THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-212110
Case No. 2011-CP-26-7104

JEREMIAH DICAPUA,

APPELLANT,

V.

THOMAS D. GUEST, JR.,

RESPONDENT.

FINAL BRIEF OF APPELLANT

Jeremiah DiCapua, #105096
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C. 29899
Appellant, pro-se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

(1) Did the Court error in granting relief to Respondent's Answer of "General Denial"?

(2) Did the trial court error in entertaining and granting relief on Respondent's "Motion to Dismiss"?

(3) Did the court error in entertaining and granting relief on Respondent's "Amended Answer"?

(4) Did the court error in entertaining and granting relief on Respondent's "Amended Motion to Dismiss"?

(5) Did the court error in entertaining and granting relief on Respondent's "Amended Answer" that Appellant's claim was barred pursuant to South Carolina's statute of limitations, S.C. Code §15-3-530?

(6) Did the court error in entertaining and granting relief on Respondent's "Amended Motion to Dismiss", that Appellant's claim was barred pursuant to South Carolina's statute of limitation, S.C. Code §15-3-530?

(7) Did the trial court abuse its discretion in not granting Appellant's motion for recusal?

(8) Whether the trial judge abused his discretion in not addressing or ruling on Appellant's ex parte motions?

STATEMENT OF CASE

The Appellate is presently confined in the South Carolina Department of Corrections pursuant to a Parole violation from a 1980 Horry County Murder Conviction. The Appellate was initially released on Parole in August of 2000. In January of 2004, the Appellate was Indicted in Horry County for Distribution (2004-GS-26-303), and in April of 2004, for Possession W/Intent To Distribute Crack Cocaine (2004-GS-26-1549), as both charges stemmed from the same incident.

Appellate's arrest for the above charges were considered a Parole violation by local authorities; however, upon a Revocation Hearing held on October 13, 2004, the South Carolina Department of Probation, Parole & Pardon Services voted to allow Appellate to continue on Parole. At trial, the Appellate was represented by Thomas D. Guest, Jr., Esquire. On January 10-13, 2005, Appellate was tried before the Honorable J. Michael Baxley, for the above charges with a Jury finding of Guilt. Appellate was sentenced to Thirty (30) Months, (2 1/2 Yrs.) on each charge with the sentences to run concurrent. The Court also imposed a $25,000 dollars fine regarding each charge.

The day after trial, on January 14, 2005, Judge Baxley issued a Sua Sponte Order Vacating Appellate's Conviction and Sentence. The Order was based upon what Judge Baxley believed to be the erroneous admission of the video tape of a supposed drug transaction. Judge Baxley's Order Vacating Conviction and Sentence also reinstated Appellate's Bond which allowed him to continue on Parole.

The State timely Appealed Judge Baxley's Order. On Appeal, Appellate was represented by Eleanor Duffy Cleary, Esquire, of Appellate Defense. On April 23, 2007, the South Carolina Court of Appeals Reversed Judge Baxley's Order reinstating only Appellate's Sentence. . . "We Reverse and Reinstate DiCapua's Sentence."

On May 8, 2007, Appellate Defense filed a Petition For Rehearing with the South Carolina Court of Appeals. However, on June 6, 2007, on Motion from the Horry County Solicitor's Office, (while Appellate's Petition was still pending), Judge Baxley held a Hearing Re-Sentencing

Appellate anew. Appellate was again represented by Attornay Thomas D. Guest, Jr. On June 25, 2007, Appellate's Parole was Revoked because of that hearing. On June 28, 2007, the South Carolina Court of Appeals denied Appellate's Petition For Rehearing.

A timely Notice of Appeal was filed by Appellate Defense and on July 13, 2009. The south Carolina Supreme Court Affirmed the Reversal of the South Carolina Court of Appeals. The Case was finally Remitted to the Circuit Court on or about July 29, 2009.

A Notice of Appeal (Direct Appeal) from the Convictions and Sentences was filed and Attorney Wanda H. Carter of the Appellate Defense was appointed to represent Appellate; however, Appellate moved to withdraw and dismiss his appeal. On January 29, 2010, the Court of Appeals entered an Order of Dismissal and the Case was remitted to the Circuit Court on February 23, 2010.

On March 29, 2010, Appellate filed an Application for Post-Conviction Relief alleging Ineffective Assistance of Trial Counsel among other issues. On April 28, 2010, the Respondent made it's Return and on February 1, 2011, an Evidentiary Hearing was convened at the Horry County Courthouse.

The Appellate was represented by Attorney Paul Archer; Respondent by Christina J. Cato, Assistant Attorney General. On February 23, 2011, the Honorable Benjamin H. Culbertson granted Appellate's P.C.R. Vacating his Convictions and Sentences with the case being Remanded for a New Trial.

On March 14, 2011, Appellate timely filed a Pro se Notice And Motion To Re-Convene Evidentiary Hearing 59(e), because Appellate's Attorney waived fifteen (15) of sixteen (16) P.C.R. Issues without Appellate's consent.

With total disregard to Appellate's 59(e) Motion, Respondent's filed their Notice of Appeal on April 5, 2011, upon the Order granting Appellate's P.C.R. Appellate was represented by Elizabeth A. Franklin-Best of Appellate Defense; Respondent by Christina J. Cato, Assistant Attorney General.

On November 8, 2011, Appellate Defender, Elizabeth A. Franklin-Best, Motioned the South Carolina Supreme Court to Supplement Appellate's Appendix (Re: 59(e)). . . "consideration of the Motion is necessary for the proper adjudication of his claims since this Motion was filed before the State filed it's Notice of Appeal."

On December 6, 2011, Appellate Defense, Elizabeth A. Franklin-Best put before The South Carolina Supreme Court a Motion To Remand For An Evidentiary Hearing 59(e). On January 11, 2012, The Supreme Court of South Carolina denied Appellate's Motion To Remand. On April 11, 2012, Appellate Defense made it's Return to the State's Petition for Writ of Certiorari. Respondent's Appeal is still pending.

On August 23, 2011, Appellate filed a Lawsuit against his Trial Attorney, Thomas D. Guest, Jr., alleging Malpractice. On April 9, 2012, an Evidentiary Hearing was held before the Honorable Benjamin Culbertson. Defendant Guest was represented by Douglas Walker Mackelcan, III, and David W. Overstreet, of the Law Firm of Carlock, Copeland & Stair, LLP, Appellate was Pro se.

