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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

APPEAL FROM Horry COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

Case No: 2005-CP-26-2710

Dr. Brad R. Johnson,

Petitioner,

vs.

Lewis W. Hall, Lewis V. Hall, L.W.
Hall Enterprises, LLC, Cold Air A/C
Service, Inc.

Respondents.

RETURN TO PETITION
FOR WRIT OF CERTIORARI

Lori

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TABLE OF CONTENTS

	<u>Page</u>
Issue Presented for Review.....	1
Counter-Statement of The Case.....	1
Statement of Facts.....	3
Arguments.....	4
I. The Trial Court correctly required the Plaintiff to proceed to trial.....	4
II. As an additional sustaining ground, the Plaintiff's Request for a Continuance dealt with damages issues which were not addressed in the directed verdict motion and not considered by the jury in their defense verdict.....	7
III. The remaining issues set forth in the Petition should be dismissed because they were not raised in the Trial Court and preserved for review.....	8
Conclusion.....	8

TABLE OF AUTHORITIES
CASES

Brown vs. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997).....8

Faith Holiness Church vs. Church of God, 282 S.C. 487, 319 S.E.2d 348 (Ct. App. 1984).....5

Paschal vs. Causey, 309 S.C. 206, 420 S.E.2d 863 (Ct. App. 1992).....5.

Wayne Smith Construction Co., Inc. v. Wolman, Duberstein & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987).....6

Windham vs. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983).....5.

RULES

Rule 40(b), SCRCP.....2,4,5,9

Rule 59, SCRCP.....3

ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred in affirming the ruling of the trial court requiring the Plaintiff to proceed to trial less than 180 days after service on the corporate Defendants.

COUNTER-STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint on May 31, 2005. The Plaintiff alleged multiple causes of actions including civil conspiracy, assault, false imprisonment, battery, malicious prosecution, abuse of process, defamation and premises liability. The Defendant Lewis W. Hall answered the Complaint and asserted various affirmative defenses and counterclaims.

Subsequent to the filing of the initial pleadings, the Plaintiff moved to amend the Summons and Complaint to add additional parties. By Order filed February 26, 2007, the Honorable J. Michael Baxley, hearing judge, granted the Plaintiff's Motion to Amend. However, he provided the Plaintiff ten additional days to consider the issue and notify the Court of his intent to add the new parties. (See attached as Exhibit "A" the Form 4 Order filed February 26, 2007 referenced as being on page 49 of the record on Appeal, but omitted in this Respondent's copy of the Record on Appeal.)

On May 18, 2007, the Plaintiff filed an Amended Complaint naming as additional Defendants L. W. Hall Enterprises, LLC and Cold Air AC Service, Inc. Lewis W. Hall filed his Answer to the Amended Complaint on May 31, 2007.

At a Master Roster meeting conducted by Judge Baxley as Chief Administrative Judge for Horry County on August 20, 2007, the case was without objection and with the consent of all parties scheduled for trial. The case was to be called not before the week of October 1, 2007. Pursuant to the terms set forth at the roster call, the case was called to trial on October 1, 2007.

By oral motion in open court on October 1, 2007 followed by written motion dated October 3, 2007, the Plaintiff moved for a continuance based upon Rule 40(b), SCRCP. By oral order on October 1, 2007, Judge Baxley denied the motion for continuance and ordered the case to proceed to trial.

After the presentation of the Plaintiff's case, Judge Baxley granted the directed verdict motions of Lewis W. Hall, L. W. Hall Enterprises, LLC and Cold Air AC Service, Inc. The case continued against the Defendant Lewis V. Hall. On October 4, 2007, the jury returned its verdict in favor of the remaining Defendant Lewis V. Hall.

By written motion filed October 12, 2007, the Plaintiff made a motion for a new trial pursuant to Rule 59, SCRCP. The motion was based primarily on the Court's ruling under 40(b), SCRCP. Judge Baxley denied the Plaintiff's motion for new trial by administrative decision of the Court filed December 17, 2007. Thereafter, the Plaintiff filed his Notice of Appeal and served a copy of the Notice of Appeal on opposing counsel by mail on February 29, 2008.

On October 11, 2011, the Court of Appeals filed an unpublished opinion affirming the trial court's orders denying the Plaintiff's motion for a continuance and motion for new trial.

