

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 1200349

James Provins, Employee/Deceased  
Debra Provins, Alleged Dependent,  
vs.

Spirit Construction Services, Inc.,

AND

Insurance Company of the State of PA,

CLAIMANTS

EMPLOYER,

CARRIER,  
DEFENDANTS/RESPONDENTS

**RECEIVED**  
JAN 29 2018  
SC Court of Appeals

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Appellate Panel Review held in Columbia, South Carolina,  
on November 14, 2017 per notices timely and properly served  
upon all parties of interest.

Appellate Panel Decision and Order filed  
January 11, 2018

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APPEARANCES:

Appellant /Claimant represented by Donald L. Smith, Esquire  
of Attorney Office of Donald Smith in Anderson, South  
Carolina.

Defendants/Respondents represented by J. South Lewis, II,  
Esquire of Willson Jones Carter & Baxley, P.A. in Greenville,  
South Carolina.

## STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, II, on December 5, 2016, in Anderson, South Carolina. On March 6, 2017, Commissioner Campbell issued the following Order:

**IT IS, HEREBY, ORDERED** that the claim for death benefits is denied.

No hearing costs are assessed in this instance.

**IT IS SO ORDERED.**

In his Decision and Order, dated March 6, 2017, Commissioner Campbell made the following specific Findings of Fact and Conclusions of Law:

### Findings of Fact

**IT IS FOUND AS A FACT:**

1. That all parties to this action are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with James Provins as Employee/Deceased/Claimant, Debra Provins as Alleged Dependent/Claimant, Spirit Construction Services, Inc. as Employer, and Insurance Company of the State of PA as Carrier, Defendants.
2. That Employee/Deceased/Claimant James Provins was an employee of the above-named Employer on January 24, 2012, on which date he did sustain an injury to his right shoulder.
3. That the average weekly wage of Employee at the time of the above-described accident was \$1,130.51, with a corresponding compensation rate of \$725.47.
4. Employee passed away on April 14, 2014, before he reached maximum medical improvement for his right shoulder.
5. At the time of Employee's death, he had not been released from care for his right shoulder, and was still undergoing treatment with Dr. Bonnarens.
6. There was no bad faith denial of medical treatment or unreasonable delay by Defendants. The evidence, including emails among counsel included in Defendants' exhibits, indicate that another surgery had been recommended by Dr. Bonnarens (for a recurrent rotator cuff tear) and Defendants requested medical releases be signed to further investigate causation of same. (Defendants' Exhibit A).
7. Prior to the work injury of January 24, 2012, Employee suffered from a significant alcohol abuse problem. This finding is based upon the medical records which illustrate

Employee was a long-suffering alcoholic, and drank excessively, to include beer and liquor, for the majority of his life. These records included history provided by Employee, as well as family members, such as the following:

- a. Ms. Provins, Claimant's widow, provided such a history at the time of his hospitalization/death in April 2014. "*According to his wife a long history of alcoholism...*". (See APA #18, p. 374)
  - b. An admission report from April 10, 2014, details a history of a "52-year-old male who is an alcoholic and drinks about half a pint of Vodka *every day for most of his life...*". (See APA #18, p. 234)
  - c. On July 7, 2009, Employee's sister, Ms. Zimmerman, called the police and Employee was transported to University of Louisville Hospital with chief complaint of "I'm drinking myself to death." He further reported that "I can't sleep at all unless I get drunk." It was reported that Employee was a longstanding alcoholic, who consumed 16-18 beers per day and a half a pint to a pint of liquor per day. (See APA #11, pp. 121-126)
  - d. When Employee initially began treating with Dr. Bonnarens, on April 15, 2013, he reported drinking 8-10 beers per day, and this was before his shoulder surgery. (See APA #12, p. 154)
  - e. In none of the post-accident medical reports does it indicate that Employee's drinking habits changed or increased after his work injury or shoulder surgery, which is indicative of someone who simply has been a longstanding user of alcohol, notwithstanding the work injury. The testimony of Employee's widow, Debra Provins, that the drinking only became a problem after his work injury, in response to dealing with his pain, is not supported by the history she herself provided upon Employee's hospital admission on April 10, 2014. (See APA #18, p. 374)
8. I give little weight to the report of Dr. Price. Dr. Price's opinion that Employee had "No history of pain, anxiety, depression or alcoholism prior to" the work injury is clearly refuted by the pre-injury medical records. I find that Employee did have a pre-injury history of alcoholism and depression as indicated by his suicidal threats and excessive alcohol consumption pre-injury. Even Employee's other expert, Dr. Martin, acknowledges a history of depression, suicidal ideation, and alcohol dependence.
9. Dr. Price's opinion is based on incorrect, or at a minimum flawed, facts which formed his causation opinion, including but not limited to the following:
- a. Ms. Provins told Dr. Price that Employee "developed an alcohol abuse problem secondary to his injury," but the medical records and Ms. Provins' own testimony do not support this assertion. Ms. Provins acknowledged at the hearing that she was unaware of his heavy abuse of alcohol, to include hard liquor, as far back as 2001. (11r. Tr., pp. 26-27)