On April 30, 2012, Judge Culbertson signed an Order granting Defendant's Motion To Dismiss. On May 28, 2012, Appellate filed a Notice of Appeal.

This Appeal follows:

ARGUMENT I

DID THE COURT ERROR IN GRANTING RELIEF TO RESPONDENT'S "ANSWER" OF "GENERAL DENIAL".

Appellant argues that Respondent's "Answer" of "General Denial" should have been striken from the record and that Appellant was entitled to relief of Default Judgment against Respondent for the following facts of law.

Appellant hereby incerporates his "Motion to Strike Answer" and trial transcript. (see enclosed). R.P. 37-38 - R.P. 94 thru 108

On November 2, 2011, Respondent filed their Answer in the form of a "General Denial", (see enclosed) in response to R.P. 30-31 Appellant's Summons and Verified Compliant. (see enclosed). R.P. 8 thru 29

That Respondent's "Answer" failed te comply with Rule 8(b), SCRCP, and thus by pleading a mere "General Denial", had in effect net file an "Answer" at all within the applicable peried of time. "General Denials" have been abolished in the State of South Carolina civil practice and procedure, unless Respondent can controvert every allegation of the complaint, including jurisdiction. (See tr. p. 14, line 8 - p. 16 - line 1; p. 21, lines 5-16). R.P. 99, L. 8 thru 25 - R.P. 100, L. 10 thru 25 R.P. 101, L. 17 thru 25 - R.P. 106, L. 5 thru 25 - R.P. 107, L. 1 thru 16

The Respondent failed to state the facts constituting his defenses to each cause of action and failed to admit or deny the averments upon which Appellant relied in the Verified Complaint, which was served upon Respondent on October 3, 2011. Respondent failed to assert any denials which fairly meet the substance of the Appellant's factual averments.

That because, any bar certified attorney was aware of the fact that "General Denials" were abolished, the pleading filed by the Respondent was a violation of Rule 11, SCRCP, and the pleading denominated "Answer (General Denial)" should have been striken from the record; and

Because the Respondent had merely submitted an abolished pleading in response to the Summons and Verified Complaint, no "Answer" within the meaning of the South Carolina Rules of Civil Procedure had been timely filed with the Court, nor served upon the Appellant. The Respondent was in default, and the record should have reflect same.

ARGUMENT II

DID THE TRIAL COURT ERROR IN ENTERTAINING AND GRANTING RELIEF ON RESPONDENT'S "MOTION TO DISMISS".

Appellant asserts Respondent's "Motion to Dismiss" was not properly before the Court and should have been dismissed as a matter of law,

Appellant hereby incorporate his previously filed **Objection to "Motion to Dismiss" and "Trial Tarnscript"**, (see enclosed), R.P. 39 thru 45 that the Respondent's motion to dismiss was not properly before R.P. 94 thru 108 the Court, inasmuch as the Respondent had failed to comply with the applicable rule which requires proper "notice" of motion. Rule 6(b) and Rule 7(b)(1) of South Carolina Rules of Civil Procedure, SCRCP, requires the proponent of a motion to give due notice of motion no later than ten (10) days before the time specified for the hearing. here, no notice is given, nor is there a time specified for a hearing on the motion. Thus, the motion was not properly before the Court. The motion should be dismissed as a matter of law. (See tr. p. 14, line 8 - p. 16, line 1; p. 21, line 5-16). R.P. 99, L. 10 thru 25 - R.P. 107, L. 3-16

The Respondent did not present with its motion any matter outside of the pleading. therefore, the Court was required to limit its consideration to the allegations of the Verified Complaint. The Respondent's motion to dismiss was totally lacking of merit. The motion asserts two grounds for dismissal. (1) failure to state a claim upon which relief can be granted; and (2) failure to comply with S.C. Code §15-36-100, et seq.

Both these grounds was frivolous on their face and the motion should have been denied.

Moreover, for the purposes of the Respondent's motion to dismiss, the averments of the complaint must be taken as true. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). If the complaint on its face sets forth allegations which would entitle Appellant to any relief under any theory of the case, dismissal of the action is inappropriate. Crucible Chem. Co. Inc. v. Burlington Indus., 310 S.C. 243, 423 S.E.2d 121 (1997). Here, as to all causes of action, the verified complaint speaks for itself. However, by way of analogy, the complaint obviously states a valid claim for legal malpractice and/or professional negligence. R.P. 35-36 - R.P. 40

To state a claim for legal malpractice in South Carolina, the complaint must allege the (1) existence of an attorney/client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. See McNair v. Rainsford, 330 S.C. 332, 449 S.E.2d 488 (Ct. App. 1998). Additionally, for a legal malpractice action "arising out of a conviction for a crime" the general standard is that Plaintiff must allege innocence in order to show liability. Brown v. Theos, ___ S.C. ___, 550 S.E.2d 304 (2001). R.P. 98, ¶ 12 thru 25 R.P. 10, PARA 11

As to the first element of legal malpractice, page 3, para. 11 of the Verified Complaint, clearly alleges that "Respondent/Defendnt Thomas D. Guest, Jr., ... was appointed by the Court to represent the Appellant ... in a fully established attorney-client relationship". See also page 2, line 3; In regard to the second, breach of a duty by the attorney, the Verified Complaint, on page 2, line 3, alleges that Respondent Guest R.P. 9 PARA 3 R.P. 9, PARA. 3

"beached numerous duties owed to the Appellant"; see also page 3, ¶12; page 4, ¶13, page 5, ¶¶14-15; page 6, ¶20; page 8, ¶¶24-25; page 9, ¶28; page 10, ¶¶29-31; page 11, ¶¶32-35; page 12, ¶36 and page 13, ¶40. On page 12, ¶37, the Verified Complaint alleges that Respondent Guest even stipulated to the fact that he breached a duty to renew the objection which ultimately caused Appellant to be incarcerated, and also resulted in failing to preserve issues for appeal. (emphasis supplied). As for the third element, damages to the client, the Verified Complaint, in addition to the foregoing matters, alleges on page 2, line 3, that Respondent's acts and omissions resulted in damages, losses, and injuries which were directly and proximately caused by the Respondent's breach of those duties". See also page 10, ¶29-31; page 12, ¶¶36-37; page 13, ¶¶41-42; page 14, ¶42. Finally, as to the final element, innocence, the Verified Complaint alleges that the Appellant is innocent of the crimes which were charged against him. page 2, ¶2. The Verified Complaint alleges that the post-conviction relief proceeding resulted in the Court granting relief, and thereby rendering the Appellant innocent. See page 12, ¶37; page 13, ¶39. The Respondent assertion that the Appellant fails to state a claim upon which relief may be granted was obviously a sham defense meant solely for the purposes of delay; concomitantly where the motion should have been denied as a matter of law as regarding each of the causes of action set forth in the Verified Complaint; and

