THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1202545

Scott Ledford, Employee, ... Appellant,

v.

Department of Public Safety, Employer, and
State Accident Fund, Carrier, ... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

E. Hood Temple
HATFIELD TEMPLE, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

and

J. Kevin Holmes
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800
Attorneys for Appellant

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1. THE APPELLATE PANEL COMMITTED AN ERROR OF LAW IN FAILING TO RULE THE HEARING COMMISSIONER SHOULD HAVE RECUSED HERSELF.

The Respondent argues Commissioner Barden is not subject to mandatory disqualification for any of the enumerated reasons set forth in Rule 501, Canon 3E(1)(a) through (d). The Rule provides a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, **including by not limited to** ... the instances enumerated. (Emphasis added). The Commentary makes clear a judge shall disqualify himself or herself "regardless whether any of the specific rules in Section 3E(1) apply."

Commissioner Barden's impartiality was reasonably questioned by her own conduct. Black's Law Dictionary defines "impartial" as favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just." Black's Law Dictionary, 5th Ed., West Publishing Co., p 677 (1979). It is neither fair nor just for a judge to threaten criminal prosecution unless a case is settled on grossly unfavorable terms. The Appellant does not have to prove why the Commissioner Barden was willing to shirk her statutory duties or abuse the powers of her office. The Appellant only needed to show she engaged in conduct that caused her impartiality and her integrity to be reasonably questioned by the Appellant.

The Respondent argues the Appellant did not move to have Commissioner Barden recuse herself until after "she reveals her ruling would be unfavorable to the Appellant." (Respondent's Initial Brief, p. 10). This argument leaves the impression that Commissioner Barden told the parties how she was going to rule

during the telephone conference on September 16, 2014. While Commissioner Barden's comments clearly indicated she was biased against the Appellant, Commissioner Barden never told the parties' attorneys how she was going to rule. If she had simply told the parties what her ruling was, there would have been no motion for recusal and the Appellant's remedy would have been to request review and judicial review. But that is not what happened.

During the telephone conference Commissioner Barden accused the Appellant, a career law enforcement officer, of committing perjury and said "while he may be a former member of the South Carolina Highway Patrol ACE Team, he was not a member of the 'Truth Team.'" (Affidavit of E. Hood Temple dated 10/10/14). During the telephone conference she implied he was a tax cheat and called his tax returns "creative accounting." (Affidavit of E. Hood Temple dated 10/10/14; Affidavit of Robert Jayroe). During the telephone conference she went so far as to say she "did not believe anything the [Appellant] said except his name and age." (Affidavit of E. Hood Temple dated 10/10/14). If all she said was she had concerns about the Appellant's credibility based upon her review of the record and he should consider settlement, there would have been no motion for recusal. But that's not what happened either.

Commissioner Barden threatened to report the Appellant to the Attorney General for criminal prosecution unless he settled his claim for what she understood would be a "minimal amount" offered after her conference call. (Affidavit of E. Hood Temple dated 10/10/14). She offered not to perform a statutory

duty imposed upon her if the case was settled thereby undermining public confidence in her integrity and impartialit. The Appellant has not overlooked Commissioner Barden's nine page order in which she found herself impartial and falsely accused Appellant's counsel of lying.[1] A review of her own Order shows she admits committing the improper conduct. (Order Denying Recusal filed 11/3/14, Findings of Fact 10 – 14, pp. 5 – 6). She calls her "findings" at the time of the telephone conference only "tentative" as an excuse for not having to report them. The problem is there was nothing tentative about what she said. Her suggestion her findings did not have to be reported because they were only "tentative" is a subterfuge.

Maybe it is true Respondent's counsel didn't take what Commissioner Barden said as a threat; after all, it wasn't a threat directed at her client. But Respondent's counsel, who was a party to the conference call, has had multiple opportunities to deny what Appellant's counsel says was said during the telephone conference and has not done so. But it really does not matter what either lawyer may have thought because, at the end of the day, the question is not how the lawyers perceived the conference call, as a "threat" as described by Appellant's counsel or as a

[1] Just as the Appellant urged the Court to use caution accepting Commissioner Barden's findings of fact in her Order, the Appellant urges the Court to use caution in accepting her findings of fact concerning her own impartiality. It is noted this Court found Commissioner Barden's decision in the case of Burnett v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012), a case also dealing with a police officer, disturbing. "We find the circuit court erred in affirming findings of fact that were unsupported by substantial evidence in the record. Particularly disturbing is the finding that the 2008 MRI showed 'only a 'minimal' protrusion with no nerve root displacement or impingement, and comparatively, no greater pathology of any significance (if any) than the MRI of 2004....' Because no evidence indicates this opinion originated from a medical provider, yet it appears in the single commissioner's order, we are forced to conclude it is the medical opinion of the single commissioner, adopted by the Commission." *Id.*, 437 S.E.2d at 206.