Plaintiff's counsel, Stuart M. Axelrod, moved to be relieved of counsel on October 18, 2011. By Order filed November 23, 2011, the Court of Appeals granted that motion and relieved Mr. Axelrod as attorney. Thereafter, the Plaintiff filed a petition for rehearing on December 27, 2011. The petition was denied by Order from the Court of Appeals filed January 30, 2012. On April 4, 2012, the plaintiff filed a Petition for Writ of Certiorari with the Supreme Court.

STATEMENT OF FACTS

This case involves a dispute between neighbors that

occurred on or about March 26, 2005. After a brief encounter and exchange of gestures between the plaintiff and the Halls, the plaintiff somehow lost consciousness on his neighbor's property. (R p. 166, line 20 through p. 177, line 6.) The plaintiff has no specific recollection of the facts surrounding the incident leading up to him blacking out. (R p. 178, line 23 through p. 179, line 14)

ARGUMENTS

I. THE TRIAL COURT CORRECTLY REQUIRED THE PLAINTIFF TO PROCEED TO TRIAL.

The Defendant Lewis W. Hall believes that the Court of Appeals was correct in affirming the trial court's decision requiring this case to go forward.

The Plaintiff claims that he is entitled to a broad shield of protection under Rule 40(b), SCRCP which states in part:

...Notwithstanding the foregoing, no action may be called for trial until 180 days after service of the last pleading which adds a new party to the action, unless all parties consent in writing.

In this case, the conduct of the parties on the record prior to the call of the case clearly reflects a consent to proceed forward. At the Master Roster call which occurred on August 20, 2007, the Plaintiff, by not objecting to the placement of the case on the October 1, 2007 roster, waived any

objection to the 180 day rule set forth in Rule 40(b), SCRCP. The Plaintiff indicated to the Court that he would be ready for trial by the week of October 1, 2007. (R p. 161, line 21, through p. 162, line 1) Our Appellate Courts have consistently held that a party who fails to object to the trial of a case and affirmatively agrees to its trial at a designated time cannot later assert that the trial Court erred in trying the case before the close of the statutory period. See Paschal vs. Causey, 309 S.C. 206, 420 S.E.2d 863 (Ct. App. 1992); Windham vs. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983); and Faith Holiness Church vs. Church of God, 282 S.C. 487, 319 S.E.2d 348 (Ct. App. 1984).

In addition, the Plaintiff did not comply with the Administrative Order of the Honorable J. Michael Baxley which required that any request for a continuance be made no later than 5:00 p.m. Wednesday prior to the scheduled trial term. In this case, the Administrative Order was not complied with and the Motion for Continuance was not made until the day of trial. A copy of the Administrative Order is attached hereto and made a part hereof as Exhibit "B". (R p. 160, line 22 through p. 161, line 3.

Third, two of the reasons listed in the Plaintiff's Motion

for Continuance became moot at the trial of the case. Those reasons included a Motion for Continuance filed by the Co-Defendant Lewis V. Hall and a Motion for Summary Judgment filed by the Defendant Cold Air AC Service, Inc. Both of those Motions were withdrawn prior to the case being called as indicated in the Plaintiff's own Motion. (R p. 151, lines 10-23; p. 152, lines 7-9; p. 159, lines 15-23)

Fourth, the Plaintiff did not comply with Judge Baxley's Order allowing him to add a new party. There is no subsequent Order of the Court allowing the amendment to add the Defendant Cold Air AC Service, Inc. at the time it was finally added outside the time period prescribed by Judge Baxley. As a result, Cold Air AC Service, Inc. was arguably not even a proper party to the litigation and the Plaintiff should not be allowed to continue his case or seek a new trial of the case by virtue of adding a party outside the time set forth in the trial Judge's Order.

Finally, whether to grant a continuance in a case is within the discretion of the trial court. The court's decision will not be disturbed absent an abuse of discretion. Wayne Smith Construction Co., Inc. v. Wolman, Duberstein & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987). Given all the

factors listed above, as well as the additional sustaining ground developed below, it is clear the trial court did not abuse his discretion in refusing to grant the continuance in this case.

II. AS AN ADDITIONAL SUSTAINING GROUND, THE PLAINTIFF'S REQUEST FOR A CONTINUANCE DEALT WITH DAMAGES ISSUES WHICH WERE NOT ADDRESSED IN THE DIRECTED VERDICT MOTION AND NOT CONSIDERED BY THE JURY IN THEIR DEFENSE VERDICT.