The Respondents asserted that the action should be dismissed

with prejudiced due to Appellant's failure to comply with S.C. Code §15-36-100, et, seq., (tr. p. 4, lines 11-22; p. 11, lines 4-22). (Tr. p. 11, line 22; p. 14, line 8; p. 21, line 17 - p. 23, line 1). The Court's ruling was misplaced and frivolous. The Court failed to recognize that the statute in question bears no applicability to the instant action, for its effective date is July 1, 2005. It is undisputed that §15-36-100 only applies to causes of action occurred between October 16, 2003 and June 6, 2007. And certainly, the facts which resulted in the grant of post-conviction relief occurred between October 16, 2003 and January 14, 2005. R.P. 101, L.17 thru 23 - R.P. 102, L.8 thru 25 R.P. 103, L.12 thru 16 - R.P. 104, L.2-3 - R.P. 105, L.7 thru 25 Subsequent to these occurrence, the General Assembly passed into law S.C. Code §15-36-100 et. seq. on July 1, 2005. This statute applies prospectively to causes of action which accrued after its effective date of July 1, 2005. Clearly, Appellant's causes of action accrued well before that date. Granted that some of the facts continued to be developed after July 1, 2005, as relating back to the original facts giving rise to the post-July 1, 2005 acts and omissions, this does not require the Plaintiff to file two separate summons and complaints, merely to satisfy an overblown hyper-technical interpretation of the applicable law. It would be patently absurd, and a tax upon the judicial economy of the court to inter-related facts, and same causes of action. In fact, had the Appellant done so, then it is fairly predictable that the Respondent would have screamed res judicata, or some other form of issue preclusion.

The fact is that the Verified Complaint in this action contained a steady train of elemental facts, each being the impetus and fuel giving rise to later facts. It was Respondent Guest's unprofessional acts and omissions which permitted the State of South Carolina to file a successful appeal, thus delaying Respondent Guest's related albeit later acts and omissions on June 6, 2007. The Respondent was not entitled to the benefit of that delay, as the State's appeal was based squarely on the acts and omissions of Respondent Guest himself. To allow such a benefit would turn the question of justice to stand on its head. The Respondent's acts caused that delay, until June 6, 2007 when he further committed acts and omissions which are also the subject of the complaint. As such, the cause of action accrued from the earliest impetus. Here, that impetus was in existence clearly before the legislative enactment of §15-36-100; and clearly before June 6, 2007. To require the filing of separate complaints, one without an expert affidavit for pre-July 1, 2005 acts and omissions, and one with post-July 1, 2005 acts and omissions is tantamount to carrying a logical argument to its absurd end. Respondent nor the Court cited no legal authority for such a proposition, and Appellant can find none to support same. Similarly, using a statute of limitations and the "discovery rule" analogy, the statute of limitations runs from the date of injury resulting from the wrongful conduct. Dillon County Sch. Dist. No. 2 v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332

S.E.2d 555 (Ct. App. 1985). Here, those injuries occurred well before July 1, 2005, the effective date of §15-36-100. The Respondent in effect asserts that the law be retroactively applied to events which transpired before its effective date. Such is clearly contrary to law, and clearly an erroneous proposition. Respondent's motion to dismiss should have been denied as a matter of law; Deese v. Schmutz, 2011-UP-439, filed October 11, 2011, footnote 2, S.C. Court of Appeals; see also Cooper v. Hawkins, see Order U.S. Dist. Ct., Greenville Division, June 23, 2008, interpreting the applicability of the precise statute in question involving defense counsel in the instant case, i.e. Davis W. Overstreet; and Melton v. Medtronic, Inc., 0:06-cv-01843, U.S. Dist. Ct., Rock Hill Division, and (see tr. R.P. 41 Thru 44, PARA 3 - R.P. 97 L. 1 Thru 17 p. 16, line 14 - p. 21, line 5; p. 23, lines 1-10.

Upon information and belief, according to Section II of the Motion Information and Coversheet, Respondent attached a proposed order to the motion to dismiss. Such proposed order was not served upon the Appellant, in violation of Rule 5(b)(3), SCRCP, which provides that such proposed orders "shall" be served on all counsel of record. Respondent had not complied with this rule, and the proposed order should have been striken and quashed, or otherwise not be considered by the Court. The Certificate of Service attached to the motion only mentions the "foregoing pleadings" and make no mention of such proposed order, however, the motion coversheet did not. Thus, it is clear that proper service is lacking.

ACCORDINGLY, Appellant objects to the Respondent's motion to dismiss, as it was not properly before the Court, lacks a legal merit and is intended solely for the purposes of delay. The Answer (General Denial) should have been striken, and default judgment should be entered as a matter of law. The Respondent's motion to dismiss must be denied as a matter of law.

ARGUMENT III

DID THE COURT ERROR IN ENTERTAINING AND GRANTING RELIEF ON RESPONDENT'S "AMENDED ANSWER"?

Appellant asserts that Respondent's **"Amended Answer"** was not properly before the Court and that said **Amended Answer** should have been dismissed as a matter of law. (see enclosed). R.P. 46 thru 54

Appellant hereby incorporates his previously filed **Notice of Motion and Motion to Strike Amended Answer** and for entry of **Default Judgment** and hereby further submits the trial transcript of record. (see enclosed). R.P. 55 - thru 58

Appellant asserts that Respondent submitted their **"Amended Answer"** to Appellant's **Verified Complaint"** on December 12, 2011, and that Appellant submitted his counter **Motion to Strike Respondent's Amended Answer"** and also moved for entry of **"Default Judgment"** of Respondent's **"Amended Answer"** pursuant to Rule 12(f) and Rule 55, SCRCP. (see enclosed) and trial transcript, page 14, line 8, p. 15, line 9. R.P. 37-38 - R.P. 99, L. 10 thru 25

