THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-01880

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the .....Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

FINAL BRIEF OF APPELLANT PRO SE GARY WEAVER

Gary Weaver, Appellant Pro Se
P.O. Box 539, Little Rock
S.C. 29567
Ph: 843 841 1606
Fx: 843 774 2050

Mark W. Buyck, III
I.D. No. 011902
P.O Box 1909, Florence S.C. 29503-1909
Ph: 843 662 3258; Fx: 843 662 1342
Attorney for Respondents
Progress Energy Carolinas, Inc

Original

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I.D. No. 011902
P.O Box 1909, Florence S.C. 29503-1909
Ph: 843 662 3258; Fx: 843 662 1342
Attorney for Respondents
Progress Energy Carolinas, Inc

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TABLE OF AUTHORITIES

A complete listing of authorities cited in this appeal is included in Appellant's Amended Initial Brief, (pp 3-6) including references to Statutes, Legal Encyclopedias, Treatises, and Other references. Following are the authorities cited in this Final Brief:

Other Authorities

1. Constitutions.

   U.S. Constitution, Art. III, Sect. 2. Cl 1

   U.S. Constitution, Art. III, Sect. 2.. 6th amendment; 14th Amendment

   U.S. Constitution, Art. III, Sect. 2. 5th amendment

   S.C. Constitution, Art. I, Sect. 3. 19

2. Statutes

   S.C. Frivolous Civil Proceedings Sanctions Act (Code Sect. 15-36-10 (D))

   S.C. Code Sect. 18-1-140, and 18-9-270

3. SCACR

   Commentary, Canons 1, 2A, 3, 3B (2),(4)(5)

   Commentary, 3, B (7) & 3 B (8) of Rule 501

   Rule 502, Judicial Discipline. .

   Code of Judicial Conduct.

4. Rules

   Rules 5 (d), 7 (a), 8 and 12 (a) (b) (h) SCRCP etc

   Rule 55 SCRCP

   Rule 60 (b) (1) SCRCP

5. Legal Encyclopedias (citations omitted)

   17 C.J.S. Contempt, Sect. 77 (citations omitted)

   61 A Am.Jur. Pleading, Sect. 300, p.251

   61 A Am. Jur. Pleading, Sect. 282, p. 241

   61 A.Am. Jur. Pleading, Sect. 279, p. 240.

   61 A Am.Jur. Pleading Sect. 542, p. 436.

   61 A Am.Jur. Pleading, Sect. 402, p. 319.

   61 A Am. Jur. Pleading Sect. 544, ,p. 437

   61 A Am.Jur. Pleadings, Sect. 298, p.250..

   Am. Jur. 2d., Evidence, Sect. 124

61 A. Am. Jur. Pleadings. Sect. 288, pp. 245-247.

61 A. Am. Jur, .Pleadings, Sect. 366, p.277

61 A Am Jur. Pleading, Sect. 249. p. 228

61 A Am Jur. Pleading, Sect. 249. p. 228

61 A Am. Jur. Pleading, Sect. 287, p.244.

61 B. Am.Jur.,2d. Pleading or Surprise, Sect. 827..

56 Am Jur. 2d. Motions, Rules, and Orders, Sect. 32, p.32

17 Am. Jur. 2d Contempt, Sect. 9 (1990).

16 A. Am. Jur. 2d Constitutional Law, Sect, 812 (1979)

46 Am. Jur. Judges, Sect. 146, p. 242.

6. Treatises

1. Alex Sanders and John s. Nichols, Trial Handbook for S.C. Lawyers, 4th Edit. Proof of Facts, Sect. 10.1, p.434; Sect. 9.1, p.396;

2. James F. Flanagon, S.C. Civil Procedure, 2nd Edit. S.C. Bar C.L.E. Pleadings, Rule 8, p.63.

3. Ralph King Anderson, Jr. Nuts and Bolts of S.C. Substantive and Procedural Law. A Trial Notebook. S.C. Bar C.L.E. Div. 1998

4. S.C. Jurisprudence, Costs 111 C. Ref; Appeal and Error. Sect. 119

5. Black's Law Dictionary, Rev. Edit. West Pub. Co. 1968, pp. 1030, 1031

STATEMENT OF ISSUES ON APPEAL

1. This Final Brief addresses the Lower Court's and Respondents' due process and related violations against Appellant of the Federal and State Constitutions, selected State statutes, the S.C. Rules of Procedure, appeal standards, and selected case law, as follows, inter alia:

1. The prime issue in this Appeal is the Lower Court's egregious mis-handling of Respondents' violation of the **Settlement Agreement** between the parties in Case No. 2004-17- CP-232 Carolina Power and Light Co. vs. Weaver (hereafter "First Case") filed on or about July 9, 2008..

2. Major issues in this Appeal, are the Lower Court's denial of Appellant's legal rights by the Court's permissive condonation in ignoring Respondents willful, knowing and deliberate negligent abuse of due process violations of Rules 6 (d), 7 (a) and 12 (a), Rule 13 (a) and Rule 8 (d) SCRCP at the November 3, 2009 Hearing in the said First Case; viz., Respondents neglect to file an Answer to the Complaint within thirty (30) days; Respondents failure to file a compulsory Counterclaim in the said First Case pursuant to Rule 13 (a); Respondents failure to give notice and timely file their irrelevant undocumented Rule 12 (b) (4) & (5) Motion pursuant to Rule 6 (d); Respondents failure to deny the averments in the responsive pleading as required under Rules 8 (b) (c) & (d) SCRCP thereby admitting the averments.

3. The Lower Court's egregious abuse of discretion, and errors of law and facts in Case No. 2008-17-CP-180 Weaver vs. Progress Energy (hereafter "Second Case') filed on or about May 30, 2008.

4. The Lower Court's violation of Appellant's rights under the U.S. Constitution: due process and equal protection of the law, etc: U.S. Const, **Art III, Sect 2; 6th Amendment; 14th Amendment. .**

5. The Lower Court's violation of Appellant's rights pursuant to the S.C. Constitution: **Art. I, Sect.19**.

6. The Lower Court's violation of The American Rule for allocation of fees and costs.

7. The Lower Court's clear confusion, abuse of discretion and errors of the facts and law in the First and Second Cases and its unilateral *sua spont,* impatient, antagonistic and biased misapplication of the doctrine of *res judicata* in the Second Case.

8 The Lower Court's violation of the S.C. Frivolous Civil Proceedings Sanctions Act (**S.C. Code Ann. Sect.15-36-10(D)©)** and the associated violations of constitutional rights to due process and equal protection of the law..

9. The Lower Court's general adverse demeanor, hostile attitude, bias, prejudice, impatience and antagonism towards Appellant, during the November 3, 2009 Hearing, in violation of **Rule 501 Code of Judicial Conduct, Canons 1 through 4.**

10. Respondents' unexpected and surprise unilateral abandonment of their Rule 12 (b) (4) & (5) SCRCP Motion to Dismiss dated August 4,2008 (R. p. 226) (without merit and in violation of due process) set for Hearing at the Lower Court on November 3, 2009 for that purpose, without notice, and condoned indulgently by the Lower Court.

11. Respondents' introduction for the first time on appeal, their improper and inappropriate claim for judgment under Rule 12 (b) (6) or Rule 56 SCRCP. **(Res. Final Brief, p.16)**

12. Such other of the violations documented in Appellant's Amended Initial Brief and other Court filings as discussed herein below.

2. Additional to the above cited issues, Appellant has submitted for the Court's consideration, three major issues in this appeal created by the Lower Court's incompetent and biased handling of the November 3, 2009 Hearing supposedly set for the purpose of disposing of Respondents' **Rule 12 (b) (4) & (5) SCRCP** Motion to Dismiss dated August 4, 2008 **(R. p. 226):**

1. The Lower Court's unilateral un-constitutional imposition of attorney fees without notice or opportunity for Appellant to respond, etc, as a sanction against Appellant on the bogus *sua sponte* argument of *res judicata* based on the Court's confusing the facts and law of the First and Second Cases, and in constitutional violations of the S.C. Frivolous Civil Proceedings Sanctions Act. **(R p.10) (Code Sect. 15-36-10, (D)©)**

2. The Lower Court's unconstitutional (case law) threatened imprisonment of Appellant for ninety days in the event he does not pay the said fees within thirty days of judgment. **(R. para. 3, p,.4)**

3. Respondents' unilateral abandonment without notice, of their Rule 12 (b) (4) & (5) SCRCP Motion to Dismiss **(R. p.226),** condoned by the Lower Court.

3. Central to the issue of the Lower Court's forced payment of fees under threat of imprisonment, is Appellant's proposed application of the **American Rule** where the parties in an action pay their own attorney's fees, subject to certain exceptions..

4. Accordingly, as a major issue on appeal, the following introductory discussion is filed herein in support of Appellant's Motion for American Rule and other relief from the travesty of justice perpetrated at the Lower Court Hearing on November 3, 2009.

5. The Lower Court's abuse of discretion on this matter involved its abuse of two exceptions that have developed in the Courts to the mandatory application of the American Rule in South Carolina: abuse of **Rule 11 (a) SCRCP** and abuse of the state's **Frivolous Civil Proceedings Sanctions Act (FCPSA).Code 15-36-10 (D)(C)** with the unproven misapplication of the alleged Appellant's frivolous litigation exception in both cases. The Lower Court's deliberate denial of prior notice and opportunity for Appellant to respond to the allegations in both instances, and other related violations, resulted in the Lower Court's denial of Appellant's constitutional rights to due process and equal protection of the law now on appeal.

6. Appellant's plea for relief is supported by the modern view of judicial policy for the American Rule which has been expressed by the U.S. Supreme Court:

> "(S)ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel....Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration. See, **Fleishmann Distilling Corp. vs. Maier Brewing Co., 386 U.S. 714, 718** (1967).

7. This discussion supports Appellant's appeal of the Lower Court judge's rulings that negligently exceed the judicial limits of gross abuse of discretion and clear errors of fact and law in this case. In one biased, prejudiced and impatient fell swoop, the

incompetent Lower Court judge confused and befuddled the facts and issues of the case under review, permissively permitted Respondents to violate case law, the Rules of procedure, Rule 11 (a), and **FCPSA**, the American Rule, and Appellant's constitutional rights, not to mention ruling an unwarranted vindictive, vicious threat of incarceration for 90 days in a Dillon jail for Appellant having the temerity to determinately litigate a challenge of a multi-billion interstate government protected monopoly electric utility, in an attempt to protect his consumer rights.

8. Faced with innocuous, lip service, S.C. Public Service Commission and Office of Regulatory Staff consumer protection by the state regulatory agencies, which are little more than wholly owned subsidiaries of the utilities, Appellant was forced to protect himself against Respondent's abusive regulatory action and litigation and commence defensive litigation, which the Lower Court incorrectly deemed *sua sponte*, to be *res judicata* in a flurry of legal confusion and judicial asperity, violating the Rule that a Court cannot offer e defense of res judicata on behalf of a Defendant. That dictum is ground alone for this Court to grant Appellant his appeal.

9. The essential facts of the case on appeal are straight forward: Respondents filed an original lawsuit for collection of an alleged disputed debt (First Case); the parties executed a Settlement Agreement (contract) which Respondents violated.**(R.p 74)** Subsequently, with a "crystal clear" Form 4 order, the Lower Court ordered both parties to comply with the contract within 45 days. (**R.5) Although Appellant had complied with the Settlement Agreement in every respect, Respondents knowingly and willingly did NOT comply for seven months, and only then when Appellant filed a Notice of Non-Compliance with the Lower Court. (R. p.144)** Appellant mailed eight letter notices of non compliance to Respondents (R. p. 121) and as noted, subsequently had to file a Notice of Noncompliance with the Court, all of which Respondents ignored. (R.p.144). Appellant then was forced to file a formal **Complaint** for breach of contract and damages, etc. to protect his consumer interests and rights. (2nd case**). (R.pp.20-54)**

10. Respondents negligently failed to file an Answer or Counterclaim pursuant to the Rules of Procedure (30 days), and 14 months later, on August 4, 2008 three days before the Hearing of the case, improperly filed a Rule 12 (b) (4) & (5) SCRCP affirmative

defense Motion, falsely claiming improper service and jurisdiction of the person of the Complaint.(R. p 226)

11. On November 3, 2009 in a flurry of legal confusion, and misinformation of Respondents' false verbal witness without any documentation submitted, the Lower Court, *sua sponte,* improperly invoked *res judicata* **(inter alia, case law says that a trial judge cannot offer a res judicata defense on behalf of a Defendant--Respondents in this Second Case),** improperly invoked frivolous filings by Appellant, violating **Rule 11** (a), the **FCPSA**, the American Rule and Appellant's consumer and constitutional rights on the specious, fallacious grounds of Appellant's alleged frivolous filings. Adding insult to injury the Court violated case law procedures for invoking Rule 11 (a) and **FCPSA** against Appellant.

12. Finally, it is respectfully submitted that if relief is not granted with respect to the cited Lower Court and Respondents' violations of the Constitutions, the statutes and Rules, and the American Rule, etc, as requested herein, there will remain a chilling effect on future consumers seeking Court protection for their rights as consumers of electricity from government protected monopoly suppliers in this state and from a small army of in-house utility attorneys and the oldest, established law firms under contract.

STATEMENT OF THE CASE

This appeal addresses the egregious abuse of discretion, and clear errors and omissions of fact and law in the Lower Court's unconstitutional Order dated November 25, 2009 **(R. p.10; S.R. p. 1)** and its Order dated January 6, 2010. **(R.p.19; S.R. p.29).** The said former Order was prepared by Respondents for, and executed by, the incompetent, biased, prejudiced, antagonistic Lower Court judge clearly possessed with a hostile attitude towards Appellant from the outset of the Hearing held on November 3, 2009, in violation of Canons 1, 2, and 3, Rule 501 Judicial Conduct, of SCACR.

