

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-001494

Theodore P. Polansky, Employee, Respondent,

v.

SC Office of the Attorney General,
Employer, and State Accident Fund, Carrier, Appellants.

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

The Movant/Respondent in the above-referenced matter, Appellate Case No. 2016-0014-4, (which is the appeal by the Appellants from the Award to the Respondent by the Hearing Commissioner, which was affirmed by the Full Commission and then affirmed by the Circuit Court and then reaffirmed after Motion for Rehearing by the Circuit Court, would respectfully show unto the Court as follows:

1. That the Appellants filed multiple appeals and in reference to this appeal, the Appellants obtained a Stay of the appeal pending resolution of other separate and distinct matters filed in the Circuit Court basing the Request for a Stay on whether or not those matters would be appealed; and on a "final resolution" of the Motions for Reconsideration (SCRCP Rule 59 Motion) as to orders that had been filed, one of which was the Circuit Court's Order in this Appeal affirming the Commission's Award. **Please note** that statement is correct! The Appellants actually filed two appeals to two Orders on which they had filed Rule 59 SCRCP Motions which were still pending when they filed those appeals. A Rule 59 Motion stay an appeal until the Motion is decided. SCRCP 59(f), "**Time for Appeal; ...**" The Order of the Court staying this Appeal is on file with the Court and specifically provided that,

"Counsel for Appellants shall provide this Court with a status update in thirty (30) days and every thirty (30) days hereafter." (Emp. Added.)

Order of Judge Lockemy, September 28, 2016.

2. That by letter dated October 26, 2016, the Appellants wrote to this Court in reference to both this appeal and the appeal, Case No.: 2016-1890), referring to the stay of this appeal and asking for a further Stay as to all deadlines in Case No. 2016-1890. A copy of that letter is attached hereto and

incorporated herein as Exhibit "A" which is on file with the Court.

3. That by letter dated November 9, 2016 in response to the October 26, 2016 letter, the Court advised the Appellants that they needed to file a Motion pursuant to the Appellate Court Rules. A copy of that is attached hereto as Exhibit "B" and is already a part of the Record in this matter. Note no Motion was ever filed.

4. That by letter dated November 30, 2016 attached hereto and incorporated herein as Exhibit "C", the Appellants again wrote the Court in reference to this appeal (2016-1494) and 2016-1890 and in reference to this appeal, alleged that Counsel for the Claimant ("Respondent") intended to seek further Orders in reference to the Order that gave rise to this appeal and requested in that letter that the Court continue to hold this appeal in abeyance.

Additionally, as to 2016-1890, the Appellants notified the Court that they would,

"request that appeal no. 2016-1890 be dismissed at this time." (Emp. Added) (Exhibit)

5. That on December 1, 2016, Counsel for the Movant/Respondent and the Movant herein forwarded a letter to Counsel for the Appellants which read in pertinent part as to the issue before the Court in this appeal as to any Stay being

continued because of any intention by Counsel for the Movant/Respondent to take any further action in the Circuit Court that:

"Dear Tim:

I just thought of this as a way that we can get moving forward on the appeal. Since Judge Manning did not rule on the Motion but the Motion was filed and heard, what I propose is that we can include the Motion as part of the Designation of Matter and then I will submit an argument that the appeal should have been dismissed as an additional sustaining Ground as to the Award of the Commission awarding benefits."

See Letter of Counsel for the Movant attached hereto and incorporated as Exhibit "D" affirming the quotation and redacted for relevance.

6. That by letter dated December 14, 2016, Counsel for the Movant/Respondent wrote Counsel for the Appellants requesting that he be advised as to the status of lifting the Stay and moving forward with the Appeal. A copy of that letter is attached hereto and incorporated herein by reference as Exhibit "E".

7. That by letter of **that same date December 14**, 2016, Counsel also notified the Court that he would not be proceeding and/or challenging the Supersedes; that the Appellants had not complied with the direction of the Court to file a Motion in 2016-1890; and notified the Court that therefore, "in all

respects, the Stay can be lifted." He notified Defense Counsel of the communication and that he "looked forward to moving forward with their Appeal". A copy of that letter is attached hereto as Exhibit "F".

8. That by letter dated December 15, 2016, with a copy to Appellants' Counsel, Counsel for the Movant/Respondent was notified by the Court that the Court's Records showed that the Appellants were waiting on the Transcript in 2016-1890 and they would be required to file their Initial Appellants' Brief within thirty (30) days of receipt of the Transcript. A copy of that letter is attached hereto as Exhibit "G" and is on file with the Court.