Appellant further argues that Respondent on or about November 2, 2011, filed and **"Answer (General denial)"** in response to having been served with the Summons and Verified Complaint. The Summons and Complaint were served upon the Respondent, whose authorized agent accepted service thereof on December 3, 2011; an no other answer is permitted pursuant to Rule 7(a), SCRCP; (see tr. p. 14, line 8 - p. 15, line 9). R.P. 99, L. 10 thru 25

Their Amended Answer clearly makes no reference to, and clearly abandons he "general denial" defense asserted in the

original pleading, which consisted of a one paragraph long general denial of all allegations contained in the Complaint; and

The Amended Answer raised for the first time in the proceedings various new defenses and new matters, not previously raised or noticed in the original pleading, nor even mentioned or attempted to be set forth therein; and therefore constituted unfair surprise and prejudice the Appellant, who prejudicially relied upon the pleadings contained in the original pleading in drafting, formulating, filing and serving his Reply to the original pleading based on the issues and the sole general denial defense noticed. (See tr. 14, line 10 - p. 16, line 1; tr. p. 21, line 5 -16). R.P. 106, L. 5-16 - R.P. 107, L. 5 thru 16

The Amended Answer with its newly raised defenses and new matters, reveals the original pleading to have been a "sham" pleading interposed solely for the purposes of delay, inasmuch as it was filed on the thirtieth (30th) day after service of the Summons and Complaint upon the Defendant and did not raise or give notice of the newly raised defenses and new matters contained in the Amended Answer. Moreover, the Amended Answer violates the notice pleading requirements of Rule 8(b), SCRCP, inasmuch as the new defenses and new matters are not logically related to anything contained in the prior original pleading, particularly where, as here, the general denial defense had clearly been abandoned and the general denial defense no longer exist; and

The Amended Answer contains newly raised defenses and new matters which were not affirmatively pleaded in the original pleading, and thus are "waived" by such failure to affirmatively plead them as required by Rules 7(a) and Rule 12(b), SCRCP; and

Because the Respondent had abandoned the general denial defense asserted in the original pleading, the newly raised defenses and new matters are not logically related to, and do not relate back to the date of the original pleading inasmuch as the newly raised defenses and new matters asserted in the Amended Answer have not arose from conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; and

That because the sole general denial defense raised in the prior pleading has been abandoned in lieu of the newly raised defenses and new matter set forth in the Amended Answer, the only "Answer" pending before the Court is the Amended Answer, which was filed some sixty (60) days after the effective date of service of the Summons and Complaint. The Respondent was in default. In the circumstances of not relating back to or being logically related to the general denial defense previously asserted, the Amended Answer is out of time, and the Respondent was in default. The Amended Answer was filed and served approximately sixty (60) days after service of the Summons and Verified Complaint upon the Defendant as Rule 12(a), SCRCP, provides that a defendant "shall" serve his answer within thirty (30) days of the service of the Complaint upon him; and

The Appellant has suffered unfair prejudice and is unduly surprised by the Amended Answer, inasmuch as the Respondent having filed one answer to the Verified Complaint, now abandons the general denial defense asserted therein, and the Plaintiff prejudicially relied upon the contents thereof in Reply. The Respondent improperly, and without leave of the Court broadens the parameters of the issues and matters raised in its original pleading, without having provided prior notice to the Appellant of any intent to rely upon those newly raised defenses and new matters; causing the proceedings to be vexed and unnecessarily multiplied; and

The Respondent knew or should have known of the availability of the newly raised defenses and new matters, at the time the original pleading was filed; and chose not to pursue them. Pursuant to Rule 7(a); (See tr. p. 14, line 8 - p. 15, line 9), Rule 8, and Rule 12(a), SCRCP, Appellant was vested with a right to proper notice of these newly raised defenses and new matters within thirty (30) days; (See tr. p. 15, line 10 - p. 16, line 1; tr. p. 21, lines 5-16). R.P. 99, 2/0-thru 25 - R.P. 106, 1 5 thru 16

The general denial defense set forth in the original pleading did not require the same kind of evidence which the Respondent would utilize in attempting to or actually proving the newly asserted defenses and new matters contained in the Amended Answer; and

Because the newly raised defenses and new matters do not relate back to the abandoned, and non-existent general defense in

the original pleading, the newly raised defenses and new matters constitute insufficient defenses, are immaterial, impertinent or scandalous matter because the original general denial defense was a "sham" defense asserted solely for the purposes of delay and the Respondent was in default. A defense asserted by a Respondent in default by some sixty (60) days, clearly renders the Amended Answer and its newly raised defenses and new matters as insufficient, immaterial, and impertinent to the proceedings; and

The Appellant also had a pending motion to strike the original pleading, which should in the interest of judicial economy be joined to the instant motion to strike the Amended Answer. Therefore, Respondent's **Amended Answer** is **not** properly before the Court, and Respondent is in **default!** RP. 55 Thru 58

ARGUMENT IV

DID THE COURT ERROR IN ENTERTAINING AND GRANTING RELIEF ON RESPONDENT'S "AMENDED MOTION TO DISMISS"?

Appellant asserts Respondent's **"Amended Motion to Dismiss"** was not properly before the Court and that said motion should have been dismissed as a matter of law.

Appellant hereby incorporates his previously filed "Objection" to Respondent's "Amended Motion to Dismiss" and hereby further submits the trial transcript of record. (see enclosed) R.P. 67 Thru 69 - R.P. 86 Thru 109

Appellant argues that Respondent's "Amended Motion to Dismiss" was out of time and barred from litigation, specifically their newly incorporated raised defense of statute of limitations, where as:

Respondents filed their original motion to dismiss on or bout November 2, 2011; rising two grounds:

1. Failure to state a claim upon which relief can be granted;
2. Appellant's failure to comply with S.C. Code §15-36-100, et seq.

Thereafter, Appellant filed two responsive pleadings thereto on November 14, 2011 in the form of a Reply; (see enclosed) and also the "Objections to Motion to Dismiss". (see enclosed). Thus, the Respondent did not amend their motion to dismiss before a responsive pleading was served thereto, and in effect was no longer entitled to amend once as a matter of course "at anytime before" a responsive pleading was served. Rule 15(a), SCACR.