As noted, this is an appeal to reverse and vacate the Lower Court's judgment and for relief in this case. As discussed herein, the main grounds for the appeal include, inter alia, Respondents violations of SCRCP and statutes by their neglect to file an Answer, Counterclaim and any affirmative defenses (Rules 8 (b) (c) & (d) and 12 (b) SCRCP) to the Complaint filed for Respondents' breach of contract (Mutual Release in the First

Case) and contempt of Court authority, filed by Appellant in this action (the so-called "Second Case"). The said Complaint (Second Case) was filed on May 30, 2008 following the two Orders of Judge Paul Burch dated February 28, 2008 (**S.R. p. 65**) and the requested Court clarification to Appellants enquiry, dated March 24, 2008. **(S.R. p. 66).**

This case includes Respondents' liability to Appellant under the doctrine of laches for their untimely filing (14 months after service of the Complaint and 3 days before the Hearing on August 10, 2008) of their untimely and defective Rule 12 (b) SCRCP Motion to dismiss; Respondents sat on their hands and came to the Court with unclean hands (see, detailed discussion in Appellant's Initial Reply Brief, **p.21);** the said Rule 12 (b) Motion was filed on undocumented fatuous grounds of alleged insufficiency of process, insufficiency of service of process, and lack of jurisdiction over the person, rebutted by Appellants First and Second Memoranda (R. pp. 250, 269). Said Rule 21 (b) Motion was unilaterally abandoned and their proposed argument switched by Respondents without notice, at the November 3, 2008 pre-trial Hearing set to hear the Motion.

Respondents failed to file and serve any written or oral Motions for res judicata, frivolous litigation and sanctions. Respondents permanently waived their affirmative defenses including their Rules 12 (b) (6) and 56 SCRCP claims **filed for the first time on appeal. (Res. Final Brief, p.16).** See Appellant's **Final Reply Brief** for a full discussion on this issue. **(Item II, pp.2-14).**

The case addresses the Lower Court's unmitigated confusion of the issues in the first and Second Cases in this action, and its unconstitutional sua sponte rulings as to alleged res judicata, alleged frivolous litigation and related sanctions without notice or opportunity for response by Appellant in violation of the law, Rules and case law (e.g., Code Sect. 15-36-10 (D)); according to legal authority the Court may not offer a res judicata defense for a Defendant as in this case; the Court's violations per se, of the S.C.Frivolous Civil Proceedings Sanctions Act; ("Act") Court approval of inflated, excessive and unfair attorney's fees ($7,500) in violation of the The American Rule for allocation of such fees which is appropriate in this case given the Court's violation of the exceptions under the Act and the Rule; and last but not least, there are the above noted Court's hostile "attitude", bias, prejudice, and antagonism demonstrated against

Appellant at the November3, 2008 Hearing in violation of the Canons and Rule 501 SCACR. .

LAW OF THE CASE

Legal authorities define application of the "law of the case" doctrine in a variety of ways. Black's Law Dictionary, Rev. Edit. West Pub. Co. 1968, pp. 1030, 1031 states that the doctrine has reference to decisions on legal questions and principles of law announced, and does not embrace questions of fact or decisions on questions of fact. The doctrine includes all errors relied on for reversal and all errors lurking whether mentioned in Court's opinions or not, "and all errors lurking in the record on appeal which might have been but were not expressly relied on." The doctrine is generally deemed applicable whether a former determination is right or wrong. **Id.**

Based on this authority Appellant respectfully submits that Respondents' discussion of applicable Law of the Case (Res. **Initial Brief pp. 9-11 & Final Brief, pp-8-**11)) relying on decisions, alleged facts, etc. in earlier actions directly and indirectly related to the S.C. Public Service Commission ("SCPSC"), is irrelevant and immaterial to the issues under consideration in this appeal, and should be summarily ignored by the Court. (See discussion in **Appellant's Reply Brief, pp 23, 24**). Appellant respectfully submits that Respondents references to prior SCPSC cases as the law of the case, are negligent misrepresentations and immaterial to the appeal at hand which concerns Respondents breach of a Settlement Agreement (Second Case), not unrelated earlier regulatory and related matters before the SCPSC

Respondents claim that Findings of Fact and Conclusions of Law in Case No. 2000-CP-17-090 are the law of this case. (**Res. Final Brief, p.8**), further citing. SCPSC Case No. 2001-249-E (**Res. Initial Brief, p.9)** which was dismissed because Mrs. Weaver was unable to prosecute the case due to her documented on-going serious medical problems that continue to this day. That was a Complaint against Respondents for failing to provide area security light services as agreed, and Appellant refused to pay any bills until the lights were fixed. The SCPSC Order No. 2001-1095 cited **(Brief p.9)** in fact denied in part, and "among other things" cited by Respondents (**Initial Brief**, line 9, p.9) granted Appellant in part his claims against Respondents, not mentioned in Respondents Briefs. Case No. 2000-CP-17-090 was not decided on the merits of the case.

The case was apologetically dismissed on technical grounds by Judge Paul Burch who explained to Appellant that Respondents claimed that Appellant should have filed a "petition" and not a "Complaint" and under case laws cited had to be dismissed.

SCPSC Case No.2007-401-E cited, relating to Appellant's unsuccessful attempt with the SCPSC to enforce Para. 5. of the Settlement Agreement (R. **p. 74)** to change electric providers. (Second Case). Respondents had fraudulently agreed to change providers in para. 5 of the Mutual Release as an inducement for the Release...

What has been decided on technical legal grounds ten years ago, and not the merits, cannot be reopened by this Court as the law of the case in deliberating a civil case that is totally unrelated to the former regulatory subjects before the SCPSC. Appellant respectfully rebuts Respondents claims that former SCPSC related actions dismissed on technical procedural grounds rather than the merits are the law of this case.

Based on the Black definitions cited above, Appellant respectfully submits that the law of the case is reflected in two Lower Court Orders issued by two competent judges in Case No. 2004-CP-17-232, the "First Case" relating to collection of an alleged disputed debt by Respondents who to this day still have not provided a proper accounting: The Form 4 Order of Judge Paul Burch dated February 28, 2008 ordered Respondents to comply with the Settlement Agreement (Mutual Release) within forty five (45) days or face contempt of Court authority charges for failure to comply. **(S.R. p. 65). Re**spondents failed to comply for seven months thereafter and only did comply after Appellant filed a Notice of Non-Compliance with the Lower Court **(S.R..p. 263)** In response to Appellant's request for clarification of the order (**R.p.122**), Judge Burch issued a Form 4 Order dated March 24, 2008 and stated it was "crystal clear with no ambiguities." **(S.R. p.66)**. Therefore Appellant filed the Complaint in Case No. 2008-CP-17-180 the subject of this Appeal ("Second Case") for Respondents' breach of contract, contempt of Court, etc. **(R. pp. 20-55)**

The second relevant Order in the First Case was issued by Judge James Lockemy on June 27, 2008 **(S.R. pp.67-70).** Referring to Appellant's inquiry about the Respondents' violation of the Settlement Agreement (Mutual Release) in the case, the Judge clearly recognized the separation of the issues between the two cases, and ordered: "These matters are not properly before me as they have been previously addressed by

Judge Burch in the Hearing on January 30, 2008, his Order of February 28, 2008 and his Order in response to the Defendant (Appellant) Gary Weaver's Motion for Reconsideration dated March 24, 2008". (**S.R. para. 9, p.69**). With this Order the judge also instructed: "This case has ended." (first case). (**S.R. para.14, p.70**) Clearly distinguishing between the issues involved, the judge made no mention of the Second Case, Appellant's Complaint now the subject of this appeal.

In conclusion, based on the foregoing discussion Appellant respectfully submits that the law of the case in this appeal is not Case No, 2000-CP-17- 090 as Respondents contend, but the two Orders cited above

STATEMENT OF THE FACTS

1. Factual Background

1. In June 1994, the law firm of Daniel H. shine executed an agreement with Respondents to provide power. Plaintiff Beatrice Weaver was not a party to the agreement and in fact was not even present in this State at that time. Some time during 1997, Appellant contracted with Respondents to install, operate, repair and maintain some Area security Lights at the residence. This agreement was based on Respondents public advertising, representations and warranties that the lights would be maintenance free, repair free, worry free, and would provide a secure and reliable area lighting system for the safety of person and property. Following some two years of continuing malfunctioning, unreliable, and insecure operating area lights, and repeated verbal and written requests to Respondents and their agents for repairs, maintenance and product performance guarantees, etc., Appellant filed an informal Complaint against Respondents with the SCPSC in 2000 because of Respondents continued no response to Appellant's requests. The SCPSC turned the informal Complaint into a formal Complaint, and thereafter the rest is regulatory and legal history that developed in this case.

2. The SCPSC granted in part Appellant's claim for credit, and denied in part the claims for damages, etc., on he grounds that it lacked the authority and jurisdiction. Some time around 2001, the amount of credit due was negotiated between the SCPSC Executive director and unknown representatives of Respondents in ex parte communications unknown to Appellant. Appellant's enquiries to both parties as to how much credit was agreed on and granted, fell on deaf ears, and the SCPSC Executive

director actually informed Appellant that it was "none of your business" to which Appellant objected.

3. Thereafter followed approximately two years during which Appellant demanded numerous times in writing, to be informed by Respondents and the SCPSC of how much credit was granted and how the amount was calculated, etc. Appellant confirmed that he was ready, willing and able to pay any account due on receipt of a proper accounting and a proper reconciliation of accounts, and that he would not pay bills or delay payments until such accounting was made available. To this day, despite several fruitless inaccurate, deficient accounting attempts, Appellant still does not know how much credit was granted by Respondents and approved by the SCPSC. In retaliation, on or abut July 9, 2004 Respondents filed Case No. 2004-CP-17-232 ("First Case"): Progress energy Carolinas, Inc. vs. Gary and Beat5rice Weaver on a claim for an alleged debt.

4. There followed a lengthy legal dispute, over Mrs. Beatrice Weaver's inclusion in the case under the doctrine of necessaries, and statute of limitations, etc., despite the fact that she was not a signatory or a party to the original agreement executed by the Shine law firm for Gary Weaver in 1994, seven years previously. There were also constitutionality questions, and Appellant's assurances verbal and in writing and to the Court and Respondents that he was solely liable for and agreed to pay any final account due following a proper reconciliation and accounting, and a series of Court continuances due to Mrs. Weaver's three cancer ailments, etc., dating since 2004.

5. On September 18, 2007 the parties executed a Mutual Release Settlement Agreement, which in law is a contract. (R. pp. 74,75). The reason for the settlement was because Mrs. Weaver had a serious surgery set for September 23, 2007, the outcome of which was very uncertain. And Mrs. Weaver did not want any complicated unsettled matters pending in the event of her untimely death as a result of the surgery. This was made known to counsel for Respondents. Appellant did not want to settle the case, but agreed to Mrs. Weaver's request, and on the condition that Respondents agree to a change of providers, which they did, fraudulently knowing as professionals, that it would be virtually impossible to do so under SCPSC regulations, etc.

6. On October 1, 2007, the Lower Court executed an imperfect Form 4 Judgment dismissing the case as settled between the parties. **(R. p.3).** As a Pro Se party in the case, Appellant did not receive a copy of the said imperfect Form 4 Judgment until April 14, 2008 some seven months later, when he made a routine enquiry of the Dillon County Clerk of Court of the status of the case.

7. On October 24, 2007 Respondents made a Motion to Enforce Settlement **(R.pp. 77-79)** on the grounds that Mrs. Weaver failed to dismiss a Counterclaim before the SCPSC that it had already been dismissed earlier by the SCPSC, confirmed in writing by the SCPSC counsel and a copy duly filed with the Court as an exhibit. In 2002, Respondents had filed with the SCPSC a ridiculous and frivolous Motion to Deny Electricity Power to Mrs. Weaver (not a party to any agreement with them), her corporations, relatives and anything related to her, on the specious grounds that she denied Respondents' meter readers access through a closed gate (not the designated access gate), alleged high grass and dogs. Eventually Respondents withdrew the ridiculous Motion, but Mrs. Weaver had filed a Counterclaim and refused to withdraw it. The untrained poorly supervised meter readers continued to persist in using the wrong access gate to the property, never knew where the three meters were located on the property, were poorly managed, and occasionally neglected to read the meters because they "could not find them", etc. Because of her cancer ailments, eye problems and other illnesses, Mrs. Weaver who is a very independent person, was unable to prosecute the Counterclaim and the SCPSC had dismissed it earlier in 2007 for that reason.

8. On October 25, 2007 Appellant coincidently filed a Motion for Enforcement of the Mutual Release (Settlement Agreement contract). **(R.p. 83-85),** because Respondents refused to connect electric power to the residence as agreed for the next day on September 19, 2007 following execution of the Settlement Agreement, and **even though the conditions for same were duly and timely met by Appellant**. Ibid, para. 1 & 2.

