THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

9th Judicial Circuit Court Judge

App. Case No. 2017 - 001717
Case No. 2007-CP-10-1444

C. Holmes,

Appellant,

v.

J. Y. Becker, Manton Grier,
and Haynsworth Sinkler Boyd, P.A.,
as successor to Sinkler & Boyd, P.A.,

Respondents.

APPELLANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

The Respondents' motion to dismiss raises one objection to this appeal. Respondents argue that the orders appealed do not fall within the purview of South Carolina Code section 14-3-330. This code section describes the types of orders that fall within the jurisdiction of the Supreme Court (and thereby the appellate court) for appeal. Here is the applicable code section governing appealability of Orders:

S.C. Code 14-3-330. Appellate jurisdiction in law cases.

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

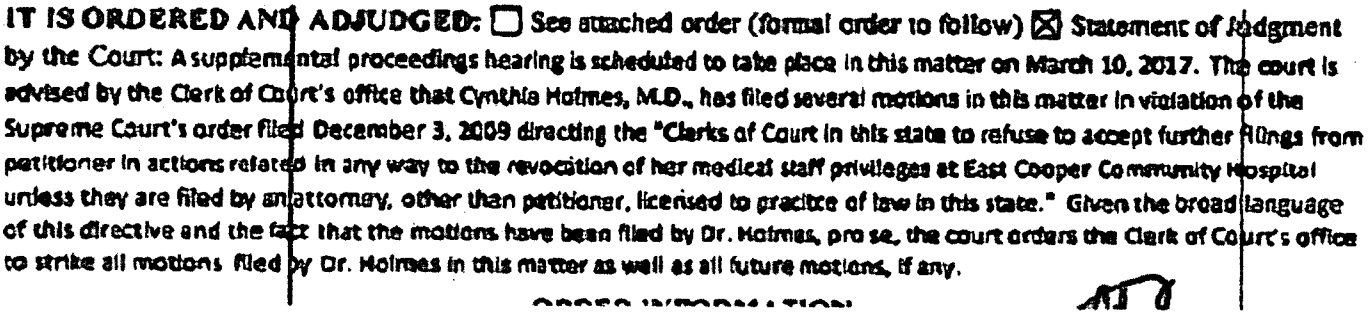
(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

The lower Court, in this case, is presiding over the Respondents' attempt to collect a very large judgment against Dr. Holmes, to include, apparently, an attempt to possess and sell her home. The Court issued an Order which struck all motions that Dr. Holmes had filed in her defense and precluded her from filing any future motions, thereby stripping her of any ability to defend herself and her estate from the onslaught of the Respondents.

Judge Scarborough's Order states:



IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: A supplemental proceedings hearing is scheduled to take place in this matter on March 10, 2017. The court is advised by the Clerk of Court's office that Cynthia Holmes, M.D., has filed several motions in this matter in violation of the Supreme Court's order filed December 3, 2009 directing the "Clerks of Court in this state to refuse to accept further filings from petitioner in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, other than petitioner, licensed to practice of law in this state." Given the broad language of this directive and the fact that the motions have been filed by Dr. Holmes, pro se, the court orders the Clerk of Court's office to strike all motions filed by Dr. Holmes in this matter as well as all future motions, if any.

"The touchstone of due process is protection of the individual against arbitrary action of

government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV.

Most recently, Dr. Holmes was the subject of an order regarding sanctions, which, the Judge who issued the order has precluded her from taking any action to challenge. This appeal is important. It addresses a severe restriction, if not the extinguishing of a Citizen's right to defend herself and her property in Court. In the interests of Justice, the matter should be heard.

I. The order is appealable under S.C. Code Section 14-3-330(1).

The order is appealable under S.C. Code Section 14-3-330(1) because it involves the merits. An order "involving the merits" is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distributors, Inc., v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993).

A. Standing

Standing is a prerequisite and is "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008); *Youngblood v. DSS*, 402 S.C.311, 741 S.E.2d 515 (2013). In this case, Pro Se respondents, Grier and Becker have admitted they have no standing, obtaining an Order from

the lower court removing them from the case as they deny any interest in the judgment sought. If the parties who brought the action have no standing, then this is something that is "necessarily affecting the judgment." *Link v. School District of Pickens Cty.*, 302 S.C. 1, 393 S.E.2d 176 (1990).