Item No. 1 in the Plaintiff's Motion for Continuance was that he had a psychiatrist that was supposed to be deposed on November 28, 2007. However, the Plaintiff's psychiatrist deposition had been noticed and cancelled on several prior occasions by Plaintiff's counsel. The last time Dr. Weinbaum's deposition was scheduled was on September 12, 2007. However, the deposition was cancelled on September 10, 2007 by Karen from the Axelrod Law Firm, attorneys for the plaintiff. A copy of the letter from Dr. Weinbaum confirming the above was attached to the Return to the Plaintiff's motion and is attached hereto and made a part hereof by reference as Exhibit "C".

As shown in the record, the Co-Defendants except for Lewis V. Hall were successful in their directed verdict motions. R. p. 182, line 23 through p. 190, line 7) Simply put, the Plaintiff did not meet his burden of proof on any of the causes

of action against the Defendants Lewis W. Hall, L. W. Hall Enterprises, LLC or Cold Air AC Service, Inc. As a result, the reasons requested in the continuance had no bearing on the trial against those Defendants and any error committed by Judge Baxley amounted to harmless error. When the Plaintiff fails to prove an alleged error harmful, the error does not constitute grounds for dismissal. Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997)

As to the Defendant Lewis V. Hall, after consideration of all the facts and circumstances of the case, including medical evidence on behalf of the Plaintiff, the jury returned its verdict in favor of the Defendant. (R p. 191, line 18 through p. 192, line 14) Accordingly, any reasons pertaining to a continuance based on establishing damages was moot because the jury did not consider damages in its verdict.

III. THE REMAINING ISSUES SET FORTH IN THE PETITION SHOULD BE DISMISSED BECAUSE THEY WERE NOT RAISED IN THE TRIAL COURT AND PRESERVED FOR REVIEW

As succinctly stated in footnote (1) of the Court of Appeals opinion, the appellate courts should not review all of the constitutional arguments raised by the plaintiff because they were not raised in the trial court.

CONCLUSION

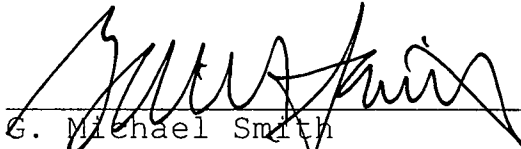
It is clear from the record in this case that Plaintiff's

counsel either consented by his actions to proceed forward with this case when it was called for trial on October 1, 2007 or, in the alternative, failed to follow the trial Court's mandate regarding amending the complaint to add the new Defendant. As a result, the Plaintiff cannot now attempt to utilize Rule 40(b), SCRCP, to excuse his conduct in this case. In addition, even if Judge Baxley erred in requiring the Plaintiff to proceed to trial, the error was harmless because the crux of the Plaintiff's request for a continuance was to support his position on damages. By virtue of the directed verdict motion on liability against the Defendants Lewis W. Hall, L. W. Hall Enterprises, LLC and Cold Air AC Service, Inc., any damages evidence was moot. In addition, the jury's verdict for the Defendant is indicative of the fact that the Plaintiff failed to meet his burden of proof on liability against the remaining Defendant Lewis V. Hall and any damages evidence would have been immaterial in that deliberation. Accordingly, since the Plaintiff failed to establish any harm by Judge Baxley's ruling, the opinion of the Court of Appeals affirming the Orders of trial Court should be affirmed in this case and this Honorable Court should dismiss the Petition for Writ of Certiorari.

(Signature block following page)

Respectfully submitted,

THOMPSON & HENRY, P.A.



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(843) 248-5741

ATTORNEYS FOR THE RESPONDENT
LEWIS W. HALL

May 4, 2012

EXHIBIT "A"

Brad R Johnson
Plaintiff(s)

1/2005 CP-26-2710

Vs.

ORDER

Lewis W Hall
Defendant(s)

IT IS ORDERED that the MOTION BE STRUCK FROM THE ACTIVE motion calendar for the following reason(s):

PLTFFS MOTIONS TO COMPEL — GRANTED WITH CONSENT OF DEFENDANTS. Both Defense counsel will VERIFY INTERROG. WITHIN 10 DAYS.

ATTY SMITH'S MOTION TO QUASH ALL LIS PEDENS FILED IN THIS CASE IS GRANTED EFFECTIVE IMMEDIATELY. ATTY SMITH TO SUBMIT FORMAL ORDER ON THIS ISSUE ONLY WITHIN 10 DAYS.