9. On May 22, 2008, power was eventually connected, some eight months after Respondents had agreed to connect power on September 19, 2007, and following Appellant's filing the Notice of Non-Compliance filed on April 14, 2008 **(R.pp. 144-147)** that was one of Respondents' violations of the Mutual Release agreement. (R.**pp. 74-75)**

10. The two October 2007 Motions were heard in the Lower Court on January 30, 2008. See, Form 4 Judgment dated February 28, 2008 **(R.p. 4).** On March 7, 2008, Appellant filed a letter with the Court seeking clarification of the Order, **(R.pp. 122-139).** The Court deemed the letter to be a Rule 52 (b) SCRCP Motion. **(R.p.5, line 6).** During the Hearing held on January 30, 3008, following Appellants explanation of the history of the case and Respondents cumulative pattern and practice of abusive violations of procedures, and actions related to the conduct of the case, and Respondents willful violation of the Mutual Release terms, the Court admonished Respondents threatening them with contempt of Court, and jail: **"Mr. Buyck, you understand that goes to your folks? Mr. Buyck: Yes sir.**

> **And I don't want to have to put you in jail, but I want to see some officers of that company down here if and when that happens; because somebody is gong to jail, most likely..." See, Trans, 30 Jan. 2008.R.pp 185-193; pp.188.**

On May 14, 2008 following receipt of a copy of the incomplete Form 4 Judgment dated October 1, 2007 from the Dillon Clerk of Court **(R. p.3),** Appellant filed the said formal Notice of Non Compliance within 45 days by Respondents **(R.pp. 144-147)** of the Form 4 Order dated February 28, 2008 **(R.p 4)**

11. Because Case No, 2004-CP-17-232 (First Case) had been allegedly dismissed by Settlement Agreement, and based on Respondents non compliance with Form 4 Orders dated February 28, and March 26, 2008, on May 30, 2008 Appellant filed the Complaint **(R.pp. 20-54)** (Second Case) in this action averring Respondents' violation of the Lower Court's Form 4 Orders of February and March 2008, **(R. pp. 4,5)** for breach of agreement of the Mutual Release agreement, non compliance with a Court order, and contempt of Court authority as stated by the Court in the Form 4 Judgment dated February 28, 2008.

12. Simultaneously, because of the uncertainty of the First Case status at the time, Appellant also deemed it appropriate to file a Motion to Consolidate **(R. pp. 194-207) t**his new Case No. 2008-17-CP-180 ("Second Case") because it seemed that based on the facts of the situation, the First Case in fact may not have been dismissed due to the imperfect dismissal pursuant to the incomplete Form 4 Judgment dated October 1, 2007 which situation would be decided by the Court's deliberation of the Motion.

13. A Hearing on Motions was held on June 2008 in Georgetown and the Lower Court confirmed conclusively that the First Case No. 2004-CP-17-232 was "ended." The merits of the Second Case No, 2008-CP-17-180 were never adjudicated at that Hearing and on August 10, 2008 the Court referred the case matters back to Judge Paul Burch pursuant to his two Orders of February 28 and Mach 26, 2008 (**R.pp. 4,5**), as matters not properly before the Court. **(R.p.7).**

14. On August 7, 2009, some 15 months following the service of the Complaint and **three days** before the August 10, 2009 trial date of the Second Case the subject of this appeal, Respondents filed an untimely Rule 12 (b) (4)(5) Motion to Dismiss on the alleged undocumented specious grounds of insufficiency of process, insufficiency of service of process and lack of jurisdiction of the person. **(R. pp. 226-227).** Since Respondents had not filed an Answer, Counterclaim or any affirmative defenses of record, on or about August 3, 2009, Appellant filed a Motion for Entry of Default and Default Judgment (R. **pp. 229-249),** and a Motion to Continue the Trial Date on medical grounds. **(R. pp.262-268).**

15. The Court set the trial date for November 9, 2009. A pre-trial Hearing was held November 3, 2009 ostensibly to hear the three pending Motions: Respondents' Rule 12 (b) Motion to Dismiss; Appellant's Motion for Default; and the Motion to continue the Trial Date.

16. None of these Motions in fact were heard by the Lower Court judge. Respondents unilaterally abandoned without notice their Rule 12 (b) (4)(5) Motion to Dismiss and presented a rambling verbal dissertation on previous litigation none of which was related in any way to their pending Motion or the case at hand. Appellant never had an opportunity to present his case due to the impatient, precipitate sua sponte rulings by the presiding judge for res judicata, which ground a judge may not offer in defense for a Defendant, and without notice or opportunity for Appellant to respond ruled Appellant's Complaint to be frivolous and imposed sanctions subject to imprisonment for any future noncompliance. Respondents had filed no written or verbal Motions at the Hearing, which was biased, antagonistic and prejudicial to Appellant.

17. The Lower Court issued its unconstitutional Order dated November 25, 2009 **(R.pp.10-14)** written by Respondents; To conform with the Rules of procedure,

Appellant filed a Rule 59 (c) SCRCP Motion for Reconsideration dated December 18, 2009 (**R.pp.295-335**) knowing in advance that the biased Court would not approve it. Surely as expected, the Lower Court filed its Order dated January 6, 2010, denying the Motion. (**R. p.19**). Accordingly, Appellant duly and timely filed a Notice of Appeal on or about February 7, 2010.

2. Facts of the Case.

1. Respondents did not file an Answer, Counterclaim or affirmative defenses to the Complaint in violation of Rule 7 (a) 8, and Rules 12 (a) & (b) SCRCP. According to the Rules, Respondents admitted the averments in the Complaint pursuant to Rules 8 (c) and (d) SCRCP. Therefore, any and all assertions of Respondents in defense are permanently waived and moot issues, ignored by the Lower Court in its haste to finish the November 3, 2009 Hearing.

2. Respondents filed a Rule 12 (b) (4)(5) SCRCP Motion to Dismiss, some 15 months after service of the Complaint, and three days before the trial date set for August 10, 2009. (**R.p.226),** and thereby permanently waived any right to claim any affirmative defense pursuant to Rules 8 (b) (c) and (d), and Rule 12 (b) SCRCP.

3. Respondents sat on their hands and came to the Court with unclean hands; and are liable to Appellant pursuant to the doctrine of laches relating to their lack of filing required documents and the late filing and subsequent abandonment of their Rule 12 (b) Motion to Dismiss

4. As noted, the said Rule 12 (b) Motion to Dismiss on alleged undocumented grounds of insufficiency of process, insufficiency of service of process, and lack of jurisdiction over the person, was abandoned by Respondents without notice at the November 3, 2009 Hearing. This surprise abuse of process was prejudicial to Appellant who was prepared to rebut the Motion before the Court and had not received any notice of res judicata from Respondents or the Court. Res judicata was permanently waived as an affirmative defense pursuant to Rules 8 (b) and (d). (**Transcript. pp. 55-73)**

5. Res judicata did not apply as there was no preclusion of issues, facts or claims because there was a Settlement Agreement of an account claim in the First Case No. 2004-CP-17-232, and the issues in the Second Case No. 2008-CP-17-180 relate to

Respondents violations of a Court order and breach of agreement and nothing to do with the previous case. (See, **Transcript, R.p.66, lines 10-24**).

6. The Lower Court's ignorance of the issues in the two cases was palpable. The Court clearly did not know what was in the first or Second Cases, confused the two cases, and erred with abuse of discretion, and clear errors of fact and law; and a trial Court cannot offer a res judicata defense on behalf of a Defendant as in this case.

7. For the above reasons, the Lower Court erred in ruling a frivolous suit and sanctions against Appellant and threatening Appellant with potential contempt of Court and jail.

ARGUMENTS

1. The Lower Court erred because of Respondents failure to deny the averments in the Complaint to which a responsive Answer and Compulsory Counterclaim are required by Rule and not filed by Respondents, are admitted by Respondents when not denied in the responsive pleading required by Rule which Respondents knowingly and willfully neglected to file, and *res judicata* was a moot issue by virtue of the Rules and case law.

2. The Lower Court erred by ruling *sua sponte*, its unilateral application of the doctrine of *res judicata*, because Respondents willfully and knowingly neglected to file an Answer and Counterclaim to the Complaint in this action, and thereby waived any and all affirmative defenses permanently pursuant to Rules 7, 8, 12, 13, and 15 SCRCP. (Abuse of discretion; clear error of fact and law).

3. The Lower Court erred pursuant to the doctrine of laches. Respondents sat on their hands and came to the Court with unclean hands on two counts:

1. After neglecting to file an Answer and Counterclaim within thirty (30) days of filing the Complaint, some fifteen (15) months after service of the Complaint, pursuant to Rule 6 (d) and Rule 12 (a) SCRCP, Respondents filed an untimely and improper Rule 12 (b) Motion to dismiss just three days prior to the scheduled trial date on the alleged affirmative defense grounds of insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction, which Motion Respondents subsequently abandoned without notice at the pre-trial Hearing held on November 3, 2009 for which the Hearing was scheduled, condoned by the Lower Court..

2. Respondents unclean hands stemmed from their subsequent implied argument for an affirmative defense without filing a written or vernal Motion to dismiss, presumably on the indirect implied grounds of res judicata at the November 3, 2009 Hearing instead of their abandoned irrelevant Rule 12 (b) Motion to Dismiss, over Appellant's objections, and in violation of **Rule 8 (c) SCRCP** requiring an affirmative defense claim of res judicata be filed with a responsive pleading which they failed to file.

4. Res judicata is barred because of the preponderance of evidence in the broad sense, clear and convincing evidence for specific issues, Respondents violation of Rule 8 (c) SCRCP, case law and legal authority preventing the Lower Court from unilaterally offering the res judicata defense for a Defendant as in this case. (Due process violations, abuse of discretion; clear error of law and fact).

5. The Lower Court erred because the Complaint had never been previously dismissed as claimed by Respondents, and there were no prior dispositions by any Court at any time, anywhere, of the allegations filed in the Complaint for the first time. (Abuse of discretion; clear error of law and fact).

6. The Lower Court's sua sponte ruling to dismiss Appellant's suit as frivolous litigation and to impose improper sanctions, was barred by the preponderance of evidence, and the Court's violation of the procedural requirements of the S..C. Frivolous Civil Proceedings Sanctions Act; no notice and opportunity for Appellant to respond, etc. (Code Sect. 15-36-10 (D)) (Denial of due process and equal protection of the law; abuse of discretion, clear error of law and fact, etc)

7. The Lower Court erred in ruling a "hybrid" civil/criminal contempt of Court with sanctions in an abuse of discretion, and clear error of law and fact, and against the preponderance of the evidence, leading to reversible error.

8. The Lower Court's conduct of the case at the November 3, 2009 Hearing supposedly set to hear Respondents' **unilaterally abandoned** Rule 12 (b) (4) & (5) SCRCP Motion to Dismiss without notice, was an unexpected **surprise** to Appellant with Respondents' violation of **Rule 60 (b) (1) SCRCP,** condoned by the Court..

9. The Lower Court's conduct of the case was biased, prejudiced, impatient, pre-arranged, and antagonistic to Appellant, and a violation of Canons 1, 2, and 3, Rule 501, Judicial Conduct.

10. The Court must deny Respondents' request for dismissal pursuant to Rule 12 (b ((6) SCRCP, failure to state facts sufficient to constitute a Cause of action, because the claim is without documented merit, was not presented in the Lower Court and is presented for the first time on appeal. See Respondents' Final Brief, p.16.

11. The Court must deny Respondents' alternative request for dismissal pursuant to Rule 56 SCRCP for summary judgment because the facts and evidence presented in the Lower Court are riddled with genuine issues of material facts, and the evidence documents that Respondents are not entitled to judgment as a matter of law. Ibid. to the contrary, the facts and the cited law are such that it is Appellant that is entitled to judgment as a matter of law.

The Legal Questions

The foregoing discussion raises the following legal questions on appeal for deliberation of this Court:

1. Did the failure and neglect of Respondents to duly serve and file an Answer (and Counterclaim) to the Complaint, render the averments in the Complaint to which a responsive pleading is required by Rule, admitted when not denied in a responsive pleading.(Rules 8 (c) and (d) SCRCP)

2. Did Respondents abuse process when they filed a Rule 12 (b) (4) & (5) SCRCP Motion to Dismiss on alleged grounds of insufficiency of process, insufficiency of service of process, and lack of jurisdiction over the person; said Motion received by Appellant on Friday, August 7, 2009 just three days before the trial date set on Monday, August 10, 2009 and fifteen (15) months after the filing of the (Second Case) Complaint on May 30, 2008

3. Did Respondents abuse process by unilaterally without notice or service abandoning the said Rule 12 (b) (4) & (5) Motion to Dismiss at the Hearing held for that purpose on November 3, 2009 when invited by the Lower Court to discuss the Motion.

4. Did Respondents abuse process by implying res judicata without filing or serving a prior formal written or even an oral Motion during the Hearing instead of responding to the Lower Court's invitation to discuss the said **Rule 12 (b)** Motion to Dismiss, that as stated above, was originally improperly filed with the Court and abandoned by Respondents without notice or even mention during the Hearing..

5. Did Respondents waive the right to claim affirmative defenses of res judicata, mistake, laches, and any other matter constituting an avoidance or affirmative defense pursuant to **Rule 8 (c) SCRCP**, and by not filing an Answer or Counterclaim to the Complaint, and in any event subsequently, by not filing or serving a written or oral Motion to Dismiss on res judicata grounds at the November 3, 2009 Hearing on the case.

6. Did the Lower Court err by condoning the said abuse of process by Respondents and ignore Respondents admittance of the averments in the Complaint by the lack of filing and serving an Answer, Counterclaim or Rule 8 (c) affirmative defenses; thus rendering the Lower Court's unilateral, sua sponte rulings dismissing the Complaint on alleged res judicata grounds, alleged frivolous litigation and sanctions, moot issues and reversible errors. (Abuse of discretion; clear error of fact and law).

7. Was the Complaint dismissed previously by any Court at any time, as claimed by Respondents.

8. Were the issues adjudicated previously by any Court at any time, as claimed by Respondents.

9. Notwithstanding, did the Lower Court err by ignoring the statutory requirements of the S.C. Frivolous Civil Proceedings Act in ruling sua sponte, against Appellant, without notice or service, insufficiency of evidence, and lack of a written or oral Motion from Respondents. (Violation of S.C. Code Ann. Sect 15-36-10 (D))

10. Did the Lower Court criminalize the civil suit by threatening Appellant with a prison sentence of ninety days in violation of Appellant's constitutional rights to due process and equal protection of the law and without a Hearing on the issues.

