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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Honorable William P. Keesley

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Case No. 2013-CP-32-01272
Case No. 2014-CP-32-00399

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Alexander Guice, ..... Appellant,

v.

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

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**RESPONDENTS' RETURN IN OPPOSITION TO APPELLANT'S MOTION FOR SANCTIONS**

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Pursuant to Rule 240, SCACR, Respondents US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Appellant Alexander Guice's Motion for Sanctions Against Respondents' for Repeated Violations of Rules 241(a) and 269 of the South Carolina Appellate Court Rules ("Motion for Sanctions"). Appellant's Motion is meritless and should be rejected.

As was the case with Appellant's prior meritless motions, his current Motion for Sanctions is nothing more than an attempt to circumvent the appellate process and force or coerce a ruling in his favor on the merits. It is Appellant, not Respondents, who is "clog[ging] the courts with frivolous motions or appeals." Polk County v. Dodson, 454

U.S. 312, 323 (1981). Respondents and this Court continue to be forced to expend time and valuable resources in order to respond to Appellant's repetitive and frivolous filings.

First, Appellant alleges repeatedly that Respondents have committed sanctionable behavior by referencing and quoting from the Circuit Court's September 25, 2014 and July 17, 2015 Orders. There is nothing sanctionable about referencing the underlying orders which, although on appeal, have not been overturned.[1]

In particular, Respondents have not violated Rule 241, SCACR. Subpart A of that Rule provides, in pertinent part, that, "[a]s 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." Rule 241(a), SCACR. However, Subpart B of Rule 241 contains a list of exceptions to the general rule set forth in Rule 241(a), including "[m]oney judgments as provided in S.C. Code Ann. § 18-9-130." Rule 241(b)(1), SCACR. Section 18-9-130(A)(1), in turn, provides that a "notice of appeal from a judgment directing the *payment of money* does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. Code Ann. § 18-9-130(A)(1) (emphasis added).

The July 17, 2015 Order directed Appellant to pay Respondents "the sum of $32,933.13" as a sanction because "the relief sought by the Appellant was unsupported by law or procedure," and because defense of this case has been "made needlessly difficult because the Appellant insisted on taking unfounded positions, did not accept

[1] Ironically, Appellant states that there has been no order of this Court "reviewing the July 17, 2015 Circuit Court Order on appeal." (Motion for Sanctions, p. 9). This is because of Appellant's continued and repeated attempts to delay and circumvent the appellate process.

reasonable explanations, caused redundant filings in various forums, and liberally made unwarranted defamatory accusations." The Circuit Court's "award of attorneys' fees and costs is a money decree which should be enrolled as a separate judgment and draw interest under S.C. Code Ann. 34-31-20(B )." (July 17, 2015 Order, pp. 26-28, Att. A). This award for the payment of money was not stayed on appeal pursuant to S.C. Code Ann. § 18-9-130(A)(1) but, instead, is accruing interest until Appellant pays it in full.

Respondents cited to the prior orders of the Circuit Court as evidence of where this case stands and to demonstrate the frustrations of both counsel and court with Appellant's vexatious litigation tactics. There is no appellate rule that would prohibit such reference to the record below. In addition, Appellant has repeatedly cited the September 25, 2014 Order substantively, arguing that it awarded him all the relief he seeks on appeal. (*See, for example*, Appellant's Motion for Summary Judgment and Stay Pending Adjudication, dated Jan. 3, 2016 and received by this Court on Jan. 6, 2016).

Furthermore, although Appellant has variously argued that the Circuit Court lacked jurisdiction to issue the July 17, 2015 Order, that he was not afforded proper notice of the March 27, 2015 hearing, and/or that he was awarded all the relief he sought in the September 25, 2014 Order, (Claimant's Initial Brief, dated Sept. 14, 2015 and received by this Court on Sept. 16, 2015), he has not challenged the Circuit Court's award of attorney's fees as a sanction for his abuse of the legal process. Therefore, that issue is not preserved for appellate review and cannot be challenged by Appellant at this point. *See* Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument that was not raised in the opening brief); Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2

(Ct. App. 2013) (argument not preserved for appellate review where the party failed to raise in the opening brief). Even if he had properly preserved this issue on appeal, which Respondents do not concede, "[a] trial court's sanctions will not be disturbed absent a clear abuse of discretion." Johnson v. Dailey, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995).

Second, the fact that Respondents have requested in their Returns that this Court sanction and/or warn Appellant about his continued filing of frivolous motions does not constitute a sanctionable violation of Rule 269, SCACR. Appellant reads far too stringent a requirement into that Rule, asserting that a "party must file a motion to seek the imposition of sanctions, not request for imposition of sanctions against the offending party in a Return." (Motion for Sanctions, p. 13). As Rule 269 provides, the Court may impose sanctions on its own motion or on that of a party, with 10 days' notice. This Court has not imposed any sanctions on Appellant to date. Therefore, his due process rights have not been offended in any way.

Even if, for the sake of argument but without conceding, Respondents failed to comply in all respects with Rule 269 in their requests that this Court impose some reasonable parameters on Appellant's abuse of the civil judicial system, the proper response would be for this Court to simply deny Respondents' request for a warning or sanctions.

Respondents have not filed any frivolous motions or appeals. The multiple appeals to this Court and to the Supreme Court have all been filed by Appellant. Appellant's basis for recovery is not supported by statute, case law or any other rule of law. Neither Respondents nor their counsel have engaged in any sanctionable behavior.

Instead, they have vigorously and fairly defended their position against an inherently baseless claim.

Appellant, on the other hand, has filed and continues to file repeated motions and petitions in an attempt to both delay and circumvent the appellate process. He misquotes authority, whether intentionally or inadvertently. For example, Clinton Mills, Inc. v. Alexander & Alexander, Inc., 687 F. Supp. 226 (D. S.C. 1988) does not hold that, "[a] motion for sanctions is a matter subject to the court's general supervisory authority to ensure fairness to all who bring their case to the judiciary for resolution," as Appellant suggests. (Motion for Sanctions, p. 6). Instead, Clinton Mills dealt with a motion to disqualify the plaintiffs' counsel, and the quoted section reads, "[a] motion *to disqualify counsel* is a matter subject to the court's general supervisory authority ..." 687 F. Supp. at 228 (emphasis added). Whether to disqualify counsel because they represented a party in the prior business deal at issue and they might be called on a fact witnesses, which was the case in Clinton Mills, has nothing to do with whether Respondents should be subjected to sanctions in this case.[2]

The quote, "[v]iolation of any provision of the South Carolina Rules of professional Conduct [South Carolina Appellate Court Rules] qualifies as sanctionable misconduct," (Motion for Sanctions, pp. 6-7), does not appear anywhere in the Clinton Mills case. Nor does the quote attributed to Johnson to the effect that, "[a]n 'attorney [or party] may also be sanctioned for filing a pleading, motion, or other paper in bad faith ...whether or not there is good ground to support it," (Motion for Sanctions, p. 7), appear

[2] Similarly, Latham v. Matthews, C.A. No. 6:08-cv-02995-JMC; C.A. No. 6:08-cv-03183-JMC, 2011 U.S. Dist. LEXIS 1434 (D. S.C. Jan. 6, 2011), involved a motion to disqualify counsel on the basis of a conflict of interest, and not whether a party should be sanctioned.

anywhere in that case. None of the statutes and cases Appellant cites for his assertion that it is, "well settled federal and South Carolina jurisprudence that violations of any provisions of the South Carolina Appellate Court rules qualifies as sanctionable misconduct," (Motion for Sanctions, p. 10), provide any such thing.

The sanctions cases cited by Appellant to support his argument that, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction," McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830, 832 (Ct. App. 2008); Baughman v. AT&T, 306 S.C. 101, 108-109, 410 S.E.2d 537, 541-542 (1991); and Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), involved striking a pleading as a sanction for discovery abuses, which is not at issue in this appeal. Instead, Appellant simply asks this Court to grant him the substantive relief he is seeking – in other words, he hopes to circumvent the normal appellate process by playing games of alleged "gotcha."

Appellant has not and cannot demonstrate that Respondents or their counsel have acted in bad faith. There has been no "actual or constructive fraud" here, or any "design to deceive or mislead," or any "neglect or refusal to fulfill some duty" due to some "interested or sinister motive." State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915). Appellant has not and cannot point to any actions by Respondents that would fulfill any of the elements of the standard definition of bad faith. Instead, he relies on cases analyzing whether a duty exists in tort law, Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.AE.2d 167 (1977) and Carson v. Adgar, 326 S.C. 212, 1997 S.C. LEXIS 100 (1997), and cases considering whether an insurer has acted in bad faith

in refusing to pay a claim. Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002). Those cases and standards do not apply here, as this is neither a tort case nor a case claiming bad faith insurance practices.

The case cited by Appellant for his consideration of willful disobedience, State v. Bevilacqua, 316 S.C. 122, 447 S.E.2d 213 (Ct. App. 1994), concerned a criminal contempt action for the Department of Mental Health's failure to comply with a family court order. First, the standard for criminal contempt simply does not apply to Respondents in this case – Respondents have not refused or failed to comply with any court order. Second, in its exploration of the application of the willful disobedience standard in Bevilacqua, this Court explained that, "[i]ntent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all of the acts, words and circumstances surrounding the occurrence." 316 S.C. at 129, 447 S.E.2d at 217. Thus, even if willful disobedience were relevant in this case, which it is not, Appellant is unable to show any nefarious intent on the part of Respondents or their counsel. Respondents and Respondents' counsel are simply defending against Appellant's claim, which they are entitled to do.

Appellant has not and cannot show that Respondents have demonstrated gross indifference to his rights, constitutional or otherwise. There is nothing wrong or inappropriate in Respondents filing returns to Appellant's various motions and petitions.[3] There is nothing wrong or inappropriate in Respondents requesting that this Court issue an order to curb Appellant's abuse of the appellate process. Appellant has filed

[3] In fact, at one point, Appellant took issue with the fact that Respondents advised the Supreme Court that no response was deemed necessary to one of Appellant's filings. (Att. B).

numerous appeals, motions and petitions the Circuit Court, to this Court and to the Supreme Court, all attempting to obtain relief that has no basis in law or in fact. Respondents have been forced to respond, at great cost, at each level and often simultaneously at different levels. For instance, while this Court is considering this appeal and Appellant's current motion, Appellant has sought to have his latest petition reinstated at the Supreme Court, and has filed an objection to Respondents' response filed with that Court, even though his goal before that Court is to force a decision on the merits in his favor. (Motion for Leave to Reinstate and/or in the Alternative for Relief from Judgment, dated Nov. 21, 2016, Att. C (w/o attachments)) (Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. in Opposition to Motion for Leave to Reinstate and/or in the Alternative for Relief from Judgment, dated Nov. 29, 2016, Att. D (w/o attachments)) ("Reply" to Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. in Opposition to Motion for Leave to Reinstate and/or in the Alternative for Relief from Judgment, dated Dec. 3, 2016, Att. E (w/o attachments)).

Stone v. Reddix-Smalls, 295 S.C. 514, 368 S.E.2d 840 (1988), also cited by Appellant, involves a circuit court's power to find counsel in contempt. Ironically, the actions cited in Stone that justified the contempt order – challenges by a party to the judge's authority, "including a disparaging comment on the judge's 'professionalism,'" 295 S.C. at 515, 368 S.E.2d at 840 – are precisely the behaviors to which Appellant has subjected nearly every decision-maker who has decided against him.

Appellant's argument that the Workers' Compensation Commission is a court of equity is plainly erroneous and barely warrants addressing other than to point out that

Respondents deny his spurious allegations of bad faith. Respondents note that the case cited by Appellant, Hanekamp v. Atlas Tech., Inc., No. 2011-CP-10-1243 (May 16, 2014), was a Charleston County Court of Common Pleas Order Granting Summary Judgment as to Defendants' Counterclaims. (Att. F). There is no indication that this summary judgment order was ever appealed and it is not binding precedent on this Court. Ironically, however, the litigation tactics the plaintiff was sanctioned for in Hanekamp are the same actions Appellant has committed at every level of adjudication in this claim – filing repeated frivolous motions with this Court, the Supreme Court, the Circuit Court and the Commission.

Finally, there is no need for this Court to suspend the briefing schedule while it considers Appellant's Motion for Sanctions. This appeal has already been subjected to multiple delays while Appellant filed numerous motions to this Court and petitions to the Supreme Court. All that is left to perfect this appeal is for Appellant to file the Record on Appeal and for the parties to file their final briefs. Respondents have already provided Appellant with a long list of items he requested from them. (Correspondence between Appellant and Respondents' counsel regarding items for the Record on appeal, Att. G). His repetitive attempts to avoid a proper appellate ruling from this Court, including his repeated petitions to the Supreme Court, continue to abuse the appellate judicial process.

## CONCLUSION

For all the reasons stated herein, Respondents respectfully request this Court to deny Appellant's Motion for Sanctions and to deny his request to suspend the briefing schedule while this Motion is under consideration.

Respectfully submitted,

December 7, 2016

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# Attachment A

7-17-15
ORIGINAL

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON )

ALEXANDER GUICE,

Claimant,

v.

US FOODSERVICE, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY C/O GALLAGHER BASSETT SERVICES, INC.,

Carrier,

Respondents.

Civil Action No. 2013-CP-32-01272
Civil Action No. 2014-CP-32-00399

**ORDER**



WAM #1

These two cases were consolidated and came for hearing on various issues detailed below. The court finds in favor of the Respondents and dismisses these cases.

The foundational claims of Mr. Guice (the Appellant) relate to his assertion that he is entitled to be relieved from a full and final settlement agreement that resolved his original workers' compensation claim in its entirety. The Appellant is self-represented. He did not appear for the hearing.

This matter has a convoluted and detailed procedural history, which is further complicated by the existence of two separate files that overlap to a large degree. The length of this order is an effort to make sure that any issues that have been raised are ruled upon and to provide context and clarify the basis for rulings, particularly as they relate to the Appellant's claims of misconduct against this court that are in pending motions.

Mr. Guice was injured on May 5, 2005, and filed a workers' compensation claim. The Respondents provided medical treatment and temporary compensation payments. The parties entered into a comprehensive Settlement Agreement and Release ("settlement") "in full and final satisfaction of all claims whatsoever as a result of the alleged accident." 1 Appellant signed this settlement, which was approved by the Commission pursuant to S.C. Code Ann. §42-9-390, and the Commission's order was filed on January 5, 2006. At the time, Appellant was represented by counsel. The Commission's approval of the settlement was not timely appealed.

Nearly seven years later, the Appellant sought to reopen his claim by filing submissions without the assistance of counsel. On December 7, 2012, Appellant filed a Form 50, Request for Hearing, and then an Amended Form 50 dated January 5, 2013, alleging entitlement to additional medical examination and treatment, temporary total disability benefits, and permanent disability as a result of his May 5, 2005 work-related accident. He also attacked the validity of the settlement and raised issues of unlawful termination of employment, unlawful reduction of his

1 Under the settlement, dated December 22, 2005, Respondents paid Twenty Thousand and No/100 ($20,000.00) Dollars and, in return, Appellant released the Employer and its workers' compensation insurance carrier from "any and all claims, demands, actions, or causes of action under the South Carolina Workers' Compensation Act, on account of any and all injuries, disability, disfigurement, specific loss, death, operations, medical, hospital or like expenses, continuances, recurrences, aggravations, changes of condition, ailments, illnesses, and diseases or other damages, consequences or results, past, present or future, in any way connected with, or arising from the alleged injury sustained by Claimant on or about May 5, 2005 ...." The settlement was "full, final and complete regardless of whether the Claimant is able to keep any employment whatsoever, or is able to earn any wages at any time in the future ...."

average weekly wage calculation, unlawful termination of temporary total compensation payments, inadequate legal representation, and he sought penalties.

A workers' compensation hearing was scheduled for March 28, 2013, based upon Appellant's submission to the Commission. However, on February 22, 2013, Commissioner Susan S. Barden issued an Order holding that, as Appellant had "settled on a full and final basis on or about January 6, 2006, [Appellant's] hearing request is hereby denied." Commissioner Barden canceled the hearing date and dismissed "any and all motions filed pertaining to WCC No. 0506205," which was the Commission's file number for this matter. Appellant then began pursuing two separate avenues to have his claim heard.

First, on February 28, 2013, he filed a Form 30, Request for Commission Review, of Commissioner Barden's February 22, 2013 Order. In his notice of appeal to the Full Commission, he alleged seven different points of appeal, including: (1) "Did Commissioner Susan S. Barden have proper jurisdictional authority to make any judgments regarding WCC No. 0506205"; (2) "Was Commissioner Barden's Order invalid due to no regulatory or statutory grounds stated to support canceling the hearing"; (3) "Did the Order signed by Commissioner Barden on 02/22/2013 violate Rule 5(b)(3) SCRCP"; (4) "Did the Order signed by Commissioner Barden on 02/22/2013, with respect to canceling the hearing, violate Rule 7(b)(1) SCRCP"; (5) "Did Commissioner Barden's Order dated 02/22/2013 violate the Appellant's right to a hearing"; (6) "Was the Appellant subjected to a conspiracy involving Commissioner Barden, Virginia L. Crocker, Judicial Director, and Erin L. Hantske, Esquire, the representative for the Respondent"; (7) "Is Commissioner Barden's conduct subject to be reported to the SC Ethics Commission IAW Rule 501(3)(D)(1) SCRCP with respect to the Order dated 02/22/2013."

Second, on March 4, 2013, before any action had been taken by the Commission on

Appellant's Form 30 appeal, Appellant mailed a Motion for Reinstatement of Employment and Release of Temporary Total Compensation Payments ("Motion for Reinstatement") to the Commission. It lists many of the same issues he raised in his Form 50, including but not limited to the following: 1) unlawful termination of his employment; 2) unlawful reduction in his average weekly wage/compensation rate; 3) unlawful termination of temporary total compensation payments; 4) challenges to the settlement; 5) complaints about his former legal counsel; and, 6) a request for penalties. Respondents opposed Appellant's motion for reinstatement.

On March 18, 2013, Appellant mailed a proposed Order granting his motion for reinstatement to the Commission. On March 27, 2013, Mr. Gary Cannon, Executive Director of the Commission, wrote to the Appellant, returning Appellant's motion for reinstatement, along with the filing fee. The letter stated that Mr. Cannon was "returning the Motion and the filing fee because the Commission does not have subject matter jurisdiction for the issues set forth in the Motion." It is this March 27, 2013 letter from Mr. Cannon that Appellant appealed to the circuit court and ultimately the Court of Appeals. The Court of Appeals remanded that case as discussed herein. The first circuit court complaint was filed in April 2013 (Case Number 2013-CP-32-01272).

On May 3, 2013, the Respondents filed a motion to dismiss the appeal pending before the circuit court. That motion is now before this court and is decided, *de novo*, as discussed below.

On May 8, 2013, the Appellant filed a motion seeking entry of default. He is not entitled to default, this being an appeal.2 Mr. Guice then sent letters objecting to the court's roster.

A hearing was held before The Honorable Thomas A. Russo on June 3, 2013. Although Appellant was notified of the hearing, he failed to attend or arrange to have counsel present.

Judge Russo decided to proceed with the hearing, and he granted Respondents' motion to dismiss based on lack of jurisdiction because the Appellant had failed to exhaust all of his administrative remedies. Judge Russo also ordered that, "Upon exhaustion of all administrative remedies, the above-referenced Claimant may have an appeal to the circuit court once that agency has reached a final decision." Judge Russo issued that order on June 13, 2013.