PLAINTIFF'S MOTION TO AMEND ^{TO ADD NEW PARTY(S)} IS GRANTED BUT PLAINTIFF IS TO ADDITIONAL DAYS TO CONSIDER THE ISSUE AND WILL NOTIFY COURT HIS INTENT.

IT IS ORDERED that the within entitled MOTION(S) be: _____ until the _____

Reason: _____

2. Transferred to the Jury/Non-Jury Calendar.

3. Other: _____

Conway, South Carolina

02/16, 2007

Atty S Axelrod

Presiding Circuit Judge

[Signature]

Atty J J Nettles

Atty S Michael Smith

EXHIBIT "B"

**AN OPEN LETTER TO ATTORNEYS AND PRO SE PARTIES WITH CASES
PENDING ON THE HORRY COUNTY JURY ROSTER:**

Beginning July 1, 2007, in the wake of Judge Thomas' election to the Court of Appeals, it will be my privilege to serve as Chief Administrative Judge for civil court in the Fifteenth Judicial Circuit. I look forward to working with you in this capacity. In an effort to streamline operations of the Horry County Civil Courts, this letter sets the procedures and methods of operation for all JURY cases, pending in Horry County. A separate letter will be posted on the NON-JURY roster outlining new NON-JURY procedures.

In posting these procedures, the Court is aware that change is often difficult. Please understand, however, that each of the following new procedures is a result of collaboration with judges, staff, and members of the Bar, and each procedure is targeted to alleviate a specific problem presently being experienced in administering the jury roster. This is a work in progress, and any suggestions you have concerning the jury roster will be welcomed and should be forwarded directly to my office or given to Horry Bar Association president Natasha Hanna who may wish to take a position on behalf of the Bar Association.

NEW RULES FOR JURY CASES

1. **Master Roster Meetings** -- Master Jury Roster meetings will be held bi-annually. The first is scheduled for Monday, August 20, 2007, in Courtroom 3B, beginning at 10:00 a.m. All attorneys with cases on the roster, as well as all pro se parties, are expected to attend and be prepared to advise the court when the case will be ready for trial, approximately how long the trial will take, and whether there are any unusual issues with regard to the case. Any requests for protection for the remainder of 2007 must be made at least five (5) business days prior to the master roster meeting.

Master Roster Meeting Format -- At the roster meeting, attorneys and parties should be prepared to advise the Court whether the case can be tried within 13 months of the filing date. Cases will be listed on the roster on a "not before a particular date" basis as opposed to allowing counsel to actually choose the week of trial for a case. Attorneys and pro se parties in cases that cannot be ready for trial within 13 months of filing will need to meet with the administrative judge, as will those anticipating a trial of longer than one week's duration. If the parties wish to discuss a request for a date certain trial at the master roster meeting, a motion for date certain must be filed at least five (5) business days prior to the meeting (see paragraph 9 below).

2. **Earlier Publication of Trial Rosters** -- In order to give counsel adequate time to notify clients and witnesses, and to be fully prepared for trial, trial rosters will be posted thirty (30) days in advance of the court term beginning with the roster for the August 13, 2007 term. Trial rosters will consist of 25 cases per judge. Please note that a limited number of non-jury items will also be included on the roster as

discussed in item 3 below. Roster meetings will continue to be held on Monday morning at the start of the term.

3. **Back-up Non-Jury Cases on Trial Roster** – To relieve the backlog in non-jury appeals, the docket clerk will set ten (10) non-jury appeals cases at the end of the jury trial roster. These cases will be called for trial if all jury cases are resolved. An email advising counsel of the fact that a particular non-jury appeal has been set for trial in this fashion will be sent out at the time the roster is initially posted. Counsel and parties should be on standby in the event these cases are reached, and non-jury docket coordinator Teresa Phillips will telephone counsel and parties as soon as it is evident that the non-jury cases will be reached. Failure to appear will result in dismissal of the case. Counsel and parties for these non-jury appeals do not need to attend the jury roster meeting on Monday morning, but must be on standby for the call of the case. Further, if the case has resolved or the appeal is moot, please advise Teresa Phillips immediately upon the case being posted for back-up trial so that it may be deleted from the roster.