- b. The information provided by Employee's sister, Alice Marie Zimmerman, that prior to his injury he was "a social drinker but had not consumed alcohol the way he did following his injury" is not supported by the pre-injury medical records. Specifically, Ms. Zimmerman herself called the police on Employee and had him hospitalized in July of 2009, at which time a history was provided that he drank 16-18 beers per day, as well as half a pint to a pint of liquor per day.
  - c. Dr. Price did not review any medical records from before the work injury, so as to ascertain a complete history of his alcohol habits.
10. Dr. Price, as a PhD and licensed clinical psychologist, is not qualified to provide a medical opinion regarding a cause of death.
  11. Dr. Martin's causation affidavit is not reliable, in that it acknowledges pre-injury alcohol abuses, but then relies on subjective history included in Dr. Price's report from Employee's attorney, Employee's widow, and his sister, in opining that his alcohol consumption worsened after the work injury. However, Dr. Martin did not review the body of medical records showing issues with alcohol abuse prior to the work injury. Furthermore, Dr. Martin's opinion cannot be reconciled with the hospital admission records in April of 2014, which outline a lifelong history of alcohol abuse.
  12. Dr. Martin's affidavit is further discredited by his reliance upon the report of Dr. Price, which, as detailed herein, contains factual errors and inconsistencies regarding Employee's pre-injury alcohol dependency. Therefore, I give little weight to Dr. Martin's affidavit.
  13. I give greater weight to the expert report of Dr. James Ballenger, who has practiced clinical psychiatry and served as a forensic examiner for over 30 years. Dr. Ballenger reviewed voluminous records and explained his opinions at his deposition. Dr. Ballenger's conclusions that Employee suffered from a progressively worsening alcoholism over the course of his adult life is consistent with the medical records, both prior to and subsequent to the work injury. I give greater weight to Dr. Ballenger's conclusion that the work injury had essentially no impact upon Employee's alcohol abuse and ultimate death.
  14. No qualified medical doctor who actually treated Employee prior to his death, or in the hospital at the time of death, provided a medical causation regarding the precise causative factors in Employee's death. Thus, we are left to rely on posthumous analysis by experts to determine whether there is any causal connection between Employee's right shoulder injury and his death.
  15. The cause of Employee's death was multifactorial, to include sepsis, respiratory failure, multi-organ decompensation, and alcohol abuse. While alcohol was certainly a contributing factor - if not a primary factor - in his ultimate death, no expert has pinned down the precise cause of death. This finding is based upon the Death Certificate (Claimants' Exhibit R, p. 685), and the "Death Summary" from the hospital at the time of death (APA #18, p. 397).