11. Was the said sanction inappropriate and redundant given the Court's violation of S.C. Code Ann. Sect 15-36-10 (D), and improperly imposed for a civil, criminal or "hybrid" potential contempt.

12. Did the Lower Court violate Canons 1, 2 and 3, Rule 501, SCACR.

13. Did Respondents violate Rule 6 (d) SCRCP by neglecting to file Motions within ten days of due date.

14. Because Respondents waived all affirmative defenses **permanently,** did the Lower Court lack subject matter jurisdiction over Respondents claims; were all

subsequent rulings moot as to Respondents claims, and was its judgment thereby void or voidable.

DISCUSSION

The following discussion summarizes the arguments presented in Appellant's Initial Brief, Amended Initial Brief (ordered by the Court), Reply Brief, Initial Final Brief (duly filed within 20 days of filing the Record on Appeal pursuant to Rule 211 (a) SCACR.), and the Supplemental Record on Appeal (ordered by the Court), by reference are made part hereof.

The major elements of this appeal and the related consequential issues to be addressed, are. First, Respondents' request for dismissal of the appeal based on erroneous Rule 12 (b)(6) and Rule 56 SCRCP grounds, second, the Lower Court's violations of the U.S. and S.C. Constitutions in ruling res judicata, frivolous suit and sanctions, third, Respondents violations of the Rules of procedure and mis-representations to this Court of Lower Court Orders, and Appellant's rebuttal to the Lower Court's abuse of discretion and clear errors of fact and law on appeal.

1. On review, the appellate Court is limited to determining whether the trial judge abused his discretion; an abuse of discretion occurs when the trial Court's ruling is based on an error of law as is abundantly clear in this case. For example, the trial Court blatantly violated Code Sect. 15-36-10 (D). See, **State vs Patterson (S.C. App. 2006) 367 S.C. 219, 625 .S.E.2d 239. rhg dnd,cert, dnd**. And the Court of Appeals may reverse where the decision is affected by an error of law as exists in this case. **Olmstead vs. Shakespeare (S. C. App. 2002) 348 S.C. 436, 559 S.E. 2d 370, rehg dnd, cert. granted.** Thus, an award of attorney's fees at issue in this case, will not be disturbed unless the trial judge abused his discretion in consideration of the applicable factors. The facts, evidence and law were clearly abused in this case and the fee award should be vacated. **See, Heath vs. County of Aiken, (S.C. 1990) 302 S.C. 178, 594 SE 2d709.** The appellate Court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. See, **State. Op cit**

2. **Respondents' request for dismissal of the appeal based on Rule 12 (b)(6) or Rule 56 SCRCP (Res. Final Brief, p.16) is not supported by the facts, the**

evidence and the law, and must be denied because they were filed the first time on appeal.

1. A. From the outset of this case Respondents have engaged in a repeated pattern and practice of avoidance and violations of the Rules of procedure of both the lower circuit and appellate Courts. (See, detailed discussion in Appellant's **Initial Reply Brief, pp.14-20.)** Thus the first task is to dispose of the improper Rule 12 (b) (6) and Rule 56 SCRCP issues. Respondents' Rule 12 (b) (6) SCRCP request on appeal is not a Motion, and is an affirmative defense alleged for failure to state facts sufficient to constitute a cause of action.

B. The Court is respectfully referred to the detailed discussion of this issue in Appellant's Initial Reply Brief dated March 25, 2011, Item II, **pp 2-13**. This detailed discussion of the Rule 12 (b)(6) issue includes:

General Requirements for Rule 12 (b) (6) Motions; pp.3-5

The Procedural Defects of Respondents Claiming Rule 12 (b)(6);pp.. 5-7

A Rule 12 (b)(6) claim may challenge an asserted Defense; pp. 7-9

Conversion of Rule 12 (b)(6) to Rule 56 Summary Judgment; pp. 9-11

Application of Case Law; pp. 11-14

C. As noted herein above, in either negligent or willful violation of Rules 7 (a) and 12 (a), SCRCP, Respondents did not file an Answer or Counterclaim to the Complaint in this action within 30 days or at all; and the said request to dismiss was not filed by Motion in the Lower Court or in the required responsive pleading under Rule 12 (b). In short, the fact is, Respondents failed to assert the affirmative defense in law or fact in the Lower Court and have provided no evidence to the contrary. Respondents presented no Motion alleging any matters outside the pleading to the Lower Court, and thus, a claim for summary judgment under Rule 56 is precluded under Rule 12 (b) plus other factors discussed below. These facts create several issues for consideration of the Court. .

2. First, we must assume that counsel for Respondents knew or reasonably should have known that they were in willful and knowing violation of the Rules of Procedure as stated by filing a frivolous request absent any documented evidence that they filed a Rule 12 (b)(6) or Rule 56 Motion to dismiss in the Lower Court. It follows,

that if this is true, then counsel is in violation of **Rule 11 (a) SCRCP**. and **S.C. Code Sect. 15-36-10**., the S.C. Frivolous Civil Proceedings Sanctions Act. Accordingly, Appellant respectfully requests the Court to impose an appropriate sanction against Respondents and counsel.

3. Affirmative defenses for Respondents have been permanently waived, "affirmative defenses are waived if not pled." **Howard vs. S.C. Dept. of Highways, 538 SE 2d 291, 343 SC 149 (S.C. App. 2000)** As stated, Respondents failed to raise the Rule 12 (b)(6) issue in the Lower Court. An issue not raised to or ruled on by the trial Court is **not** preserved for appellate review. See, **Allendale County Bank vs. Cadle (S.C. App. 2001) 348 SC 367, 559 SE 2d 342, rhg dnd, cert. grant, cert, dismissed as improvidently granted, 356 SC 412, 589 SE 2d 752.; Pye vs. Estate of Fox (SC 2006) 369 SC 555, 633 SE 2d 505.** An issue may not be raised for the first time on appeal; to preserve an issue for appeal, it must be raised to, and ruled upon by the trial Court; that is, the trial Court must be given an opportunity to resolve the issue before it is presented to the appellate Court. **See, In re Michael H. (S.C. 2004) 360 S.C. 540, 602 SE 2d 729 rehg dnd,cert dnd.** Purchasers failed to preserve for appellate review their claim that a real estate agency failed to comply with the Rule governing Motions for summary judgment, where the purchasers did not raise the claim in their Motion in opposition or in their Motion to alter or amend the judgment. See, **Chastain vs. Hiltabidle (S.C. 2009) 381 S.C. 508, 673 SE 2d 826 rehg dnd.**

4. Finally, *arguendo*, notwithstanding the untimely request, the merits of the Rule 12 (b)(6) request per se, are at issue. Rule 12 (b0(6) having been permanently waived by Respondents negligence in filing a Motion in the Lower Court, the issues are rendered moot and by Rule and case law fade from existence; hence the respective Courts do not have jurisdiction of the subject matter as to Respondents claims and therefore by Rule and law the Court must deny Respondents requests. It is noted herein that Respondents unilaterally abandoned their untimely **Rule 12 (b) (4) & (5)** Motion to dismiss at the November 3, 2009 Hearing in the Lower Court presumably because, in addition to being in violation of the cited Rules of Procedure, including Rule 11 SCRCP, as explained herein, the Motion was without merit as documented by Appellant. See, First and Second Memoranda **(R.pp. 250, 269).** Similarly, in addition to waiving any

legal right to file a Rule 12 (b)(6) or Rule 56 request to dismiss the appeal, the request is entirely without merit. See Appellant's discussion on Respondents repeated abuses of procedure in this action. See, Appellants Final Reply Brief, pp. **14-21.**

5. In considering a Rule 12 (b)(6) Motions to Dismiss a Complaint, the lower trial Court must base its ruling solely on allegations set forth in the Complaint. **Doe vs. Marion, (S.C. 2007), 373 SC 390, 645 SE 2d 245.** Further, when deciding a Motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the Plaintiff (Appellant), and with every doubt resolved in his behalf, the Complaint states any valid claim for relief. **Plyler vs. Burns, (S.C. 2007) 373 SC 637, 647 SE 2d 188; Doe, Id.** If the facts alleged and inferences reasonably deducible therefrom would entitle the Plaintiff (Appellant) to any relief on any theory of the case, then dismissal for failure is improper under Rule 12(b)(6). See, **Sloan Constr. Co., Inc. vs. Southco Grassing Inc. (S.C. 2008) 377 S.C. 108, 659 SE 2d 158.**

6. In determining whether any triable issues of fact exist, as required to support summary judgment, the Court must view the evidence and all inferences which can reasonably drawn therefrom in the light most favorable to the non moving party. **Hedgepath vs. Am. Tel & Tel.Co. (S.C. 2001) 348 S.C. 340, 559 SE 2d 327.** Finally, a Rule 12 (b)(6) Motion to dismiss is converted into a Motion for summary judgment when the trial Court goes outside the face of the Complaint to Rule on the Motion. Since there was no such Motion filed or ruled on by the Lower Court either inside or outside the face of the Complaint, it is inappropriate to consider a dismissal on appeal given the case law cited. See, **Brazell vs. Windsor (S.C. App. 2007) 376 SC 83, 655 SE 2d 736**

7. On appeal from the dismissal of a case pursuant to Rule 12 (b)(6), an appellate Court applies the same standard of review as the trial Court; that standard requires the Court to construe the Complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the Plaintiff to relief on any theory of the case. **Rydde vs. Morris (S.C. 2009) 2009 WL744405; Zurcher vs. Bilton (S.C. 2008) 379 SC 132, 666 SE 2d 224.** The Lower Court not only avoided any consideration of this standard entirely, but omitted any consideration for Appellant on any theory of the case.

8. Respondents did not file a Rule 56 Motion for Summary Judgment in the Lower Court at any time. Pursuant to Rule 56 (b), Respondent as a Defendant, was entitled to file such a Motion "at any time" during the Lower Court proceedings, which it failed to do. Rule 56 (c) provides that the said Motion must be filed at least ten days before the time fixed for the Hearing (in the Lower Court).Rule 56 is unclear as to the treatment of a request as opposed to a formal Motion to the appellate Court for the first time on appeal. Respondents have not filed a formal Motion for dismissal under Rule 56, but merely filed a request for application of Rule 56 summary judgment as an alternative to Rule 12 (b)(6) also not a formal Motion..

9. Additional to Appellant's opposition to a Rule 56 ruling on the basis of Respondents failure to file a claim in the Lower Court, is the fact that there are no documented genuine issues as to any material facts, and that they are entitled to a judgment as a matter of law, pursuant to Rule 56 (c). Appellant has documented beyond any doubt that there are genuine issues of material fact in this case, and it is Appellant who is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. See, **Brandt vs. Gooding (S.C. 2006) 368 SC 618, 630 SE 2d 259, rhg dnd,** On this ground alone the request must be denied.

10. Summary and Conclusion: The Lower Court violated all of the cited dicta. It's unconstitutional, sua sponte, impatient, unfounded res judicata dismissal of Appellant's Complaint and imposition of unconstitutional sanctions were never considered on the merits, let alone in the light most favorable to Appellant. At no time during processing of the case in the Lower Court, was a Rule 12 (b)(6) or Rule 56 Motion filed by Respondents, nor Ruled on by the Court and based on cited case law, Respondent's first request on appeal must be summarily denied by the Court. Respondents failure to plead an affirmative defense in the Lower Court is deemed a waiver of the right to assert it, in the Lower Court and on appeal. See, **Madren vs, Bradford (S.C. App. 2008) 378 S.C. 187, 661 SE 2d390).** Rule 56 is not appropriate since it was not filed at any time in the Lower Court, treatment before the appellate Court for filing the first time is unclear, there are genuine issues of material fact and Appellant is entitled to judgment as a matter of law.

3. **The Contempt of Court Issue**

1. Respondents' "Argument" presented in their Initial Brief (pp.**12-17; Final Brief, pp. 11,12, 16, last line)**) is devoted entirely to defending the Lower Court's abuse of discretion in holding Appellant in an alleged contempt of Court for past alleged "vexatious" litigation and alleged violation of Court orders. **Ibid .p.12.** Neither brief refers to any argument in support of the Rule 12 (b) (6) or Rule 56 SCRCP claims for relief. The record cited as justification for alleged contempt was presented to the Lower Court verbally without exhibits. Respondents briefs refer to prior unrelated regulatory cases (**Initial Brief, pp. 9-12); Final Brief pp.2-10**) and unrelated issues and claims as subject matter in previous Court cases.

2. Respondents rely on their contention that the Lower Court "ended" the First Case in this action, No. 2004-CP-17-232, and that Appellant allegedly violated "prior Court orders" related thereto. **(Initial Brief, p.13)** . As discussed in Appellant's Brief (pp,-) the record clearly shows that there are no Appellant violations of any Court orders relating to the "ending" of the said case. All of Appellant's filings had to do with the Complaint (Second Case) for Respondents' breach of contract and contempt of Court. "Ending" the former "First Case", did not "end" the Second Case No. 2008-CP-17-180 for Respondents breach of contract and contempt of Court authority. That is the fundamental issue in this appeal that the Lower Court and Respondents confused, and contempt of Court and res judicata were improperly ruled.

3. The legal authorities support Appellant's contention that the Lower Court abused its discretion and denied Appellant due process and equal protection of the law in this matter. Thus it is stated that indirect or constructive contempt involving actions committed beyond the presence of the Court may not be punished summarily, as in this case. **17 C.J. S. Contempt, Sect. 77 (citations omitted**. Proof beyond a reasonable doubt or preponderance of the evidence may be necessary and appropriate to protect the due process rights of the party, **Ibid**. In such civil contempt cases a person charged must be given reasonable notice of the proceeding, fully and fairly apprising the accused of the specific acts charged, and giving him sufficient time to prepare a defense. **Op cit, Sect. 78.** The Lower Court as movant in this case bears the burden of establishing **clear and**

convincing evidence of the contempt and proof beyond a reasonable doubt. Ibid, citing Poston vs. Poston, 331 S.C. 106, 502 SE 2d 86 (1998).