The Respondent could therefore amend the motion within

thirty (30) days of Appellant's November 14, 2011 response, if the said responses are deemed by the Court to be permissive in nature rather than required. Rule 15(a), SCRCP. Respondent did not assert that Appellant's responses were not required, and the Court was not Respondent's advocate; the issue had not been raised by the Respondent thusly constituting a waiver of any such assertion. Accordingly, Respondent was only permitted under the Rule to amend his motion to dismiss within thirty (30) days of Appellant's responses; and failing that, the Respondent could only amend by proper motion to the Court seeking leave to amend. That did not occur in this case.

Here, thirty days after Appellant's responses would have placed the upper limit on time to amend Respondent's motion at December 14, 2011. Rule 15(a), South Carolina Rules of Civil Procedure. The Respondent amended motion to dismiss was clearly out of time; and obviously not cognizable, as a matter of law.

Moreover, because the Respondent's amended motion to dismiss was out of time, Respondent's only proper recourse was to apply to the Court for leave to amend. Rule 15(a), SCRCP, and the Respondent clearly had not sought leave of the Court to amend his original motion. The amended motion should have been denied and dismissed, as a matter of law. (see tr. p. 14, line 8 - p. 16, line 1; p. 21, lines 5-16). R.P. 99, L.10 thru 25 - R.P. 101, L.5 thru 16

The amended motion to dismiss, raises for the first time in the entire proceedings new defenses (Amended Motion to Dismiss, paragraphs 1 and 3), specifically, **statute of limitations**, which

were not presented in the original motion to dismiss, and thus, these new grounds, in effect attempt to raise new defenses which were not previously noticed or mentioned in neither the Answer, Amended Answer, nor in the original motion to dismiss. As such, these new grounds and newly raised defenses do not "relate-back" to the original motion to dismiss, as required under Rule 15(c), SCRCP. The amended motion should have been denied as a matter of law and should have been striken from the record. R.P. 63 thru 65

No "notice of motion" is attached to the amended motion, as was the case with the original motion, and this violates Appellant's due process right to proper notice, and violates the "notice pleading" requirements of South Carolina state practice and procedure. (Tr. p. 14, line 8 - p. 16, line 1; p. 21, lines -5-16). R.P. 99, L. 8 thru 20 - R.P. 106, L. 5 thru 16

Although leave to amend should be freely given when justice so requires, the South Carolina Rules of Civil Procedure greatly circumscribes such grace, by requiring litigants to comply with both procedural requirements, and requirement to timely act on their rights. Here, the Court has disregarded Appellant's rights to adequate timely notice of what the pleadings would have been. Respondent was bound by his own decisions to not timely secure those opportunities for amendment of pleadings as provided by the rule of court. Respondent effectively even disregards the Court's authority, by out of hand amending his motion to dismiss, when the Court itself was the final arbiter of whether such amendment were even possible, or required in the interest of justice.

Respondent did not assert any such interest, and the Court should not have acted as Respondent's advocate by sua sponte raising and disposing of said issue.

Accordingly, the amended motion to dismiss should have been denied, as justice requires same, and otherwise striken from the record, as it was not even cognizable by the Court.

ARGUMENT V

DID THE COURT ERROR IN ENTERTAINING AND GRANTING RELIEF ON RESPONDENT'S "AMENDED ANSWER", THAT APPELLANT'S CLAIM WAS BARRED PURSUANT TO SOUTH CAROLINA'S STATUTE OF LIMITATIONS. S.C. Code §15-3-530.

Appellant asserts the Court granted relief to Respondent on a waived issue and therefore, the issue was barred from litigation.

On December 2, 2011, Respondent served Appellant with his "Amended Answer" raising for the first time a defense of statute of limitation. (See enclosed). R.P. 46 Thru 54

The Respondent on or about November 2, 2011, filed an "Answer (General Denial)" in response to having been served with the Summons and Verified Complaint. The Summons and Complaint were served upon the Respondent, whose authorized agent accepted service thereof on October 3, 2011; an no other answer is permitted pursuant to Rule 7(a), SCRCP; and R.P. 99, L. 10 Thru 25

The Amended Answer clearly made no reference to, and clearly abandons the "general denial" defense asserted in the original pleading, which consisted of a one paragraph long general denial of all allegations contained in the Complaint; and

The Amended Answer raised for the first time in the proceedings various new defenses and new matters, not previously raised or noticed in the original pleading, nor even mentioned or attempted to be set forth therein; and therefore constitute unfair surprise and prejudice to the Plaintiff, who prejudicially relied upon the pleadings contained in the original pleading in drafting, formulating, filing and serving his Reply to the original pleading based on the issues and the sole general denial

defense noticed therein; (see tr. p. 4, lines 11-22; p. 11, lines 4-10; p. 11, line 10 - p. 14 - line 8; p. 21, line 17 - p. 23, line 1). R.P. 25 thru 58

The Amended Answer with its newly raised defenses and new matters, revealed the original pleading to have been a "sham" pleading interposed solely for the purposes of delay, inasmuch as it was filed on the thirtieth (30th) day after service of the Summons and Complaint upon the Respondent and did not raise or give notice of the newly raised defenses and new matters contained in the Amended Answer. Moreover, the Amended Answer violates the notice pleading requirements of Rule 8(b), SCRCP, inasmuch as the new defenses and new matters were not logically related to anything contained in the prior original pleading, particularly where, as here, the general denial defense has clearly been abandoned and the general denial defense no longer exists; and

The Amended Answer contains newly raised defenses and new matters which were not affirmatively pleaded in the original pleading, and thus are "waived" by such failure to affirmatively plead them as required by Rules 7(a) and Rule 12(b), SCRCP; and

Because the Respondent had abandoned the general denial defense asserted in the original pleading, the newly raised defenses and new matters are not logically related to, and did not relate back to the date of the original pleading inasmuch as the newly raised defenses and new matters asserted in the Amended

Answer did not arose from conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; and

That because the sole general denial defense raised in the prior pleading has been abandoned in lieu of the newly raised defenses and new matter set forth in the Amended Answer, the only "Answer" pending before the Court was the Amended Answer, which was filed some sixty (60) days after the effective date of service of the Summons and Complaint. The Respondent was in default. In the circumstances of not relating back to or being logically related to the general denial defense previously asserted, the Amended Answer was out of time, and the Respondent was in default. The Amended Answer was filed and served approximately sixty (60) days after service of the Summons and Verified Complaint upon the Respondent as Rule 12(a), SCRCP, provides that a defendant "shall" serve his answer within thirty (30) days of service of the Complaint upon him; and