On July 1, 2013, the Appellant filed a motion to reconsider or to alter or amend. Judge Russo held a hearing on September 3, 2013, which the Appellant did not attend. Judge Russo denied the motion in a Form 4 order entered on September 6, 2013.

Appellant timely appealed Judge Russo's order to the South Carolina Court of Appeals by way of Notice of Appeal dated November 13, 2013. Respondents filed a motion to dismiss the appeal before the South Carolina Court of Appeals dated February 28, 2014. The Respondents asserted that the Appellant's appeal should be dismissed because he failed to exhaust his administrative remedies before filing his appeal to the circuit court and because neither the March 27, 2013 letter from Mr. Cannon, nor the circuit court order, was a final order for purposes of appeal. When Appellant initiated his appeal to the Court of Appeals concerning the March 27, 2013 letter from Mr. Cannon, he had already filed a Form 30 appeal of Commissioner Barden's dismissal of his claims to the Full Commission. That process was not final. In fact, it was pending at the time he appealed Director Cannon's March 27, 2013 letter.

Commissioner Barden's February 22, 2013 order considered and dismissed the issues Appellant raised in his Form 50s, all of which centered on the same issues raised in his motion for reinstatement. At the time the Appellant filed his appeal to the Court of Appeals, the Commission was in the process of considering his Form 30 appeal from Commissioner Barden's February 22, 2013 order.

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2 Mr. Guice sometimes places a summons on documents which are inappropriate to be accompanied by a summons.

On July 17, 2013, the Full Commission entered a final order and Appellant appealed the July 17, 2013 order to the South Carolina Court of Appeals, which was not the correct forum at that point. Since Appellant's injury occurred prior to July 1, 2007, he should have filed this appeal with the Court of Common Pleas. Accordingly, the Court of Appeals *transferred* Appellant's appeal to the circuit court (see Rule 204(a) SCACR) by way of an order dated December 6, 2013. Based upon this previous transfer from the Court of Appeals to the circuit court, the Court of Appeals granted Respondents' motion to dismiss because the Appellant had another appeal pending under the same workers' compensation file number. Accordingly, the case was remanded to the circuit court with the notation to "consider the merits of this appeal in conjunction with Appellant's appeal from the Commission's final Order."

At that point, Mr. Guice had the pending 2013 action in Common Pleas, but he decided to file another action in circuit court on January 31, 2014. He filed several documents, and the new file was given Case Number 2014-CP-32-00399. He filed a document dated December 23, 2013, which is captioned as a Notice of Appeal. He filed a document dated December 26, 2013, which is captioned as an Amended Notice of Appeal. A document dated January 2, 2014, is captioned as a Notice of Demand, which is addressed to Respondent's counsel. He filed a Summons, which is attached to a Brief, with numerous attachments. The Summons and Brief are dated January 26, 2014.

These documents constituting the beginnings of the new file are difficult to put into a normal procedural framework. It appears that the Respondents moved to dismiss under Rule 12(b)(1) and 12(b)(6), SCRCP, stating that if the filing is deemed to be a Complaint, the court lacks jurisdiction. It also raises the fact that no Complaint was attached to the Summons and that any statute of limitations for a complaint would have expired. The motion to dismiss seeks

attorney's fees and costs. The dismissal request was filed with the Clerk of Court on March 11, 2014. The Respondents also seemed to wrestle with how to construe the initial filings in the 2014 case because they filed an Answer on March 11, 2014.

Apparently, Mr. Guice received a copy of the motion to dismiss before it was filed as evidenced by the fact that he filed separate responsive documents five days before the motion to dismiss and the Answer were filed. On March 6, 2014, the Appellant filed documents captioned as a Reply and as an Answer. In any event, the court determines that the Summons filed to begin the 2014 case was not appropriate. The action was not accompanied by a Complaint. It is dismissed for the reasons discussed below.

Since motions and appeals were pending in the Court of Common Pleas, the staff of the Clerk of Court for Lexington County properly and routinely docketed matters for a hearing. Mr. Guice raised strenuous objections. Any objections raised by Mr. Guice to the methodology by which these cases were docketed are misguided and based on incorrect assumptions about how cases are called for hearings and trials. A notice of hearing was dated March 13, 2014, scheduling the hearings for April 3, 3014.

On March 19, 2014, the Appellant filed a motion to disqualify, seeking to remove Judge Russo from the case. Mr. Guice's motion is twenty pages long. It asserts that Judge Russo is not fair and impartial regarding his case, and demands that the April 3 hearing have a different judge assigned. The file reflects that Mr. Guice had complained to South Carolina Court Administration about the Lexington County Clerk of Court's office, and a copy of the response from Court Administration, which includes references to Judge Russo, was filed with the Clerk on March 20, 2014.

Judge Russo issued a Form 4 order dated and filed April 3, 2014, in which he continued the hearing. No reason was specified. The motion to disqualify was decided in a written order filed on April 4, which denied the motion. It appears that the pending matters were then set, in the normal course, to be heard at a succeeding non-jury term over which The Honorable Brian M. Gibbons was scheduled to preside. That notice was generated on May 5, 2014.

By letter dated May 12, 2014, the Appellant transmitted a document entitled Notice to the Court. He used that format later with Judge Gibbons, though it has no basis in practice and does not follow permissible actions under the Rules of Civil Procedure. It is directed to "The Honorable Thomas A. Russo, apparent former presiding judicial officer." It "DEMANDS" that a written explanation be placed into the official record of why Judge Russo is no longer the presiding officer and "DEMANDS" that Judge Gibbons enter a written certification that he is familiar with the file and can complete the hearing without prejudice. This court is not clear whether Mr. Guice is confused by the fact that the judicial assignments for circuit court in this state system are unlike the methodology of the federal system and some other states. In any event, having considered his repeated objections to the assignment of judges and docketing of hearings, this court concludes that he is fundamentally mistaken in his assumptions and apparent beliefs that improprieties have taken place regarding the administrative handling of his files.

Judge Russo wrote Mr. Guice a letter dated May 20, 2014, attempting to explain the procedure. He addressed the issues raised in the Appellant's correspondence and Notice regarding the subject of Judge Russo's alleged bias and the handling of these files.

On June 6, 2014, the Appellant filed a written brief addressing the issues concerning his appeal. It discusses the claims of alleged flaws in the decision of the Full Commission rendered July 17. 2013. It argues unlawful termination of employment, improper cessation of temporary

total benefits, raises challenges to the settlement and clincher, attacks the conduct of Appellant's counsel in the original workers' compensation action, challenges the sufficiency of the order of the Commission, and argues against the motion to dismiss. In short, the Appellant addressed the issues that seem to be asserted in both circuit court files.

The hearing in circuit court was rescheduled for June 16, 2014. Although Appellant was notified of the hearing, he failed to attend or arrange to have counsel present, though he submitted a lengthy memorandum. Judge Gibbons presided over the hearing. The order issued by Judge Gibbons lists only one case number in the caption, 2014-CP-32-00399. However, the body of the order included the issues raised in both files. The order begins by stating that the issue before the court was the Appellant's Amended Notice of Appeal dated December 23, 2013. Later, Judge Gibbons' order states that he is entertaining the Respondents' motion to dismiss. It seems clear that Judge Gibbons heard the Appellant's Amended Notice of Appeal dated December 23, 2013, and Respondents' motion to dismiss dated February 24, 2014. After reviewing all submissions presented by the parties and considering briefs and arguments of counsel and Appellant, Judge Gibbons granted Respondents' motion to dismiss and affirmed the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission dated July 17, 2013. Judge Gibbons was more than accommodating to the Appellant, apparently considering issues raised in written communication and, perhaps, in emails.

When counsel for the Respondents submitted a proposed order, Mr. Guice filed his memorandum of comments and exceptions. Judge Gibbons' issued his order on July 21, 2014.

Appellant then filed a motion for new trial dated August 4, 2014, alleging that the circuit court's July 21, 2014 order failed to consider the Court of Appeals remand order and demanded that Judge Gibbons' order be set aside for a new trial. Appellant's motion for new trial also

lodged accusations of impropriety against Judge Gibbons. The accusations against the judge and attorney include abuses of discretion, fraud upon the Court, and dishonesty.

As for the merits of the motion for new trial, the gist of the Appellant's assertion is that Judge Gibbons' July 21, 2014 order should be set aside because it did not take into consideration Appellant's prior motion for reinstatement of employment and release of temporary total compensation benefits. This was asserted to be at issue because of the letter from Mr. Cannon denying any additional motions based upon Commissioner Barden's February 22, 2013 order. Again, because of the overlapping claims, it should be noted that Appellant's motion for reinstatement of employment and release of temporary total compensation payments requested relief based upon essentially the same positions. Those included the alleged invalidity of the original 2005 settlement, the Appellant's attempt to reinstate Appellant's employment effective November 2, 2005, immediate release of unlawfully withheld temporary total compensation payments of $1,154.00 per week effective November 2, 2005, immediate payment of a twenty-five percent penalty for unlawfully withheld temporary total compensation payments, and other relief and actions the Commission deemed just and proper.

WBK #10

The Respondents filed their Reply to the motion for new trial on August 20, 2014.

Having now reviewed the matter *de novo*, it is apparent that the relief sought in the motion for reinstatement of employment and release of temporary total compensation payments concerned the same 2005 settlement and is the identical relief sought in the current appeal. Judge Gibbons' Order dated July 21, 2014, noted that the Appellant instituted his appeal with the Court of Common Pleas requesting, among other things, to set aside the decision and order dated July 17, 2013, by the Appellate Panel of the South Carolina Workers' Compensation Commission, which fully affirmed Commissioner Barden's February 22, 2013 decision and

order; set aside the decision and order from Commissioner Barden dated February 22, 2013; and, reinstate his employment and temporary compensation. The issues set for determination and the facts in controversy at the time Judge Gibbons considered them, and now at the *de novo* hearing stage, appear to be identical in all material respects to the issues set for determination and the facts in controversy contained in Appellant's pleadings filed with the Court of Appeals. What the Court of Appeals had done was to note that Appellant had a pending appeal with the circuit court based upon the transfer order of December 6, 2013, and remanded the case to the circuit court for consideration. Both circuit court files are seeking the same relief.

On August 25, 2014, Mr. Guice filed a document captioned as a Verified Notice to the Court. It cites ethical canons of the Code of Judicial Conduct. It "DEMANDS" that Judge Gibbons certify that he is not operating under any disability that would impair his ability to decide the issues fairly and impartially. It "DEMANDS" that Judge Gibbons provide a written rationale as to why he did not respond to the exceptions and comments that the Appellant filed regarding the proposed order that had been submitted by Respondents' counsel. It "DEMANDS" explanation about why certain alleged facts were not included in the court's ruling. It "DEMANDS" a written explanation as to why the court failed to address the remand notice from the Court of Appeals in Case Number 2013-CP-32-01272. Both sides provided written arguments related to the Appellant's motion for new trial.

The Respondents' brief points out that the procedural history of this case is clouded by the voluminous, repetitive submissions of the Appellant and the duplicitous nature of filings. The Respondents stated that in order to evaluate the Court of Appeals' order of April 24, 2014, "it is necessary to consider the entire procedural background of this matter." This court agrees.

Judge Gibbons considered the motion of the Appellant (the motion for new trial), and he considered the Appellant's assertion that there was a failure to properly consider the remand. Judge Gibbons issued an Order dated September 25, 2014, granting Appellant's motion for new trial. He made reference to the fact that the case has a convoluted procedural history. He noted that the Appellant did not appear for the hearing, but sent numerous documents to the court before and after the hearing, some by email. He did not recall having reviewed two files in the case. The September 25 order contains the following language:

> Since my written Order of July 30, 2014 does not appear to set forth the Court's decision in detail and since it does not specifically address matters contained in 2013-CP-32-1272 as instructed by the SC Court of Appeals, the Court agrees with Appellant/Claimant that he should be granted a new trial or hearing in Circuit Court. This Court of course could have reopened this matter for further consideration, but declines to do so as explained more fully below.

WPC #12

> . . .
>
> Further, for this court to continue to be the presiding judge, after receiving numerous pages of meritless and spurious allegations of unethical, incompetent, and impartial behavior from the Appellant/Claimant would put the Court in a precarious ethical posture.

The order clearly states that the allegations raised post-hearing against Judge Gibbons were determined to be "baseless and meritless." It also clearly states that the judge recused himself on his own (*sua sponte*) from further involvement in these cases. Specifically, Judge Gibbons stated in the September 25 order that "while categorically denying any unethical behavior in how this matter was heard and decided" and "mindful of the disdain of allowing disgruntled litigants to seek recusal for adverse rulings, the integrity of the Court simply must be upheld in this matter."

These parties had different interpretations of the September 25 order. Specifically, there is a dispute about the portion of the Order that states, "[t]he Appellant/Claimant's motion for new trial or hearing is GRANTED as to all particulars set forth in his motion . . .." The order unequivocally states, "[t]his matter be reassigned in the discretion of the Chief Administrative Judge of the Eleventh Judicial Circuit for a *de novo* hearing on all matters instructed by the SC Court of Appeals in both pending Case Numbers 13-CP-32-1272 and 14-CP-32-399."

At that point, the Appellant seized upon the language of Judge Gibbons' order, including the language about granting relief "as to all particulars set forth in his motion." The Appellant became convinced that he had prevailed on all of his substantive claims. This interpretation is without support. Judge Gibbons did not have the ultimate merits of the case before him when he issued that order. The full sentence reads, "1. The Appellant/Claimant's motion for new trial or hearing is GRANTED as to all particulars set forth in his motion and that my Order of July 30, 2014 be and hereby is VACATED." The motion pending before Judge Gibbons was the motion for a new trial (essentially, a Rule 59 motion). It would make no sense for a judge to order a new trial or hearing, if the judge intended to grant all the substantive relief requested by the Appellant.

WPA #13

The Respondents moved to alter or amend by motion filed on October 17, 2014. Since Judge Gibbons had declared himself to be recused, and since his order directed that the Chief Judge for Administrative Purposes provide instructions for a *de novo* hearing to be conducted, the files were provided to the undersigned judge to administer in the role of Chief Judge. Immediately upon receiving the files, the undersigned judge began a process of trying to gain familiarity with the files and to issue directives.

On October 22, 2014, the Appellant filed a motion for sanctions, and Reply to the Respondents' Motion to Alter or Amend. This was based on the Appellant's erroneous interpretation of Judge Gibbons' order of September 25. Since the Appellant believes that Judge Gibbons ruled that the Appellant is entitled to all the money he has claimed, he made a demand upon Respondents' counsel to pay that money. The motion for sanctions is without merit, since Judge Gibbons did not rule that the Appellant is entitled to the sums claimed.

A series of administrative orders followed, beginning on October 23, 2014. The self-represented Appellant, who lives in another state, was repeatedly asserting issues through email and letters, which are not proper filings. It took a long period to review these files, and it became apparent that the best use of judicial resources and the most promising way of having the cases proceed expeditiously would be to have them assigned to one judge. The court issued administrative orders doing the following things.

1) The cases were designated as complex litigation and assigned to one judge, the undersigned judge, to avoid having different judges duplicating the effort to follow the difficult procedural history.
2) Because of that decision, a hearing that had been routinely scheduled for November 10, 2014 before a visiting judge was continued.
3) The two cases were consolidated under Rule 42(a), SCRCP, because they seemed to be seeking essentially the same relief.
4) It did not appear that the Clerk of Court's file included the file of the Workers' Compensation Commission. So, an order was issued directing that the Commission files be maintained by the Commission and obtained by the Court of Common Pleas.

The order to maintain the files was entered in an abundance of caution due to the age of the underlying workers' compensation case.

In addition, as noted in Judge Gibbons' last order, it was obvious that the files were more confusing than necessary because of the use of email communications to attempt to raise issues that should be raised by properly filed motions and briefs. So, instructions were issued, including the requirement that any attempt to file a motion had to be raised through a proper filing with the court and that the use of emails was to be curtailed and limited to proper purposes.

Since Judge Gibbons had an outstanding motion to reconsider, but he had recused himself from the case, the parties were advised in an administrative order that Judge Gibbons would be contacted, in writing, to see if he would handle that motion. If he determined not to handle the reconsideration motion, the court advised the parties that it would have to consider Judge Gibbons to be unavailable and commence the process of determining if the court could declare itself sufficiently familiar with the record to make a ruling (citing Rule 63, SCRCP, and the order of Chief Justice Toal (Order 2011-02-04-01) dated February 4, 2011 that established the procedures to follow in such instances).

WPM #15

On November 3, 2014, the Appellant filed a motion, forty-four pages in length, plus attachments, objecting to the court's issuance of these administrative orders. His assertions fall into several categories, none of which have merit. Only one of the points seems to have any foundation in fact, and it relates to a drafting issue.

The drafting in one of the administrative orders could have been more precise. In Paragraph 6 of the October 23, 2014 administrative order, that was filed very late in the afternoon of that day, the court stated, in part:

> There is a dispute as to the interpretation to be given to orders issued by The Honorable Brian M. Gibbons. Both the appellant and the respondent have

> filed motions for reconsideration of the order(s). It is the undersigned judge's understanding that Judge Gibbons has recused himself from this matter. If he is recused, he may take the position that he is precluded from further involvement in this case. . . .

The Appellant challenges two things. He challenges the use of the term "reconsideration." In common parlance in the South Carolina legal community, a motion to alter or amend is called a reconsideration motion, and the Respondents' October 17, 2014 motion to alter or amend Judge Gibbons' order of September 25 was an outstanding motion for reconsideration.

The more significant assertion relates to Mr. Guice's reading as to the statement that both parties had filed reconsideration motions to Judge Gibbons' orders. The wording in that one sentence in the administrative order uses the *plural* - "orders." Judge Gibbons had entered two orders. He entered the first order granting the Respondents' motion to dismiss. In response, the Appellant styled his motion as one for a new trial, but he cited Rule 59, which is a motion to alter or amend. In common parlance, Mr. Guice had filed a reconsideration motion. So, it was a correct statement that both parties had filed reconsideration motions to Judge Gibbons' orders. While the Administrative Order could have been stated with more precision to state exactly what was pending as opposed to what had already been decided, there is nothing in the way it was drafted that is prejudicial to anyone and it does not have any negative impact upon the cases, despite the Appellant's contrived argument that it somehow does. Even if one accepts that the statement is incorrect, it is preposterous to read into those words some sinister intent, incompetence, or abuse of discretion.

More to the point of any motion to set aside the administrative orders, Mr. Guice believes that he had received a ruling in his favor and that the administrative orders were not only

unnecessary, but were an intentional attempt to deny his recovery and to cause him injury. For the reasons stated above and below, the court finds that Mr. Guice is mistaken in his interpretation. He did not receive a ruling in his favor on the merits of his claims. Assertions that administrative orders were entered to cause further delay are unfounded.

The Appellant claims some sort of conspiracy to protect various officials. He accuses the Clerk of Court of improper actions. He accuses the undersigned judge, the Clerk of Court, and the Respondents' attorney of committing fraud. He accuses the undersigned judge of abusing his discretion in issuing the administrative orders and in other actions. He asserts that it was illegal and unethical for the undersigned judge to write a letter to Judge Gibbons asking if Judge Gibbons would be deciding the Respondents' motion to alter or amend. He accuses the undersigned judge of racial bias.

None of these very serious accusations are supported by one scintilla of evidence, nor are they supported by any reasonable reading of an applicable rule or law. Mr. Guice has demonstrated no basis for overturning the administrative orders, and any motion he may have to seek to accomplish the withdrawal of those orders is denied.