16. The testimony of Ms. Provins, Employee's widow, was not reliable as it related to Employee's history of alcohol use. This finding was based on my observation of her testimony, and comparison of same to the pre-injury medical records:
- a. Ms. Provins admitted at the hearing that she would not be around her husband for weeks at a time while he traveled for work, and she did not know to what extent he was drinking before the injury (*See* Hr. Tr. pp. 27-28)
  - b. She testified that prior to the injury, Employee was a beer drinker, but began consuming liquor in large amounts after the injury. However, this does not square with the report she provided to the hospital in April 2014, nor is it consistent with the pre-injury medical records, going all the way back to 2001, in which it was noted that Employee drank beer and hard liquor. (*See* APA #10, p. 113)
  - c. She admitted that she really knew very little about Employee's health history. (*See* Hr. Tr. p. 35)
17. The testimony of Ms. Zimmerman, Employee's sister, regarding his pre-injury alcohol use is not supported by the greater weight of the evidence in the record. While she testified that Employee did not drink alcohol excessively prior to the injury, she herself called the police on Employee in 2009, at which time it was reported he was drinking excessive amounts of beer and liquor on a daily basis. Furthermore, she acknowledged that she had no knowledge of his drinking habits when he was traveling regularly for work, but that when he was home, she saw him regularly drink beer and liquor. (Hr. Tr. pp. 46-49)
18. There is no objective evidence - only subjective history provided by Employee's relatives - that his drinking increased significantly after his work injury. In fact, Employee admitted to drinking on a daily basis prior to the work injury at the Compensability Hearing. What is more, there is not a single medical record, either with the treating workers' compensation doctors or his personal doctors/hospitals in Kentucky, which indicate that Employee's alcohol consumption increased after the work injury. To the contrary, on his admission to the hospital in April 2014, he reported that he had tried to quit drinking. (APA #18, p. 264) I decline to speculate that Employee drank more as a result of his work injury.
19. Even assuming Employee has increased his alcohol intake after - and because of - the work injury, such would not constitute a compensable work "injury by accident" or death. Dr. Ballenger testified that the act of drinking, even for an alcoholic, is an intentional one. (Claimants' Exhibit J, p. 619) Injury resulting from a willful intent to injure one's self is not compensable. S.C. Code Ann. 42-9-60. I find that Employee understood the harm his drinking was causing.
20. Employee knew, even before his work injury, that he was harming his body drinking. He told the University of Louisville Hospital in July 2009 that "I'm drinking myself to

death.” (APA #11, pp. 121-126) Under Caper v. Flautt, 407 S.E. 2d 248 (1991) an injury has to be unforeseen or unexpected to be compensable, and the medical records establish that Employee appreciated the damage that alcohol abuse was causing, including the risk of death, and had been counseled to quit drinking and seek treatment. Under the circumstances, I cannot find that his death was “by accident” as required to be considered compensable.

21. I find that it would be against public policy to hold that one’s choice to abuse a substance, which results in death, should be attributable to his employer/carrier. This would create a “slippery slope” which could result in unintended conclusions, such as an addict’s behavior being ascribed to a workers’ compensation claim.
22. Claimants have failed to prove by a preponderance of the evidence that Employee/Deceased’s death in April 2014 is causally related to the shoulder injury which occurred on January 24, 2012.
23. Defendants’ motion for costs and attorney’s fees is denied.

#### Conclusions of Law

Accordingly, as provided in § 42-17-40, S.C. Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Employee/Deceased, James Provins, was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer, Spirit Construction, was a covered employer under the Act.
2. Under § 42-1-160, Employee/Deceased did sustain an injury to his right shoulder, for which he was afforded medical treatment by Defendants.
3. Under § 42-9-290, Employee/Deceased’s death was not proximately caused by the January 24, 2012, right shoulder injury.

On March 20, 2017, within the statutory period, counsel for Claimants filed an application for review in the case setting forth his grounds for review, copies of which were furnished to all interested parties prior to oral argument presented to the Appellate Panel on November 14, 2017. By appeal, counsel for Claimant submitted the following grounds *verbatim* for review:

1. Whether the Single Commissioner erred as a matter of fact and law in finding that Claimant has not died, in part, because of the Employer’s bad faith refusal to abide by the Act and provide treatment for Claimant.