4. **Continuances** – Continuance requests must be in the form of a filed motion, and can no longer be considered based upon a phone call or letter. Attorneys/parties requesting a continuance should send the request by fax, together with a copy of the filed motion bearing the Clerk's stamp, no later than 5:00 p.m. WEDNESDAY prior to the scheduled trial term as follows:

Ms. Alma Jenkins
Jury Docket Coordinator
Horry County Clerk of Court's Office
(843-915-5075 voice
(843) 915-6075 fax

Continuance requests without proof of a motion being filed cannot be considered. Proof of filing includes either providing a copy of the filed motion with the clerk's stamp affixed thereon, or a copy of the motion filing letter, copy of the \$25.00 filing fee check, and a copy of an affidavit of service of the motion on all opposing parties. All continuance requests should include the reason for the request, the name and contact information of all adverse attorneys or pro se parties, and a written statement from all adverse attorneys or pro se parties advising whether there is consent to the request. Failure to provide this information will result in denial of the continuance motion. Your letter will be faxed back to all attorneys and pro se parties with a grant or denial noted on the face of the letter. Motions for continuance made after the deadline must be addressed by the presiding judge of the term of Court, so your appearance at the Monday roster meeting will be required unless the presiding judge communicates otherwise.

5. **Effect of Continuances** – In the past, when a case was continued, based upon its case number, several weeks may pass before the case would be called for

trial again. This is confusing for parties and others not familiar with the system. Effective July 1, a continuance will only postpone the trial of the case for one term, and the continued case will be placed at the top of the trial docket for the following term. However, upon a showing of meritorious circumstances, the presiding judge will be authorized to grant a continuance of up to one month; however, anyone requesting a continuance for longer than one month must address this issue with the chief administrative judge.

6. **Conflicts with Other Courts** – The Court is aware that there are other courts operating simultaneously while jury terms are in progress. However, it will no longer be sufficient for counsel or a party to simply say "I have to be in general sessions" or "I have to be in federal court" and on that basis request a continuance. The Court will require written documentation of the court conflict and the name and contact information of the scheduling officer for that court. Hereafter, jury docket coordinator Alma Jenkins will resolve the conflict with the other circuit or federal court so that the civil jury case will be held as scheduled. Counsel and parties are required to give jury docket coordinator Alma Jenkins a minimum five (5) business days notice prior to the jury term when such a conflict is occurring. Counsel is referred to Rule 601 of the SC Appellate Court Rules when such scheduling conflicts arise.

7. **Jury Trials by Special Referee** – Both S. C. Code Ann § 14-11-60 and Rule 39, SCRPC, allow jury (or non-jury) trials to be conducted by a special referee appointed by the Court. A standard Order allowing such disposition may be found on this website at the following link: [_____](#). Any parties wishing to resolve a case by this method should prepare a similar Order and submit it to the Court. By consent, parties are free to choose the special referee whom they wish to preside, who should be a member in good standing of the South Carolina Bar. Unless otherwise agreed by the parties, the costs of referring the case shall be borne equally between the parties. The Court strongly urges this alternative resolution method for cases, as it is quicker, less expensive for parties, less formal, may employ high/low agreements, and often operates under relaxed rules of evidence.

8. **Status conferences** – From time to time, the Court will make a day available for the purpose of conducting status conferences. The first date for status conferences has been scheduled for Friday, July 20, 2007, beginning at 10:00 a.m. Attorneys or pro se parties requesting a status conference on this day should contact Jury court coordinator Alma Jenkins at the address listed above. Due to their complex nature, the Court is going to require status conferences in certain types of cases in an effort to insure their progress toward trial, and all parties will be notified in advance of the date and time.

9. **Date certain trial requests** -- Presently there are over 100 sizeable and expert-intensive condemnation, construction, and/or medical malpractice cases pending in Horry County, many of which are projected to take more than one week for trial. To assign date certain trials for only these cases would swallow the docket

and prevent the orderly flow of business for the other 2000 plus cases that are pending. Thus, a date certain trial can only be assigned under compelling circumstances. These circumstances generally include difficulties such as having three (3) or more experts who will testify at trial, a projected trial length of a full week or more, having more than ten (10) parties in the case, having at least five (5) lay witnesses from out of state, and/or other similarly challenging factors. Any request for a date certain trial must be made by separate motion, not as a part of a scheduling order, setting forth the specific reasons for which the request is made, stating the positions of the other parties, estimating the length of trial, and advising if any specific court terms are agreeable or problematic to all. Please understand in advance that the Court will be unable to accommodate many of these requests. Furthermore, it will not be possible for counsel to choose the particular date for a trial, and many date certain trials will be set on back-up status behind another such case.