The Clerk of Court's staff normally prepares dockets based on the documents that are filed. The Appellant reads impropriety in the actions of the Clerk of Court and the judges regarding how these hearings were scheduled, but no showing of impropriety has been made. He has also complained about information on the Internet website done by the Clerk of Court's staff in conjunction with Court Administration. That website makes it clear that the information is not official.3 He puts unwarranted emphasis upon those entries, and he has been given reasonable

3 The disclaimer that must be accepted to access the information reads, in part: Portions of such information may be incorrect or not current. Any person or entity who relies on any information obtained from this web site does so at his or her own risk. In addition, nothing contained within this web site is an official record of the County or the elected officials responsible therefore. All official records of the County and the offices of countywide elected

explanations about why things are done as they are – he recites some of the explanations in his Motion In Objection to Administrative Order. His complaints are unfounded and do not affect his substantive or procedural rights, as he claims.

When Judge Gibbons responded stating that he would not entertain the Respondents' motion to alter or amend due to the judge's recusal, he did so in a letter filed on November 6, 2014. That answer introduced the process under Rule 63.

However, around that time, the Appellant was submitting various documents to the Supreme Court of South Carolina concerning these cases. Among other things, he filed for something that he denominated as a writ of mandamus to require the undersigned judge to take certain actions. Part of his argument was that Judge Gibbons decided all of Appellant's substantive requests for relief. The difficulty this created administratively is that there was a pending motion before the Supreme Court seeking a determination that there was nothing for the circuit court to do – that Judge Gibbons' order had already decided everything. That does not appear to be a request for mandamus as much as a request for a stay, and the uncertainty caused further delay.4 The Appellant also apparently had a motion for rehearing filed with the South Carolina Court of Appeals.

On December 8, 2014, the Appellant filed a motion for judgment on the pleadings. That motion is denied and is addressed on page 23 of this order.

On December 9, 2014, the undersigned judge entered an administrative order related to Rule 63, SCRCP, in response to Judge Gibbons' decision to decline to rule on the Respondents' motion to alter or amend. That administrative order was filed on December 11,

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officials are on file in their respective offices and may be reviewed by the public at those offices.

4 The order eventually issued by the Supreme Court demonstrates that the difficulty in dealing with these filings was not limited to the Court of Common Pleas.

2014. It referenced the procedure required under Rule 63 and the order of Chief Justice Toal, and it stated that the undersigned judge would have to determine whether sufficient familiarity with the file could be obtained to decide the Respondents' motion.5

On December 11, 2014, a copy of the Workers Compensation Commission file was received in the judge's office in digital format. On that day, the undersigned judge wrote a letter to the Appellant concerning the status of the cases. It reads:

> This is in response to your letter of November 25, 2014, and the communication that I received today which included copies of your request that the Supreme Court of South Carolina issue a Writ of Mandamus to require me to take certain actions. Earlier this week, I prepared, signed, and mailed to the Lexington County Clerk of Court for filing an administrative order regarding the status of your cases. I am attaching a copy of it, in case you have not received it. If the Supreme Court believes that other directives are appropriate, I will do my best to follow them. In my view, these cases are being properly administered. The sheer volume of the filings has required huge amounts of time.
>
> Any motions that you have properly filed will be scheduled for hearings as necessary and decided, once the court can get over the initial hurdle of obtaining the information required under Rule 63. There is a particular order in which things have to be addressed. Your interpretation of the status of your cases and the law and procedures will be taken into account.
>
> Today, I received the DVD from the Workers Compensation Commission. My law clerk has opened the disc and advises me that there are over 100 documents on it. The attached order explains what procedure the court deems to be appropriate at this time.

WAC #19

On January 16, 2015, a letter from the South Carolina Court of Appeals was filed with the Clerk of Court for Lexington County. When the Supreme Court issued its directive that it

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5 It stated, "The court has issued administrative orders and directives to obtain the file from the South Carolina Workers Compensation Commission. That commission has advised the court's staff that the file is voluminous, that it is in electronic format, and that a DVD will be sent to the judge's office upon completion. When that is received, the court will issue further procedural directives in conformity with the provisions of Rule 63 and the Chief Justice's administrative order.

was not going to proceed with the request for mandamus, it appeared at that point that there were no appellate stays in effect to further delay the cases going forward.

So, a supplemental administrative order was issued on March 3, 2015, in which the procedural posture of this claim was outlined, as the parties had been advised in December. The court had evaluated the situation and determined that it should not decide the Respondents' pending motion to alter or amend Judge Gibbons' order. This administrative order gave notice to the parties about the process to be used in handling this matter and deciding this appeal, including notice of a *de novo* hearing to be held on March 27, 2015 at 10:00 a.m. The order made it clear that all pending motions would be heard. The undersigned noted Appellant's belief that the circuit court order of September 25, 2014 granted Appellant all of the relief he sought including back wages and reinstatement of his former employment. Finally, it was noted in the Administrative Order that failure to appear may be deemed an abandonment of any claims made in any pending motions. The parties submitted additional briefs and filings for consideration. At its core, Appellant is seeking to reverse a full and final settlement agreement resolving his original workers' compensation claim in its entirety.

WPL #20

On March 9, 2015, the Appellant filed several documents. He filed his memorandum in response to the March 3 order and Motion for Relief from the Administrative Orders. He also filed a document in which he purported to cancel the hearing that had been ordered. A motion to stay was filed, and a motion to disqualify the undersigned judge. The motion for stay asserted that the case should not be heard until a decision was made on the Motion for Relief from Administrative Orders, which the court also considered as a request not to proceed until the Motion to Disqualify was decided. As is routine with the Appellant, he stated that his motions are made without a request for oral argument.

THE HEARING ON MARCH 27, 2015

The hearing was not continued or canceled. On March 27, 2015 at 10:00 a.m., the Appellant was not present. After waiting to make sure that the Appellant was not simply late, the bailiff was instructed to conduct a search of the Judicial Center and to call out Mr. Guice's name. The Appellant was not located.

At the outset of oral arguments, the court considered Appellant's motion to have the undersigned recused from hearing this matter. After reviewing the written submissions of the Appellant, the undersigned finds those accusations and claims are completely unfounded. Not only are they unfounded against the undersigned, but it appears he has a pattern of filing motions for recusal against judges or impugning the integrity of judges who make a ruling adverse to him. The motion to remove the undersigned as presiding judge in this matter is denied.

WPA #21

Appellant's motion to stay the proceeding and Appellant's motion to disqualify filed March 9, 2015 are denied as the motion is unsupported, not based on any valid claim, and not pursued. There is no reason to stay these proceedings or disqualify the undersigned.

The file reflects that the Appellant requested to have the undersigned recused after learning the undersigned had been in the hospital briefly in January 2015 for a surgical procedure. To the extent that the Appellant has any pending motion to recuse the undersigned due to disability, the motion is denied as there is simply no merit to such assertion. The procedure was done during a week when the undersigned judge was scheduled for vacation, and it only required an overnight stay in the hospital.

The next issue addressed at oral arguments was the Appellant's notice of cancelation of this hearing.6 The Appellant had been advised previously that he does not have the authority to cancel a hearing. He may request a continuance of a scheduled hearing, but cannot unilaterally cancel the same. In his notice of cancellation, Appellant accuses the undersigned of not conferring with Appellant prior to setting this hearing and notes he has something else to do. Appellant also indicates he lives in Tampa, Florida and does not have the financial resources to come to South Carolina. The Appellant has provided no valid reason for the postponement of the hearing, and to the extent any of the filings submitted by Appellant can be construed as a motion for postponement or continuance, they are denied.

As addressed above, to the extent that there is a continuing objection to the administrative orders issued or continuing motions for relief from the administrative orders, those objections and motions are denied. The administrative orders issued in this matter were designed to consolidate a claim with a complex procedural history before a single judge and get this matter to a point where the issues could be heard and ruled upon. The administrative orders were proper administrative functions and any objection to the same is denied.

Concerning Judge Gibbons' order which Appellant asserts in his written submissions granted him reinstatement of his job and back due benefits, the Appellant misunderstands that order and is reading it in a way that is contrary to Judge Gibbons' ultimate ruling. It ruled that there be a *de novo* hearing. Judge Gibbons' last order was not a final determination of the merits and there is no reasonable basis to conclude that it granted the Appellant all of the relief he

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6 This was not the first time that Mr. Guice issued his own notice of cancelation of a hearing. In one instance, Mr. Guice forwarded a notice of cancellation of the November 10 hearing. An order was issued canceling the hearing, but advising the Appellant as follows: "He may move to cancel a hearing, but does not have the power to cancel a hearing on his own. The Clerk of Court is directed to make a copy of the notice sent by Mr. Guice and put it in the files, but to return the original notice to him. The notice, on its face, is not executed by a judicial officer and has no force or effect."

sought in this matter. Had it been Judge Gibbons' intent to grant final and complete relief, he would not have provided for rescheduling of the motion or vacate his order completely.

Judge Gibbons' order was vacated at the Appellant's request. The Respondents agree that any motion concerning Judge Gibbons' order is moot as that order was subsequently vacated.

With regard to Appellant's motion(s) for judgment on the pleadings, it (they) is (are) denied. This matter comes before this Court on appeal from the South Carolina Worker's Compensation Commission. There are no pleadings with which to grant a judgment in favor of Appellant. Appellant asserts Respondents' failure to specifically respond and deny allegations contained in the numerous submissions constitutes an admission of those allegations and he is therefore entitled to the relief sought. That is a misunderstanding of procedure, and the Respondents have made no such admissions. Appellant is not entitled to a judgment as a matter of law, default judgment, or judgment on the pleadings. The improper use of summonses has already been noted, and attaching a summons to something other than a complaint does not have the consequences that the Appellant believes that it should have. Matters that are within the exclusive jurisdiction of the Workers' Compensation Commission have to be raised and ruled on there.

Having worked through the procedural issues, the question before the court is the Respondents' motion(s) for dismissal of both cases. As discussed above, the Appellant's appeal of Judge Russo's order on November 13, 2013 was at a time when neither the Commission nor the circuit court had entered a final, appealable order. Appellant initiated his appeal to the Court of Appeals concerning Director Cannon's letter after the Appellant had already filed a Form 30 appeal of Commissioner Barden's dismissal to the Full Commission. So, the administrative action was pending at the time he appealed the letter from Mr. Cannon.

Commissioner Barden's February 22, 2013 order considered and dismissed the issues Appellant raised in his Form 50s, all of which centered on the same issues raised in his motion for reinstatement. Judge Russo noted that an appeal in circuit court could be pursued, once Appellant exhausted his administrative remedies. Yet, the Appellant filed his appeal to the South Carolina Court of Appeals while the Commission was in the process of considering his Form 30 appeal from Commissioner Barden's February 22, 2013 order.

The Full Commission entered a final order on July 17, 2013, and Appellant appealed the July 17, 2013 order to the Court of Appeals, which was the wrong court. That was transferred by the Court of Appeals to the Court of Common Pleas. Since the Appellant had another appeal pending under the same workers' compensation file number, there was also a remand, with a notation to "consider the merits of this appeal in conjunction with Appellant's appeal from the Commission's final Order." Those matters are now in circuit court.

WPK #24

This court believes that it has complied with the Court of Appeals order remanding this matter to the circuit court. At issue before the Court of Appeals was a letter written by the executive director of the South Carolina Workers Compensation Commission on March 27, 2013, returning the Appellant's motion for reinstatement of employment. That letter stated that the motion for reinstatement was being returned as the Commission does not have subject matter jurisdiction for the issues set forth in the motion.

This court had concerns about issues regarding the authority of the executive director to take the action that he did, in the manner that he did, and at the time that he did. The court had questions about the proper procedure to be followed concerning those issues in a Common Pleas proceeding. The court intended to discuss those at the March 27 hearing. Appellant failed to appear to address the court's concerns. Any arguments not raised are abandoned.

Addressing this issue, however, it now appears that all the executive director did was to notify the Appellant that the motion for reinstatement was being returned, with the filing fee. His previously filed claim included a demand for reinstatement of his employment. When the court questioned the only party present at the hearing about the authority of the executive director to make that decision, it was stated that the Appellant's attempted filing was for something the Commission cannot do and that all the director did was return the papers and filing fee. It was asserted that the Commission could not grant the relief that was being requested in the returned documents. So, counsel knew of no authority of the Commission to entertain the proposed filing. More importantly, the merits have been now been addressed by the Commission for the overlapping relief that was being sought.

Respondents' motion to dismiss the claims in both cases filed in Common Pleas is granted. Appellant's claims are barred because he signed a full and final settlement agreement and release resolving his workers' compensation claim, which was approved by the South Carolina Workers' Compensation Commission on May 5, 2005. When the Appellant sought to reopen his workers compensation claim in November of 2012 and contest that settlement agreement and release, he also sought reinstatement of his employment and additional compensation benefits for his original work accident and injury. The South Carolina Workers' Compensation Commission, both the single Commissioner and the Appellant Panel, have denied all of Appellant's motions and ruled in favor of Respondents based on this claim having been resolved in its entirety in 2005. The claims all appear to be final resolutions of the matters that were raised and attempted to be raised to the Commission. The file supports the Respondents' contention that the Appellant may not now seek to reopen the workers compensation claim for additional benefits of any kind and that these cases should be dismissed.

To the extent Appellant has additional motions, objections, or issues not addressed herein, Appellant was not present at the hearing, after having been cautioned that the failure to appear may be deemed as an abandonment of those issues. Any motions, objections, or requests for sanctions not addressed herein were deemed abandoned and are denied.

The Respondents' request for attorney fees and costs associated with defending this matter throughout the lengthy and redundant appeal process is granted. Respondents have been forced to respond to multiple duplicative and redundant filings submitted by Appellant over approximately three years since Appellant sought to reopen his original settlement. Respondents requested an order for sanctions, fees, and penalties. They seek sanctions for defending this matter by way of a Reply to Appellant's "Motion For Entry of Clerk's Default" dated May 10, 2013. Since that request, Respondents have appeared for oral arguments on no less than four occasions and have done extensive work to defend against these claims. Appellant has failed to appear for any argument on his behalf. He has been provided with a detailed affidavit in support of the fees and costs requests.

WPH #26

The Appellant filed documents after the submission of the proposed order. The last one basically asked that the court go ahead and sign the proposed order so that the Appellant can proceed to seek relief in other courts. The proposed order has been modified by the court.

Substantial sanctions are appropriate based on clear and convincing evidence that, from the outset, the relief sought by the Appellant was unsupported by law or procedure. It is also established by clear and convincing evidence that the defense was made needlessly difficult because the Appellant insisted on taking unfounded positions, did not accept reasonable explanations, caused redundant filings in various forums, and liberally made unwarranted defamatory accusations.

The court finds that Respondents' request for attorneys' fees and costs in the amount of $32,933.13 is reasonable, and it is awarded. In awarding attorney's fees, this court has considered the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997). The *Jackson* factors support an award of fees requested by Defendant.

**1. Difficulty of case**

This case was complex and difficult, primarily due to the repetitive, atypical, and detailed filings and assertions raised by the Appellant. The case required having to be knowledgeable about workers' compensation, circuit court, and appellate court issues and procedures.

WPM #27

**2. Time expended**

Counsel for Defendant has devoted an extremely significant amount of time over a course of years. It is detailed in the second affidavit submitted. Much of the additional time was occasioned by the filings of the Appellant in multiple courts, frequently based on Appellant's misunderstanding of the proper procedures.

**3. Professional Standing**

The attorneys enjoy good professional standing. The documents submitted by primary counsel have been very well written and have greatly assisted the court. Counsel has demonstrated high standards of professionalism and civility in the face of what appear to be completely unwarranted attacks upon her integrity.

**4. Contingency of compensation**

This factor is not pertinent to the Court's decision.

**5. Beneficial Results**

There is no question that Respondents' counsel obtained beneficial results. To obtain these results required tenacity and diligence, at the highest level of professional effort.

**6. Customary Legal Fees**

The hourly rates are reasonable and rather standard for fees charged in such cases.

In summary, the factors in *Jackson v. Speed* support the award of attorneys' fees to Respondents.

THEREFORE, IT IS ORDERED:

1) That the Respondents' motion to dismiss is granted and the appeals are denied and dismissed.

2) That sanctions are imposed and the Appellant must pay to the Respondents' the sum of $32,933.13. This award of attorneys' fees and costs is a money decree which should be enrolled as a separate judgment and draw interest under S.C. Code Ann. § 34-31-20(B).

#28

**AND IT IS SO ORDERED.**

William P. Keesley
Judge, 11th Judicial Circuit

July 17, 2015

# Attachment B

mgc

**Reply To**
ERIN L. HANTSKE
Direct Dial: (843) 576-2946
erin.hantske@mgclaw.com

January 28, 2015

***VIA U.S. MAIL***
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Alexander Guice v. The Honorable William P. Keesley, in his official capacity as Chief Administrative Judge for the Lexington County Court of Common Pleas
Date of Accident: May 5, 2005
WCC File No.: 0506205
Our File No.: 2098.12550
Claim No.: 004063-032175-wc-01
Appellate Tracking No.: 2014-002625

Dear Mr. Shearouse:

The undersigned is submitting this letter to advise the Court that US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. ("Employer/Carrier") do not intend to file a Return to Petitioner's Petition for Rehearing, as no formal response is necessary. Instead, Employer/ Carrier rely on arguments and evidence previously presented to this Court in: 1) the Opposition of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. to Petitioner's Motion for Sanctions, dated January 9, 2015; 2) Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. to Petitioner's Reply to Correspondence from The Honorable William P. Keesley, dated December 30, 2014; and 3) Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. to Emergency Petition for Writ of Mandamus, dated December 15, 2014, with exhibits as redacted under cover of letter dated December 23, 2014.

If you have any questions, please contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC

Erin L. Hantske

cc: Alexander Guice, pro se
The Honorable William P. Keesley

**From:** Alexander Guice <alguice@hotmail.com>
**Sent:** Monday, February 02, 2015 1:57 PM
**To:** Erin Hantske
**Cc:** Keesley, William P.; Keesley, William P. Law Clerk Anna Wade
**Subject:** Guice V. Keesley, Case No. 2014-002625

**Importance:** High

Ms. Hantske:

Good afternoon.

Please be advised that I received a copy of your correspondence dated January 28, 2015 you submitted to Mr. Shearouse on behalf of your client(s). It is my opinion that your aforementioned communication contained an argument embodied within the same, which should have been properly submitted in the form of a responsive pleading.

In particular, in addition to you advising the Court that you did not intend to file a Return to the Petition for Rehearing, you stated, "**as no formal response is necessary**", which as the Petitioner, I would assert is highly debatable. Furthermore, you proceeded to substantiate your argument by reminding the Court of previous pleadings you filed on behalf your client(s).

A written communication by your office to the Court advising the same of your intent **not** to file a responsive pleading was not necessary; the Court is well aware of Rule 240(e), SCACR, as it directly relates to the time limits to file a responsive pleading, and after your office was afforded the required 10 days, the Court certainly would have concluded, on its own, of your intentions not to file a responsive pleading on behalf of your client(s).

In good faith, I respectfully request that you immediately submit correspondence to the Court advising the Court to disregard your January 28, 2015 correspondence. Your immediate attention and response to this matter is requested and appreciated. Thank you.