2. Whether the Single Commissioner erred as a matter of fact and law in finding that Claimant has not suffered permanent impairment to his right upper extremity prior to his untimely death.
3. Whether the Single Commissioner erred as a matter of fact and law in finding that Claimant's issues with alcohol has returned prior to the on-the-job accident, despite no evidence to substantiate the claim other than employees who maintained their job despite mass layoffs.
4. Whether the Single Commissioner erred in finding that Defendants' allegation that Claimant prevented their investigation of causation by failing to sign a HIPAA form, when the treating physician has related the second tear of the shoulder to the first tear.
5. Whether the Single Commissioner erred as a matter of fact and law in finding that Claimant's inability to "wipe his ass", maintain his career, earn a living to support his disabled wife and two daughters, necessity of borrowing from everyone to subsist, did not cause the iron worker depression.
6. Whether the Single Commissioner erred as a matter of fact and law in finding that Dr. Ballenger was credible, despite the fact that he misrepresented his payment for his testimony, the fact that he relied on testimony company employees from the initial hearing which was summarily dismissed by the sitting Commissioner, instructed the undersigned that he was the expert and knew that clear meaning of Claimant's expert's words were not what he meant with their use, etc.
7. Whether the Single Commissioner erred as a matter of fact and law in ignoring the findings of Claimant's IME performed by Dr. Dwight Jacobus, M.D.
8. Whether the Single Commissioner erred as a matter of fact and law by disregarding public policy, and finding on behalf of the defense who denied, denied, denied, until Claimant died.

#### FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. That all parties to this action are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with James Provins as Employee/Deceased/Claimant, Debra Provins as Alleged Dependent/Claimant, Spirit Construction Services, Inc. as Employer, and Insurance Company of the State of PA as Carrier, Defendants.

2. That Employee/Deceased/Claimant James Provins was an employee of the above-named Employer on January 24, 2012, on which date he did sustain an injury to his right shoulder.
3. That the average weekly wage of Employee at the time of the above-described accident was \$1,130.51, with a corresponding compensation rate of \$725.47.
4. Employee passed away on April 14, 2014, before he reached maximum medical improvement for his right shoulder.
5. At the time of Employee's death, he had not been released from care for his right shoulder, and was still undergoing treatment with Dr. Bonnarens.
6. There was no bad faith denial of medical treatment or unreasonable delay by Defendants. The evidence, including emails among counsel included in Defendants' exhibits, indicate that another surgery had been recommended by Dr. Bonnarens (for a recurrent rotator cuff tear) and Defendants requested medical releases be signed to further investigate causation of same. (Defendants' Exhibit A).
7. Prior to the work injury of January 24, 2012, Employee suffered from a significant alcohol abuse problem. This finding is based upon the medical records which illustrate Employee was a long-suffering alcoholic, and drank excessively, to include beer and liquor, for the majority of his life. These records included history provided by Employee, as well as family members, such as the following:
  - a. Ms. Provins, Claimant's widow, provided such a history at the time of his hospitalization/death in April 2014. "*According to his wife a long history of alcoholism...*". (See APA #18, p. 374)
  - b. An admission report from April 10, 2014, details a history of a "52-year-old male who is an alcoholic and drinks about half a pint of Vodka *every day for most of his life...*". (See APA #18, p. 234)
  - c. On July 7, 2009, Employee's sister, Ms. Zimmerman, called the police and Employee was transported to University of Louisville Hospital with chief complaint of "I'm drinking myself to death." He further reported that "I can't

sleep at all unless I get drunk.” It was reported that Employee was a longstanding alcoholic, who consumed 16-18 beers per day and a half a pint to a pint of liquor per day. (See APA #11, pp. 121-126)