4. If confinement, as threatened by the Lower Court in this case, rests on a theory of civil contempt, **due process** requires that a Hearing be held to determine whether the accused individual has in fact behaved in a manner which amounts to contempt, the right to testify, and to call witnesses, etc. **Ibid.** In a civil contempt proceeding, a Defendant may assert a present inability to comply with the order of the Court; where compliance is impossible, neither the moving party, nor the Court has any reason to proceed with the action. **Oliner vs.Kontrabecki, 305 B.R. 510 (N.D. Cal. 2004)**

5. We have shown that Respondents did not file any Motions for Rule 12 (b), Rule 56, res judicata, or for frivolous suit and sanctions, and the Lower Court violated the provisions of the S.C. Frivolous Civil Proceedings Sanctions Act (**Code Sect. 15-36-10 (D)(C))** by failing to give notice, and violating Appellant's constitutional due process rights.

4. **<u>The res judicata Issue</u>: The Lower Court erred because Respondents failed to deny the averments in the Second Case Complaint to which required a responsive Answer, Counterclaim and any affirmative defenses which were not filed or served; averments are admitted when not denied in any responsive pleading which Respondents neglected or deliberately failed to file and serve, and res judicata was permanently waived and rendered a moot issue as an affirmative defense. (Rules 7 (a).8 (a)-(d), & 12.)**

1. The issue of *res judicata* as a ground for dismissal was Ruled in error of fact and law by the Lower Court. Se detailed discussion in the Appellant's Initial Final Brief, **dated April 30, 2011, Items IV.& V, pp. 21-36,** by reference made part hereof.. The Lower Court's res judicata ruling should be reversed on three major grounds:

A. Respondents did not file or serve an affirmative defense of res judicata in the Lower Court; thus the argument was permanently waived as a defense and thus rendered moot for consideration, sua sponte, by the Lower Court. (Abuse of discretion; error of fact and law. violation of Rules 7 (a), 8 (a)-(d), 12 (a)(b))

B. Appellant's averments in the Second Case Complaint are admitted by Respondents when not denied in a required responsive pleading, Answer and

Counterclaim, as in this case. (Rules 7 (a), 8 (a) (d); 12 (a) (b).SCRCP.; error of law and fact)

C. **A trial judge may NOT raise an affirmative defense of res judicata for the defending party.** See, **61 A Am.Jur. Pleading, Sect. 300, p.251** In this case, the Lower Court judge Ruled res judicata, sua sponte, on Respondents verbal representation at the November 3, 2009 Hearing without any documentation, thus favoring Respondents who did not file any pleading or Motions for this affirmative defense. (Abuse of discretion).

2. Res judicata was moot and did not apply in this case as there was no preclusion of issues, facts or claims because there was a Settlement Agreement of an alleged account in the First Case; (Mutual Release) with no determination of the merits of the First Case, and the issues in this Second Case relate to Respondents violations of a Court order relating to the Settlement Agreement, and nothing to do with the previous First Case. (abuse of discretion)

3. As noted, Respondents neglected to duly and timely file and serve an Answer, Counterclaim or any affirmative defenses to Appellants Complaint (Second Case), in violation of Rules 7 (a) and 8 (a)-(d) SCRCP. This neglect and violation of the mandatory Rules of procedure had two consequences relating to the issues in this appeal:

A. First, Appellant's averments in the Second Case Complaint are admitted by Rule, when not denied in the responsive pleading, which in this instance did not exist in any case. (Rule 8)d) SCRCP. Thus, after thirty (30) days from the date of filing and serving the Second Case Complaint, all of Respondents matters and claims subsequently discussed in this action are moot and of no substance by Court Rule and are reversible error on grounds of the Lower Court's abuse of discretion, clear error of fact and law. The averments, having been admitted by Rule through negligence of deliberation, it follows that the Lower Court lacked jurisdiction of the subject matter as to Respondents case in this action. Pursuant to **Rule 12 (h) SCRCP**, whenever it appears by suggestion of the parties, or otherwise, that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action insofar as Respondents claims are concerned.

B. By neglecting to duly and timely file and serve an Answer, Counterclaim and affirmative defenses, Respondents waived all rights to claim any

affirmative defenses such as res judicata on which this case was wrongly judged by the Lower Court. Said ruling was the Lower Court's biased and prejudiced response to Respondents unilateral abandonment of their untimely filed and served Rule 12 (b)(4)&(5) SCRCP Motion and instead offering an unsolicited verbal, undocumented discussion of prior redundant regulatory litigation between the parties implying res judicata without actually filing any written or oral notice of a Motion at the Hearing. Thus a City's failure to file and Answer to an amended Complaint, waived the opportunity to raise res judicata as an affirmative defense, even though the city filed a Motion to dismiss based on res judicata. See, **Jim's Steakhouse, Inc., vs City of Cleveland, 81 81 Ohio St. 3d 18. 688 N.E. 2d 505 (1998)** A Motion to dismiss is generally not the proper method to raise the affirmative defense of res judicata. **State ex rel,Super America Group. vs. Licking Cty. Bd. of Elections, 80 Ohio St. 3d 182, 685 N.E. 2d 507 (1997).**

And a trial judge may not raise an affirmative defense for the defending party. See, **61A Am.Jur. Pleading, Sect. 300, p.251. t**hus, the Lower Court in this case cannot present res judicata, sua sponte, as an affirmative defense fro Respondents, particularly given the latter's violation of Rules of procedure and case law.

4. It has been shown that Respondents have violated Rules 7 (a), 8 (a)-(d) and 12 (a)(b) by failing to file and serve an Answer, Counterclaim, affirmative defenses and by untimely filing and abandoning a Rule 12 (b)(4)(5) Motion in the Lower Court. Rule 7 (a) requires a responsive pleading to Appellant's Complaint which was not forthcoming from Respondents. Hence as stated, Appellant's averments are admitted, and further discussion on any other issues are moot, a lack of subject matter as to Respondents case, and reversible error in the Lower Court. A case becomes moot when judgment, if rendered, will have no practical effect upon existing controversy. **Seabrook vs. City of Folly Beach, 523 SE 2d 462, 337 S.C. 304 (S.C. 1999).** Further it is stated that the function of appellate Courts is not to give opinions on abstract questions, but to decide actual controversies touching the rights of some party to litigation, and thus, issues which become moot are not a proper subject of review. **Bylerly vs. S.C. Nat. Bank Corp. 427 SE 2d 715, 311 S.C. 127.**

5. Since the averments in the Complaint are admitted by Rule, there comes the question as to whether or not there is a "justiciable controversy" existing as to Respondents implied affirmative defense and the Court ruling of res judicata which has been waived in any case. It is stated that a justiciable controversy is real and a substantial controversy which is ripe and appropriate for judicial determination as distinguished from contingent, hypothetical or abstract dispute. **U.S.C. A. Const. Art 3, Sect 2, Cl. 1; Waters vs. S.C. Land Resources Cons. Comm., 467 SE 2d 913, 421 S.C. 219, reh dnd, (S.C. 1996)** Justiciable controversy exists when a concrete issue is present; there is definite assertion of legal rights, and a positive legal duty which is denied by an adverse party. **Graham vs. State Farm Mut. Auto. Ins. Co., 459 SE 2d 844, 319 SC 69 (.C. 1995)**

6. Here we have Respondents verbal discussion at the November 3, 2009 pre trial Hearing of an implied claim for res judicata already permanently waived pursuant to Rules and case law cited herein, so it follows that by law there is no justiciable controversy as to Respondents claims and the Lower Court's rulings. Respondents' failure to file and serve an Answer and Counterclaim in the First Case, eliminated any affirmative defenses that Respondents may claim, ex post facto. What remains are Appellant's averments in the Complaint to be adjudicated by the appellate Court which have been admitted by Respondents. By Rule of law there is no justiciable controversy as to appellant's averments.. And as the aggrieved party in this appeal, Appellant's right of review is restricted to persons or parties aggrieved by the decision below, which are not Respondents. **First Union Nat. Bank of S.C. vs. Soden, 511 SE 2d 372, 333 S.C. 554 (S.C. 1998).**

7. Moreover an argument can be presented that Respondents neglect to file an required Answer and Counterclaim, could reasonably be construed as deliberate and a denial of Appellant's constitutional right to due process and equal protection of the law.

8. It is required that an Answer and Counterclaim contain statements of facts sufficiently definite so that Plaintiffs (Appellant) will be informed of the defense they must be prepared to meet. **61A Am. Jur., Pleading, Sect. 282, p. 241.** The Answer must contain sufficient information to place in issue the claims that are made the basis of the suit. **Ibid. Rule 8 (b)** SCRCP{ describes the responses made in the Answer, one of three:

admission, denial, or denial for lack of information. When admitted, as in this case by Rule, the truth of the pleading is established for purposes of trial and the admitting party (Respondents) cannot demand proof at trial. If not denied as in this case, the truth of the matter is likewise admitted under Rule 8 (d) SCRCP. The allegations in Complaints must be admitted or denied. Rules 7 (a) and 8 (a)-(d). See, **Sanders and Nichols, Trial Handbook for S.C. Lawyers, 4th Edit. Proof of Facts, Sect. 10.1, p.434,** By neglecting to file an Answer and Counterclaim, Respondents filed to admit, failed to deny, and failed to deny for lack of information. An undenied averment is admitted under Rule 8 (d) SCRCP. See, **Flanagon, Pleadings, Rule 8, p.63.**Another legal authority states that where no Answer is filed, the Defendant is deemed to admit the Plaintiff's (Appellant) pleadings, and thus, judgment maybe entered based upon those pleadings. **61 Am. Jur. Pleading, sect. 279, p.240.** Appellant was denied the opportunity to argue his case before the Lower Court at the November 3, 2009 pre trial Hearing due to the hostile, antagonistic attitude and impatience of the presiding judge who Ruled in a rush to judgment.. See. **Transcript., (R. pp. 55-73).**

9. Pursuant to Rule 12 (a) SCRCP a Defendant shall serve his Answer or a Motion to dismiss within 30 days after service of the Complaint, which as stated, Respondents neglected to do at all. Instead they filed an untimely Rule 12(b)(4)(5) Motion to dismiss some 14 months after service of the Complaint and only three days before the scheduled trial date for August 10, 2008. See Appellants First and Second Memoranda to the Lower Court addressing this issue **(R.pp 250, 260)**.

10. Rule 12 (b) SCRCP requires that the Motions to dismiss authorized by the Rule are to be made, **before pleading** if a further pleading is permitted. Thus, if the pleading objected to, is the Complaint, the Defendant must file a Rule 12 (b) Motion to dismiss prior to filing of the Answer. **61 A Am.Jur. Pleading, Sect. 542, p.436. A**s noted, Respondents never did file or serve an Answer or Counterclaim within the 30 days or ever, and filed a Motion to dismiss some 14 months late which they abandoned at the November 3, 2009 pre trial Hearing.. See **discussion in the First and Second Memoranda, op cit. Rule 5 (d)** SCRCP provides that all papers after the Complaint required to be served u a party, must be filed with the Court within five days after service. As noted Respondents neither filed nor served an Answer; timely or otherwise.

11. **Effect of failure to file an timely Answer:** With regard to this case, Respondents' failure to file and serve an Answer and Counterclaim, under Rule 7 (a) and Rule12 (a) SCRCP, can result in a **default judgment** under Rule **55 SCRCP**. See discussion, **61 A Am.Jur. Pleading, Sect. 402, p. 319.** Respondents' failure and neglect in this matter, prejudiced Appellant, by the omission, delay, and neglect. Appellant therefore deemed it appropriate based on the law, to duly file Motion for Entry of Default and Default Judgment, **(R. pp. 229-249)**

12. The trial judge denied Appellant the opportunity to argue his case for default judgment at the November 3, 2009 Hearing. **(Transcript, p.55)** And it has been stated that even if the Court does not enter a default judgment for failure to comply with Rule 12 (a) deadline for filing an Answer, the Court can order the Defendant or the attorney to pay the Plaintiff's cost of Motions filed as a result of failure to file a timely Answer, **61 A. Am. Jur. Ibid.**

13. Finally, a party defending a claim who fails to file a Rule 12 (b) Motion to dismiss within the time period specified by **Rule 12 (a) SCRCP**, thereby waives the right to raise such a Motion. **Op cit. Sect. 544, ,p. 437**

14. Summary and Conclusion:

1. The evidence is clear and convincing on the issues in favor of Appellant.

2. Based on the consensus of the cited authorities, cases, and Rules, Appellant submits that Respondents' neglect and failure to file and serve an Answer, Counterclaim or a timely Rule 12 (b) Motion to dismiss the Complaint, **rendered Appellant's averments as admitted,** making all of Respondents subsequent claims for affirmative defenses moot issues, null and void, and removed them as justiciable controversies between the parties.

3. Res judicata as a claim for dismissal, was permanently waived and not properly before the Lower Court which abused its discretion and committed reversible errors of fact and law by ruling res judicata, sanctions, etc., sua sponte, at the November 3, 2009 pre trial Hearing

5. **The Lower Court erred by ruling res judicata sua sponte, because Respondents waived any and all affirmative defenses permanently pursuant**

to Rules 7, 8, 12 and 15, SCRCP. (Abuse of discretion, clear error of fact and law, and clear and convincing evidence.).

1. The following discussion summarizes the argument presented in Appellants Brief, pp. 12-16. The issue of res judicata is at the heart of this appeal. It therefore appears incumbent on Appellant to briefly justify the claim for Respondents permanent waiver of any affirmative defenses to support Appellant's rebuttal of the Lower Court's abuses in this action, particularly as to its sua sponte ruling for res judicata on which the sanctions, etc, turn..