9. That by letter dated December 16, 2016, Counsel for the Movant/Respondent notified the Court that he was apologizing because he knew the Stay had been originally granted and that his letter was in reference to: whether or not there was still a reason for the continuation of the Stay and that he did not know that the Court was simply waiting on the Appellants to notify them that they were in receipt of the Transcript in 2016-1890. He again looked forward to moving forward with the appeal in which the Stay had been granted; i.e., 1494. A copy of that letter is attached hereto as Exhibit "H" and is on file with the Court.

10. That the Movant/Respondent verily believes that there is no further communication in reference to either 2016-1890 and/or the current appeal, 2016-1494, between December 16, 2016 and February 1, 2017 as none is in his file. The next communication is the receipt of the Court's request concerning the status of the Transcript in file no. 2016-1890 dated February 1, 2017. A copy of the Notice is on file with the Court.

11. That in response to that inquiry by the Court, the Appellants again responded in reference to 2016-1494 and 2016-1890 by letter dated February 10, 2017, a copy of which is attached hereto and incorporated herein by reference as Exhibit "I" is which is on file with the Court. In that letter instead of addressing the inquiry of the Court as to the status of the Transcript, Counsel asked that appeal no. 2016-1890 be dismissed and asked that the Court continue the Stay that had been granted by Judge Lockemy on September 28, 2016. The Appellants', even though the Counsel for the Appellants have been copiously copied with and was aware of all the communications and requests for the Stay to be lifted and to proceed with appeal filed with the Court by Counsel for Movant/Respondent, sought the continuation of the Stay, without additional Motion, on the basis that the attorney for the,

"Claimant/Respondent had expressed the desire to possibly seek an additional Order from the Circuit Court."

Again even though having received all the correspondence by the Respondent trying to move forward with the appeal, and also having been fully and completely informed that there was no intent to move forward with any further actions in the Circuit Court, and Counsel for Appellants having not responded for well over two (2) months, made this material misrepresentation of fact to the Court as a basis to further stay the appeal in this matter. Such misrepresentation was in addition to having not been dilatory in responding to the Court and by making misrepresentations to the Court that resulted in this matter now not moving forward for a period of over six (6) months from the time that the Notice of Intent to Appeal was first filed. While Counsel for the Movant/Respondent verily believes that the misrepresentations made by the Appellants were unintentional from the standpoint of not reviewing the file before notifying the Court, there is no question that misrepresentations were made, delays occurred and that the Court's Order Staying this matter which required the Appellants to every month notify the Court as to the status was not complied with. Not only did the Appellants not comply with that but in addition the Court had to write the Appellants to determine the status of the case to which no straight accurate answer and response was ever given.

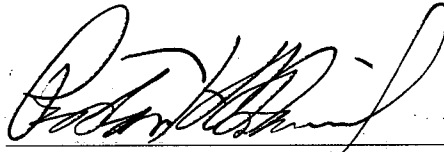
As is set forth in all the Orders that are on file with the Court concerning the various appeals that the Appellants have filed, including Appellate File No. 2016-001890, No. 2016-001892, and No. 2016-001494 (which is the only remaining appeal left), the Movant/Respondent has requested expedited hearings and an expeditious resolution of the appeal ever since at least December of 2015. The Movant/Respondent has tried to do everything he could to move forward with this appeal being considered in a situation where he was awarded benefits by the Workers' Compensation Commission; that decision was affirmed on Appeal; and then it was appealed to the Circuit Court wherein it was affirmed by Order of the Circuit Court; and then after Motion for Reconsideration was again affirmed by the Circuit Court and wherein the Appellants have failed to pay or refused to pay over three (3) years of benefits that have accrued under the Award of the Workers' Compensation Commission and only instituted weekly payments after the Respondent underwent the expense of filing a Motion to Compel Payment.

Wherefore, for all the foregoing reasons the Movant/Respondent would respectfully submit that this matter should be dismissed because of the lack of diligence on proceeding with the appeal; for the misrepresentations and lack of knowledge of the status of the appeal, the stay and the action in general that have been made which would have resulted in this matter

leaving forward at least four (4) months ago had they made; and for the failure to comply with the Court's Order directing the Appellants after the Stay was issued to notify the Court every thirty (30) days as to the status of the appeal. (A general unlimited stay under Rule 263(b) SCACR).

The Claimant would request reimbursement for his costs in filing this Motion but would waive any attorney's fees in the hope that this matter will finally be dismissed and resolved.