B. The Orders under appeal finally determine a substantial matter forming part of the defense.

Historically, the Courts have found the term "involving the merits" to be "a difficult one to define so as to cover every possible case that may arise. Lowndes v. Miller, 25 S.C. 119 (1886). In Mid-State Distributors, Inc. v. Century Importers, Inc., the Supreme Court refined the definition of "involving the merits," creating the modern definition. 310 S.C. 330, 426 S.E.2d 777 (1993). In that case, the Court declared that an order "involving the merits" is one that "must finally determine some substantial matter forming the whole or a part of the cause of action or defense." Id. This case, at least in the undersigned's experience, appears to raise a unique question because the Court's Order, refusing to allow Dr. Holmes to file any motion or pleading at all to defend herself in a collection action arises from the application or mis0application of an Order unique to Dr. Holmes. Considering the impact this decision would have on any party, in any case, it seems that this issue would finally determine a substantial matter forming the whole of the defense, as it basically precludes Dr. Holmes from making one.

II. The order is appealable under S.C. Code Section 14-3-330(2).

The order is appealable under S.C. Code Section 14-3-330(2)(a) because it affects a substantial right when such order "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." In this case, the order effectively

forecloses one party's right to contest the case on the merits including, but not limited to, Pro Se defendants wrongdoing and misrepresentations that they had ownership rights and interests which affects a substantial right and is immediately appealable. *McLaughlin v. Strickland*, 279 513, 309 787 (Ct. App. 1983).

The denial of the right to represent oneself, to have access to the court, to file, and/or to defend is closely related to the right to a particular mode of trial, a well-established substantial right which was denied. S.C. Code Section 14-3-330(2); *see Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017).

Relatively new case law in *Brooks*, *infra*, provides that the South Carolina Constitution guarantees every person the right of access to the courts. S.C. Const. art. I, § 9 provides, "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." A litigant has a statutory right to proceed pro se in South Carolina. S.C. Code Ann. § 40-5-80 (2011) ("[The chapter regulating the practice of law] may not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires."); *Washington v. Washington*, 308 S.C. 549, 550, 419 S.E.2d 779, 780 (1992). The statutory right of self-representation is also provided to litigants under federal law. 28 U.S.C. § 1654 (2016). *Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017). In this case, the right to represent oneself, to have access to the court, to file, and/or to defend is closely related to the right to a particular mode of trial, a well-established substantial right, and this order must be immediately appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

The order is also appealable under S.C. Code Section 14-3-330(2)(c) because it affects a

substantial right when such order "strikes out an answer or any part thereof or any pleading in any action." This case involves striking any pleadings, including but not limited to, lack of standing and other substantial defense. The Order must be immediately appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

III. The order is appealable under S.C. Code Section 14-3-330(3).

The order is appealable under S.C. Code Section 14-3-330(3) which allows appellate review of orders affecting a substantial right "made in any special proceeding or upon a summary application in any action after judgment." In the instant case, the lower court proceeding is not a traditional action. It is a "special proceeding." *See Allen v. Partlow*, 3 S.C. 417 (1872). Denial of the right to defend including but not limited to, denial of substantial defense without a full and fair review on the entire record affects a substantial right in this special proceeding.

IV. The order is appealable under S.C. Code Section 14-3-330(4).

The order is appealable under S.C. Code Section 14-3-330(4) because it affects an interlocutory order or decree ... "granting, continuing, modifying, or refusing the appointment of a receiver." S.C. Code Section 14-3-330(4). The prior lower court order on appeal entered March 14, 2017, provides "thereafter a receiver will be appointed." Order filed on March, 14, 2017. Accordingly, the order and prior orders are appealable under S.C. Code Section 14-3-330(4). *See Williams v. Northwestern Securities Life Ins. Co.*, 307 S.C. 462, 415 S.E.2d 809 (1992).

V. The lower court's reliance on the December 2009 order is a violation of State and federal statutory and Constitutional law.