The Appellant has suffered unfair prejudice and is unduly surprised by the Amended Answer, inasmuch as the Respondent having filed one answer to the Verified Complaint, now abandons the general denial defense asserted therein, and the Appellant prejudicially relied upon the contents thereof in Reply. Now, the Respondent improperly, and without leave of Court broadens the parameters of the issues and matters raised in its original pleading, without having provided prior notice to the Plaintiff of any intent to rely upon those newly raised defenses and new matters; causing the proceedings to be vexed and unnecessarily

multiplied; and

The Respondent knew or should have known of the availability of the newly raised defenses and new matters, at the time the original pleading was filed; and chose not to pursue them. Pursuant to Rule 7(a); Rule 8, and Rule 12(a), SCRCP, Appellant was vested with a right to proper notice of these newly raised defenses and new matters within thirty (30) days; (see tr. p. 4, lines 11-22; p. 11, line 4-10; p. 11, line 10 - p. 14 - line 8; p. 21, line 17 - p. 23, line 1). R.P. 55 thru 58, R.P. 67 thru 70

The general denial defense set forth in the original pleading does not require the same kind of evidence which the Respondent would utilize in attempting to or actually proving the newly asserted defenses and new matters contained in the Amended Answer; and

Because the newly raised defenses and new matters did relate back to the abandoned, and non-existent general denial defense in the original pleading, the newly raised defenses and new matters constitute insufficient defenses, are immaterial, impertinent, or scandalous matter because the original general denial defense was a "sham: defense asserted solely for purposes of delay and the Respondent was in default. A defense asserted by a Respondent in default by some sixty days, clearly renders the Amended Answer and its newly raised defenses and new matters as insufficient, immaterial, and impertinent to the proceedings; and

The Appellant also had a pending motion to strike the original pleading, which should have in the interest of judicial

economy be joined to the instant motion to strike the Amended Answer.

The Appellant argues that although he was compelled to argue the statute of limitations, the Court erred in entertaining and ruling that his claims were barred by the statute of limitations. R.P. 96, L.24-25 - R.P. 97, L.1 thru 17 - R.P. 98, L.12 thru 25 (See: tr. p. 4, lines 11-22; p. 11, lines 4-10; p. 11, line 10 - R.P. 99, L.1 thru 7 p. 14, line 8; p. 21, line 17 - p. 23, line 1).

Here, the Respondents waived their defense of statute of limitations, where the provisions governing the statute of limitations under South Carolina law are found in S.C. Code Ann. §15-3-10 et. seq. (Law Co. op 1976 & Supp. 1984)

And where the general rule is that the civil action must be commenced within the stated period after the cause of action has occurred. (See §15-3-20).

The cause of action is said to have occurred at the moment when the Plaintiff/Appellant has a legal right to institute and maintain the action. See Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781-785 (1962). R.P. 98, L.12 thru 25 - R.P. 99, L.1 thru 4

Further, the Appellant argues that if the Respondent's issue of statute of limitations was properly before the Court, the Court erred in entertaining and ruling that his claims were barred.

Where party interpretating statute of limitation has the burden of proving when the testimony is conflicting upon the question, it becomes an issue for the jury to decide. Little v. Brown; and Williamson Tobacco Corp., 243 F. Supp. 480 (D.S.C. 2001).

ADDENDUM
TO ARGUMENT V

Appellant strongly asserts that if "Respondent's **"Amended Answer"** was properly before the Court, the Court's ruling that Appellant was barred pursuant to the statute of limitations code of laws was in error.

Appellant contends he could not file a claim of malpractice against Respondent until he had a legal right to institute and maintain the action. See Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781-785 (1962). R.P. 98, L. 12 thru 25 - R.P. 99, L. 1 thru 4

Appellant argues that his legal right to institute and maintain his claim of malpractice against Respondent came to light on February 23, 2011, when the lower court **granted** post-conviction relief.

The Court ruled Respondent was ineffective for failing to renew his objections and further, the Court vacated Appellant's convictions. Only then could Appellant plead innocence, a necessary element of legal malpractice claim. See Brown v. Theos, 550 S.E.2d 304 (2001). R.P. 98, L. 12 thru 25 - R.P. 99, L. 1 thru 4

Therefore, Appellant contends that if South Carolina statute of limitations was applicable law, the statute in question must be tolled until February 23, 20111, when Appellant's PCR was granted. Only then did Appellant have the legal right to institute and maintain his claim. Brown v. Finger; and likewise, only then could Appellant legally plead innocence, a necessary element of a malpractice claim. (See Brown v. Theos).

ADDENDUM
TO ARGUMENT V, cont't

R.P. 96 24-25 RR 97 1-6
Tr. p. 11, lines 24-25 - p. 12, lines 1-6
R.P. 98 12-25
Tr. p. 13, lines 12-25
R.P. 99 1-4
Tr. p. 14, lines 1-4
R.P. 105 15-25
Tr. p. 20, lines 15-25
RP 106 20-25
Tr. p. 21, lines 20-25
R.P. 107 1-5
Tr. p. 22, lines 1-5

ARGUMENT VI

DID THE COURT ERROR IN ENTERTAINING AND GRANTING RELIEF ON RESPONDENT'S "AMENDED MOTION TO DISMISS": THAT APPELLANT'S CLAIM WAS BARRED PURSUANT TO SOUTH CAROLINA'S "STATUTE OF LIMITATION", S.C. Code §15-3-530.

Appellant asserts the Court granted relief to Respondent on a waived issue; that Respondent's **'Amended Motion to Dismiss'** was out of time and as a matter of law, not properly before the Court. R.P. 55 thru 58 - R.P. 63 thru 66

Appellant further argues that, Respondent filed the original motion to dismiss on or about November 2, 2011; raising two grounds:

1. Failure to state a claim upon which relief can be granted;
2. Plaintiff's failure to comply with S.C. Code §15-36-100, et. seq.

Thereafter, Appellant filed two responsive pleadings thereto on November 14, 2011 in the form of a Reply, and also the R.P. 35-36 "Objections to Motion to Dismiss". (See enclosed). Thus, the R.P. 39 thru 45 Respondent did not amend his motion to dismiss before a responsive pleading was served thereto, and in effect was no longer entitled to amend once as a matter of course "at anytime before" a responsive pleading was served. Rule 15(a), SCRCP.