Regards,

Alexander Guice
PO Box 13281
Tampa, FL 33681
813.562.0547
Petitioner, Pro Se

# Attachment C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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IN THE SUPREME COURT'S ORIGINAL JURISDICTION

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Appellate Case No. 2016-002258

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Alexander Guice, Petitioner,

*v.*

The Honorable James E. Lockemy,
Acting In His Official Capacity as
Chief Justice, South Carolina Court Of Appeals,
Respondent.

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**MOTION FOR LEAVE TO REINSTATE AND/OR IN THE ALTERNATIVE FOR RELIEF FROM JUDGMENT**

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Pursuant to Rule 260(a), SCACR; Rule 240, SCACR; and/or other holding authorities, Petitioner ALEXANDER GUICE, the *pro se* Petitioner, the Injured Employee ("Petitioner" or "Injured Employee") alleges the pleadings in this matter are being filed by Petitioner in *propria persona* wherein pleadings are to be considered without regard to technicalities. Hulsey v. Ownes, 63 F3d 354 (5th Cir 1995); also see Conley v. Gibson, 355 U.S. 41 at 48 (1957). Specifically, Petitioner submits this Motion seeking the Court's leave to reinstate the above-entitled action, or in the alternative, for relief from judgment from the November 10, 2016 Order striking and dismissing the instant petition, wherein Petitioner would allege as follows:

ARGUMENT

1. Petitioner alleges Rule 260(a), SCACR, provides in part: "...A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The

clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded)." Id.

Here, the "Order" striking and dismissing Petitioner's Complaint; Petition; Memorandum in support of Petition; Motion to proceed in forma pauperis; and Emergency Motion for injunctive relief was issued on November 10, 2016. Order, Appellate Case No. 2016-002258, dated 11/10/2016. Attachment "**A**". Petitioner has filed this Rule 260(a) application seeking to reinstate the instant petition on November 21, 2016, via USPS priority mail, wherein said Motion for leave to reinstate should be actually received by the Court not later than November 23, 2016 which would be within the November 25, 2016 filing deadline[1]. Additionally, Petitioner has provided notice of this filing, and true copies of the same, to all parties of record. As such, this Rule 260(a), SCACR application for reinstatement is properly before this Court for. Id.

Furthermore, Petitioner contends the Court lacked "subject matter jurisdiction" at the time it issued the Nov. 10 Order on grounds that the Court violated Petitioner's protected due process rights to reasonable notice and the opportunity to be heard prior to issuance of the same, wherein the Nov. 10 Order should be deemed "void" without regard to whether this prayer is actually received by the Court within fifteen (15) days after the Court issued its Nov. 10 Order pursuant to the "excusable neglect" doctrine set forth in the U.S. Supreme Court's holding in Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 382-83, 398-99 (1993); this Court's holding authorities as set forth in Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d214, 216 (1972), and State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972), which

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1 Petitioner points out that Nov. 24, 2016 is a federal and state holiday wherein the Court will be closed, which should be considered in computing the time period of when the Court actually receives this prayer if the Court is closed for business on Nov. 24 and has limited staff and/or personnel working on Nov. 25, 2016.

removes any tolling for a party seeking an order be set aside for lack of subject matter jurisdiction. Id.

2. Petitioner contends, per Rule 260(a), the Court should reinstate the instant Petition on grounds that; (**I**) the Court erred by *sua sponte* striking and dismissing Petitioner's Petition without first affording Petitioner reasonable "notice"; (**II**) the Court erred by *sua sponte* striking and dismissing Petitioner's Petition without first affording Petitioner the "opportunity" to be heard in terms of curing the deficiencies; (**III**) the Court lacked subject matter jurisdiction at the time it issued the Nov. 10 Order because it violated Petitioner's due process rights to reasonable notice and the opportunity to be heard; (**IV**) the Nov. 10 Order should be deemed "void" because the Court lacked subject matter jurisdiction at the time it issued the Nov. 10 Order; (**V**) there has been a change in controlling law (Rule 11(a), SCRCP) respective to parties not represented by attorney(s) filing affidavits in support of their pleadings which the Court failed to consider; (**VI**) the technicalities respective of Petitioner's Petition have now been corrected; and (**VII**) the Court's judgment to *sua sponte* strike and dismiss Petitioner's Petition based on technicalities rather than adjudicating the Petition based on the merits was "too severe".

**I. Violation of "Reasonable Notice" under the Due Process Clause and Rule 269**

Petitioner contends the Court should consider reinstating Appellate Case No. 2016-002258 on grounds the Court erred in terms of failing to afford Petitioner reasonable notice that Petitioner's Motion for leave to proceed in forma pauperis had been denied and that Petitioner's Petition was defective due to Petitioner not including an Affidavit with his filings.

As an initial matter, as it specifically relates to a party's constitutional due process right to reasonable notice, S.C. Const. art. I § 22, provides in part: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice..." Id. This requirement is echoed upon consideration of U.S. Const. amend. XIV,

§ 1, which provides in part: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law..." Id. Moreover, the requirement of affording a party reasonable notice is expressly stated in Rule 269, SCACR, which provides in part: "Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice..." Id.

Furthermore, this Court's holding in Webster v. Clanton made it expressly clear regarding the fundamental duty of a Court to protect a parties' due process rights to reasonable notice and the opportunity to be heard, wherein you stated this general rule:

> *It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on.*

Id. at 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972).

Here, the Court issued its Nov. 10 Order *sua sponte* striking and dismissing Petitioner's Petition, where Petitioner has expressly alleged violations of Petitioner's private constitutional rights to "Due Process" and "Equal Protection" (See Complaint, Petition for Writ of Prohibition and/or Mandamus; and Memorandum in support of Petition, Appellate Case No. 2016-002258, previously filed) by the named Respondent and by the Lower Court, wherein the Court failed to afford Petitioner reasonable "notice" that the Petition contained defects or that the Court denied Petitioner's Motion to proceed in forma pauperis prior to striking and dismissing the same, which Petitioner contends violated Petitioner's constitutional right to reasonable notice under the Due Process Clause of the U.S. and South Carolina Constitutions, respectively, and violated Rule

269, SCACR. Att. A. Rule 269, SCACR. U.S. Const. amend. XIV, § 1. S.C. Const. art. I, § 22. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (U.S. Sup. Ct. 1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (S.C. Sup. Ct. 1991).

Finally, Petitioner contends because the Court's Nov. 10 Order violated Petitioner's due process right to reasonable notice pursuant to the U.S. Constitution; the S.C. Constitution; and Rule 269, the Nov. 10 Order is controlled by an "error of law", wherein the Court "abused its discretion" respective of the Nov. 10 Order, wherein the Nov. 10 Order should be set aside in accordance with this Court's holding in Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976)("An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support.") on grounds the Petitioner's protected rights were substantially prejudiced because Petitioner was not afforded protected reasonable notice that there were defects in Petitioner's petition and other filings prior to the Court striking and dismissing the petition. Id. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)(To warrant reversal, an appealing party must demonstrate not only error in the court's ruling, but also resulting prejudice.).

## II. Violation of "Opportunity to be Heard" under the Due Process Clause and Rule 269

Petitioner contends the Court should consider reinstating Appellate Case No. 2016-002258 on grounds the Court erred in terms of failing to afford Petitioner a meaningful opportunity to be heard in terms of curing the defects as to paying all required filing fees and providing an affidavit with the pleadings prior to striking and dismissing the petition.

As an initial matter, Petitioner has a constitutionally protected right to a meaningful opportunity to be heard prior to the issuance of any Court Order which affects Petitioner's private rights, or to correct any filings that are not in compliance with the South Carolina Appellate Rules pursuant to U.S. Const. amend. XIV; S.C. Const. art. I, § 22; Rule 269, SCACR; the U.S. Sup. Ct. holding in Mullane; and this Court's holding in Stono River Envtl. Prot. Ass'n. Id.

Specifically, Rule 269 mandates that the Court, on its own motion, or sua sponte, and "after ten (10) days notice" may "...impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require..." Id. However, a review of the record confirms that at no time subsequent Petitioner's filings between Nov. 1-8, 2016 and prior to the Court's issuance of the Nov. 10 Order did the Court issue a Notice to Petitioner advising that there were deficiencies in Petitioner's petition; that the Court had denied Petitioner's Motion to proceed in forma pauperis; that Petitioner was required to pay the required filing fees prior to the Court striking and dismissing the petition; or affording Petitioner ten (10) days to cure the apparent deficiencies per Rule 269, SCACR. Id. Record. Att. A.

Here, the Court issued its Nov. 10 Order *sua sponte* striking and dismissing Petitioner's Petition, where Petitioner has expressly alleged violations of Petitioner's private constitutional rights to "Due Process" and "Equal Protection" (See Complaint, Petition for Writ of Prohibition and/or Mandamus; and Memorandum in support of Petition, Appellate Case No. 2016-002258, previously filed) by the named Respondent and by the Lower Court, wherein the Court failed to afford Petitioner a meaningful "opportunity to be heard" in terms of affording Petitioner a minimum of ten (10) days to cure any defects respective of the petition and other filings prior to

the Court issuing the Nov. 10 sua sponte Order, which Petitioner contends violated Petitioner's constitutional right to the "opportunity to be heard" pursuant to U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 22; Rule 269, SCACR; the U.S. Sup. Ct. holding in Mullane; and this Court's holding in Stono River Envtl. Prot. Ass'n. Id. Sabariego v Maverick, 124 US 261, 31 L Ed 430, 8 S Ct 461 (U.S. Sup. Ct. 1888)(holding "A judgment of a court without hearing the party or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal.").

Finally, Petitioner contends because the Court's Nov. 10 Order violated Petitioner's due process right to the meaningful "opportunity to be heard" pursuant to the U.S. Constitution; the S.C. Constitution; Rule 269; the U.S. and this Court's holdings in Mullane, *supra* and Stono River Envtl. Prot. Ass'n., *supra*, respectively, the Nov. 10 Order is controlled by an "error of law", wherein the Court "abused its discretion" respective of the Nov. 10 Order, wherein the Nov. 10 Order should be set aside in accordance with this Court's holding in Ledford on grounds the Petitioner's protected rights were substantially prejudiced because Petitioner was not afforded the meaningful opportunity to correct the defects prior to the Court striking and dismissing the petition. Id. Stephen, *supra*.

**III. Lack of Subject Matter Jurisdiction**

Petitioner contends the Court should reinstate the instant Petition on grounds the Court lacked subject matter jurisdiction over the action at the time it issued the Nov. 10 Order because the Court failed to comply with the Due Process Clause in terms of affording Petitioner "notice" and the "opportunity to be heard" to correct technicalities associated with the Petition.

As an initial matter, the subject matter jurisdiction of a court is fundamental. "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be

taken notice of by this Court. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court." Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 84849 (2001) (citation omitted). "Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" Watson v. Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (quoting Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). Further, it is well settled federal and South Carolina jurisprudence that violation of a party's protected due process rights divest a court of subject matter jurisdiction of the action at bar. Webster, *supra*; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Pure Oil Co. v. City of Northlake, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956); Hallberg v. Goldblatt Bros., 363 Ill.25 (1936).

In the instant petition, a review of the record establishes that; (**a**) on Nov. 1, 2016 Petitioner filed and served a Complaint, a Petition for Writ of Prohibition and/or Mandamus, a Memorandum in support, a Notice, a notarized Verification, a Motion to proceed in forma pauperis, and a Proof of service; (**b**) on Nov. 8, 2016 Petitioner filed and served an Emergency Motion for injunctive relief; and (**c**) at no time subsequent Nov. 1, 2016 or prior to Nov. 10, 2016 did the Court issue any Order in the instant petition affording Petitioner notice that the Court denied the Motion to proceed in forma pauperis or that there were any defects associated with Petitioner's pleadings. Record. Attachment A.

Furthermore, the Court had jurisdictional and procedural due process obligations to provide Petitioner reasonable notice, and a meaningful opportunity to be heard, in terms of advising Petitioner that the Court had in fact denied the motion to proceed in forma pauperis and that Petitioner's pleadings were defective because no affidavit was attached, and affording

Petitioner the meaningful opportunity to correct the technicalities, prior to the Court's issuance of the Nov. 10 Sua Sponte Order striking and dismissing Petitioner's pleadings, pursuant to Rule 269, SCACR; S.C. Const. art. I, § 22; U.S. Const. amend XIV, § 1; this Court's holding in Webster; and the U.S. Supreme Court's holding in Mullane; however, the Court failed to perform this critical obligation. Id.

Because the Court failed to afford Petitioner reasonable notice or the opportunity to be heard prior to its issuance of the Nov. 10 Order, the Court lacked subject matter jurisdiction over the action at bar at the time it issued its Order on Nov. 10, 2016. Attachment A. Watson, *supra*; Mullane, *supra*; Webster, *supra*. Finally, because the Court lacked subject matter jurisdiction at the time it issued the Nov. 10 Order, the Court should grant reinstatement of the instant petition pursuant to Rule 260(a), SCACR and well settled law. Id. Mullane, *supra*; Webster, *supra*.

**IV. November 10, 2016 Order must be deemed "Void"**

Petitioner contends because the Court lacked subject matter jurisdiction at the time it issued the Nov. 10 Order (Att. A), said Order must be deemed void.

It is well settled federal and South Carolina jurisprudence that the action of a court, regarding a matter as to which it has no jurisdiction, is void. State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972). Orner. V. Shalala, 30 F.3d 1307 (Colo. 1994)(holding "Judgments entered where court lacked either subject matter or personal jurisdiction, or that were otherwise entered in violation of due process of law, must be set aside"); see also Elliot v. Piersol, 1 Pet. 328, 340, 26 U.S. 328, 340 (U.S. Sup. Ct. 1828)(holding that if a court is without authority, its judgments and orders are regarded as nullities); also see Turner v. Malone, 24 S.C. 398 (1886) (holding a judgment or order entered without jurisdiction is void ab initio); see also Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (explaining that an order

issued without jurisdiction is void and a void order has no legal effect).

**V. Change in controlling Law regarding Rule 11(a), SCRCP**

Petitioner contends the Court should grant reinstatement of the instant petition because the Court erred by applying an inaccurate controlling law to the Petitioner's pleadings.

Specifically, a review of the Nov. 10 Sua Sponte Order establishes that the Court found, "Further, since petitioner has failed to provide the filing fee **and affidavit required by the order of February 25, 2015**..." (Emphasis added). Att. A. At issue, is the Court's reliance on its February 25, 2015 Order it issued respective to Appellate Case No. 2014-002625 where this Court struck and dismissed Petitioner's Petition because Petitioner failed to include an affidavit.

However, on January 28, 2016 and under Appellate Case No. 2015-002219, this Court issued an Order amending Rule 11(a), SCRCP, wherein a party not represented by an attorney is not required to verify their pleadings or accompany an affidavit with the same so long as the pleading, motion or other paper Petitioner files with the Court is signed and states Petitioner's address. Order, Appellate Case No. 2015-002219. Attachment "B".

Furthermore, "Both federal and South Carolina courts employ a robust presumption against statutory retroactivity." Ward II, 595 F.3d at 172 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994); Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990)). "Under this presumption, courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment." Id. "Since legislatures generally intend statutes to apply prospectively only, this rule of statutory construction is a means of giving effect to legislative intent." Id. (citing Rivers v. Roadway Exp., Inc., 511 U.S. 298, 304–05 (1994)).

Because Petitioner's pleadings filed on Nov. 1, 2016 and Nov. 8, 2016, respectively,

were all signed and contained Petitioner's address (Record), the Court erred by retroactively applying its decision from February 25, 2015 to Petitioner's filings dated Nov. 1 and 8, 2016 after this Court's issuance of the Jan.28, 2016 Order amending Rule 11(a), SCRCP in terms of removing the requirement for motions or pleadings filed by parties without representation of an attorney to include an affidavit, in clear departure from the holdings set forth in Ward II, Landgraf, Jenkins, Rivers; and this Court's own controlling Jan. 28, 2016 Order, wherein said retroactive application of this Court's Feb. 25, 2015 Order to Petitioner's Nov. 2016 filings constitutes an 'error of law' and an abuse of discretion. Id. Att. A. Att. B. Ledford, *supra* ("An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support.").

Finally, the Nov. 10 Order should be set aside and the instant petition reinstated wherein Petitioner's rights were substantially prejudice by the Court's error of law respective to applying and imposing an outdated and unrequired obligation upon Petitioner, because the Court should have never sua sponte struck and dismissed Petitioner's Petition and other filed pleadings on grounds that have since been repealed, *by this Court*. Atts. A-B. Stephen, *supra*.

**VI. Technicalities respective of Petitioner's Petition have been cured**

Petitioner contends the instant petition should be reinstated on grounds that the technicalities identified in the Court's Nov. 10 Order have been corrected.

Specifically, Petitioner provided $25.00 motion filing fees for the Petition; the Emergency Motion for Injunctive Relief; and this pleading, totaling $75.00[2], and *although not*

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2 Pursuant to this Court's Administrative Order dated September 30, 2016 regarding the 'Revised Motion Fees List', a Motion to proceed in forma pauperis was not listed or referenced, wherein Petitioner did not submit a $25.00 motion fee payment for the same. If, however, Petitioner is required to pay a $25.00 Motion fee for the Motion to proceed in forma pauperis after it was denied, please advise Petitioner of the same, and Petitioner shall promptly remit payment of same to the Clerk.

*required* pursuant to this Court's Jan. 28, 2016 Order (and amended Rule 11(a), SCRCP), Petitioner has provided an "affidavit" which verifies every pleading, motion, or other paper that has been filed in the instant petition. See attached Affidavit. Copies of three (3) $25.00 Certified Money Orders for filing fees. Attachment "C". Because Petitioner has timely cured all technicalities, as identified in the Nov. 10 Order, the instant petition should be reinstated so the Petition can be adjudicated on the merits rather than being dismissed due to technicalities. Grant v. Goodwin, Appellate Case No. 2010-173587 (S.C. Ct. App. Jul. 11, 2012)("Noting South Carolina's policy of favoring the disposition of issues on their merits rather than on technicalities").

**VII. Sua Sponte Striking and Dismissal of Petition based on technicalities too severe**

Petitioner contends the Court should consider reinstating the instant petition on grounds that sua striking and dismissing the instant petition based on technicalities rather than deciding the petition on the merits was too severe.

As an initial matter, South Carolina jurisprudence indicates that Courts in this state prefer deciding issues on the merits rather than disposition and/or dismissal based on technicalities. "When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). Furthermore, if there is no showing of bad faith, willful disobedience, or gross indifference to the rights of the adverse parties, a sanction that results in a default or dismissal is a severe punishment. Id. at 198-99, 511 S.E.2d at 719 (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991)). McNair v. Fairfield Cty., 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008) (internal citations omitted)(holding the decision to dismiss

the cases and impose other sanctions for noncompliance with discovery "should be imposed only in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights.").

Indeed, there are several examples where this Court determined dismissal and/or disposition of cases based on technicalities was too severe and reversed the lower court's judgments. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 540-41, 725 S.E.2d 693, 695, 698 (2012)(reversing the trial court's dismissal of the plaintiff's claim under section 15-79-125 and holding that the prelitigation expert affidavit was sufficient and did not require an opinion as to proximate cause, allowing the medical malpractice claimant's case to proceed); Ross v. Waccamaw Community Hospital, 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013)(rejected argument that noncompliance with the mandated 120-day statutory time period is a jurisdictional procedural defect and not a penalty of dismissal for lack of subject matter jurisdiction); Wilkinson v. E. Cooper Cmty. Hosp., Inc., 410 S.C. 163, 174, 763 S.E.2d 426, 432 (2014)(determining "to permit medical malpractice cases to proceed on the merits rather than to affirm unwarranted dismissals based on technical noncompliance with the medical malpractice statutes").

