final analysis, where the Appellant is entitled to equal protection of our laws and is entitled to our Constitutionally Protected Due Process Right to be

heard pursuant to Article I, sections 3, 22 of the South Carolina Constitution; and where the even application of the rule of law provides order, structure, predictability and security, based on the merits, there is no reasonable or plausible legal theory where Respondents can continue to prevail in the instant appeal, or the requirement or the allowance for this honorable Court to allow this appeal to proceed for another day.

Accordingly, Appellant moves the Court to patently reject and deny the defenses and requested relief as contained within Respondents' Return and immediately grant this Rule 269 application to Strike Respondents' Initial Brief, to include granting the relief as stated in Appellant's Motion to Strike.

#### VERIFICATION

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

Respectfully submitted,

By: \_\_\_\_\_

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

March 26 2016

Sworn to before me this  
26 day of March, 2016

Tamela Colon  
Notary Public of Florida

My commission expires 12/12/16



TAMELA COLON  
NOTARY PUBLIC  
STATE OF FLORIDA  
Comm# FF214230  
Expires 12/12/2016

# EXHIBIT V

**RE: Status of Appeal - WCC No.: 0506205**

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From: **Hollmon, Eugenia** (EHollmon@wcc.sc.gov) This sender is in your contact list.  
Sent: Thu 11/15/12 10:55 AM  
To: Alexander Guice (alguice@hotmail.com)

We have scanned all of the documents that you sent to you file, but your appeal is not proper. You can only file an appeal if you have had an official order signed by a Commissioner. According to our records this case has never had a hearing of any kind. It is currently closed, but if you are seeking benefits you need to file for a hearing. You may do that by downloading a Form 50 off of our website. The Form 50 requires a \$25 filing fee and if you are unable to pay that you can also download a Form 32.

Since you are represented by Atty. Bacon he must file these documents for you or you will need to send a letter requesting to have him released along with the required forms.

Genia Hollmon

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**From:** Alexander Guice [mailto:alguice@hotmail.com]  
**Sent:** Wednesday, November 14, 2012 10:36 PM  
**To:** Hollmon, Eugenia  
**Subject:** Status of Appeal - WCC No.: 0506205

Dear Ms. Hollmon:

I am respectfully requesting to know whether or not I am required to submit any further paperwork with regards to the Appeal received by your office on November 6, 2012. On the Certificate of Service submitted with the Appeal received by your office, US Foods Inc., the Respondent, received a certified copy of the Appeal on November 5, 2012.

If there is any further documentation required at this time by the Appellant, please do not hesitate to contact me. Thank you. Please respond.

Alexander Guice  
Pro Se Appellant

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**RECEIVED**

William P. Keesley, Successor Circuit Court Judge

MAR 29 2016

**SC Court of Appeals**

Case No. 2013-CP-32-01272

Case No. 2014-CP-32-00399

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Appellate Case No. 2015-001821

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION  
WCC Case No. 0506205

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Alexander Guice, Employee, Appellant,

v.


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

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**PROOF OF SERVICE**

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I hereby certify that the Respondents, through Counsel, were provided a true copy of a cover letter to the Clerk; a 'Reply to Return to Motion to Strike Respondents' Initial Brief and Leave to Stay' with supporting attachment and a proof of service, by depositing the same in the US Postal Service, via Priority Mail, and addressed to: **Erin L. Hantske, Esq., P.O. Box 650007 Mt. Pleasant, SC 29465** on this 26<sup>th</sup> day of March, 2016.



---

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(813) 562-0547  
Appellant, Pro Se

March 26, 2016

Alexander Guice

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Phone: (813) 562-0547  
Email: [alguice@hotmail.com](mailto:alguice@hotmail.com)

March 26, 2016

Via Priority Mail

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

**RECEIVED**  
MAR 29 2016  
SC Court of Appeals

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

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of a 'Reply to Return to Motion to Strike Respondents' Initial Brief and Leave to Stay' with a supporting attachment and a proof of service in regards to the above-entitled action. Please forward to the appropriate personnel for processing, and please return clocked copies of the same to the undersigned in the pre-paid self-addressed envelope enclosed for your convenience.

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

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

Very truly yours,



Alexander Guice  
Appellant, *pro se*

Enclosures: As stated

cc: Erin L. Hantske, Esquire  
Heather S. Weiss, Director

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