The Respondent could therefore amend the motion within thirty (30) days of Appellant's November 14, 2011 responses, if the said responses were deemed by the Court to be permissive in nature rather than required. Rule 15(a), SCRCP. Respondent did not assert that Appellant's responses were not required, and the Court was not Respondent's advocate; the issue has not been

raised by the Respondent thusly constituting a waiver of any such assertion. Accordingly, Respondent was only permitted under the Rule to amend his motion to dismiss within thirty (30) days of Appellant's responses; and failing that, the Respondent could only amend by proper motion to the Court seeking leave to amend. That did not occur in this case. R.P. 57, PARA. 7 & 8

Here, thirty days after Appellant's responses would place the upper limit on time to amend Respondent's motion at December 14, 2011, Rule 15(a), South Carolina Rules of Civil Procedure. The Respondent amended motion to dismiss was clearly filed on or about January 17, 2012. Clearly out of time; and obviously not cognizable, as a matter of law.

Moreover, because the Respondent's amended motion to dismiss was out of time, Respondent's only proper recourse was to apply to the Court for leave to amend. Rule 15(a), SCRCP, and the Respondent clearly had not sought leave of the Court to amend his original motion. The amended motion should have been denied and dismissed, as a matter of law. (See tr. p. 4, lines 11-22; p. 11, lines 4-10; p. 14, line 8; p. 21, line 17 - p. 23, line 1). R.P. 99 & 11 thru 34

The amended motion to dismiss, raises for the first time in the entire proceeding new defenses, specifically, statute of limitation, S.C. Code §15-3-530, (Amended Motion to Dismiss, paragrapgh 1),, which were previously waived by the Respondent, as pleaded in the Reply, (page 2, paragraph #3) filed by the Appellant. R.P. 35 thru 36 Moreover, the amended motion to dismiss raised new grounds which were not presented in the original motion to

dismiss, and thus these new grounds, in effect attempt to raise two new defenses which were not previously noticed or mentioned in neither the Answer, Amended Answer, nor in the original motion to dismiss. As such, these new grounds and newly raised defenses did not "relate-back" to the original motion to dismiss, as required under Rule 15(c), SCRCP. The amended motion should have been denied as a matter of law, and should have been striken from the record.

No "notice of motion" was attached to the amended motion, as was the case with the original motion, and this violates Appellant's due process right to proper notice, and violates the "notice pleading" requirements of South Carolina state practice and procedure;

Respondent persists, as with the original motion, in submitting proposed orders to the court, which Respondent had not bothered to serve upon the Appellant. This improper ex parte communication was illegal, and violated the Appellant's right to be privy to the assertions of the Respondent in this case.

Although leave to amend should be freely given when justice so requires, the South Carolina Rules of Civil Procedure greatly circumscribes such grace, by requiring litigants to comply with both procedural requirements, and requirement to timely act on their rights. Here, the Respondent had grossly shunned our state practices and procedures, disregarded Appellant's rights to adequate timely notice of what the pleadings will be, and effectively slept on his right to apply to the court for leave to

amend his motion. Respondent is bound by his own decisions to not timely secure those opportunities for amendment of pleadings as provided by the rules of court. Respondent effectively even disregards the Court's authority, by out of hand amending his his own motion to dismiss, when the Court itself is the final arbiter of whether such amendment was even possible, or required in the interest of justice. Respondent had not asserted any such interest, and the Judge shall not have acted as Respondent's advocate by sua sponte raising and disposing of said issue.

Accordingly, the amended motion to dismiss should have been denied, as justice required same, and otherwise striken from the record, as it was not even cognizable by the Court.

ADDENDUM
TO ARGUMENT VI

Appellant strongly asserts that if "Respondent's **"Amended Answer"** was properly before the Court, the Court's ruling that Appellant was barred pursuant to the statute of limitations code of laws was in error. R.P. 46-54

Appellant contends he could not file a claim of malpractice against Respondent until he had a legal right to institute and maintain the action. See Brown v. Finger, 240 S.C. 102, 111, 124 S.E.2d 781-785 (1962). R.P. 98, L. 12 thru 20

Appellant argues that his legal right to institute and maintain his claim of malpractice against Respondent came to light on February 23, 2011, when the lower court granted post-conviction relief. R.P. 105, L 12 thru 25

The Court ruled Respondent was ineffective for failing to renew his objections and further, the Court vacated Appellant's convictions. Only then could Appellant plead innocence, a necessary element of legal malpractice claim. See Brown v. Theos, 550 S.E.2d 304 (2001).

Therefore, Appellant contends that if South Carolina statute of limitations was applicable law, the statute in question must be tolled until February 23, 2011 , when Appellant's PCR was granted. Only then did Appellant have the legal right to institute and maintain his claim. Brown v. Finger; and likewise, only then could Appellant legally plead innocence, a necessary element of a malpractice claim. (See Brown v. Theos).

ADDENDUM
TO ARGUMENT VI, cont'd

R.P. 96 24-25 R.P. 97 1-6
Tr. p. 11, lines 24-25 - p. 12, lines 1-6
RP 98 12-25
Tr. p. 13, lines 12-25
RP 99
Tr. p. 14, lines 1-4
RP. 105 15-25
Tr. p. 20, lines 15-25
R.P. 106 20-25
Tr. p. 21, lines 20-25
R.P. 107 1-5
Tr. p. 22, lines 1-5

ARGUMENT VII

DID THE TRIAL COURT ABUSE ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR RECUSAL.

The Appellant argues that the judge abused his discretion in not recusing himself from his case. On March 27, 2012 the Appellant made motion for Judge Benjamin Culbertson to recuse himself from hearing his case. (See enclosed). R.P. 71 thru 73

The Appellant argues that pursuant to Rule 501, South Carolina Appellate Court Rules, (SCACR) and Canon 3 (E)(1) and Commentary of Canon 3 (1)(a):

1. That the Court had scheduled a hearing for Monday, April 9th, 2012, on the Respondent's Motion to Dismiss and/or Amended Motion to Dismiss at 2:00 PM before the Honorable Benjamin Culbertson; and

2. That it appeared that the Honorable Benjamin Culbertson was disqualified from acting in the capacity of judicial officer at the aforementioned motion proceeding in the instant case; and

3. Rule 501, SCACR, and Canon 3 thereunder, states in pertinent part that:

E. Disqualification

"(1) A judge shall disqualify himself ... in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has .... personal knowledge of disputed evidentiary facts concerning the proceeding."