Here, the Court sua sponte struck and dismissed the instant petition in the Nov. 10 Order. Att. A. However, in striking and dismissing the instant petition, the Court did not find that Petitioner acted in bad faith; was willfully disobedient; or acted with gross indifference to the rights of the adverse parties, wherein the sua sponte striking and dismissal of the instant petition, based on technicalities, and not on the merits, was "harsh medicine"; "too severe"; and a clear departure from this Court's previous holdings in Grier, Ross, and Wilkinson. Id.

Because the technicalities relied upon by the Court to strike and dismiss the instant

petition have been cured, and because Petitioner has not acted in bad faith; willfully disobeyed Court orders; or acted with gross indifference to the rights of the adverse parties, the Court should reinstate the instant petition and allow the petition to be decided upon the merits, which would be consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. Grant, *supra*.

3. Petitioner contends the fifteen (15) day time period for the Court to receive this Rule 260(a) Motion for reinstatement should not apply in this instance on grounds of "excusable negligence" and on grounds that Petitioner alleges that the Nov. 10 Order is void, wherein there is no time limit to raise this issue before the Court, which is why Petitioner also seeks in the alternative, relief from the Nov. 10, 2016 Order[3].

**I. Excusable Negligence**

Petitioner contends the doctrine of 'excusable negligence' should control the tolling of time as opposed to the 15 day period set forth in Rule 260(a). In Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 382-83, 398-99 (1993), the U.S. Supreme Court set forth a four-factor test courts must employ to determine whether a party's neglect of a deadline is excusable. These factors include: "...(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith." Id.

In terms of applying the four-factor test set forth in the Pioneer Inv. Servs. Court to the instant petition, (1) there is no danger of prejudice to the opposing party, because the instant petition was sua sponte struck and dismissed based on technicalities rather than decided on the

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3 Petitioner points out that this argument is dispositive if the Court receives this pleading on or before 11/25/2016.

merits; (2) the length of delay and its potential impact on judicial proceedings is negligible because the instant petition was sua sponte struck and dismissed by the Court approximately nine (9) days after Petitioner filed the Petition on Nov. 1; (3) the reason for the potential delay of timely service of this pleading upon the Court is the November 24, 2016 Federal and State Holiday of Thanksgiving, wherein the Court and the U.S. Postal Service will be closed, which is not in the control of the moving party; and (4) Petitioner has in fact acted in good faith. Id.

**II. No time limit to attack a void judgment**

Petitioner contends the Court should waive the fifteen (15) day time limit to receive this prayer on grounds that Petitioner attacks the Nov. 10 Order as a void judgment.

As an initial matter, federal and South Carolina jurisprudence indicates that an alleged void judgment issued by a Court lacking of subject matter jurisdiction at the time it issued the Order in question may be challenged at any time. Milliken v. Meyer, 311 U.S. 457, 61, 339, 85 L.Ed. 2d 278 (U.S. Sup. Ct. 1940)(holding "A void judgment which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court."); see also Windsor v. McVeigh, 93 US 274, 23 L.Ed. 914 (1876)(holding an order that exceeds the jurisdiction of the court is void, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue.); see also Webster (A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts **whenever** and for **whatever purpose it is presented and relied on.**)(Emphasis added).

Here, Petitioner has filed a Rule 260(a) Motion for reinstatement and/or in the alternative, relief from judgment respective of the Nov. 10 Order. *Supra*. Att. A. However, Petitioner alleges that the Court lacked subject matter jurisdiction of the action at the time it issued the Order (*supra*), wherein this pleading should be accepted and considered by the Court "whenever" this pleading is received by the Court, whether prior to or subsequent November 25, 2016 pursuant to this Court's holding in Webster and the U.S. Supreme Court's holding in Milliken. Id.

## CONCLUSION

Based on all the foregoing reasons, the Court should consider granting this Rule 260(a) motion and reinstating the instant petition as a matter of law. Further, if the Court grants this motion, Petitioner request the Court consider expediting the adjudication of the Emergency Motion for Injunctive Relief based on the merits, because Appellate Case No. 2015-001821 has since elevated from the "Initial Briefing" stage to the "Final Briefing" stage.

Respectfully submitted,

*By:* _____

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November 21, 2016

# Attachment D

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2016-002258

Alexander Guice, .....Petitioner,

v.

The Honorable James Edward Lockemy,
Acting In His Official Capacity
As Chief Justice, South Carolina Court Of Appeals,.....Respondent.

**RESPONSE OF US FOOD SERVICE, INC. AND ACE AMERICAN INSURANCE COMPANY C/O GALLAGHER BASSETT SERVICES, INC. IN OPPOSITION TO MOTION FOR LEAVE TO REINSTATE AND/OR IN THE ALTERNATIVE FOR RELIEF FROM JUDGMENT**

Although not named in Petitioner's Motion for Leave to Reinstate and/or in the Alternative for Relief from Judgment ("Motion"), US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. ("Employer/Carrier"), Respondents below, are filing the above-referenced Response, pursuant to Rules 240(e) & 245(c), SCACR, in order to protect their interests before this Court. Petitioner's request for reinstatement of his Complaint, Petition, memorandum in support of Petition, and motion for injunctive relief directly affect Employer/Carrier, as Petitioner seeks to have this Court order specific relief from them.

This Court should deny Petitioner's Motion. Petitioner still has presented no valid reason to invoke this Court's original jurisdiction under Rule 245, SCACR, and he is not entitled to any of the relief he seeks.

While it is unclear whether Petitioner's Motion is timely,[1] it is clearly without merit.[2] Contrary to his assertions, Petitioner does not have a right to have this Court exercise its original jurisdiction. Rule 245, SCACR. Nor was he entitled to a full hearing or notice prior to this Court deciding his Petition. None is required by Rule 245, which provides that, "[u]nless otherwise ordered by the Supreme Court, the petition shall be decided without oral argument." Rule 245(c), SCACR. As a result, Petitioner's arguments regarding notice and lack of jurisdiction are based on an incorrect premise (that he was entitled to notice and a hearing) and must be rejected.[3]

Petitioner alleges he was not afforded reasonable notice of the defects in his Petition. However, this Court's February 25, 2015 Order in Appeal No. 2014-002625 cautioned him about filing future petitions asking the Court to exercise its original jurisdiction and advised him that future petitions must be accompanied by a sworn affidavit. In addition, this Court's rules provide clear notice to Petitioner that filing fees are required. Rule 240(d) states that motions and petitions "shall be accompanied by the filing fee set by order of the Supreme Court." Rule 240(d), SCACR. In addition, Rule 240(g) provides clear notice to Petitioner that, "[f]ailure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition."

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[1] Rules 260(a) & 263(a), SCACR, require any petition for reinstatement to be actually received by the Court within fifteen days of the date the Order was filed, and do not allow extra days for mailing.

[2] Employer/Carrier incorporate by reference, as if set forth verbatim herein, their Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. in Opposition to Petition for Writ of Prohibition and/or Mandamus and Motion for Leave to Proceed in Forma Pauperis, filed November 9, 2016 ("Prior Response").

[3] Petitioner relies on Rule 269, SCACR, in his attempt to impose a 10-day notice period on this Court. However, Rule 269 applies to the imposition of sanctions for frivolous motions and petitions and not to adjudication of other motions and petitions by this Court. This Court did not impose any sanctions in its November 10, 2016 Order.

Rule 240(g), SCACR. A *pro se* litigant "who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 (2003).

Petitioner's argument that this Court lacks subject matter jurisdiction is also misguided. "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Dove v. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994). This Court clearly has subject matter jurisdiction over workers' compensation appeals. Furthermore, as discussed above, this Court did not lose appellate jurisdiction by dismissing Petitioner's Petition and motions without prior notice and hearing because he was not entitled to same.

The recent changes to Rule 11(a), SCRCP, did not alter the effect on Petitioner of this Court's February 25, 2015 Order, Appeal No. 2014-002625. Those changes primarily concerned when electronic signatures are appropriate, and did not loosen the requirement that a *pro se* litigant file motions and petitions in good faith. Nor did they affect this Court's ability to require a party to affirm that his motion or petition is filed in good faith. *See* In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

There was nothing unduly harsh in this Court's dismissal of Petitioner's Petition and other motions. In fact, Petitioner appears to be inviting this Court to make a finding that his filings are in bad faith. (Motion to Reinstate, pp. 12, 13, 14). As Employer/Carrier explained in their Prior Response, Petitioner has abused and continues to abuse the judicial system, attempting to "game" the result he seeks. In that process, he has caused Employer/Carrier to incur substantial legal fees in order to defend against an inherently meritless claim. Employer/Carrier indeed are prejudiced by the need to

respond continually to Petitioner's unending baseless motions and petitions.[4] As a result, Employer/Carrier again request that this Court impose sanctions on Petitioner in order to dissuade him from continuing to file frivolous motions and petitions that waste judicial resources. Rule 269, SCACR.

## CONCLUSION

For all the reasons stated herein and in their Prior Response, this Court should deny Petitioner's motion in its entirety, and should impose sanctions on Petitioner pursuant to Rules 267(b) & 269, SCACR.

Respectfully submitted,

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*Attorney for US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc.*

November 29, 2016

[4] In fact, Petitioner filed his Initial Reply Brief with the Court of Appeals on November 14, 2016 and, apparently, is preparing the Record on Appeal, as Respondents have provided Petitioner with copies of a long list of items he indicated he needed for inclusion in the Record. (Att. A). Thus, Petitioner is moving this Court for relief at the very same time his appeal proceeds at the Court of Appeals.

# Attachment E

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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IN THE SUPREME COURT'S ORIGINAL JURISDICTION

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Appellate Case No. 2016-002258

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Alexander Guice, Petitioner,

*v.*

The Honorable James E. Lockemy,
Acting In His Official Capacity as
Chief Justice, South Carolina Court Of Appeals,
Respondent.

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**"REPLY" TO RESPONSE OF US FOOD SERVICE, INC. AND ACE AMERICAN INSURANCE COMPANY C/O GALLAGHER BASSETT SERVICES, INC. IN OPPOSITION TO MOTION FOR LEAVE TO REINSTATE AND/OR IN THE ALTERNATIVE FOR RELIEF FROM JUDGMENT**

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Pursuant to "Rule 240(f), SCACR"; and/or other holding authorities, Petitioner ALEXANDER GUICE, the *pro se* Petitioner, the Injured Employee ("Petitioner" or "Injured Employee"), alleges the pleadings in this matter are being filed by Petitioner in *propria persona* wherein pleadings are to be considered without regard to technicalities. Hulsey v. Ownes, 63 F3d 354 (5th Cir 1995); also see Conley v. Gibson, 355 U.S. 41 at 48 (1957). Specifically, Petitioner submits this "Reply" to the Response filed by Erin Leigh Hantske, Esquire and McAngus, Goudelock & Courie, LLC ("Attorney Hantske"), on behalf of US Food Service, Inc., and ACE American Insurance Company c/o Gallagher Bassett Services, an Interested Party ("Interested Party"), opposing Petitioner's previously filed Motion for Reinstatement of the above-entitled action ("Response"), dated November 29, 2016 (and by incorporation the

Response from the Interested Party dated November 9, 2016), received by the Petitioner via regular mail on December 3, 2016. In reply to the Interested Party's Responses, Petitioner alleges as follows:

**1. The Interested Party lacks standing to be heard in the instant petition because the Interested Party has failed to file a 'Motion to Intervene'.**

Petitioner contends the Interested Party lacks standing in the instant petition to be heard by this Court based on several pertinent factors, to include; (1) the Interested Party has failed to file a required 'Motion to Intervene'; and (2) this Court has not issued an Order granting the Interested Party standing to be a named party to the above-entitled action, wherein the two (2) "Responses" filed by the Interested Party, dated November 09, 2016 and November 29, 2016, respectively, should be deemed "frivolous" and "vexatious" litigation and disregarded by the Court as a matter of law.

**I. Failure to file a "Motion to Intervene"**

Petitioner contends a review of the record, and specifically, a review of the "Complaint"; "Notice"; "Petition for writ of prohibition and/or mandamus"; and "Memorandum in support of Petition for writ of prohibition and/or mandamus", filed by the Petitioner, confirms that neither US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc., nor Erin Leigh Hantske, Esquire and McAngus, Goudelock & Courie, LLC, are named as Respondents or Petitioners in the instant petition. See Record, Appellate Case No. 2016-002258.

Furthermore, a review of the record confirms that to date, the Interested Party, by way of Attorney Hantske, has failed to file and serve a "Motion to Intervene" with this Court in terms of the mandatory procedural device whereby the interested party, who is not named as a Respondent in the instant petition, may become a party to the action. See In re Horry Cnty. State Bank, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (holding "Intervention is a

procedural device whereby a third party who is not named in an existing lawsuit, but who has an interest in its outcome, may become a party to the action."); also see Casey Edward and Justin Williams v. State and S.C. Association of School Administrators v. Hon. Mark Sanford, Order No. 2009-05-22-03 (Sup. Ct. 2009)(holding "if any of the parties in either action desire to intervene in the other action, they **must** serve and file a **motion to intervene**") (Emphasis added); also see Casey Edwards and Justin Williams v. State, Order No. 2009-05-27-01(Sup. Ct. 2009) (holding "Governor Mark Sanford **moves to intervene** in this action concerning the Federal Stimulus Act[1] funds. He indicates he has a substantial interest in the subject matter of this action and should be permitted to intervene and be joined as a **respondent** to protect that interest. We grant the **motion to intervene** and join Governor Sanford as a respondent in this action.") (Emphasis added).

**II. Lack of standing**

Petitioner contends because Attorney Hantske, on behalf of her clients, has not filed a required 'Motion to Intervene' seeking to become a party to this matter, and because the Court has not issued a prior sua sponte Order granting leave and standing for Attorney Hantske, on behalf of her clients, to file any responsive pleadings in the instant petition in opposition to the above-referenced pleadings filed this action by Petitioner, the Interested Party and Attorney Hantske lack standing to be heard in the instant petition. See Record. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (internal citations omitted); Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001) (holding the "irreducible constitutional minimum of standing" has three components: First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or

'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."). Casey Edwards and Justin Williams, *supra*.

Still further, Petitioner contends a controlling case which is most persuasive regarding Attorney Hantske and her client's lack of standing in the instant appeal is Gillespie v. State, Opinion No. 26901(Sup. Ct. 2010). In Gillespie, the S.C. Dept. of Motor Vehicles ("SCDMV"), who was neither a named party nor filed a Motion to Intervene, unilaterally began participating in Gillespie, to include filing successive motions to reconsider under Rule 59, SCRCP. Id. After the trial court denied the motions on grounds of "lack of standing", SCDMV filed a Notice of Appeal. Id. In Gillespie, this Court opined,

> "A well-known rule of appellate procedure is that only an aggrieved party may appeal. Rule 201(b), SCACR; *see also Condon v. State*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003) ("[T]he Attorney General is required, like everyone else, to formally intervene and become a named party before he can file an appeal."). Having failed to intervene as a party, SCDMV's appeal is dismissed." Id.

Finally, Rule 245(c), SCACR, expressly provides that a Petitioner "shall serve on all other parties (respondents)" the complaint, petition, etc., wherein the only named Respondent in the instant Petition is the Honorable James E. Lockemy. Id. *supra*. Moreover, while Petitioner did provide Attorney Hantske with true copies of all pleadings filed in this matter, as a courtesy, Petitioner did not name US Foods; ACE American Insurance; or Gallagher Bassett as co-Respondents, and Petitioner lacks the pre-requisite authority or power to grant a Motion to

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1 Petitioner contends because neither Attorney Hantske nor her clients lack standing in the instant petition, their Responses filed under "Rule 245(c), SCACR" and "Rule 240(e), SCACR" is erroneous.

Intervene (particularly where no Motion to Intervene has been filed by Attorney Hantske) to allow Attorney Hantske to file pleadings in this matter; and Attorney Hantske, like the Attorney General, must file a Motion to Intervene and obtain approval from this Court prior to being allowed to lawfully participate in this matter. Gillespie, *supra*. In re Horry Cnty. State Bank.

As such, the two responses filed in this action by Attorney Hantske, on behalf of the "Interested Party", where no Motion to Intervene has been filed, and where this Court has not issued a proper sua sponte Order otherwise granting Attorney Hantske or her client's "standing" to proceed in this matter as a named Respondent, the Court must deem the two "Responses" filed by Attorney Hantske as "nullities" pursuant to this Court's holdings in Gillespie; In re Horry Cnty. State Bank; and Casey Edwards and Justin Williams, as a matter of law. Id.

**2. This Court should consider issuing an "Order to Show Cause" to determine whether to impose reasonable sanctions, pursuant to Rule 269, SCACR, against US Food Service, Inc.; ACE American Insurance Company; and Gallagher Bassett Services, Inc., for filing 'vexatious' and 'frivolous' pleadings in this matter.**

Petitioner contends the Court should consider sua sponte issuing an Order to Show Cause upon Erin L. Hantske, Esq., on behalf of her clients, to determine whether this Court should impose reasonable sanctions upon US Foodservice; ACE American Insurance Company; and Gallagher Bassett Services, for filing vexatious and frivolous pleadings in this matter, in addition to acting in bad faith, and for willful disobedience, based on several relevant factors.

As an initial matter, Rule 269, SCACR, provides in part: "Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Id.

While the "Responses" filed by the interested party does not specifically say "Return",

Petitioner contends because the pleadings were filed by Attorney Hantske erroneously under "Rules 240(e) & 245(c), SCACR", the Court should consider the responses filed by Attorney Hantske as "returns" for purposes of Rule 269, SCACR. Id. Responses filed by Interested Party dated Nov. 9, 2016 and Nov. 29, 2016, previously filed.

An Order to Show Cause issued for possible sanctions against US Foodservice, Inc.; ACE American Insurance Company; and Gallagher Bassett Services (Interested Party) is warranted on grounds that; (**a**) this Court has a duty to ensure fairness to all who bring their case to the judiciary for resolution and a violation of any provision of the South Carolina Appellate Court Rules qualifies as sanctionable misconduct (Clinton Mills, Inc. v. Alexander & Alexander, Inc., 687 F. Supp. 226, 228 (D.S.C. 1988)), wherein the Interested Party, on two separate occasions, have violated this Court's well-known rule of failing to file a "Motion to Intervene" and obtain required approval and authority from this Court to participate in the instant appeal;

(**b**) An attorney or party "may be sanctioned for filing a pleading, motion, or other paper in bad faith...whether or not there is good ground to support it." (Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (S.C. Sup.Ct.1995)), wherein the Interested Party has filed two (2) Responses in this matter in "bad faith", because the Interested Party lacks standing to be recognized or heard by this Court due to the Interested Party's failure to file the mandatory 'Motion to Intervene' or seek and obtain prior approval from this Court[2];

(**c**) The Interested Party has filed "vexatious" and "frivolous" pleadings with this Court, in terms of not only filing unlawful responses in this matter, but by requesting that this Court, on

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2 The term "Bad Faith" is defined as "The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." State v. Griffin, 100 S.C. 331, 331, 84 S.E. 876, 877 (1915) (citation omitted).

two separate instances, impose sanctions upon the pro se Petitioner based on inadmissible arguments and evidence[3];

(**d**) The Interested Party has demonstrated a pattern of unlawful and unilateral "willful disobedience" to the rule of law, wherein in addition to filing two vexatious and frivolous pleadings in this matter, without first filing a 'Motion to Intervene' and obtaining prior approval from this Court to be deemed Respondents in this matter, the Interested Party unlawfully and unilaterally violated S.C. Code Regs. 67-505(A)(Supp. 2005)("After the one hundred fifty day period, the employer's representative **shall not** suspend or terminate temporary compensation except as provided in this regulation or R.67-506.") (Emphasis added), and R.67-506(Supp. 2005), when they unlawfully and unilaterally terminated Petitioner's entitled Temporary Total Compensation Payments on or around December 01, 2005, after the expiration of the first one-hundred-fifty-day-period after notice of injury, without filing the required documentation or obtaining the pre-requisite authority and permission from the S.C. Workers' Compensation Commission to do so (See Redacted WCC Form 18, dated December 01, 2005 (Memorandum in Support of Pet., Att. "G", previously filed))[4]; and

(5) The Interested Party has demonstrated "Gross Indifference" to the substantial rights afforded to Petitioner, on grounds that even if the Interested Party had filed the mandatory Motion to Intervene and had obtained the mandatory grant of the Motion by this Court and had

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3 See Interested Party's Response dated 11/29/2016, and specifically, in footnote "2" on page "2" of the same, where the Interested Party "incorporate by reference, as if set forth verbatim herein, their Response of US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. in Opposition to Petition for Writ of Prohibition and/or Mandamus and Motion for Leave to Proceed in Forma Pauperis, filed November 9, 2016 ("Prior Response")".