2. Actually, the question arises as to which party has the burden of proof as to Appellant's claim that Respondents' permanently waived their right to assert any affirmative defense and the right to benefit from the Court's sua sponte ruling. It has been Ruled that party pleading an affirmative defense, has the burden of proving it. **Pike vs. S.S. Dept. of Tpt'n,. 540 SE 2d 87, (2000). See also, 61 A Am.Jur. Pleadings, Sect. 298, p.250.**

3. The burden of proof cannot be upon both parties at the same time as to the same issue. Generally the party seeking the aid of the judicial process to advance its position has the affirmative, and therefore, carries the burden of proof. Typically this party is the Plaintiff (Appellant) and in most cases the party who begins. See, **Sanders and Nichols, op cit., Sect. 9.1, p. 396. See also, Am. Jur. 2d. Evidence, Sect. 124.** Accordingly, Appellant (Plaintiff) proceeds to discuss here for the Court record, Respondents (Defendants) permanent waiver of any affirmative defenses, under the Rules of procedure.

4. An "affirmative defense" is new matter which, assuming a Complaint to be true, constitutes a defense to it. An affirmative defense admits the Plaintiff has a claim, but asserts some legal reason why the Plaintiff cannot have any recovery on that claim. According to legal authority, since the Plaintiff must apprise the Defendant in the beginning as to what he relies upon for recovery, it is only right that the Defendant should be required also to inform the Plaintiff of any special or affirmative defenses he expects to make by pleading the facts constituting such defenses. **61 A. Am. Jur. Pleadings. Sect. 288, pp. 245-247.**

5. The SCRCP cited herein, provide the Rules for alleging affirmative defenses which we have shown in Appellant's appeal pleadings, that Respondents have from the outset of the case violated, either negligently or deliberately. We have noted that affirmative defenses must be timely raised in the responsive pleading or in a timely Motion for summary disposition made before the filing of a responsive pleading, and Respondents failure to do so constitutes a permanent waiver of the defense. Of particular significance to this appeal, is that a trial Court does not have a duty to sua sponte intervene and assert an alleged affirmative defense for Defendants, as it did in ruling sua sponte for a res judicata dismissal, frivolous suit and sanctions in this case. **Ibid.** We have noted herein above, that a trial judge may NOT raise an affirmative defense for the defending party, as it did in this case **Op cit, Sect. 300. p. 251**. The Lower Court Ruled res judicata, frivolous suit and sanctions sua sponte, prejudicing Appellant and favoring Respondents who did not file, serve or give notice to Appellant of written or verbal Motions for such affirmative defenses at the pre trial Hearing on November 3, 2009. See, **Transcript (R. pp. 55-73)**

6. **The purpose of the cited Rules is to prevent an unfair surprise at trial, Ibid**. The legal sufficiency of an affirmative defense is decided on the bass of the pleadings alone. **61 A. Am. Jur, .Pleadings, Sect. 366, p.277**. Respondents abandonment of its untimely filed and served Rule 12 (b) (40(5) Motion to dismiss and lack of any other formal Motions at the November 3, 2009 Hearing when Appellant was presented with a complete unfair procedural violations with "surprise" (Rule 60 (b)(1) SCRCP) to Appellant who was prepared to argue the three pending Motions: Appellant's declaratory judgment, Motion to continue date, and Respondents Rule 12 (b) (4)(5) Motion to dismiss, not res judicata, unconstitutional frivolous suit or sanctions without proper procedural notices, etc.

7. The Lower Court's sua sponte rulings were presumably predicated on an incorrect assumption of Appellant's consent to Respondents' surprise oral arguments and abandonment of its Motion without proper notices and service, etc..Appellant did not consent and objected. (**Transcript, pp. 55-73**).

8. As noted herein above, an affirmative defense is waived unless it is presented by Motion before the pleading, affirmatively in the responsive pleading, or by

an amendment. Affirmative defenses that are neither pled, nor tried by consent, are deemed waived. **Ibid.** As noted herein, Respondents violated all of the Rules of procedure, Even though it may appear to be within the evidence, when a party fails to raise a defense, it is waived, which waiver is granted res judicata effect. The purpose of the civil Rule requiring assertion of certain defenses in responsive pleadings is to present, define, and isolate the controversial issues. **61 A Am Jur. Pleading, Sect. 249. p. 228** An omitted affirmative defense is lost. **D & d Leasing Co., vs. Lipson, 305 S.C. 540, 409 SE 2d 704 (Ct. App. 1991); Sierra vs. Skelton, 307 SC 217, 414 SE 2d 169 (Ct. app. 1991).** A party may not raise an unpleaded issue when it would substantially prejudice the other party, as is the case here. **Oyler vs. Oyler, 293 SC 4, 358 SE 2d 170 (Ct. App. 1987).**

9. **Rule 10, (b) SCRCP** states that affirmative defenses are stated separately. **And Rule 8 (d)** automatically denies the allegations of the affirmative defense. **Rule 12 (b)** defenses are waived if not raised in the first Motion or pleading. **See, Flanagon, Chapt. 12, p.86.** For all practical purposes the responsive pleader (/Respondents) must use or lose the waivable Rule 12 (b) defenses. **Ibid.**

10. We have shown that Respondents Rule 12 (b) (4)(5) Motion to dismiss (personal jurisdiction, etc), was timely filed (15 months after the service of the Complaint, and three days before the trial date), and the res judicata implied argument was considered by the Lower Court 18 months after service of the Complaint. Neither argument was raised before the Court within the 30 days period for response after service of the Complaint. In any case the Rule 12 (b) Motion was entirely without merit. See, Appellant's First and Second Memoranda **(See, Tr. pp. 250, 269)**

11. If the Defendant (Respondents) does not file an Answer on time, the Plaintiff (Appellant) may have the Court take notice of the default. To vacate the entry of default, a showing of good cause for the failure to Answer must be made. **Ibid.** Appellant duly filed a Motion for Entry of Default and Default Judgment **(see, R. pp. 229-249).** At the November 3, 2009 Hearing, the impatient, antagonistic Lower Court judge denied Appellant the opportunity to argue the Motion for default (and the other three pending Motions) and permitted Respondents to escape their need to show good cause for their failures to file an Answer, Counterclaim, and affirmative defenses. (See. Tr. pp. 55-73)

12. Summary and Conclusion:

1. The cited evidence, authorities and cases are clear and convincing that Respondents waived their right to assert affirmative defenses, and in any case such assertions are moot issues for disposition of the Court.

2. Respondents violated Rule 8 (c) SCRCP by failing to set forth affirmatively the defense of res judicata specifically, or any other matters constituting an avoidance or affirmative defense in an Answer and Counterclaim to the Second Case Complaint. Respondents violated Rule 6 (d) SCRCP by not filing or serving a written Motion asserting dismissal on the affirmative defense of res judicata, nor even filing an oral Motion with particularity at the pre trial Hearing on November 3, 2009, some 18 months after service of the Complaint.

3. Respondents filed their Rule 12 (b) (4)(5) Motion to Dismiss some 15 months after service of the Complaint and three days before the trial date. Respondents unilaterally abandoned their Motion at the Hearing, and the Lower Court permitted Respondents instead to discuss unrelated litigation before the S.C. Public Service Commission dating some ten years, presumably implying a res judicata defense without filing any oral or written Motion or notice to Appellant. As noted, this was unfair and a surprise to Appellant who was prepared to argue the four pending Motions before the Court, none of which related to res judicata of frivolous litigation and sanctions, and a violation of the law by Respondents and the Court itself.

4. The Lower Court erred in ruling sua sponte for res judicata dismissal of the suit since Respondents failed to raise the defense by Motion or responsive pleading. A trial judge may not raise a res judicata affirmative defense for the defending party.

6. The Lower Court erred pursuant to the doctrine of laches, and Respondents are liable to Appellant for related errors and damages.

1. See detailed discussion in Appellants **Brief, pp. 16,17**; also see, Appellant's **Second Memorandum, Item 4, (R. pp. 270,271)** After neglecting to file and serve an Answer and Counterclaim and a timely affirmative defense, as noted above, Respondents sat on their hands and came to the Court with unclean hands 14 months after service of the Complaint; pursuant to Rule 6 (d) and 12 (a) SCRCP, Respondents filed an

untimely and improper Rule 12 (b)(4)(5) Motion to Dismiss three days prior to the trial date.

2. The Complaint in this action was duly filed on **May 30, 2008**, and duly served on Respondents on or about **July 29, 2008**. see, Appellant's First Memorandum, **(R.p.256-260).** As noted, Respondents neglected to file an Answer or Counterclaim.

3. On **August 7, 2009** some 14 months later, Respondents served a Rule 12 (b)(4)(5) SCRCP Motion to Dismiss on Appellant. On **August 6, 2009**, Appellant filed a Motion for Entry of Default, for Default Judgment; for Partial Summary Judgment. **(R. pp. 229-249).** On **August 10, 2009**, following a Hearing on that date, the Court granted Appellant a continuance on two Motions to be heard in November 2009. See, Form 4 Judgment dated August 10, 2009 **(R. p.7).** In all here were four Motions to be heard in November 2009, none of which were for res judicata or any other affirmative defense. Additionally, the Court verbally instructed Appellant to file memoranda addressing the issues raised by the parties during the discussion on Respondents' Motion to dismiss.

4. Accordingly, Appellant duly filed two memoranda – the cited First and Second Memoranda. **(R. pp. 256,269**). A Hearing was held on November 3, 2009, None of the four Motions pending before the Court was heard, due to the conduct of the Hearing by an impatient, antagonistic judge and Respondents abandoning their Rule 12 (b) Motion to Dismiss (probably because it was without merit)..The Lower Court dismissed the case sua sponte on gross abuse of discretion errors of law and fact, citing res judicata, frivolous suit and sanctions for Appellant's alleged "vexatious" pleadings based on Respondents oral discussion without any exhibits or supporting evidence presented, etc...

5. With respect to this claim for Respondents liability to Appellant under the doctrine of laches, the foregoing discussion refers to Respondents delay sitting on their hands and coming to the Court with unclean hands violating the cited Rules of procedure in filing and serving their Rule 12 (b) (4)(5) Motion to Dismiss filed on or about **August 4, 2009**, some 14 months after service of the Complaint, and three days before the trial date.

6. Respondents knowingly and deliberately abused the judicial process: Rule 6 (d) SCRCP requires written notice of a Motion ten days before the time specified for

the Hearing on August 10, 2008; i.e., by August 1, 2008 instead of August 7 ,2008. If there is not notice, then an affirmative defense is not adequately pleaded as in this case where Respondents offered no good cause for being 14 months late and three days before the trial date. See, **61 A Am. Jur. Pleading, Sect. 287, p.244.**

7. As reported herein, Respondents violated Rule 7 (a) and Rule 12 (a) (b) by not filing and Answer, Counterclaim and affirmative defense; Rule 8 (a)-(d) SCRCP as to pleading and permanent waiver of their affirmative defense; and Rule 5 (b)(1) by not filing notice of the Motion with all of the Plaintiffs , the parties of record in this action. These and related procedural defects are discussed in detail in Appellant's First Memorandum **(R. 253-260)**

8. Respondents Unclean Hands: Respondents engaged in prejudicial surprise procedures on three counts:

1. Respondents serving a Rule 12 (b) Motion to Dismiss just three days (instead of ten) before the august 10, 2008 trial date was a "surprise" preventing Appellant from preparing a rebuttal, resulting in the Lower Court requesting Appellant to prepare a memorandum. See First and Second Memoranda cited.

2. The second surprise occurred when Respondents unilaterally abandoned their Rule 12 (b) Motion to Dismiss at the November 3, 2009 pre trial Hearing without oral or written notice to Appellant.

3. The third surprise occurred when in lieu of arguing their Rule 12 (b) Motion, Respondents commenced to orally present a long discussion of prior litigation involving the S.C. Public Service Commission, presumably as an implied request for res judicata.

4. The test of prejudicial surprise in these three situations is whether Appellant had a fair opportunity to defend against Respondents surprise procedures which may be found if Appellant did not have an opportunity to present evidence on the issues not in the record that he would have introduced had the issue been properly pleaded and the fact that Appellant had no notice or knowledge of the issue prior to trial. See. **61 B. Am.Jur.,2d. Pleading or Surprise, Sect. 827..**

5. Clearly, these prejudicial "surprises" are convincingly abuses of the judicial process by Respondents, condoned by the abuse of process and clear errors of law and fact by Lower Court. See also, **Rule 60 (b)(1),**

6. Respondents abandonment of their Rule 12 (b) Motion (unclean hands): There were four Motions to be heard at the November 3, 2009 pre trial Hearing: three from Appellant and Respondents untimely, waived Rule 12 (b) Motion to Dismiss which they abandoned.. If we consider that the abandonment of the Motion was a de facto withdrawal then the technical question arises: Did Respondents abandonment of their only Motion before the Court, leave Appellant's Motion for Default Judgment the only Motion of record before the Court for adjudication, notwithstanding the Court sua sponte raising the res judicata issue instead, which had been permanently waived by Respondents and could not be offered by the Court on behalf of the Defendant.?

7. Both the Court and Respondents simply ignored the existence of the said Motion and Appellant was denied an opportunity to address the issue before the Court. It is stated that a mutant's failure to proceed on a Motion, or when no ruling has been made on it, or where the movant acts in a manner which is not consistent with the object of the Motion, may result in the Motion being abandoned. The effect of a withdrawal of a Motion is to leave the record as it stood prior to the filing as though the Motion had never been made. **56 Am Jur. 2d. Motions, Rules, and Orders, Sect. 32, p.32,**

8. It is stated that when either party files a timely request for a Hearing on a Motion that may be dispositive of a claim or defense, the Lower Court generally must provide an oral Hearing and **adequate notice** of the time, place and nature of that Hearing before entering an order that is dispositive of a claim or defense. **Ibid.** Once a request for a Motion Hearing has been granted, and the matter set for a Hearing, the other party may have a right to rely upon such setting regardless of whether it made its own request. **Ibid.**

9. Appellant was denied argument against Respondents Motion and in support of his own three Motions; disposed of res judicata as an affirmative defense, and disposed on Appellant's Motions in his favor.