"professional courtesy" as described by Respondent's counsel. It is how what was said was perceived by the Appellant, whose case, reputation, liberty, and financial security were threatened and placed in jeopardy that mattered.

Appellant's counsel took immediate action to protect the Appellant's rights as soon as the improper conduct occurred. Lawyers are taught it is unethical to threaten criminal prosecution to force the settlement of a civil case. *See*: Rule 407, Rule 4.5. It is no less repugnant that such a threat should be made by a judge. Appellant's counsel was shocked. He immediately dictated a memorandum to document what had been said during the telephone conference. (Memo to File dated 9/16/14). He hired Robert Hill, Esquire, at his own expense, to research the law on perjury and judicial ethics. He discussed the matter with his partner, with a criminal defense attorney, and with other attorneys who practice workers' compensation law. And, he ordered a transcript of the hearing held before Commissioner Roche so he could compare the Appellant's testimony given in the two hearings. He received a draft motion to recuse Commissioner Barden prepared by Mr. Hill on September 30, 2014 and they discussed the need to prepare supporting affidavits, exhibits, and a memorandum to be attached to the motion. And, as he was ethically obligated to do, he discussed the ramifications of what had happened with his client, the Appellant. After all, it was the Appellant who would be the one potentially be facing criminal prosecution, if the case was not settled. Not surprisingly, the case did not settle as Commissioner Barden's telephone conference causes the Respondent's prehearing settlement offer to drop from

$47,500.00 to $10,000.00. (Sarah Alphin e-mail dated 8/13/14; Unredacted Motion to Recuse). It was the Appellant who decided that the motion to recuse should be filed. The motion to recuse, supporting documents, and memorandum of law were filed as soon as humanly possible on October 10, 2014. (Motion to Recuse filed 10/10/14). This was long before Commissioner Barden issued her detailed instructions with her Request for Proposed Order on November 3, 2014 or she issued her Order on December 17, 2014. (Request for Proposed Order; Hearing Commissioner Order). The motion having been supported should have been granted.

CONCLUSION

Appellant's counsel did want the Court left with the impression he waited until Commissioner Barden's findings and ruling were made known before taking action to seek her removal. Action was taken immediately after the offending conduct occurred and long before her "final" findings and ruling were made known. For the reasons set forth in the Appellant's Initial brief and herein, the Appellant prays that the Court reverse the decision of the Appellate Panel and rule the Appellate Panel committed an error of law by failing to rule Commissioner Barden should have recused herself.

Respectfully submitted,

HATFIELD TEMPLE, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

By: _____
E. Hood Temple

and

THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800

By: _____
J. Kevin Holmes

Florence, South Carolina

July 20, 2016

DAVID T. PEARLMAN
J. KEVIN HOLMES
THOMAS M. WHITE
MALCOLM M. CROSLAND, JR.
STEVEN E. GOLDBERG
MICHAEL J. JORDAN

STEINBERG
LAW FIRM | LLP

BENJAMIN W. AKERY
CATHERINE D. MEEHAN
KELLY M. ALFREDS
CHARLES S. GOLDBERG, LLC, OF COUNSEL
HUGO M. SPITZ (RETIRED)
IRVING STEINBERG (1902-1980)

61 Broad Street | P.O. Box 9 | Charleston | SC | 29401 | (843) 720-2800 | (843) 722-1190 fax | steinberglawfirm.com

July 20, 2016

The Honorable Jenny Abbot Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Scott Ledford v. Department of Public Safety
Appellate Case No. 2016-000601

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Initial Reply Brief of the Appellant, Additional Designation of Matter to be Included in the Record on Appeal, and the Proof of Service on opposing counsel.