4 The term "Willful Disobedience" is defined as "A willful ...act done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.'" State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994).

the permission to proceed in this matter as a named Respondent, the "request" that the Court impose sanctions upon Petitioner, on two separate instances as set forth in the Interested Party's "Responses", were unlawful, as Rule 269, SCACR expressly requires that the party alleging sanctionable misconduct file a "motion" and the alleged offending party be afforded ten (10) days notice to respond to any alleged sanctionable misconduct, wherein by requesting the Court impose sanctions upon Petitioner as set forth in the Interested Party's "Responses" (filed under Rule 240(e), SCACR), only affords Petitioner five (5) days to file a "reply" wherein Petitioner has been deprived of "reasonable notice" (as set by Rule 269) under the Due Process Clause of both the South Carolina and United States Constitutions, respectively. Rule 269, SCACR. S.C. Const. art. I, § 22. U.S. Const. amend. XIV, § 1. Responses dated 11/9/2016 & 11/29/2016, previously filed. Gillespie, *supra*.

Moreover, the alleged bad faith conduct by the Interested Party in this matter as articulated above (*supra*) demonstrates a clear pattern of similar alleged bad faith conduct by the Interested Party, respective to Appellate Case No. 2015-001821, currently pending before the lower court. Specifically, on November 29, 2016, and respective to Appellate Case No. 2015-001821, Petitioner duly filed and served a "Motion for Sanctions Against Respondents' [Interested Party] for Repeated Violations of Rules 241(a) and 269 of the South Carolina Appellate Court Rules", wherein *inter alia* Petitioner moves the lower court for the imposition of sanctions, and in fact, "severe sanctions" against the Interested Party. Cover letter to the Clerk of Court of Appeals, dated 11/29/2016 (confirming filing and service of Motion for Sanctions against Interested Party in Appellate Case No. 2015-001821). Attachment "A".

Finally, if this Court decides to act *sua sponte* in terms of issuing an "Order to Show Cause" upon the Interested Party to determine whether the imposition of sanctions is warranted,

while Rule 269, SCACR, and S.C. Code Ann. § 15-36-10 *et. seq.* of the S.C. Frivolous Civil Proceedings Sanctions Act (FCPSA), clearly establishes that a party can be sanctioned for the acts and omissions of their representative agents (See Holmes v. East Cooper Community Hospital, Inc., et al, Opinion No. 27370 (Sup. Ct. March 26, 2014)(holding "Thus, we must presume that the legislature intended for a *party*, even a party represented by counsel, to be sanctionable under the FCPSA.")), federal jurisprudence is consistent with the practice of sanctioning parties for the acts and omissions of their freely selected representative agents.

Specifically, in the 1962 decision of Link v. Wabash Railroad Co., the U.S. Sup. Court reviewed a district court's sua sponte dismissal of a diversity negligence action. Id. Six years after the plaintiff filed the matter, the district court scheduled a pretrial conference and gave counsel two weeks prior notice of the scheduled conference. Id. On the day of the conference, plaintiff's counsel called the court to say that he would be unable to attend the conference, giving the impolitic reason that he was busy preparing some documents for the state supreme court. Id. The attorney did not attend the conference, and the district court dismissed the matter for failure to appear and prosecute the claim. Id. In reviewing the district court dismissal, the U.S. Supreme Court opined:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omission of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney.""

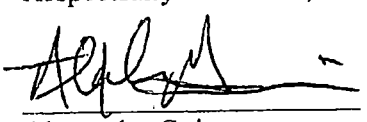
Id. at 370 U.S. 633-34 (1962)(quoting Smith v. Ayer, 101 U.S. 320, 326 (1879).

## CONCLUSION

Based on foregoing, Petitioner moves the Court to categorically reject the arguments and

relief request(s) as set forth in the Interested Party's "Responses" dated Nov. 9 and 29, 2016 on grounds of lack of standing. In addition, Petitioner request that this Court consider issuing an "Order to Show Cause" upon the Interested Party to determine whether the imposition of reasonable sanctions, pursuant to Rule 269, SCACR; § 15-36-10 *et. seq.*; and well-settled law, against the Interested Party, is warranted.

Respectfully submitted,

By: 

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December 3, 2016

# Attachment F

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| STATE OF SOUTH CAROLINA | ) | THE COURT OF COMMON PLEAS |
| | ) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | CASE NO. 2011-CP-10-1243 |
| ROBERT HANEKAMP, | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | **ORDER GRANTING SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTERCLAIMS** |
| v. | ) | |
| | ) | |
| ATLAS TECHNOLOGIES, INC., TASL, INC., DAVID DIEHL, and BRIAN MILLER | ) | |
| | ) | |
| Defendants. | ) | |



This matter came before the Court at a hearing held on April 30, 2014 involving the (a) Motion for Summary Judgment as to counterclaims of Defendants Atlas Technologies, Inc. ("Atlas"), TASL, Inc. ("TASL"), Brian M. Miller ("Miller") and David Diehl ("Diehl") (all sometimes collectively referred to as "Defendants") and (b) Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and S.C. Code Ann. §15-36-10 (Sanctions), both filed on March 24, 2014 pursuant to S.C. R. CIV. PRO. 56. Defendants seek an Order of this Court awarding summary judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions). This Court finds that Plaintiff has breached his fiduciary duty to Defendants, committed fraud, converted Atlas funds to his personal use, that plaintiff has been unjustly enriched and owes Defendants restitution, and has violated S.C. Code Ann. §33-18-410 (b) and S.C. Code Ann. §15-36-10, et. seq. Defendants also have sought a Court ordered buyout

of Plaintiffs shares in Defendants Atlas and TASL as an alternative to dissolution of the Defendant corporations.

Plaintiff faces a trapped investment from which he can no longer derive any benefit. Based on the evidence presented in this case and the multiple affidavits filed by Defendants', as well as the excerpts of the deposition of the Plaintiff, I find that reconciliation between the Plaintiff and the Defendants is unrealistic and that a forced buy-out of Plaintiff's shares in both Atlas and TASL by the Defendants is the appropriate remedy in this case. Despite his own misconduct, as detailed throughout the record in this case, I find that Plaintiff is entitled to a court ordered buyout for the "fair value" of his shares in Atlas and TASL decreased by offsets for the amount of money converted to Plaintiff's personal use and money that Defendants paid in unnecessary legal fees, experts' fees [Dixon Hughes Goodman], and costs due to Plaintiff's vexatious conduct and frivolous filings and arguments in this litigation.

Present at the hearing held on April 30, 2014 were the Defendants Brian M. Miller and David Diehl represented by Richard S. Rosen, Esq. and John E. Rosen, Esq. of Rosen, Rosen & Hagood, LLC. The Plaintiff did not appear at the hearing despite receiving proper notice. Plaintiff signed a certified mail return receipt sent by John E. Rosen, Esq. on March 24, 2014. Plaintiff also participated in the email exchanges in late March and early April 2014 between Defendants' counsel, Plaintiff and Caroline Niland, my law clerk, for the purpose of scheduling a hearing on Defendants' motions.. After Ms. Niland asked the parties on April 1, 2014 if Wednesday, April 30, 2014 at 10 a.m. was suitable for all parties, Mr. Hanekamp responded: "Ms. Niland, Currently, I am unable to attend this hearing. Thank you, Rob." Id. In response to Ms. Niland's email of April 7, 2014 at 9:39 a.m., EDT, stating that "it would be very helpful to give us dates that you would be available to attend this hearing. Please advise with some possible dates by **this Friday, April 11.** Please be aware that if you do not provide dates, a hearing will

be set on this matter..." Id. Mr. Hanekamp replied, "Ms. Niland, I do not have the ability to return to Charleston at the moment, therefore, I am unable to provide my availability. I understand. Blessings Rob." Id.

After having reviewed the pleadings, affidavits, exhibits, and other documents of record and considering the arguments of counsel, I find that there are no genuine issues of material fact in this case precluding the entry of judgment in favor of the Defendants as a matter of law. For the reasons stated herein-below, this Court finds that the Defendants' motions should be granted.

## I. FACTUAL AND PROCEDURAL BACKGROUND

This Court makes the following findings of fact:

This Motion comes after Plaintiff pursued a baseless Motion for Summary Judgment, a Second Motion for Receiver, a Second Motion for Leave to Amend his Complaint, an Amended Motion for Temporary Injunction and Restraining Order regarding advancement of Defendants' attorney's fees and costs by the corporations, as well as a Motion for Sanctions, Rule to Show Cause, to Compel, and for Commission of Out-of-State Subpoenas.

Plaintiff, since this case started over three (3 ) years ago, has filed three (3) Motions seeking appointment of a custodian or receiver including the most recent Motion for Summary Judgment filed in February of this year. All of these Motions have been denied. Judge Dennis pointed out at a hearing on August 3, 2011 that the first motion for receiver and/or custodian should never have been filed as there was no evidence to support it after Stephan V. Futeral, Esq., explained to the court that he hoped his discovery would give him the evidence needed to pursue the motion. See Transcript of Hearing August 3, 2011, pp. 2-4; 17-19.

The Court heard arguments on July 23, 2012 and ruled on the following motions in an Order dated October 24, 2012, with the exception of Plaintiff's Motion for Injunction regarding

advancement of Defendants' attorney's fees and costs by the corporations, which motion was denied in an Order dated October 10, 2012. This Court denied the Second Motion for a Receiver and granted the Second Motion for Leave to Amend. Counsel for the parties advised the Court that they reached an agreement as to Plaintiff's motions for a rule to show cause, for the commission of out-of-state subpoenas, to compel discovery, to compel depositions in San Diego and Defendants' Motions to strike, for temporary restraining order/preliminary injunction/sanctions and for a protective order, and counsel published the agreement to the court at the July 23, 2012 hearing, all which became part of the October 24, 2012 Order. Plaintiff had not to date, more than one (1) year later, filed a Second Amended Complaint.

Subsequently, after Plaintiff's counsel, Stephan V. Futeral, Esq., received all discovery and subpoenaed documents as per the October 24, 2012 Order, he moved to be relieved as counsel for Plaintiff, which relief was granted by an Order dated December 5, 2012. Plaintiff was granted thirty (30) days to find new counsel. Plaintiff *pro se* sent this Court a letter on January 12, 2013, seeking additional time to find new counsel. On the same day, Plaintiff sent out invalid subpoenas as more fully set forth in Defendants' Motion to Quash dated January 29, 2012, seeking the same information he had already received on previous occasions.

This Court issued an Order on January 14, 2013, allowing Plaintiff until February 15, 2013 to retain new counsel or proceed *pro se*. In that time period, Plaintiff, while presumably seeking new counsel, filed a Motion for Summary Judgment which had no basis and sought a receiver for a third time. See Transcript of Hearing February 20, 2013, pp. 12-13. This Court issued an Order on February 27, 2013 denying Plaintiff's Motion for Summary Judgment as well as Defendants' Motions for Rule to Show Cause and for Sanctions and Attorney's Fees.

Plaintiff found a third attorney, Bruce Miller, Esquire, who was granted reasonable time to become familiar with the case and who briefly represented Plaintiff until he too filed a

Consent Motion to be relieved as counsel for Plaintiff on July 18, 2013. In the short time Bruce Miller represented Plaintiff, the parties held a status conference with this Court on June 20, 2013, which resulted in a consent scheduling order dated June 21, 2013, whereby the following would occur: (i) the Plaintiff would obtain a valuation by his own expert of Defendant Atlas by September 1, 2013, (ii) the parties would have until October 1, 2013 to mediate the case, and then (iii) if mediation failed, the parties would commence discovery on October 1, 2013 and have a date certain for a trial in February or March 2014. Plaintiff has not acted on the order he sought as he has not obtained a valuation of his own. Bruce Miller's Motion to be relieved as counsel for Plaintiff was granted on August 9, 2013.

Plaintiff, having had three (3) previous attorneys, David A. Collins, Esq., Stephan V. Futeral, Esq., and Bruce Miller, Esq. has been proceeding *pro se*. See Deposition of Robert Hanekamp, Page 7. Throughout this litigation, Plaintiff has been engaged in a pattern of reckless conduct as the record in this case makes clear.

This Court granted summary judgment in favor of Defendants on all of Plaintiff's causes of action in its Order of December 23, 2013. Defendants assert counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions)

Defendant Atlas is a defense contracting firm doing work for the United States Government and that provides information technology, network engineering and software products and services. Defendant Brian Miller and Plaintiff Robert Hanekamp met at Naval Air Station in Bermuda. Defendant Miller met Defendant Diehl prior to moving to South Carolina and worked together at Scientific Research Corporation and then Defendant Miller established

himself as an IT consultant for a program known as The Automated Digital Network System ("ADNS"), a shipboard based network communications program. Mr. Miller was then asked to install ADNS and make it functional on the U.S.S. Normandy, a new and innovative application of the program. Due to Mr. Miller's success in getting ADNS to function on naval warships, the ADNS program was able to survive such that Defendants and Plaintiff had discussions about forming a company to work on ADNS installation, application and consulting. Atlas was incorporated on October 13, 1997. Brian Miller was able to convey his existing subcontracts to establish the initial revenue stream until the successfully bid and won a contract to perform ADNS system integration on the Enterprise Battle Group. Depo. of Hanekamp, p. 13. In addition to the government contracting work, Plaintiff and Defendants often discussed work involving the potential application and development of these systems for commercial products and services, thereby trying to diversify their workload. Depo. of Hanekamp, pp. 268-271.

Defendant Miller owns fifty percent (50%) of the shares of Atlas, Defendant Diehl owns twenty five percent (25%) and Plaintiff owns twenty five percent (25%). Together, Defendants Miller and Diehl comprise seventy five percent (75%) of the ownership of Atlas. Atlas is a statutory close corporation without a board of directors. See S.C. CODE ANN. § 33-18-210. Defendant Miller owns thirty three and thirty three hundredths percent (33.33%)of the shares of TASL, Defendant Diehl owns thirty three and thirty four hundredths percent (33.34%) and Plaintiff owns thirty three and thirty three hundredths percent (33.33%)of the shares of TASL. Defendant TASL was incorporated on November 22, 1999, and its business consists of owning and managing two parcels of commercial real estate that are leased to Defendant Atlas. Defendants Miller and Diehl together own sixty six and sixty seven hundredths percent (66.67%) of TASL shares. There have been zero (0) allegations made regarding any misconduct in the management of TASL. TASL is a statutory close corporation in which the Articles of

Incorporation and Bylaws provide for a board of directors but the shareholder management agreement excludes one and provides that management of the corporation will be conducted by the shareholders.

Plaintiff was hired by Atlas in 1998 initially as a junior level technician at the Charleston office with a salary of $50,000.00. See Affidavit of Brian M. Miller, ¶ 8; Affidavit of David Diehl, ¶ 10. His performance as an employee was satisfactory until 2003, when Plaintiff decided to move to San Diego, California, giving Defendants a mere one weeks' notice of his decision. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. Plaintiff claims that he was tasked with opening the San Diego office for Atlas but cannot point to a specific conversation, correspondence, document or any evidence that supports his contention. Depo. of Hanekamp, pp. 347-348. Plaintiff and Defendants had often talked about opening offices in other locations – Washington, D.C., Washington State, San Diego, and others, but it came as a surprise to Defendants that Plaintiff took it upon himself to move to San Diego. Miller Aff., ¶ 8; Diehl Aff., ¶ 10; Depo. of Hanekamp, pp. 347-348. Apparently, Plaintiff had a romantic relationship with a woman who lived in San Diego and who was his girlfriend. Depo. of Hanekamp, pp. 38-40, 42 (name and identifying information redacted). In order to preserve their longstanding friendship with Plaintiff, Defendants retroactively agreed to allow Plaintiff to establish an Atlas office in San Diego despite the fact that Plaintiff had never been employed by Atlas in a managerial position. Miller Aff., ¶ 8; Diehl Aff., ¶ 10. It soon became apparent that Plaintiff was not qualified to manage the San Diego office and Defendants were forced to transfer the General Manager from Atlas' Virginia office to San Diego to manage operations. Miller Aff., ¶ 9; Diehl Aff., ¶ 11; Depo. of Hanekamp, pp. 46-48.

Plaintiff failed to properly manage the San Diego office such that it experienced cost overruns on task orders performed by Atlas San Diego. Miller Aff., ¶ 6; Diehl Aff., ¶ 6; Hughes

Aff., ¶ 8. Plaintiff also mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372. According to Ana Susi, the Plaintiff in that case and Mr. Hanekamp's assistant, the atmosphere of the Atlas San Diego office was out of control, had no organization, none of the employees had ever had sexual harassment training, there was no HR presence, many employees used extreme foul language, and a lot of physical activity was inappropriate. Deposition of Ana Susi, Pages 266-269. Plaintiff admitted that one of his employees of the San Diego office had a legitimate complaint. Depo. of Hanekamp, p. 381.

In 2008, Plaintiff's security credentials were revoked meaning that he no longer had access to any government customers' facilities where Atlas was required under contract to perform work. Miller Aff., ¶ 10; Diehl Aff., ¶ 14. Thereafter, Plaintiff again unilaterally decided to move, this time to Hawaii, without seeking authorization from Atlas. Miller Aff., ¶ 10; Diehl Aff., ¶ 15. While in Hawaii, Plaintiff charged a multitude of personal expenses to the corporation and then tried to misrepresent them to Atlas' accounting office as legitimate business expenses. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff even admitted that all of his expenses incurred in Hawaii were personal expenses that he tried to pass off as legitimate including meals, rent, gifts and a Nissan Truck. Depo. of Hanekamp, pp. 58-62; 64-74.

This drain on resources, compounded with the damage caused by Plaintiff's inadequate management, resulted in substantial losses to Atlas. Miller Aff., ¶ 9; Diehl Aff., ¶ 11. Additionally, Plaintiff's incompetence and unprofessional conduct harmed the reputation and goodwill of the company, threatening even greater losses. Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-15. Defendants informed Plaintiff that the company needed an onsite manager to properly

manage Atlas' workload, customer relationships and properly supervise office personnel. Depo. of Hanekamp, pp. 98-121; 354-372.