10. **Scheduling Orders** – Once a case is listed on the trial docket, a motion for a scheduling order, which at that point is actually a continuance request, cannot be granted. Scheduling Orders should be submitted early in the litigation and prior to the case appearing on a trial docket, or at the master roster meeting. All scheduling Orders presently in effect shall remain in effect.

11. **Effect of this Order on Condemnation Cases** – The Honorable Edward B. Cottingham has been given special administrative authority over all pending SCODT condemnation cases, and he continues in this role. Judges Baxley and Cottingham will work together in scheduling these cases for trial in accordance with the statutory preference they are given.

Thank you for your attention to these matters, and we hope that these policies will assist you by providing guidelines that will make the civil court operations most efficient for attorneys and parties who have cases on your roster.

With respect,

J. Michael Baxley
Civil Chief Administrative Judge

EXHIBIT "C"

Weinbaum Psychiatric Services

Marc Weinbaum, MD

604 South Coit Street

Florence, SC 29501

Phone 843-629-0054

Fax: 843-629-9192

September 12, 2007

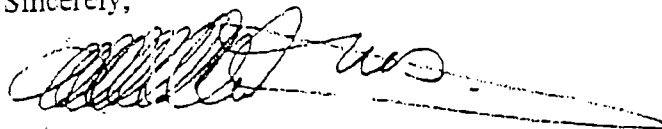
Thompson & Henry, P.A.
Michael Smith, Attorney at Law
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Re: Deposition for Brad Johnson

Dear Mr. Mike Smith,

The deposition that was scheduled today September 12, 2007 for Brad Johnson was cancelled on September 10, 2007 by Karen from the Axelrod Law Firm. The Axelrod Law Firm has not yet rescheduled this deposition.

Sincerely,



Marc Weinbaum, MD
Diplomate of the American Board
of Psychiatry

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY - 7 2012

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable J. Michael Baxley, Circuit Court Judge

Case No: 2005-CP-26-2710

Dr. Brad R. Johnson,

Petitioner,

vs.

Lewis W. Hall, Lewis V. Hall, L.W.
Hall Enterprises, LLC, Cold Air A/C
Service, Inc.

Respondents.

PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari by placing a copy of same in a United States Postal Service mail box, postage prepaid on May 4, 2012, to the attorneys of record, addressed to:

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111 SE 14th Street
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Petitioner, Pro Se

Forrest Truett Nettles, II, Esquire
The Nettles Law Office, LLC
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Charleston, SC 29402
Attorney for Lewis V. Hall

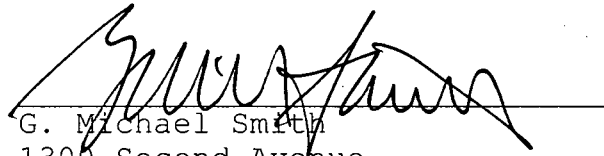
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Attorneys for Cold Air A/C Service,
Inc.

Signature Block to Follow.

Respectfully submitted,

THOMPSON & HENRY, P.A.

A handwritten signature in black ink, appearing to read "G. Michael Smith", is written over a horizontal line.

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May 4, 2012

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May 4, 2012

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MAY -7 2012

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, SC 29211

S.C. Supreme Court

RE: Dr. Brad R. Johnson vs. Lewis W. Hall, Lewis V. Hall,
L.W. Hall Enterprises, LLC and Cold Air A/C Service, Inc.
Case No.: 2005-CP-26-2710
Case Tracking No.: 2012-208988
Date of Incident: March 26, 2005
Our File No.: 15202.91

Dear Mr. Shearouse:

I am enclosing an original and six (6) copies of Respondent Lewis W. Hall's Return to Petition for Writ of Certiorari in connection with the above-captioned matter along with proper proof of service. Upon filing, please return the clocked copies to me in the enclosed envelope. By copy of this letter, I am enclosing and serving copies of the same upon opposing counsel.

Thank you in advance for your assistance in this regard.

Very truly yours,



G. Michael Smith

GMS/lwj

Enclosures

cc: Dr. Brad R. Johnson, Petitioner Pro Se
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