Sincerely,

J. Kevin Holmes
Email: kholmes@steinberglawfirm.com
Direct Fax: (843) 722-1190

JKH/gdm
Enclosures
cc: Sarah S. Alphin, Esquire

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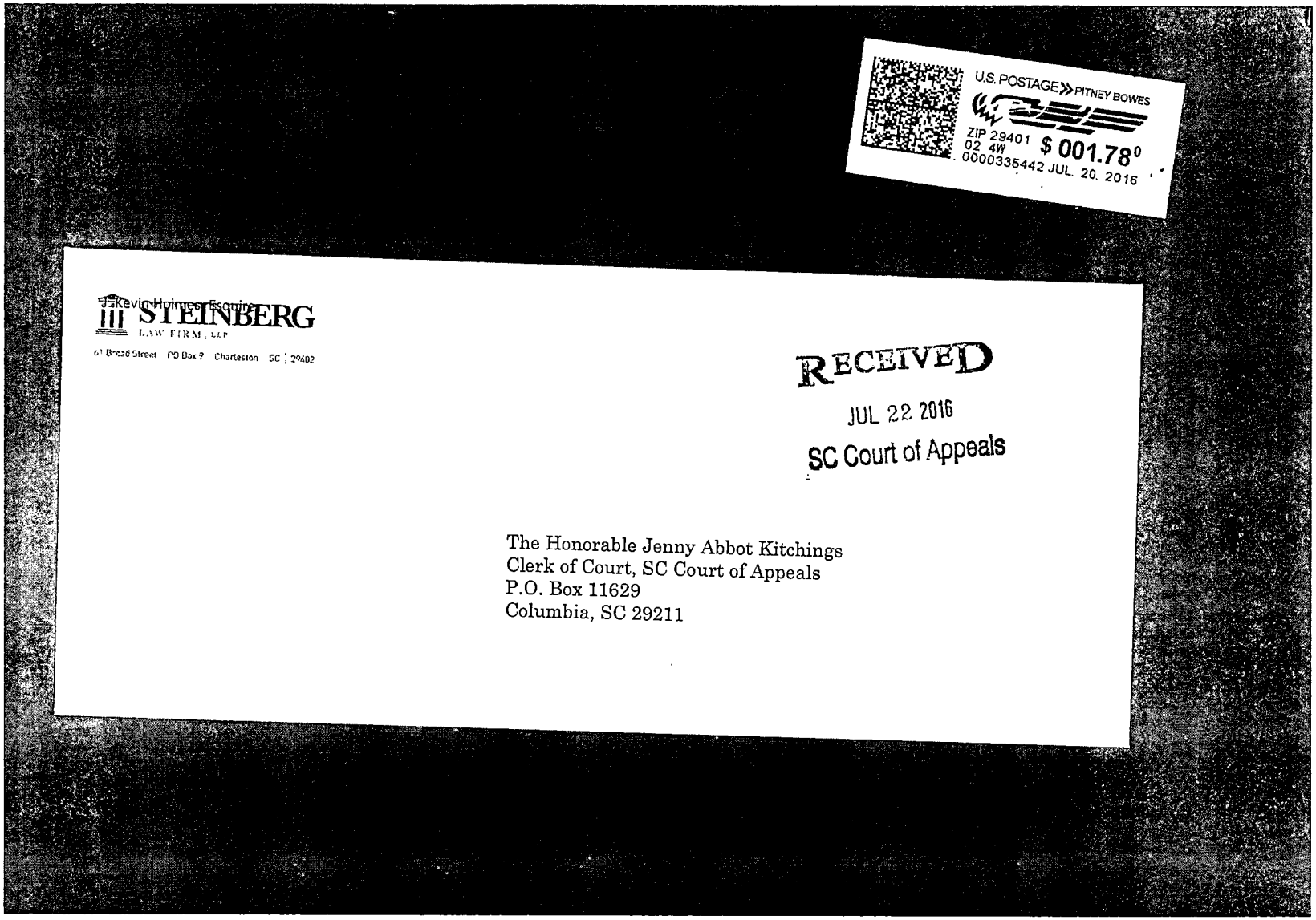
PROOF OF SERVICE

I certify that I have served the Appellant Initial Reply Brief and Motion to Include Additional Matter in the Record on Appeal on opposing counsel by depositing a copy of it in the United States Mail, postage prepaid on July 2o, 2016, addressed to Sarah S. Alphin, Esquire, Willson, Jones, Carter & Baxley, PA, 4500 Fort Jackson Blvd., Columbia, SC 29209.

July 20, 2016.

J. Kevin Holmes
THE STEINBERG LAW FIRM, L.L.P.
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
Attorney for Appellant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SC Court of Appeals
The Honorable Jenny Abbot Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211