- d. When Employee initially began treating with Dr. Bonnarens, on April 15, 2013, he reported drinking 8-10 beers per day, and this was before his shoulder surgery. (See APA #12, p. 154)
- e. In none of the post-accident medical reports does it indicate that Employee’s drinking habits changed or increased after his work injury or shoulder surgery, which is indicative of someone who simply has been a longstanding user of alcohol, notwithstanding the work injury. The testimony of Employee’s widow, Debra Provins, that the drinking only became a problem after his work injury, in response to dealing with his pain, is not supported by the history she herself provided upon Employee’s hospital admission on April 10, 2014. (See APA #18, p. 374)

8. We give little weight to the report of Dr. Price. Dr. Price’s opinion that Employee had “No history of pain, anxiety, depression or alcoholism prior to” the work injury is clearly refuted by the pre-injury medical records. We find that Employee did have a pre-injury history of alcoholism and depression as indicated by his suicidal threats and excessive alcohol consumption pre-injury. Even Employee’s other expert, Dr. Martin, acknowledges a history of depression, suicidal ideation, and alcohol dependence.

9. Dr. Price’s opinion is based on incorrect, or at a minimum flawed, facts which formed his causation opinion, including but not limited to the following:

- a. Ms. Provins told Dr. Price that Employee “developed an alcohol abuse problem secondary to his injury,” but the medical records and Ms. Provins’ own testimony do not support this assertion. Ms. Provins acknowledged at the hearing that she was unaware of his heavy abuse of alcohol, to include hard liquor, as far back as 2001. (Hr. Tr., pp. 26-27)
- b. The information provided by Employee’s sister, Alice Marie Zimmerman, that prior to his injury he was “a social drinker but had not consumed alcohol the way he did following his injury” is not supported by the pre-injury medical records. Specifically, Ms. Zimmerman herself called the police on Employee and had him hospitalized in July of 2009, at which time a history was provided that he drank 16-18 beers per day, as well as half a pint to a pint of liquor per day.

- c. Dr. Price did not review any medical records from before the work injury, so as to ascertain a complete history of his alcohol habits.

10. Dr. Price, as a PhD and licensed clinical psychologist, is not qualified to provide a medical opinion regarding a cause of death.

11. Dr. Martin's causation affidavit is not reliable, in that it acknowledges pre-injury alcohol abuses, but then relies on subjective history included in Dr. Price's report from Employee's attorney, Employee's widow, and his sister, in opining that his alcohol consumption worsened after the work injury. However, Dr. Martin did not review the body of medical records showing issues with alcohol abuse prior to the work injury. Furthermore, Dr. Martin's opinion cannot be reconciled with the hospital admission records in April of 2014, which outline a lifelong history of alcohol abuse.

12. Dr. Martin's affidavit is further discredited by his reliance upon the report of Dr. Price, which, as detailed herein, contains factual errors and inconsistencies regarding Employee's pre-injury alcohol dependency. Therefore, we give little weight to Dr. Martin's affidavit.

13. We give greater weight to the expert report of Dr. James Ballenger, who has practiced clinical psychiatry and served as a forensic examiner for over 30 years. Dr. Ballenger reviewed voluminous records and explained his opinions at his deposition. Dr. Ballenger's conclusions that Employee suffered from a progressively worsening alcoholism over the course of his adult life is consistent with the medical records, both prior to and subsequent to the work injury. We give greater weight to Dr. Ballenger's conclusion that the work injury had essentially no impact upon Employee's alcohol abuse and ultimate death.

14. No qualified medical doctor who actually treated Employee prior to his death, or in the hospital at the time of death, provided a medical causation regarding the precise causative factors in Employee's death. Thus, we are left to rely on posthumous analysis by experts to determine

whether there is any causal connection between Employee's right shoulder injury and his death.

15. The cause of Employee's death was multifactorial, to include sepsis, respiratory failure, multi-organ decompensation, and alcohol abuse. While alcohol was certainly a contributing factor – if not a primary factor – in his ultimate death, no expert has pinned down the precise cause of death. This finding is based upon the Death Certificate (Claimants' Exhibit R, p. 685), and the "Death Summary" from the hospital at the time of death (APA #18, p. 397).