Respectfully submitted,



Preston F. McDaniel, Esquire
SC Bar No. 3770
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Movant/Respondent

March 2, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-001494

RECEIVED

MAR 03 2017

SC Court of Appeals

Theodore P. Polansky, Employee, Respondent,

v.

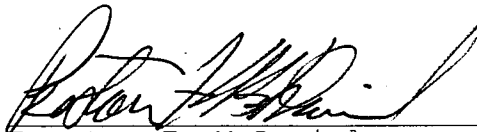
SC Office of the Attorney General,
Employer, and State Accident Fund, Carrier, Appellants.

PROOF OF SERVICE

I certify that I have served the **MOTION TO DISMISS** and **MEMORANDUM IN SUPPORT OF** by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2017 addressed to:

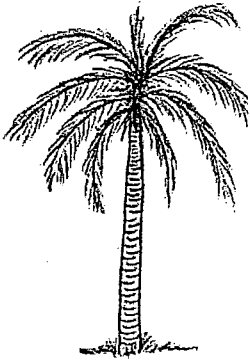
Temus C. Miles, Jr., Esquire
McKay, Cauthen, Settana & Stublely
PO Box 7217
Columbia, SC 29202-7217

Date: March 3, 2017



Preston F. McDaniel
SC Bar No. 3770
MCDANIEL LAW FIRM
1315 Elmwood Avenue
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(803) 771-7211

Attorney for Movant/Respondent



The McKay Firm, P.A.

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Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

October 26, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RE: *Theodore Polansky v. SC Attorney General*
Appeal Case No: 2016-1494 & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074

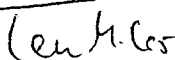
Dear Mrs. Kitchings:

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. One of those remaining issues (the immediate payment of accrued benefits) gave rise to Appeal # 2016-1890.

I have enclosed a copy of a October 10, 2016 Order of the Honorable Jean H. Toal granting an Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890. I am currently waiting to see if the Claimant will appeal the Order of Supersedeas. I request that all deadlines in Appeal # 2016-1890 be held in abeyance until the issue of Supersedeas is finally determined, after which Appeal # 2016-1890 will likely be dismissed or consolidated in to Appeal # 2016-1494

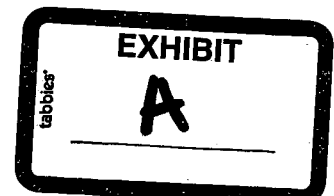
Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

Sincerely,


Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 09, 2016

Mr. Temus C. Miles, Jr., Esquire
PO Box 7217
Columbia SC 29202

Re: Theodore Polansky v. SC Office of the Attorney General (2)
Appellate Case No. 2016-001890

Dear Counsel:

We have received your letter dated October 26, 2016.

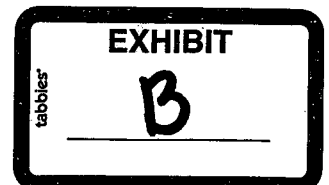
Please file a motion pursuant to Rule 240 of the South Carolina Appellate Court Rules, SCACR.

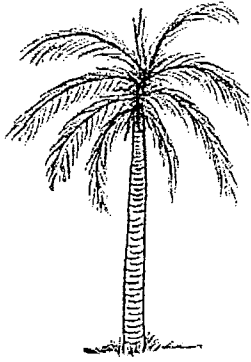
Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Preston F. McDaniel, Esquire





The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

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Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

November 30, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RE: Theodore Polansky v. SC Attorney General
Appeal Case No. ~~2016-1494~~ & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074

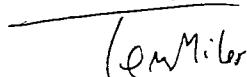
Dear Mrs. Kitchings:

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. I recently received correspondence from the Claimant Attorney indicating that he intends to seek further Orders of the Circuit Court in regards to the matters that gave rise to Appeal # 2016-1494. Accordingly, I request that the Court continue to hold Appeal # 2016-1494 in abeyance.

Additionally, as time to appeal the circuit Court's Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890 has passed with no appeal being initiated, further action on Appeal # 2016-1890 will not be needed. Accordingly, I request that Appeal # 2016-1890 be dismissed at this time.

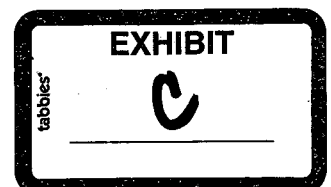
Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

Sincerely,


Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel



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COLUMBIA, SOUTH CAROLINA 29201

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for over 30 years.