9. The evidence is clear that the Lower Court's conduct of the Hearing and abuse of discretion of these issues constitute reversible errors of law and fact and Respondents are liable to Appellant under the doctrine of laches. Based on the facts of this case, Appellant claims that Respondents sat on their hands, and came to the Court with unclean hands. Further that the Lower Court's judicial conduct in handling of the issues at the November 3, 2009 Hearing constitutes a violation of and compromised Appellant's constitutional rights to due process and equal protection of the law.

10. Finally, Appellant respectfully submits that Respondents late filing of their Rule 12 (b)(4)(5) Motion to Dismiss 14 months after service of the Complaint three days prior to the trial date,, the surprise abandonment of the said Motion and implied discussion of the waived res judicata affirmative defense, amounts to vexatious frivolous litigation and Respondents are liable to Appellant and the Court under that law.

7. **The Lower Court erred because the (Second Case) Complaint had not been previously dismissed as claimed by Respondents, and there were no prior dispositions by any Court at any time, anywhere, of the averments filed in the Complaint for the first time. (Abuse of discretion, error of law and fact.)**

1. On two separate occasions, Respondents first misinformed the Lower Court that the Second Case No, 2008-CP-17-180, had been concluded. At the **August 10, 2009** (trial date) Hearing on Respondents Rule 12 (b)(4)(5) Motion to dismiss, following discussion when Appellant pointed out to the Court that no judge, any where, at any time had dismissed the case,, the Court instructed Appellant to file a memorandum on the issues because he "needed to know more about the case." Appellant filed the First and Second Memoranda referred to herein. **(R. pp. 250-260; pp. 269-294.)**

2. **The Second Memorandum** addresses the issue of the dismissal of the case, (See, **R. pp. 272-274, Items 2, 3.**); Respondents Rule 12 (b) Motion to dismiss. (See, **R. pp. 282-283, Item 5**); and Respondents failure to file an Answer and Counterclaim to the Complaint..(See, R. **pp. 275-276; p 275, Item 4; p. 276, Item 2; p.277, Item 3).**

3. As noted herein above, the Complaint had never been dismissed. (See, **Form 4, Orders, (R. pp. 3-8).** The only case "ended" was First Case No. 2004-CP_17-232 (for an alleged disputed debt collection) by Judge Lockemy on July 25, and August

12, 2009. The case was filed on or about July 9, 2004 and had to be continued because of Mrs. Weaver's three cancer afflictions and eye problems since 2004.**(R.pp. 6, 8).**

4. The second incorrect claim was made during the November 3, 2009 Hearing. (see, **Transcript, p. 64, lines 4-14**). Respondents cited Judge Lockemy's ruling: "the case is over",.(the First Case, not the Second Case). (See, F**orm 4 Order, August 12, 2009, p.p. 6.8),** referring the case back to Judge Paul Burch's Form 4 Order of February 28, 2008 **(R. p.4**) dealing with Respondents compliance with the First Case Settlement Agreement violated by Respondents, within 45 days, which Respondents violated in contempt of Court and taking 7 months thereafter to comply. For this they must be held accountable.

5. Res judicata was never at issue, as the First Case issues and claims were settled and never were addressed by any Court. Certainly no Court ever ordered that Respondents had complied with the Mutual Release conditions or Judge Burch's order.

6. Finally we address Respondents misleading and evasive testimony at the November 3, 2009 Hearing, and the presiding judge's incorrect, impatient and biased ruling that the Second Case issues had been Ruled on, relating to Judge Kockemy's order. (see, **Transcript, p.67, lines 4-23**) In summary:

"The Court: tell why it took seven months as Mr. Weaver said, to turn on the power, when it should have been turned on previously, again, that is his position.

Mr. Buyck: Your Honor, I would be happy to give you a detailed response to that question. However, I will refer you to Judge Lockemy's Order from June 2008. **(Note: there was no such order)**

The Court: All right.

Mr. Buyck: and it was our position them and now ...

(Here, the Court interrupted, and counsel did not complete the statement or the explanation for why they did not comply with Judge Burch's order to install electricity within 45 days of the order for 7 months in response to Appellant's Notice of Non compliance with a Court Order dated April 14, 2008 (R- p.144.))

The Court: Very good. Thank you. That matter has been litigated and Judge Lockemy has Ruled on it."

7. Counsel never Answered the Court's question as to why Respondents did not comply with a Court order. Counsel would have the Court believe that Judge Lockemy Ruled on that issue and the Second Case Complaint issues. The only thing Judge Lockemy Ruled on was to end the misunderstandings concerning the status of the First Case No. 2004-CP-17-232, ending it. (R. **pp.6)** He deferred the Settlement Agreement issue to Judge Burch's rulings of February 28, 2008 which ordered Respondents to connect electricity within 45 days or face contempt of Court.

8. Respondents failed to do so, and this Complaint on Appeal, is an attempt to hold them accountable for breach of agreement, fraud, contempt of Court and non compliance with a Court order; issues which no judges have ever Ruled on to this day. Where an issue is as stated by the decree of the Court undetermined on the ground that it was unnecessary to pass on it, it is not res judicata. See, **Hunter vs. Hunter, 41 S.E. 33, 63 S.C. 58, 90. Am. St. Rep. 663.** The Lower Court clearly abused its discretion on this and related issues. And there is clear error of law and fact, not to mention Respondents abuse of process. The trial Court' exercise of discretionary power is subject to appellate review, and the term "abuse of discretion" means only that the ruling of the trial Court was without reasonable factual support, resulted in prejudice to the rights of Appellant, and therefore amounted to error of law See, **Bridges vs. Wyandotte Worsted Co., 121 S.E. 2d 300, 239 S..C. 37.**

9. It has been Ruled that in order to justify the dismissal of a Plaintiff's (Appellant) pro se Complaint, it must be beyond doubt that the Plaintiff (Appellant) can prove no set of facts in support of his or her claim which would entitle him to relief. **Taylor vs. Vermont Dept, of Educ. 313 F.3d 768, 172 Ed. Law Rep. 87 (2d Cir. 2002)** Appellant respectfully submits that he has presented an abundance of facts, law and arguments in support of his claims herein.

8. **The Lower Court's sua sponte ruling to dismiss the suit as frivolous litigation and to impose improper sanctions was barred by the preponderance of evidence, and the Court's violations of the procedural requirements of the S.C. Frivolous Civil Proceedings sanctions Act (SCFCPSA)**

1. See Appellant's **Brief, pp. 39-43**, for detailed discussion of these issues. The Lower Court imposed the sanctions on appeal based on its confused understanding

of the two cases referred to in this action. See, **Transcript, R. p.69, line 24.)** As noted above, the **S.C. 1976 Code Ann. Sect. 15-36-10 (D). of the SCFCPSA,** provides that a person is entitled to 30 days notice and an opportunity to respond before the imposition of sanctions, etc. **Appellant was not given any written or verbal notice of this issue, nor a 30 day opportunity to respond to the allegation, either by the Lower Court or Respondents.**

2. **Subsect. C. 1** of SCFCPSA provides that at the conclusion of a trial, upon Motion of the prevailing party the Court shall determine if the claim or defense was frivolous. Under **Subsect, C.2**, SCFCPSA, a party shall not be sanctioned unless the Court finds a preponderance of the evidence that a litigant engaged in advancing a frivolous claim or defense. It has been Ruled that the SCFCPSA does not allow a judge to invoke its provisions, sua sponte; it clearly requires a proper Motion to be made by the aggrieved person. See, **Pool vs. Pool, 328 S.C. 324, 494 SE 2d 820 (S.C. 1998).** Respondents did not file any such Motion, but before the Hearing commenced, counsel did in fact approach Appellant and offer not to file for sanctions if the case was settled. Instead the Court ruled and imposed sanctions and Appellant submits the matter requires an official investigation.

3. Pursuant to **Subsect. B. 2** of the SCFCPSA, the Court "upon its own Motion, or Motion of a party may impose upon the person in violation, any sanction which is proper under the circumstances. Since imposition of sanctions is a decision of the judge, not the jury, it sounds in equity rather than the law, /see, **Kilcawley vs. Kilcawley, 312 SC 425, 440 SE 2d 892 (Ct. App. 1994).** In reviewing sanctions in issue, the Appellate Court may take its own view of the preponderance of the evidence. **Ibid.**

4. In **Pool vs. Pool,** the Court points out that the record contains no argument made by the husband that the wife's claim was frivolous. **Op cit**. We have the same situation here. The record shows that Respondents made no Motions or argument at any time during the November 3, 2009 Hearing or before that Appellant's claims were frivolous. The Lower Court did so on misinformation and its own confusion about the issues in the two cases involved in this action. The Court in Pool goes on to say: "Rather the evidence indicated the frivolous issue was brought up by the judge. Moreover, nowhere in the record, including the judge's order, is there mention of the SCFCPSA."

Op cit. Again, we have the same situation in this case. The Lower Court judge introduced the alleged frivolous suit issue and at no time was there any mention of the SCFCPSA.

Further the Court states that because the record would not allow an appellate Court to conclude an award was proper under SCFCPSA, the Court of Appeals erred in affirming on these grounds.

5. The preponderance of the evidence issue: The Court Ruled Appellants Complaint ,etc, to be repetitive and frivolous; volitive (sic) of the previous Court orders. **Transcript (R.p.69, line 24).** Appellant respectfully submits that it is self evident from the preponderance of the evidence in the record, that his filings were very serious indeed and anything but frivolous as defined in SCFCPSA and alleged by the Court sua sponte in violation of the Act. The question is whether or not this finding is supported by the evidence. It is not ! The evidence clearly documents that Appellant was not "volitive (sic) of the previous Court orders."

6. Regarding the "repetitive" claim, it is possible for two cases to have common issues but two different causes of action involving the same parties as in this situation. For example, Respondents violation of the Settlement Agreement and contempt of Court in the First Case, does not appear as a claim or issues in the First Case, but is the "raison d'etre" of the Second Case. None of the previous Court orders addressed the issues or averments alleged in the Second Case Complaint. The said Complaint was filed specifically to adjudicate Appellant's serious claims that Respondents violated the Mutual Release in contempt of Court in the First Case, and res judicata was inapplicable. Nothing in the averments was frivolous. It has been stated that if there are claims and evidence worthy of being submitted to a jury, the claims cannot be frivolous within the meaning of the Act. See, **Hanahan vs. Simpson, 326 SC 140, 485 SE 2d 903 (1997).**

7. **Subsect. (C) (1) (a) (b) and (c) of the SCFCPSA** provides three tests for determination of whether Appellant's filings were frivolous. The evidence shows that none of these three tests apply to Appellant's Complaint and action, and hence they are not frivolous.

8. The preponderance of the evidence presented in this and other briefs pertaining to previous Court orders clearly documents that Appellant did not make any

frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts or were not warranted under the existing law. **Subsect. (A) (4) (iv), (b) & (c).** No documents were signed in violation of Subsection A.4; neither the Court nor Respondents filed any SCFCPSA Motions

9. Summary and Conclusions:

1. The Lower Court order should be vacated on the Court's procedural violations and the sanctions cancelled.

2. As the aggrieved party, Respondents did not file a written or oral Motion seeking sanctions.

3. The Court Ruled sua sponte on erroneous grounds and violated the SCFCPSA conditions under Code **Sect. 15-36-10 (D) (C**

4. No notice was given to Appellant who did not have 30 days and an opportunity to respond.

5. The SCFCPSA act does not allow a judge to invoke the act sua sponte; it requires a proper Motion to be made by the aggrieved party or the Court.

6. The three tests under **Subsect (C) (1) (a)- (c)** for determining a frivolous question, did not apply to Appellant's action.

7. The Lower Court never applied any factor under **Subsect. E** of SCFCPSA to determine frivolity.

8. Last but not least, Respondents violated the SCFCPSA act and laches by filing an untimely Rule 12 (b) (4)(5) SCRCP Motion to Dismiss and then abandoning it at the November 3, 2009 Hearing and the belated discussion on implied res judicata without oral or written notices condoned by the Lower Court. Sanctions should be imposed on Respondents..

9. The Lower Court erred in ruling a "hybrid" civil/criminal contempt of Court with sanctions, denial of Appellant's constitutional rights, in .abuse of discretion, and clear error of law and fact, and the preponderance of the evidence leading to reversible error.

1. In incorrectly ruling a fallacious res judicata and frivolous litigation, awarding sanctions, and threatening Appellant with 90 days in jail, the Lower Court showed bias, prejudice and an antagonistic, hostile attitude towards Appellant that was

evident from the outset of the Hearing on the case. See, transcript **(R, p.70, lines 1-15)**. The Court criminalized a civil suit with threatened contempt of Court.

2. The question arises whether the unconditional contempt of Court threatened by the Lower Court, is a civil or criminal contempt or a "hybrid" ruling as determined in other cases. This deals with Appellant's constitutional rights and the standards for review to be applied. If Appellant does not pay the said legal fees (assuming they are legitimate) is that to be deemed a civil or criminal contempt of Court involving Appellant's constitutional rights including the right to jury trial if criminal charges are to be imposed?

3. First, we note that it is the Lower Court ruling sua sponte for res judicata which legal authority says it cannot do, especially without notice, etc., for a frivolous suit and sanctions, and a threatened prison term for Appellant. Respondents did not file any oral or written Motions requesting any of those rulings, and is **therefore not a complainant seeking redress,** but merely the beneficiary of the Lower Court's sua sponte rulings.