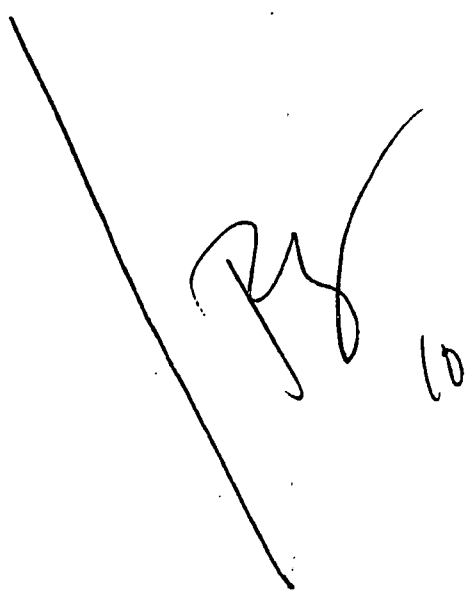
In 2009, Defendant Miller, despite having abundant cause to terminate Plaintiff's employment, agreed to, under certain conditions, create the position of CCO, to allow Plaintiff to work this position from Hawaii, and to give Plaintiff a $15,000.00 raise in salary if Plaintiff would perform certain tasks. The proposed offer required Plaintiff to facilitate a smooth transition -- to introduce, integrate and openly support a new General Manager to take Plaintiff's position. While Defendants admit that Miller and Plaintiff discussed the foregoing arrangement, Plaintiff failed to perform the conditions precedent to achieving such a deal. Depo. of Hanekamp, pp. 363-366. Plaintiff "squatted" in the General Manager position and did not find and perform the foregoing tasks with a new GM. Brian Miller Aff., August 1, 2011, ¶ 23; Depo. of Hanekamp, pp. 342-344; 363-365. Defendants deny that an enforceable contract ever existed in this regard or that they breached it.

Although still employed by Atlas, Plaintiff's performance continued to deteriorate. Plaintiff acknowledged in an email exchange with Defendants in June 2010 that he was insubordinate, incompetent, unprofessional and that he took full responsibility for all that he had done and deserved to be fired, but asked for another chance. Miller Aff., ¶ 6; Diehl Aff., ¶ 7. Defendants Miller and Diehl tried to provide Plaintiff with a dignified exit from the company given their longstanding friendship with Plaintiff. Miller Aff., ¶¶ 6, 18; Diehl Aff., ¶¶ 8, 23. Atlas received additional complaints of inappropriate behavior in the workplace from two (2) more San Diego Employees in February 2010. Finally, for the many reasons set forth herein, Plaintiff's employment was terminated in June 2010. Miller Aff., ¶¶ 18, 23; Diehl Aff., ¶ 23.

Prior to and following his termination, many attempts were made to reach a mutually agreeable solution as to the acquisition of Plaintiff's shares by Defendants Miller and Diehl.

Miller Aff., ¶ 21; Diehl Aff., ¶ 26. However, Plaintiff simply refused to respond to any of these offers. Miller Aff., ¶ 21; Diehl Aff., ¶ 26. In fact, Plaintiff and Defendants agreed to have a valuation done for Atlas and utilized the CPA firm recommended by Plaintiff's then attorney David A. Collins Esq. Affidavit of James K. Kuyk, Esq., ¶ 7; Miller Aff., ¶ 21; Diehl Aff., ¶ 26; Affidavit of Dr. Perry Woodside, ¶¶ 2- 10. Plaintiff never made a demand on Defendants despite this valuation being performed and never produced a valuation of his own. Rather than make any attempt to resolve these issues, Plaintiff filed this lawsuit. Miller Aff., ¶ 21, Diehl Aff., ¶ 26. The parties to this case engaged in a ten (10) hour mediation on March 27, 2012 but to no avail.

The Defendants seek summary judgment as to their counterclaims based on the fact that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. The Court has reviewed and relied on excerpts of Plaintiff's deposition and numerous Affidavits in the record including those of: (1) James K. Kuyk, Esq., (2) Brian M. Miller, (3) David Diehl, (4) Victor K. Kliossis, CPA, (5) Greg W. Isley, (6) Peter Shortsleeves, (7) Elizabeth D. Hughes, (8) B. Perry Woodside, III, Ph.D., (9) Bill Walter, CPA, (10) Cynthia E. Coldren, (11) Chad Phillips, (12) Brent Hettick, (13) Andrew J. Oleksiak, (14) Steven Pigott, (15) Brian J. Ball, and (6) John E. Rosen, Esq.



## II. CONCLUSIONS OF LAW

This Court makes the following conclusions of law:

Defendants' asserted counterclaims against Plaintiff for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, (5) constructive fraud, (6) accounting, (7) violation of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and (8) violation of S.C. Code Ann. §15-36-10 (Sanctions).

### A. Summary Judgment Standard.

In Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App.), rev'd on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993), the South Carolina Court of Appeals explained the standard for granting summary judgment as follows:

> In deciding a Rule 56 motion, the court must view the facts and inferences therefrom in the light most favorable to the nonmoving party. Summary Judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions and affidavits show that there is no genuine issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. A party's response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.

Id. at 313, 411 S.E.2d at 673 (citations omitted)(emphasis added).

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Baughman v. Am. Tel & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support

the nonmoving party's case. Lanham v. Blue Cross and Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Therefore, summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving part is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate cases. See Galliard v. Fleet Mortgage Corp., 880 F. Supp. 1085 (S.C.D.C. 1995).

**B. Breach of Fiduciary Duty, Misrepresentation/fraud, Conversion, Unjust Enrichment, Constructive Fraud, and Accounting.**

***i. Breach of Fiduciary Duty***

In order to prove breach of fiduciary duty, Defendants must show that wrongful conduct of the Plaintiff, with whom the Court finds that they have a fiduciary relationship, caused Defendants damage. Plaintiff was terminated for abandoning his post, incompetence, and failing to document his personal expenditures. Plaintiff also siphoned money out of the company to fund another company owned by his then live-in girlfriend. Miller Aff., ¶¶ 11-12; Diehl Aff., ¶ 16-17. Coldren Aff., ¶ 7, Shortsleeves Aff., ¶5. Plaintiff contributed to a dysfunctional atmosphere in Atlas' San Diego office such that the company was subjected to a sexual harassment suit involving hundreds of thousands of dollars in attorney's fees and costs. Miller Aff., ¶ 10; Diehl Aff., ¶ 15; Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372.

Plaintiff, by virtue of his being a shareholder of Atlas, a statutory close corporation ***without*** a board of directors, by virtue of his being a Vice President of Atlas, by virtue of his being the General Manager and in charge of the San Diego, California office of Atlas since October 2003, and by virtue of the special relationship between him and Defendants, each

reposing trust and confidence in the other regarding corporate affairs over which they had knowledge, owes fiduciary duties and obligations to Defendants. Through Plaintiff's own admission, by virtue of his allegations of a breach thereof in his initial Complaint and Amended Complaint, there exists a fiduciary duty between Plaintiff and Defendants, one that Defendants honored and Plaintiff did not. See, e.g. Amended Complaint, ¶¶ 64-68.

Plaintiff, from approximately December 23, 2008 to July 7, 2009, "telecommuted" to work in Atlas' San Diego, California office from Captain Cook, State of Hawaii, primarily by email, telephone and video conference, unbeknownst to Defendants. By virtue of unilaterally moving to Hawaii, only to "telecommute" to work, Plaintiff abandoned his post and failed to fulfill his duties as General Manager of the San Diego office of Defendant Atlas, which job required his physical presence to manage Atlas accounts, relationships and personnel.

Plaintiff, contemporaneously with his abandonment of his duties as General Manager, engaged in a scheme to defraud Atlas by using the corporate credit card to pay rental payments for his own personal residence in Captain Cook, Hawaii and authorized payments from Atlas' funds to "csanpietro", a PayPal account, later known as Ekololo, LLC, which he represented were for legitimate business purposes. In fact, "csanpietro", later known as Ekololo, LLC, was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend. The funds were actually intended for their personal land development project and possibly other business dealings for their personal benefit. Plaintiff's misrepresented that he was actually living in San Diego and properly managing Atlas's San Diego operation. He actually was living in Hawaii. Plaintiff deceived and defrauded Defendants and covered up Plaintiff's actual residence in Hawaii for fear of legitimate repercussions. Plaintiff engaged in this deceitful, illegal, fraudulent and self dealing arrangement for his own personal benefit, so that he could live on the island of Hawaii, Hawaii while deceiving Defendants into believing that he was fulfilling his

duties at Atlas' San Diego office. See Depo. of Hanekamp, pp. 58-62, 323; Affidavit of Brian Miller dated August 1, 2011, ¶ 11, 12; Affidavit of David Diehl, dated August 1, 2011, ¶ 16; Affidavit of Cynthia Coldren ¶ 7.

The unrefuted evidence in this case demonstrates that Plaintiff is guilty of siphoning money from Atlas for his own personal use. See Depo. of Hanekamp, pp. 58-62; Affidavits of Brian M. Miller (original and supplemental), David Diehl (original and supplemental), and Cynthia Coldren (original and supplemental), and Elizabeth D. Hughes. Plaintiff concedes this fraud in an email chain with Defendants dated August 19-20, 2010. See Hanekamp Depo. Exhibit 74 (See also Miller Aff., Exhibit D). Plaintiff purchased a Nissan truck with Atlas funds only to title the vehicle in his own name and then sell it to a third party on Craig's List and retain the proceeds for his personal use. Depo. of Hanekamp pp. 75-78; 148-155. Plaintiff either failed to properly document his expenses or intentionally misrepresented that such expenses were legitimate business expenses when in fact they were not. See Second Supplemental Affidavit of Cynthia Coldren, dated March 21, 2014, ¶¶ 5 - 8.

Plaintiff mismanaged the San Diego office by failing to properly manage and supervise Atlas personnel such that Atlas had to settle an expensive sexual harassment lawsuit with one of its employees. Depo. of Hanekamp, pp. 48-64, 91, 135, 355-372; Miller Aff., ¶ 10; Diehl Aff., ¶ 15. That litigation revealed a sexually charged atmosphere in the San Diego office for which Plaintiff was the direct supervisor. The problems were either ignored by Plaintiff or unknown to him due to his consistent absence from the office while living in Hawaii. Ana Susi Depo., Pages 267-269; 270 ("the atmosphere of the Atlas San Diego office was out of control...had no organization...none of the employees had ever had sexual harassment training...there was no HR presence... many used of extreme foul language, and a lot of physical activity was inappropriate.")(Q: "Do you contend that Mr. Hanekamp acted inappropriately toward you



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during your employment at Atlas? A: Yeah...") That lawsuit, other problems, including those with critical customer relationships (See, e.g. Depo. of Hanekamp, Exhibits 42, 45, 49, 60, 61, 62) personnel and cost overruns on task orders performed by Atlas San Diego prompted Defendant Miller to demand that San Diego have an onsite manager in 2009. Depo. of Hanekamp, pp. 98-121, 354-372. Plaintiff lost his credentials to access an important client installation, thereby making it impossible for him to properly manage Atlas' relationship with the customer or properly supervise the work being performed. See Miller Aff., ¶ 23; Depo. of Hanekamp, pp. 98-121. Plaintiff also mismanaged client relationships such that Defendant Miller had to travel to San Diego several times to repair the damage Plaintiff caused to Atlas' relationships with those customers. Depo of Hanekamp, pp. 355-372; Miller Aff., ¶¶ 9-10; Diehl Aff., ¶¶ 12-13.

Plaintiff, in preferring his own personal interests to that of Defendants, breached his fiduciary duties to Defendants. As a foreseeable, direct and proximate result of Plaintiff's breaches of his fiduciary duties and obligations, Defendants have been damaged in the amount of One Hundred and Two Thousand Four Hundred and Fifty Seven and 61/100 Dollars ($102,457.61). Plaintiff was given a credit of $29,220.79 as the amount that was treated as a shareholder distribution to Mr. Hanekamp due to his failure to follow Atlas protocols and properly document certain expenses. See Kliossis Supp. Aff., filed July 20, 2012. As a result of that credit, Defendants have suffered a net loss of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82). See Coldren Sec. Supp. Aff., ¶ 8.

***ii. Misrepresentation/Fraud***

In order to prove misrepresentation, Defendants must show that (1) factual representations and omissions made by Plaintiff to Defendants as alleged above were (2) false and misleading and (3) were material, and (4) were known by Plaintiff or his agents to be false or

were made in the absence of reasonable grounds to believe in the truth of the representations; (5) were intended that they should be acted upon by Defendants; (6) with Defendants being ignorant of the representations' falsity; (7) with the Defendants relying on the truth of the representations; (8) while having a right to rely thereon; and (9) the Defendants suffering actual damages as a consequent, proximate injury of Plaintiff's misconduct and by reason of Plaintiff's fraud.

Plaintiff engaged in conduct which amounts to a false representation, conduct which he calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which the Plaintiff knew to be true at the time the representations were made. Plaintiff intended that such conduct would be acted upon by the Defendants, and the Plaintiff had actual or constructive knowledge of the real facts. The Defendants lacked knowledge, and the means of knowledge, of the truth as to the facts in question, and justifiably relied upon the Plaintiff's conduct. Defendants relied on the Plaintiff's conduct to their detriment and prejudice which caused Defendants injury.

Plaintiff falsely represented:

a. That he was residing in San Diego, California, and properly supervising Atlas' operations there when in fact he was residing on the island of Hawaii, Hawaii;

b. That payments made by Plaintiff to "csanpietro", a PayPal account, later known as Ekololo, LLC, from Atlas' funds were for legitimate business purposes, when, in fact, "csanpietro", later known as Ekololo, LLC, was not a vendor of Atlas' and instead was a company controlled by Plaintiff's live-in girlfriend intended for their personal land development project and possibly other business dealings for their personal benefit;

c. That he purchased a company automobile with corporate funds when, in fact, he used Atlas' corporate funds to purchase same in his own name without authorization;

d. That he was purchasing goods from Costco for corporate purposes when in fact he was using the corporate credit card to purchase his personal groceries from Costco;

e. That he was properly supervising Atlas' personnel and carrying out his duties as shareholder, Vice President and General Manager of Atlas' San Diego, California office throughout 2008 and 2009 when in fact he was living in Hawaii and "telecommuting" to San Diego;

f. That he was able to access Atlas' client installations and facilities to carry out his duties when, in fact, he had lost such privileges due to his own misconduct;

g. That he has had valid and justifiable reasons to withhold his personal financial statements and tax returns from Atlas' and TASL's lenders when, in fact, he has refused to do so in order to extort concessions from Defendants; And

h. he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the Defense Contracting Auditing Agency as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, pp. 264-265);

Plaintiff made several admissions throughout this litigation that were contrary to allegations he previously made in this lawsuit, including, but not limited to:

a. Admitting he lived in a vacation home with his girlfriend in Hawaii while he paid for it and characterized it as "business rent".

b. Admitted, that he had a meal with a romantic interest at the Pamplemousse Grill on May 10, 2010 for $203.67 and that such a meal was not a legitimate business expense. Depo. of Hanekamp, pp. 285-287, Day 2;

c. Never wanted to dissolve Atlas even though he sought that relief. See Depo. of Hanekamp. pp. 324-325;

Plaintiff's representations were false or made with reckless disregard for their truth or falsity. Plaintiff's misrepresentations and omissions were material. Plaintiff intended to deceive Defendants by making such statements and representations. Plaintiff intended for Defendants to rely on Plaintiff's false statements, misrepresentations, and omissions. Defendants were ignorant as to the falsity of Plaintiff's misrepresentations. Defendants had the right to rely on the representations of Plaintiff. Defendants reasonably and justifiably relied upon such statements and representations to their detriment by, among other things, continuing to pay him salary and benefits and had a right to so rely. Defendants suffered damages as a direct and proximate result of Plaintiff's fraud and are entitled to actual damages in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[ net amount after credit of $29,220.79] plus punitive damages. See Coldren Sec. Supp. Aff., ¶ 8. Plaintiff has proffered no credible evidence to refute the facts presented to the Court that Plaintiff converted funds in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[ net amount after credit of $29,220.79].

*iii. Conversion*

Defendants' counterclaim for conversion requires them to prove: (1) an interest of the Plaintiff in the thing converted; (2) the Plaintiff converted the property to his own use; and (3) the use was without Defendants' permission. Plaintiff has converted assets of Atlas and TASL as discussed in detail above. The Plaintiff's actions and theft and other unauthorized exercise of the rights of ownership over the credit cards, cash, assets and other properties of the Defendants Atlas and TASL, to the exclusion of the Defendants' rights in and ownership of their assets, as hereinabove set forth, constitutes a conversion of Defendant's assets in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[ net amount after credit of $29,220.79] plus punitive damages. See Coldren Sec. Supp., ¶ 8. As a direct and proximate result of the Plaintiff's actions and conversions of Defendants' cash, credit cards and property, Defendants have been damaged and are entitled to the return of all cash and properties, in the amount of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[ net amount after credit of $29,220.79].

As set forth in the Second Supplemental Affidavit of Atlas' Finance Director, Cynthia Coldren, dated March 21, 2014, Plaintiff: (1) submitted credit card expenses from 2008-2010 that Atlas paid for totaling $12, 538.33 as legitimate, reimbursable business expenses but did not provide any supporting documentation; (2) purchased a Nissan Titan truck in 2009 in Hawaii for which Atlas incurred a loan for $11,769.00; (3) used the Atlas credit card to pay Ekololo, LLC and PayPal*CSanPietro a total of $14, 800.00; (4) incurred from 2007-2009 many other expenses while in Hawaii that were reported as legitimate business expenses in the amount of $63, 335.28. The grand total of these expenses is $102,457.61. In the summer of 2009, Atlas realized that Plaintiff was failing to follow Atlas protocols to properly document his expenses by producing receipts for legitimate business expenses. Atlas' accountant appropriately accounted

for $29, 220.75 in improper expenses incurred by Plaintiff as a shareholder distribution on Plaintiff's account.

*iv. Unjust Enrichment/Quantum Meruit/Restitution*

Defendants counterclaim for unjust enrichment requires them to prove: (1) a benefit conferred upon the Defendants by Plaintiff; (2) realization of that benefit by the Defendants; and (3) retention by the Defendants of the benefit under conditions that would make it unjust to retain it without paying its value. Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868, 872 (2000).

Plaintiff misappropriated corporate cash and credit cards for his own personal benefit and for that of his friends and cohorts as discussed in detail, supra, including but not limited to, paying for groceries at Costco with the corporate credit card, cash paid to "csanpietro", a PayPal account, later known as Ekololo, LLC or other "vendors", such as "Little Reatta" and Kona Pacific Farms that Plaintiff represented as legitimate, using corporate funds to supposedly purchase a corporate automobile but which Plaintiff registered in his own name, making a multitude of purchases in Hawaii using the corporate credit card, claiming they were for the purpose of opening a Hawaii office, when in fact Plaintiff later admitted in an email, dated August 19, 2009, that there was never an intent to start an Atlas office in Hawaii. Defendants conferred a valuable benefit upon the Plaintiff which he has realized in full. Defendants are entitled to the return of the monies Plaintiff misappropriated and/or restitution of all cash, capital, and/or funding that it contributed to the success of the Atlas San Diego office which Plaintiff converted, wasted, stolen or misappropriated.