Preston F. McDaniel
Matthew C. Robertson

Telephone (803) 771-7211
Facsimile (803) 252-0709

December 1, 2016

VIA EMAIL - tmiles@mckayfirm.com
AND US MAIL

Temus C. Miles, Jr., Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201

RE: Ted Polansky vs. SC Attorney General's Office
WCC File Nos: 9922954 & 0024408
C/A Nos: 2015-CP-40-07380 & 2015-CP-40-07468

Dear Tem:

I just thought of this as a way that we can get moving forward on the appeal. Since Judge Manning did not rule on the motion but the motion was filed and heard, what I propose is that we can include the Motion as part of the Designation of Matter and then I will submit an argument that the Appeal should have been dismissed as an additional sustaining ground as to the Award of the Commission awarding benefits.

[REDACTED]

Next, on a side note, I understood everything in your letter and understand your position except for the statement that I was to blame for the long and convoluted procedural history that developed over the summer. That really bothered me. The only thing I know that I did was to file a Motion to Dismiss the Appeal, file for an expedited hearing requesting the payment of temporary total, (which, by the way State Accident Fund did not start up voluntarily) and then at the request for the payment of back due temporary total to give Pete a chance to get the case accepted by SIF and then resolve the claim.

[REDACTED]



Temus C. Miles, Jr., Esquire
December 1, 2016
Page 2

~~_____~~ Then right in the middle of all of this, Pete leaves your firm, leaving you with an eight banker box file and you requested an extension of time to come up to snuff even though the records and briefs and everything were already in.

In all of the orders I prepared, you will note that I clearly notified the clerk as to which file the order applied to and actually used only the appropriate filing number and/or underlined filing numbers for them which apparently the clerk's office ignored.

I am not the one who filed for extensions, re-hearings and for supersedes and I am not the one that refused to pay my client so, would you please tell me how I am to blame for the convoluted process and the delay in this case? Again, that just bothers me. Of course my ABC store thanks the SAF for all of this as it has increased their profits.

I look forward to the appeal and moving forward *and to working with you.*

Sincerely yours,



Preston F. McDaniel

PFM/abh/rmt

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December 14, 2016

VIA EMAIL - tmiles@mckayfirm.com

Temus C. Miles, Jr., Esquire
McKay Law Firm
1303 Blanding Street
Columbia, SC 29201

RE: Ted Polansky vs. SC Attorney General's Office
WCC File Nos: 9922954 & 0024408
C/A Nos: 2015-CP-40-07380 & 2015-CP-40-07468

Dear Tem:

I understand you are in a seminar, but could you let me know where we stand on lifting the stay and moving forward on the Appeal. Last time our 2 letters crossed in the mail. Thanks

Sincerely yours,



Preston F. McDaniel

PFM/rmt



McDANIEL LAW FIRM
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COLUMBIA, SOUTH CAROLINA 29201

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Matthew Robertson

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Facsimile (803) 252-0709

December 1, 2016

VIA EMAIL - jkitchings@sccourts.org
AND US MAIL

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

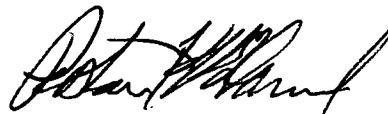
RE: Theodore Polansky v. SC Attorney General
Appellate Case No. 2016-001890

Dear Ms. Kitchings:

The Appellant in the above-referenced matter obtained an Order holding the Appeal in abeyance pending our decision on whether we would Appeal the Order of Justice Toal on their Motion for Supersedes. Based on their letter of October 26, 2016, you requested a formal Motion and to my knowledge, one has not been filed but for the Courts information we made the decision not to appeal the Order of Supersedes and in addition the time limit for appealing that would have run on November 10, 2016. Since Appellate Case No. 2016-1890 was in reference to the denial of the Rule 59 Motion that they filed concerning the payment of back due temporary total and the Supersedes reversed that decision I assume that that appeal will be dismissed. Therefore, in all respects, the stay can be lifted.

By copy of this letter, I am notifying defense counsel of this communication and notification and look forward to moving forward with their appeal.

Sincerely yours,



Preston F. McDaniel

PFM/abh/rmt



cc: Temus C. Miles, Jr., Esquire (via email & US Mail tmiles@mckayfirm.com)



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
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December 15, 2016

Mr. Preston F. McDaniel, Esquire
1315 Elmwood Ave.
Columbia SC 29201

Re: Theodore Polansky v. SC Office of the Attorney General (2)
Appellate Case No. 2016-001890

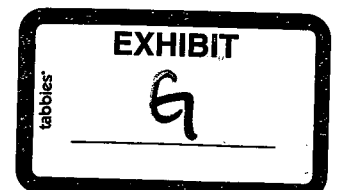
Dear Mr. McDaniel:

The Court received your letter dated December 1, 2016. Our records reflect the transcript has been ordered from the court reporter, but has not yet been delivered. Upon receipt of the transcript, the appellant will have thirty (30) days to serve its initial brief. If you wish to request further relief from the Court, you must file a motion pursuant to Rule 240 of the South Carolina Appellate Court Rules.