4. **Poston vs. Poston, 441 S.C. 106, 502 S.E. 2d 86 (1998)** discusses the issues raised. The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. **17 Am. Jur. 2d Contempt, Sect. 9 (1990).**

5. The purpose of civil contempt is "to coerce the Defendant to do the thing required by the order for the benefit of the complainant." **Poston, op cit, p.2.** If it is for civil contempt, the punishment is remedial, and for the benefit of the complainant. **Ibid.** In this case the order is to pay fees to an attorney under threat of imprisonment, who was not a complainant, but the beneficiary of the Court's sua sponte ruling. If the case is civil contempt, attorney's fees may be sanctioned. If it is criminal contempt, generally the fees may not be assessed. **Poston, op cit, p.14.** Since this is a punitive sanction imposed by the Court, the said fees should not be assessed on this and other grounds discussed elsewhere in this brief. See, **Court Order dated November 25, 2009, page 4, Item 3, line 7: stating the order is issued pursuant to " the Court's criminal contempt powers." (R. p. 13).**

6. The primary purposes of criminal contempt are to preserve the Court's authority and to punish for disobedience of its orders. **17 Am. Jur. 2d Contempt, Sect. 9 (1990). p. 3**. An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in nature..." **Ibid**. If the relief provided for contempt is a sentence of imprisonment, it is punitive if the sentence is limited to imprisonment for a definite period. **Ibid. p.4.**

7. In civil contempt cases the sanctions are conditioned on compliance with the Court's order; the conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do. **Ibid. p.5** Here, the threatened prison term is unconditional, and Appellant would have to serve the full term of 90 days if he refuses to pay the fine, before, during or after sentencing.

8. **Civil contempt must be proven by clear and convincing evidence.** Willfulness of the violations must be shown by clear and specific acts or conduct. In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt.**Ib. p.. 6.**

9. In a civil contempt proceeding, the award of attorney's fees is not a punishment, but an indemnification to the party who instituted the contempt proceedings. **Ibid.p. 6.** Here, it is the Lower Court that sua sponte, instigated the imposition of attorney's fees as a punitive sanction and imprisonment, on faulty reasoning of facts and law, not the Respondents as complainants; so assessing fees may reasonably be considered as a punishment rather than an indemnification since Respondents did not seek attorney's fees; the Court acted on its on initiative in a biased pre-meditated uninformed and confused manner; so this imposition of fees and prison is punitive not indemnification, by definition and fact.

10. **In Ex parte Griffin, 682 S.W. 2d 261, (Tex. 1984),** a $104,000 fine and a sentence to jail for 30 days was a **serious offense** entitling the contemnor to a jury trial. A civil contempt proceeding des not require a jury trial. **Shillitani vs, U.S., 384 U.S. 364, 86 S.Ct. 1531 (1966).** The Shillitani test to determine whether contempt is \civil or criminal is: **"What does the Court primarily seek to accomplish by imposing the sentence?"** <u>In this case, it was punitive by Court order, not remedial</u>.

11. From **Poston**, we note that that it is impossible to determine whether the alleged contempt and sanctions in this case, are criminal or civil. The Court's contempt order is not clear, although it states as cited, the sanctions are punitive by power of the Court. **(R.p.13).** The cited order is "hybrid" as defined by this Court, because the sanctions have characteristics of both civil and criminal contempt, if Appellant does not pay the fees within 30 days.

12. The potential sentence of 90 days imprisonment is for a definite period. But it will not be imposed unless and until Appellant violates the order to pay the fees which is at issue. This is a characteristic of civil contempt because Appellant can avoid the prison sentence by complying with the order to pay the fees within 30 days of the order. If he does not so comply, he goes to jail without any provision to reduce the prison term by complying with the order subsequent to incarceration. Clearly this is punitive.

13. As noted the Lower Court's order is explicit as to its punitive intent. See, **Transcript, R. p.71, lines 1-15.** Thus the purpose of the contempt sanction is to coerce Appellant to comply with the order and to punish Appellant if he violates the order as stated. This is both civil and criminal contempt as defined by the Courts, and "hybrid.".

14. the Lower Court order can be read as imposing a sanction on appellant for future alleged violation of the order without any determination by a tribunal that Appellant willfully violated the order on that future occasion. By punishing Appellant for future violations without first holding a Hearing to determine if Appellant willfully violated the order, the Court could potentially violate Appellant's due process rights under the **14th Amendment of the U.S. Constitution, and Article 1, Sect. 3 of the S.C. Constitution. See, Poston op cit, p 14., citing Bloom vs. Illinois, 391 U.S. 194, 88 S.Ct. 1477 (1968)**

15. Further constitutional questions and issues arise: Criminal penalties may not be imposed on someone who has not been afforded the protections the U.S. Constitution requires for such proceedings. **Poston, op cit, p.14, citing Hicks vs. Felock, 485 U.S. 632, 18 S.Ct. at 1429-30.** Due process requires a person shall have a reasonable opportunity to be heard before a legally appointed and qualified, impartial tribunal before any binding order can be made affecting his rights to life, liberty and property. **See, State vs. Brown, 178 SC 294, 182 SE 2d 838 (1935), app. dismissed by**

298 US 639, 45 S.Ct.750. Due process requires notice and an opportunity to be heard. See, **16 A. Am. Jur. 2d Constitutional Law, Sect, 812 (1979).** Appellant cannot be punished for violating the order in the future unless the willfulness of the violation is shown by clear and specific acts. Additionally, as noted herein above, Respondents have not provided notice or an opportunity to be heard in ruling for a frivolous suit sanctions.

16. If the Court determines that this case is defined s a criminal contempt case, then as may be appropriate, pursuant to **Poston** and **Ex parte Griffen**, supra, it should be set for a jury trial if such is necessary at all, given the other issues and relief raised.

17. Summary and Conclusion..

1. The Lower Court has violated Appellant's U.s. and S.C. Constitutional rights to due process by not providing notice or an opportunity to be heard on two issues the alleged fraudulent sanctions and the contempt of Court issue. If in the future, Appellant violates the Lower Court's order, a new contempt proceeding must be initiated along with the frivolous suit issue.

2. A criminal contempt case involves the issue of a jury trial; a civil contempt issue does not. An order should be issued by a Court clarifying intent, and setting forth an alleged contempt of Court in this case as either clearly civil or criminal pursuant to the above argument..

3. The imposition of a sanction for Appellant to pay attorney's fees is punitive, a violation of the American Rule, the SCFCPSA, and the two constitutions, issued sua sponte. The fees are punitive not an indemnification to counsel or Respondents who were not the party complainant seeking sanctions, or who instigated the contempt proceedings.

4. The facts and law of this case did not warrant the sua sponte award of fees, nor threatened prison for a future criminal/civil case.

5. The burden of proof in an alleged criminal contempt proceeding is on the State to prove the contempt beyond a reasonable doubt, which the Lower Court failed. See, **State vs. Bowers 370 S.C. 124, 241 Se 2d 409 (1978)**.

x. **The Lower Court's judicial conduct at Hearing on November 3, 2009, was clearly biased, prejudiced, impatient, pre-arranged, and a hostile attitude, and a violation of Canons 1,2 & 3, Rule 501, Judicial Conduct, SCACR.**

1. Appellant respectfully submits that the Lower Court's judicial conduct at Hearing of the presiding judge was incompetent based on his rulings and documented confusion of the facts and the law, and in violation of the cited. Canons See, **Commentary, Canons 1, 2A, 3, 3B (2),(4)(5); Commentary, #, B (7) and 3 b (8) of Rule 501, Code of Judicial Conduct.**

2. The Lower Court deferred Hearing of the case until the end of the calendar for the morning and getting late towards lunch time (11, 25 a,m,) From the outset of the Hearing the presiding judge gave Appellant the clear, distinct impression of impatience. bias and hostility, contrary to the attitude of previous judges, Burch and Lockemy. See, T**ranscript, (R. p.57, lines 14-21; p.57.lines 22-25, and p.58, line 12,)** . .

3. Appellant thought the Hearing was to dispose of four Motions pending before the Court, including Respondents' Rule 12 (b)(4)(5) SCRCP Motion to Dismiss. At the first invitation of the Court, Respondents abandoned their Rule 12 (b) Motion without any prior notice, and the Court permitted Respondents to commence discussion for what appeared to be res judicata, without any prior written or oral Motion filed with the Court. (**Transcript, R. p.58, line 14).**

4. This lack of diligence was the Court's first violation of due process, the Rules of procedure , the law. and the cited Canons herein above requiring the Court to uphold and be faithful to the laws and Rules, etc.

5. Appellant immediately took note that the Court referred to him as the "Defendant" in the case, whereas in fact he was the Plaintiff. This was the first of the Court's numerous confusions during the Hearing. (**Transcript. R. p.58, line 10).** This mind set and bias prevailed throughout the subsequent conduct of the Hearing, wherein the Court treated Appellant as if he were the Defendant in the First Case No. 2004-CP-17-232, instead of the Plaintiff in the Second Case No. 2008-CP-17-180 before the Court. **(Transcript r. p.71, line 24).** Counsel for Respondents mainly improperly and inappropriately argued the First Case and never mentioned their Rule12 (b) Motion in the Second Case before the Court. This bias and prejudice perpetrated and condoned by a clearly impatient Lower Court persisted throughout the conduct of the Hearing cut short by the judge's impatience and violation of the cited Canons.

6 .The Court's prejudice and clear confusions with the two cases and related orders at issue manifests itself in the course of the Hearing. See, **Transcript, R. p.64, lines 17,18.** This lack of due diligence on the part of the Court as to the evidence, prejudiced Appellant. The body language and attitude of the Court again manifested itself when the Court demanded that Appellant take an oath before proceeding. While procedurally correct the manner in which the Court demanded the oath was clearly biased, prejudiced, discriminatory, hostile, and insulting to Appellant, and contrary to Rule 11 (a) SCRCP applicable to a party pro se. See, **Transcript, R. p.64, line 20.**

7. Another example of the Court's dilatory and negligent handling of the case, relates to the handling of Appellant's presentation of the Complaint in the Second Case before the Court. The Complaint discussion was prematurely terminated by the impatient Court that **clearly had no idea what the Complaint was all about**. The Court's body language and attitude was that of impatience. The abruptness of the ending of the Hearing because of the Court's impatience and bad manners, and its sua sponte declaration of res judicata was clearly pre-arranged, premature, not to mention improper and a violation of the Rules and cited Canons. No reference to Respondents Rule 12 (b) Motion was made, nor to Appellant's three Motions pending before the Court, prevented by the Court's impatient termination of the Hearing. The Court had clearly made up its mind in advance and on the basis of insufficient and unquestioned misleading oral testimony of Respondents, and its confused state of mind as to the two cases improperly brought under discussion. No evidentiary materials were examined or filed with the Court.

8. The Lower Court was unfaithful to the law, did not comply with the law and the Rules, was impatient, unfair, biased, prejudiced, antagonistic and lacked due diligence in the negligent conduct of the Hearing. Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case. Bias and prejudice are included within the right to a fair trial guaranteed by the due process clause of the **5th Amendment to the U.S. Constitution. 46 Am. Jur. Judges, Sect. 146, p. 242.** The judge's trial conduct and the record in this case clearly document the Lower Court's bias and prejudice. Any tribunal permitted by law to try cases in controversies must not only be unbiased, but must avoid even the appearance of bias. **Op cit., Sect. 160, p.255.**

9. Conclusion: Refer the case to the **Commission on Judicial Conduct** for review and disciplinary action as may be appropriate pursuant to **Rule 502, Judicial Discipline.**

CONCLUSION

The purpose of this Appeal is to seek a reversal of the serious travesty of justice perpetrated by the Lower Court' documented unconstitutional violation of due process and equal protection of the law, abuse of discretion, clear errors of fact and law, bias and prejudice in the adjudication of this case at the November 3, 2009 Hearing. Based on the factual and procedural evidence and legal arguments presented herein, Appellant respectfully submits to this Court, that a reasonable person can only logically conclude that the presiding judge in the Lower Court was either incompetent or had an agenda at the November 3, 2012 Hearing. For the reasons stated herein above, Appellant respectfully seeks the following relief from the Court.

1. Pursuant to **S.C. Code Sect. 18-1-140, and 18-9-270**, vacate and set aside the Lower Court's Judgment and Orders on appeal.

2. Grant the relief sought in Appellant's Complaint. (R.20)

3. Alternatively, grant Appellant's Motion for Default Judgment, and grant damages, or remand the case for jury trial for damages.(R-229)

4. For the record, reverse the Lower Court's errors and omissions relating to the alleged frivolous litigation and sanctions.

5. Refer the case to appropriate authorities for investigations and reports to the Court, as to whether or not Respondents and/or their counsel engaged in any ex parte communications and any related harmful activities with the presiding Lower Court judge in this case, prejudicial to Appellant, in possible violation of any respective federal and state laws that may be applicable and take actions as may be appropriate.

6. Refer the case to the Judicial Merit Selection commission for appropriate action.

7. Such other relief as deemed appropriate by the Court.

Dated: Little Rock S.C. October 22, 2012

Gary Weaver, Appellant Pro Se
P.O. Box 539 Little Rock S.C. 29567

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the .....Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

PROOF OF SERVICE AND RULE 211 (B) SCACR CERTIFICATION

I certify that I have served Appellant's Final Brief on Mark W. Buyck III, Counsel for Respondents, by depositing a copy of same in the United States postal service, via certified mail, return receipt, postage prepaid, to his address at P.O Box 1909, Florence S.C. 29503-1909, on or before October 27. 2011. I also hereby certify that my Final Brief complies with Rules 211 (a) and (b) SCACR.

Gary Weaver, Appellant Pro Se
P.O. Box 539, Little Rock SC 29567
Ph: 843 841 1606
Fx: 843 774 2050