**C. Defendants are allowed to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act).**

This Court has previously determined that no oppressive conduct toward a minority shareholder has occurred in this case. See This Court's Order dated December 28, 2013. Nevertheless, the Court is statutorily authorized to require a buyout pursuant to S.C. Code Ann. 33-14-310(d)(4) and (e) which provide as follows:

> (d) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution, as in its discretion is appropriate, including, without limitation, an order:
>
> (4) providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.
>
> (e) The relief authorized in subsection (d) **may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate.**

Id. (emphasis added)

"**[A] court should have broad discretion to fashion the most appropriate remedy to resolve the dispute.**" See OFFICIAL CMT., S.C. CODE ANN. § 33–18–410 (1976) (Emphasis added). This Court has been involved with this case for over three (3) years and has held 4 hearings (not including Judge Dennis' hearing of August 3, 2011 for a total of 5 hearings). The case was originally filed in March of 2011 before it was transferred to this Court in August of 2011. This Court has determined that, under the circumstances of this case, an Order allowing Defendants to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value"



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pursuant to S.C. Code Ann. §33-14-310(d)(4) and (e) [and §33-18-420[1]] is appropriate, with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). S.C. Code Ann. § 33–14–420(b) (2006) provides the terms under which such a buyout should be accomplished.

While Hendley v. Lee, 676 F. Supp. 1317, 1319 (D.S.C. 1987) is a South Carolina U.S. District Court case, it is instructive here. In Hendley, Plaintiffs, Dixon L. Hendley and Ryan D. Hendley, brought an action against Terry L. Lee, Defendant, pursuant to S.C. Code Ann. § 33–21–150, et seq., (1976), as amended, seeking judicial intervention in the affairs of a deadlocked corporation engaged in the business of providing housekeeping and maintenance service to industrial plants. The Court recognized that in addition to allowing an order of forced dissolution [under predecessor statute to 33-18-400], the statute empowers a court to grant other relief, including ordering the purchase of the shares of any shareholder, either by the corporation or by other shareholders. § 33–21–155(a)(4) [the predecessor statute since repealed]. Actions arising under the [prior] statute are proceedings in equity. Hendley (citing Ward v. Ward Farms, Inc., 283 S.C. 568, 324 S.E.2d 63 (1984). The South Carolina District Court ordered a share buyout as a result of a deadlock between the shareholders and required the shareholders with financial wherewithal to purchase the other party's shares after review of the parties' relative financial positions. The Court ordered that the Hendleys were in a better position to purchase Lee's shares. Personal financial statements were submitted by all of the parties and the Hendleys had much

[1] S.C. Code Ann. § 33-18-420 provides in pertinent part: (a) If the court finds that the ordinary relief described in Section 33-18-410(a) is or would be inadequate or inappropriate, it may order the corporation dissolved under Section 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value and on terms determined under subsection (b). For section (b) see *infra*.

greater financial strength than Lee, the Hendleys together being worth approximately ten (10) times as much as Lee. To require Lee to purchase the Hendley stock would require him to commit several times his net worth, while to require the Hendleys to purchase the Lee stock would require them to commit approximately twenty five (25%) percent of their net worth. Id.

The situation in Hendley is analogous to the present case. Plaintiff is financially strapped, having faced three (3) foreclosures in the last few years and is likely unable to buyout the Defendants. See American Savings Bank v. Robert Paul Hanekamp, et al., 3CC11-1-0183K, 3CC11-1-0184K (HI 2010); NDEX West, LLC v. Robert P. Hanekamp (CA 2012)(ended in short sale 2013). The situation among the shareholders of Atlas and TASL is untenable such that absent requiring a dissolution, which is not justified by the facts of this case as the Order of December 28, 2013 makes clear, the only logical remedy to this situation is for the majority shareholders, Defendants, who are financially capable, to buyout the Plaintiff's shares in Defendants Atlas and TASL for "fair value" with such purchase price to be offset by the amount of Atlas funds Plaintiff converted to his own use as well as such amounts the Court deems just and proper for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) (attorney's fees and costs) and S.C. Code Ann. §15-36-10 (Frivolous Proceedings Act). It would be manifestly unjust to give Plaintiff a windfall because he was a destructive force in the corporation and responsible for pursuing a litigation strategy intended to devalue the corporation and injure the Defendants. Likewise, it is unworkable to allow Plaintiff to remain as a shareholder of either Atlas or TASL.

I find that the "fair value" of Plaintiff's twenty five percent (25%) ownership of the outstanding shares in Atlas is Two Hundred and Eighty Four Thousand Two Hundred and Fifty and No/100 Dollars ($284,250.00) based on the report prepared by B. Perry Woodside, III, Ph.D. of Dixon Hughes Goodman entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report dated May 10, 2011, as amended as of May 12,

2012 (the "Revised Report").

I find that the "fair value" of Plaintiff's thirty three and 33/100 percent (33.33%) ownership of the outstanding shares in TASL is One Hundred and Twelve Thousand Seven Hundred and Ninety One and 21/100 Dollars ($112,791.21) based on the county appraisals for TASL's real estate holdings less the amount of debt outstanding plus cash on hand. This amount reflects TASL's "net equity" in the property that it owns in Virginia and South Carolina. TASL has $79,150.50 in cash.

Plaintiff has taken actions in this case that are arbitrary, vexatious and in bad faith in violation of S.C. Code Ann. §33-18-410(b). He disclosed confidential and proprietary information such as Atlas' "Multiple" to the public either negligently, or with the intent of injuring the Defendants. Depo. of Hanekamp, pp. 235-236. The Multiple, or "multiplier is the ratio of indirect costs to direct costs and the methods used to calculate indirect expense rates and their results are highly confidential and proprietary information that, if known by a competitor, can provide them with a competitive advantage where preparing their prices for bids for U.S. Government contracts." Affidavit of Bill Walter, ¶ 5; Depo. of Hanekamp, pp. 235-36. Plaintiff has engaged in a variety of disruptive activities as previously detailed in Defendants' Motion for a Temporary Restraining Order, Preliminary Injunction and Sanctions, filed on June 28, 2012, Motion for Rule to Show Cause and Contempt filed on January 29, 2013, and a variety of other motions and legal memoranda on file with the Court.

I find that Defendants should be allowed to buy Plaintiff's shares in Atlas and TASL for their "fair value" of Three Hundred and Ninety Seven Thousand and Forty One and 21/100 Dollars ($397,041.21) *as offset by*:

(1) The amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82);

(2) The amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, incurred in this proceeding of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars ($52,898.98), due to Plaintiff's actions being arbitrary, vexatious and in bad faith. See S.C. Code Ann. §33-18-410(b); and

(3) Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars ($204,102.75) in attorneys fees for Plaintiff's willful violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended. See Affidavit of John E. Rosen, Esq.

Plaintiff violated S.C. Ann. § 33-18-410 (b) and S.C. Ann. § 15-36-10 in a variety of particulars, including but not limited to:

(1) Naming TASL as a Defendant in the litigation but never making a single allegation of any misconduct or wrongdoing associated with TASL;

(2) Failing to produce a valuation or offer any evidence to rebut or question the valuation report prepared by Dixon Hughes Goodman, entitled "Valuation of a 100% Equity Interest in Atlas Technologies, Inc. as of December 31, 2010" summary report, as amended by that certain Memo dated March 27, 2012 (collectively, the "Revised Report");

(3) Filing two (2) unsubstantiated motions for the appointment of a receiver and dissolution of Atlas after being admonished by the Court to produce evidence to support his motions or face sanctions, which motions were filed frivolously, as Plaintiff later admitted in his deposition that he never wanted Atlas dissolved or to have a receiver appointed (See Depo. of Hanekamp. pp. 324-325);

(4) Filing a frivolous motion for summary judgment seeking appointment of a receiver for a third (3rd) time while the parties were in a Court ordered abeyance, an abeyance sought by Plaintiff so that he could secure a third attorney to represent him;

(5) Disclosing confidential and proprietary information of Defendants, in particular their billing rates known as the "Multiple", through court filings in violation of the Consent Confidentiality Order entered into by the parties (See, E.g., Hanekamp Supp. Aff., p. 2);

(6) Filing a second frivolous Motion for Sanctions, Motion to Compel and Motion for Rule to Show Cause, in which Plaintiff misrepresented the understandings and agreements between the parties with respect to several issues including, but not limited to:

(i) the parties agreement as of September 28, 2011 in chambers limiting discovery to issues of valuation of Plaintiff's interest in an attempt to mediate the case;

(ii) the agreement of the parties to hold in abeyance discovery other than that related to valuation of the company as agreed to at the previous status conference (See Memorandum in Opp. to Plaintiff's Motions for Rule to Show Cause, Motion to Compel, and Motion for Sanctions, filed June 22, 2012); and

(iii) misrepresenting the Defendants' cooperation in attempting to provide records requested pursuant to the Plaintiff's right to inspect corporate records, which records are voluminous, difficult to locate, collate and organize, as well as burdensome in time, effort and expense to meet Plaintiff's unduly burdensome requests

and arbitrary deadlines. Defendants diligently addressed these requests, but Plaintiff set arbitrary deadlines and filed frivolous Motions to Compel, for Sanctions and for Rule to Show Cause in an attempt to abuse the litigation process and Defendants.

(7) Filing affidavits in which the Plaintiff made a variety of false statements, including:

(i) that he was "intimately familiar with Atlas' accounting and billing practices, its contracts with the government, Atlas accounting codes and the requirements of the Department of Defense and the [DCAA] as to what costs are allowable in our contracts for services" (See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2) only to admit in his deposition that he was not (Hanekamp Deposition day 2, p.264-265);

(ii) falsely claiming that he: "was personally aware that the Defendants record [these] personal expenses as supposed business expenses", only to admit in his deposition that he was not personally aware of how personal expenses were coded or whether they were ever passed on the government. See Supplemental Hanekamp Affidavit filed April 12, 2012, p. 2 and Hanekamp Depo. day 2, p. 264-269;

(iv) misrepresenting the magnitude and significance of the percentage of "General and Administrative" ("G&A") expenses Defendant Miller incurred for G&A travel and meals as being "53% of the entire company's costs" when in fact it was less than one (1%) percent of the entire company's travel and meal costs (Plaintiff juxtaposed the figure that Atlas had 80 to 100 employees alongside this statement to mislead

the Court as the record makes clear); (See Hanekamp Aff., p. 2; See Also Affidavit of Bill Walter, ¶ 17-18 and Supplemental Affidavit of Cynthia Coldren filed July 20, 2012, ¶ 10) ;

(v) falsely claiming that he could: "personally attest that Miller does not maintain regular work hours, that he spends most of his time away from our offices indulging in his personal pleasures such as boating and vacationing and there is no business purpose for the bulk of Miller's meals and travel". (Hanekamp Aff., p. 3); and

(vi) claiming that: "Defendant Miller also bills two vehicles to the company, a Porsche Panamera and a BMW 7-series, one which his wife drives, for a total annual cost of $28, 812.00" even though these statements were false and Plaintiff knew they were false. See Supp. Hanekamp Aff., p. 3; Supp. Coldren Aff. filed July 20, 2012, ¶ 16.

To reach the consideration which Defendants should pay to acquire Plaintiff's interest in Atlas and TASL, I have relied on B. Perry Woodside, III, Ph.D's Supplemental Affidavit, the Second Supplemental Affidavit of Cynthia Coldren, Atlas' Chief Financial Director, Brian M. Miller's Fourth Supplemental Affidavit and the Affidavit of John E. Rosen, Esq. Cynthia Coldren's affidavit details the money Plaintiff converted to his own personal use. Brian Miller's fourth supplemental affidavit reflects his allocation of legal fees and costs between Defendants Atlas and TASL, including the amounts deemed to be frivolous or in bad faith as to each Defendant. John E. Rosen's affidavit provides the amount of money Defendants paid in fees and costs to defend Plaintiff's frivolous claims and his bad faith, vexatious and arbitrary actions in this litigation.

An analysis of this information prepared by Cynthia Coldren results in set offs to



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Plaintiff's "fair value" in Atlas shares are as follows: $26, 476.25 for bad faith litigation in violation of S.C. Code Ann. § 33-18-410(b); $58,898.98 in expert's fees for Dixon Hughes Goodman; $145,018.50 in frivolous claims in violation of S.C. Code Ann. §15-36-10; and $73,236.82 for conversion of Atlas' funds. The resulting value for Plaintiff's buyout from Atlas is -$13,380.55. Set offs to the "fair value" of Plaintiff's shares in TASL are: $6, 278.75 for bad faith in violation of S.C. Code Ann. § 33-18-410(b); $26, 329.25 in frivolous claims in violation of S.C. Code Ann. §15-36-10. The resulting value for Plaintiff's buyout from TASL is $80,183.21.

I find that Defendants are therefore allowed to purchase all of Plaintiff's shares in both Defendants Atlas and TASL for a total purchase price of **SIXTY SIX THOUSAND EIGHT HUNDRED AND TWO AND 66/100 DOLLARS ($66,802.66).**

## III. CONCLUSION

Based on the above findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Summary Judgment as to their counterclaims for (1) breach of fiduciary duty, (2) misrepresentation/fraud, (3) conversion, (4) unjust enrichment/quantum meruit/restitution, and (5) constructive fraud is hereby GRANTED; and

FURTHER ORDERED, that the Defendants' Motion for Summary Judgment for Plaintiff's willful violations of S.C. Code Ann. §33-18-410 (b) (attorney's fees and costs), and violation of S.C. Code Ann. §15-36-10 (Sanctions) filed on March 24, 2014, is hereby GRANTED;

FURTHER ORDERED, that Defendants are hereby allowed to purchase to purchase all of Plaintiff's shares in Defendants Atlas and TASL for "fair value" of Atlas ($284,250.00) and TASL ($112,791.21) *with such purchase price to be offset by*:

a. the amount of money Plaintiff converted to his own use of Seventy Three Thousand Two Hundred and Thirty Six and 82/100 Dollars ($73,236.82)[ net amount after credit of $29,220.79];

b. the amount of costs Defendants incurred, including reasonable counsel fees and expenses of appraisers and their other experts, in this proceeding due to Plaintiff's actions being arbitrary, vexatious and in bad faith (See S.C. Code Ann. §33-18-410(b) in the amount of Fifty Two Thousand Eight Hundred and Ninety Eight and 98/100 Dollars ($52,898.98); and

c. Two Hundred and Four Thousand One Hundred and Two and 75/100 Dollars ($204,102.75) in attorney's fees due to Plaintiff's violations of S.C. Code Ann. §33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. §15-36-10, as amended.

FURTHER ORDERED, that Defendants Miller and Diehl shall purchase all of Plaintiff's shares in Atlas for $284,250.00 and all of Plaintiff's shares in TASL for $112,791.21 within sixty (60) days from the date this Order is served upon Plaintiff;

FURTHER ORDERED, that the proceeds from the sale of Plaintiff's shares in Atlas be paid to Atlas to reimburse Atlas for (i) the $73,236.82 converted by Plaintiff from Atlas for his own use, (ii) $52,898.98 in litigation costs, and (iii) $171,494.75 in attorney's fees paid by Atlas resulting from Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the S.C. Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended;

FURTHER ORDERED, that a portion of the proceeds from the sale of Plaintiff's shares in TASL (i) be paid to TASL to reimburse TASL for $32,608.00 in attorney's fees paid by TASL resulting from Plaintiff's violation of SC Code Ann. § 33-18-410(b) and the SC Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10, as amended, and (ii) be paid to Atlas to pay the remaining $13,380.55 the Plaintiff owes Atlas pursuant to the terms of this Order;



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FURTHER ORDERED, that to facilitate the sale of Plaintiff's shares and payment of funds to Atlas, TASL and Plaintiff, that the Law Firm of Rosen, Rosen & Hagood, LLC act as Disbursement Agent to receive the proceeds from the sale of Plaintiff's stock in Atlas and TASL and disburse the proceeds in accordance with the terms of this Order; and

FURTHER ORDERED, that following the Disbursement Agent's receipt of $284,250.00 and $112,791.21 from Defendants Miller and Diehl, and the disbursement of those funds as provided herein, the Defendant Corporations, Atlas and TASL, shall cancel the shares formerly held by the Plaintiff on the respective books of those Corporations.

AND IT IS SO ORDERED!

Judge Roger M. Young, Jr.
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
This 13 day of May, 2014.

# Attachment G

Alexander Guice

P.O. Box 13281
Tampa, FL 33681
Phone: (813) 562-0547
Email: alguice@hotmail.com

November 14, 2016

Via Certified Mail

Erin L. Hantske, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 650007
Mt. Pleasant, South Carolina 29465

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

Ms. Hantske:

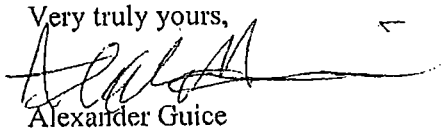
I hope you are well.

Please be advised that in accordance with your offer to provide me with copies of any documents I may not have respective of your Designation of Matter in preparation of the Record on Appeal, I respectfully request that you please provide me with copies of Designation Nos. **26**; **30**; **33**; **34**; **35**; **36**; **37**; **39**; **40**; **42**; **43**; **44**; **45**; **47**; **48**; **49**; **50**; **51**; **52**; **53**; **55**; **56**; **57**; **61**; **63**; **68**; **70**; **81**; **85**; **86**; **87**; **88**; **89**; **90**; **92**; and **93** as set forth in your Designation of Matter dated January 21, 2016 in the above-referenced matter.

At your preference, and in a good faith effort to reduce your costs, please feel free to provide the requested Designations to me electronically as a "PDF" attachment via my E-Mail Address: **alguice@hotmail.com**.

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

Very truly yours,



Alexander Guice
Appellant, pro se

/ag

cc: FILE

mgc

**Reply To**
ERIN L. HANTSKE
Direct Dial: (843) 576-2946
erin.hantske@mgclaw.com

November 21, 2016

**VIA U.S. MAIL**
Mr. Alexander Guice
P.O. Box 13281
Tampa, FL 33681

RE: Alexander Guice v. U.S. Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc.
Date of Accident: May 5, 2005
WCC File No.: 0506205
Our File No.: 2098.12550
Claim No.: 004063-032175-wc-01
Appeal No.: 2015-001821

Dear Mr. Guice:

Enclosed are copies of the items designated by Respondents that you requested in your November 14, 2016 letter.

Very truly yours,

Erin L. Hantske

Enclosures

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Honorable William P. Keesley, Circuit Court Judge

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Case No. 2013-CP-32-01272
Case No. 2014-CP-32-00399

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Alexander Guice, ..... 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 certify that I have served the **Respondents' Return in Opposition to Appellant's Motions for Sanctions** on Alexander Guice, pro se, by depositing a copy of it in the United States Mail, postage prepaid, on December 7, 2016, addressed as follows:

Alexander Guice
P.O. Box 13281
Tampa, Florida 33681

Kathy E. Aldrich

Kathy Aldrich
Legal Assistant to Erin L. Hantske
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200 (29464)
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
*Attorneys for Respondents*

mgc

**Reply To**
ERIN L. HANTSKE
Direct Dial: (843) 576-2946
erin.hantske@mgclaw.com



December 7, 2016

***Via U.S. Mail***
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Alexander Guice v. U.S. Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc.
Date of Accident: May 5, 2005
WCC File No.: 0506205
Our File No.: 2098.12550
Claim No.: 004063-032175-wc-01
Appeal No.: 2015-001821

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return in Opposition to Appellant's Motion for Sanctions, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Erin L. Hantske

Enclosures
cc: Alexander Guice, *pro se*

mgc INSURANCE DEFENSE
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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211-1629

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