Very truly yours,


CLERK

cc: Temus C. Miles, Jr., Esquire



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ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
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Matthew C. Robertson

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December 16, 2016

VIA EMAIL - jkitchings@sccourts.org

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

**RE: Theodore Polansky v. SC Attorney General
Appellate Case No. 2016-001890**

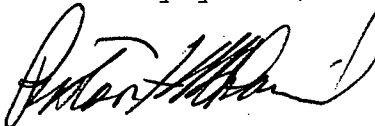
Dear Ms. Kitchings:

I received your letter of December 15th and let me apologize, because while I knew that the Appellant State Accident Fund had requested a stay, which had been granted, after that I had received, "letters" but no Motion asking for a further extension of the stay for various reasons.

I did not know that the Court was simply waiting for notice that the hearing transcript had been received, and I can only assume that I missed that somewhere in all the correspondence.

Again, I look forward to receiving notice that the transcript has been received and moving forward with the Appeal. By copy of this letter I am notifying Temus Miles of this communication. I hope that this finds you and everyone you love and care about having a very Merry Christmas and looking forward to a Happy New Year.

Sincerely yours,

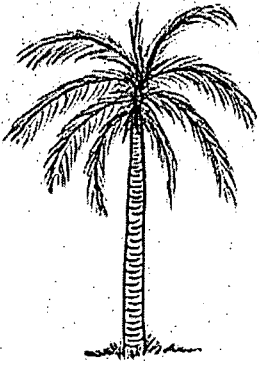


Preston F. McDaniel

PFM/rmt



cc: Temus C. Miles, Jr., Esquire (via email & US Mail tmiles@mckayfirm.com)



The McKay Firm, P.A.

1303 Blanding Street (29201)
Post Office Box 7217 (29202)
Columbia, South Carolina

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(803) 765-1839 Fax

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Temus C. Miles, Jr.

(803) 705-2149 Direct
TMiles@McKayFirm.com

February 10, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RE: *Theodore Polansky v. SC Attorney General*
Appeal No.: 2016-001494 & 2016-001890
Claim No.: 1999-003671 & 2000-3303
DOA: 10/19/1999 & 5/30/2000
Our File No.: 1200-0073 & 1200-0074

Dear Mrs. Kitchings:

Thank you for the Court's patience in these matters. These cases, and the resulting appeals, have had a long and complex procedural history which has slowed their progress.

In regards to your letter dated February 1, 2017 requesting an update on the status of Appellate Case No. 2016-001890, I request that you please dismiss that appeal at this time. I intended to dismiss that matter previously when I dismissed Appellate Case No. 2016-001892. The failure to do so at that time was an oversight on my part.

As for Appellate Case No. 2016-001494, I request that the Court continue to hold it in abeyance pursuant to the stay entered by Judge Lockemy on September 28, 2016. The attorney for the claimant/respondent has expressed the desire to possibly seek an additional Order from the Circuit Court challenging the appeal on grounds that it was untimely. Accordingly, the possibility of an additional Order of the Circuit Court in this matter still exists.

Should you have any questions or concerns regarding this matter, please contact me at my direct dial: (803) 705-2149.

Sincerely,

Temus C. Miles, Jr.

cc: Preston F. McDaniel, Esquire



McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
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COLUMBIA, SOUTH CAROLINA 29201

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Preston F. McDaniel

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Facsimile (803) 252-0709

March 3, 2017

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

RECEIVED

MAR 03 2017

**RE: Theodore Polansky v. SC Attorney General
Appellate Case No. 2016-001494**

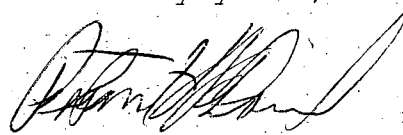
SC Court of Appeals

Dear Ms. Kitchings:

Please find attached the Motion to Dismiss which I am filing with the Court along with the required copies and enclosing the \$25.00 required filing fee.

By copy of this letter I am notifying and serving Counsel for the Appellants with a copy of this Motion. As always, I appreciate all the courtesies and kindnesses shown to me by the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Temus C. Miles, Jr., Esquire