In *Mizell v. Glover*, the South Carolina Supreme Court stated: " We find persuasive the

jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial. See *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001); U.S. v. Jones, 29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 141 F.Supp.2d 320 (E.D.N.Y.2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for public records, Rule 803(8), FRE. *Nipper*. The Fourth Circuit made clear that its holding was firmly rooted in the common law. Id. (Citing 5 John H. Wigmore, Wigmore on Evidence § 1671a (James H. Chadbourn rev.1974) (citations omitted))." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). "The federal courts addressing this issue point to the great weight and obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent juries. See *Philip Morris*, 141 F.Supp.2d 320 (denying admission of a judge's statement regarding credibility of expert witness for impeachment of that expert at a subsequent trial). Although *Philip Morris* involved the credibility assessment of a judge and not the assessment of a jury, the jury's factual finding introduced in this case is hearsay nonetheless, and we believe, is equally prejudicial. See *U.S. Steel v. Tieco* (finding appellants were prejudiced by the admission of a previous judge's factual opinion into a subsequent trial because appellees relied on the opinion throughout the trial and advised the jury during closing argument to use the opinion to make their own credibility determinations)." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). Accordingly, the consideration of hearsay in the form of a court order from another matter is reversible error and is contrary to State and Federal constitutional due process safeguards.

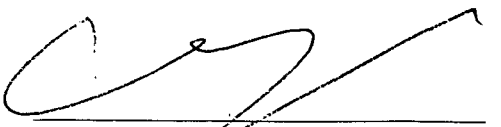
VI. Novel issues regarding new legislation, new statutory law, and new case law support review.

When a case contains a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *Osprey Inc., v. Cabana Limited Partnership*, 340 367, 532 269 (2000). It is respectfully submitted that novel issues regarding the revised S.C. Code Section 15-36-10 and new case law in *Brooks* support review. *Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017). *See Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV.

CONCLUSION

The appeal in this case is properly taken, pursuant to the applicable rules. It raises issues of constitutional importance and addresses the revocation of a substantial if not one of the most substantial rights of a citizen of this State. The Appellant respectfully requests that the Court

deny the Respondents' motion to dismiss and issue a briefing schedule so that this appeal can be considered on its merits.



Chalmers C. Johnson
Attorney for the Appellant

May 5, 2018

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PROOF OF SERVICE
Appellant's Response to respondent's Motion to Dismiss

I certify that I have served a copy of the Appellant's response to Respondent's motion to dismiss on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to Mary. M. Caskey on this date at 1201 Main St., 22nd flr., Columbia, SC 29201 and also by email to mcaskey@hsblawfirm.com

May 5, 2018

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May 5, 2018

Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Holmes v. Becker et al
App. Case No. 2017-001717

Dear Clerk of Court:

I am sending you, by mail, this response to the Respondent's Motion to Dismiss, with proof of service.

Enclosed for filing please find the following:

1. Original Response to Motion for Dismiss
2. Original Proof of Service
3. Copy of the Proof of service and SASE

Will you please file the original documents and return a clocked copy of the proof of service to me in the enclosed envelope? Thank you.

Sincerely,

Chalmers C. Johnson

Enclosures: Response to Motion to Dismiss and Proof of service (Copy of proof of service and SASE)
Cc: with enclosures, by fax 1-803-734-1839;

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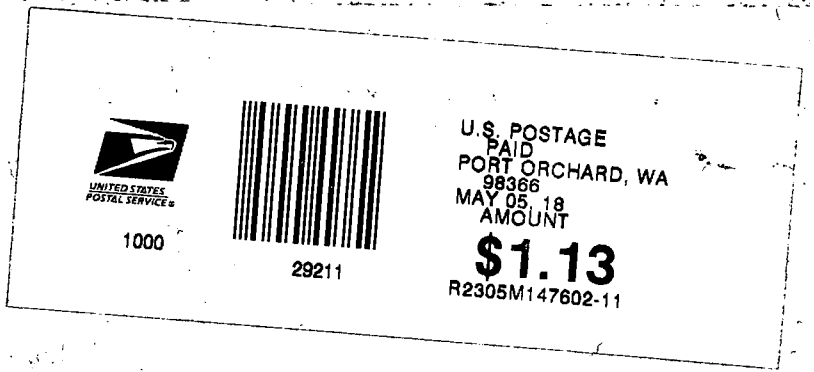

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