Emphasis provided.

4. Judge Culbertson, presided as a trier of fact in Appellant's previous post-conviction relief proceeding, and acting in such capacity personally made findings of facts therein, and said facts as found by Judge Culbertson, are the focal point of the instant action, and the subject of the Respondent's amended motion to dismiss, The post-conviction relief case number was 2010-CP-26-2664, and the Order Granting Post-Conviction Relief to the Appellant in the instant action was signed by Judge Culbertson on February 23, 2011; and

5. Accordingly, Judge Culbertson had personal knowledge of disputed facts in the instant proceeding before this Court, and the Respondent had denied the factual allegations set forth in the Verified Complaint. Thus, those facts are in dispute, and the Honorable Benjamin H. Culbertson had personal knowledge of those disputed facts, having been the judicial officer who specifically found such facts to exist. Apellant moved for Judge Culbertson to recuse himself, and otherwise moved for an order disqualifying Judge Culberson from acting in a judicial capacity at any point in the instant case. Appellant had anticipated calling Judge Culbertson as a material witness in the instant case, and it appeared his acting in the role of a judicial officer in this case would violate the judicial

canons and Rule 501, SCACR. Also, during Appellant's case, Appellant requested that Judge Culbertson to recuse himself. (See tr. p. 9, Line 10 - p. 11, line 3).

R.P. 94 L. 10 thru 25 - R.P. 95, L. 10-25
R.P. 96, L. 10 thru 25

ARGUMENT VIII

WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION IN NOT ADDRESSING OR RULING ON APPELLANT'S EX-PARTE MOTION(S)?

On January 10, 2012, Appellant made his ex-parte motion(s) for appointment of counsel, guardian ad litem and expert witness. (see enclosed). R.P. 59 Thru 62 - R.P. 96 L. 10 Thru 23

Appellant argues that his claims were meritorious, and that he was entitled to relief on the matters before the Court.

That because of Appellant's poverty, he cannot afford legal counsel, nor the services of an expert in the matter as required by applicable law as stated in McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1998). (See tr. p. 11, lines 10-22).

That because of the physical restraint placed upon Appellant due to his incarceration, the appointment of counsel or guardian ad litem and legal expert was appropriate in the circumstances, since an adverse judgment against a prisoner will affect present or future rights of the Appellant to redress and the spirit of the law demands no less. In re Bishop, 272 S.C. 306, 251 S.E.2d 748 (1979).

That because the issues presented by the case are sufficiently complex, and extraordinary; and Appellant was not versed in the nuances of law, the appointment of legal counsel or guardian ad litem, and legal expert would substantially insure that just results are reached in the action; and

That the case itself was extraordinary because it appeared that appointment of counsel and legal expert were necessary to

render justice; and the Appellant was unable to secure a lawyer on his own. Appellant had exercised reasonable diligence in attempting to retain both legal counsel and an expert, to no avail; and

That Appellant, due to his poverty, was unable to further query the public defenders' office, attorneys for public agencies, organizations, and private law offices who may or may not be willing to provide pro bono services and expert witness testimony or affidavits on Appellant's behalf; and

That although Appellant was not entitled to the appointment of legal counsel, nor to the appointment of a legal expert, the lower court "had inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible". Ex parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (1983); Roberts v. State, 318 S.C. 219, 222, 456 S.E.2d 905, 907 (1995); and Appellant beared the burden of coming forward with expert testimony, to show the standard of care, Appellant's inability to afford the services of such an expert amounts to a de facto denial of meaningful access to the courts, and a de facto denial of redress for wrongs he has sustained; see First Amendment, U.S. Constitution. (See tr. p. 11, lines 10-22). R.P. 96 - L. 10 Thru 22

Finally, it is important to note that the availability of counsel for low income parties is still itself a substantial barrier to justice, as strikingly documented by the American Bar Association's report on the status of legal aid in the United States. See generally "American Bar Assoc., Gideon's Broken

Promise: America's Continuing Quest For Equal Justice (December, 2004); and a 1998 survey of federal judges, wherein judges reported that expert testimony was most frequently directed at the 'existence, nature, or extent of injury or damage ... and the cause of injury or damage'. See Molly Treadway Johnson & Carol Krafka, et al., Federal Judicial Center, Expert Testimony in Federal Civil Trials: A Preliminary Analysis (2004).

CONCLUSION

The law arises from the facts and the facts in this case before the Court are clear...

Appellant has shown that Respondent has grossly shunned the filing procedures of the Court. Additionally, the issues raised by Respondent and ruled on favorably by the lower court were misplaced, not properly before the Court and barred from litigation.

Appellant asserts ... Court rules are regulations promuligated by the South Carolina Supreme Court and have the force and affect of [law]. Prichett v. Lanier, 776 F. Supp. 442 (D.S.C. 1991).

Appellant further asserts ... law rules must be pursued, or the law's penalty cannot be imposed. State v. Biggs, 27 S.C. 80, 25 S.E. 854, 856 (1887).

Clearly, in light of the above, the lower court's ruling dismissing Appellant's claims **cannot** stand.

Appellant respectfully submits that the trial court's decision be **reversed** and **remanded** back to the lower court for hearing procedures consistent with his Summons and Verified Complaint against Respondent.

Respectfully submitted,

Jeremiah D. Capua

This 13th day of September 2012

Jeremiah D. Capua, pro-se
McCI F-4 B-side
386 Redemption Way
McCormick, SC 29899

This 5th day of December, 2012 Jeremiah D. Capua

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-212110
Case No. 2011-CP-26-7104

JEREMIAH DICAPUA,

APPELLANT,

V.

THOMAS D. GUEST, JR.

RESPONDENT.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 5, 2012

Jeremiah DiCapua, #105096
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C. 29899
Appellant, pro-se

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-212110
Case No. 2011-CP-26-7104

JEREMIAH DICAPUA,

APPELLANT,

V.

THOMAS D. GUEST, JR.,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served three (3) copies of the Final Brief of Appellant on Attorney of Record, David W. Overstreet, Esq. and Douglas W. MacKelcan, Esq., of Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401 by U.S. Mail Service provided here at McCormick Corr. Inst, McCormick, South Carolina 29899, on the 5th day of December, 2012.

Jeremiah DiCapua #105096
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C. 29899
Appellant, pro-se