16. The testimony of Ms. Provins, Employee's widow, was not reliable as it related to Employee's history of alcohol use. This finding was based on our observation of her testimony, and comparison of same to the pre-injury medical records:

- a. Ms. Provins admitted at the hearing that she would not be around her husband for weeks at a time while he traveled for work, and she did not know to what extent he was drinking before the injury (*See* Hr. Tr. pp. 27-28)
- b. She testified that prior to the injury, Employee was a beer drinker, but began consuming liquor in large amounts after the injury. However, this does not square with the report she provided to the hospital in April 2014, nor is it consistent with the pre-injury medical records, going all the way back to 2001, in which it was noted that Employee drank beer and hard liquor. (*See* APA #10, p. 113)
- c. She admitted that she really knew very little about Employee's health history. (*See* Hr. Tr. p. 35)

17. The testimony of Ms. Zimmerman, Employee's sister, regarding his pre-injury alcohol use is not supported by the greater weight of the evidence in the record. While she testified that Employee did not drink alcohol excessively prior to the injury, she herself called the police on Employee in 2009, at which time it was reported he was drinking excessive amounts of beer and liquor on a daily basis. Furthermore, she acknowledged that she had no knowledge of his drinking habits when he was traveling regularly for work, but that when he was home, she saw him regularly drink beer and liquor. (Hr. Tr. pp. 46-49)

18. There is no objective evidence – only subjective history provided by Employee's

relatives that his drinking increased significantly after his work injury. In fact, Employee admitted to drinking on a daily basis prior to the work injury at the Compensability Hearing. What is more, there is not a single medical record, either with the treating workers' compensation doctors or his personal doctors/hospitals in Kentucky, which indicate that Employee's alcohol consumption increased after the work injury. To the contrary, on his admission to the hospital in April 2014, he reported that he had tried to quit drinking. (APA #18, p. 264) We decline to speculate that Employee drank more as a result of his work injury.

19. Even assuming Employee has increased his alcohol intake after – and because of the work injury, such would not constitute a compensable work “injury by accident” or death. Dr. Ballenger testified that the act of drinking, even for an alcoholic, is an intentional one. (Claimants' Exhibit J, p. 619) Injury resulting from a willful intent to injure one's self is not compensable. S.C. Code Ann. 42-9-60. We find that Employee understood the harm his drinking was causing.

20. Employee knew, even before his work injury, that he was harming his body drinking. He told the University of Louisville Hospital in July 2009 that “I'm drinking myself to death.” (APA #11, pp. 121-126) Under Caper v. Flautt, 407 S.E. 2d 248 (1991) an injury has to be unforeseen or unexpected to be compensable, and the medical records establish that Employee appreciated the damage that alcohol abuse was causing, including the risk of death, and had been counseled to quit drinking and seek treatment. Under the circumstances, we cannot find that his death was “by accident” as required to be considered compensable.

21. We find that it would be against public policy to hold that one's choice to abuse a substance, which results in death, should be attributable to his employer/carrier. This would create a “slippery slope” which could result in unintended conclusions, such as an addict's behavior being ascribed to a workers' compensation claim.

22. Claimants have failed to prove by a preponderance of the evidence that

Employee/Deceased's death in April 2014 is causally related to the shoulder injury which occurred on January 24, 2012.

23. Defendants' motion for costs and attorney's fees is denied.

### CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Under § 42-1-130, Employee/Deceased, James Provins, was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer, Spirit Construction, was a covered employer under the Act.

2. Under § 42-1-160, Employee/Deceased did sustain an injury to his right shoulder, for which he was afforded medical treatment by Defendants.

3. Under § 42-9-290, Employee/Deceased's death was not proximately caused by the January 24, 2012, right shoulder injury.

### ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS, HEREBY, ORDERED** that the claim for death benefits is **denied**.

No hearing costs are assessed in this instance.


**IT IS SO ORDERED.**

SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

  
Melody L. James, Commissioner

FULL AFFIRMATION

CONCUR:

  
Aisha G. Taylor, Commissioner  
Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Valerie Deller on January 11, 2018***