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. 2017-01717

C. Holmes,

Appellant,

v.

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

Respondents.

Rule 240j, SCACR, Petition for Rehearing *De Novo* Panel Review

---

C. Holmes
P.O. Box 187
Sullivans Isd.,
SC 29482-0187
(843)883-3010
For Appellant

Appellant respectfully enters Petition for Rehearing with abeyance request pursuant to Rule 240(j), SCACR, which requires *de novo* panel review of an individual judge's dismissal of appeal. The appeal was wrongfully dismissed as an interlocutory discovery order. As set forth more fully herein, we respectfully disagree because the interlocutory discovery order may be reviewed if the order contains appealable issues. The record reflects the order on appeal contains appealable issues. *Ferguson v. Charleston Lincoln/Mercury Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001). Accordingly, for substantial justice affecting substantial rights, dismissal of appeal by a single judge deserves de novo panel review. In the alternative, appellant respectfully requests deferral of decision on the motion to dismiss until consideration of Final Briefs and the Record on Appeal.

I. The standard of review for Rule 240(j), SCACR, Petition for Rehearing is *de novo*.

Questions of law are reviewed de novo. S.C. Const. art. V, § 5. The June 27, 2018, order dismissing the appeal was issued by an individual judge. **An appeal shall be allowed from decision of any one judge to a panel of the Court.** S.C. Code § 14-8-220 S.C.; Rule 240(j), SCACR. It is well established that the Federal Rules of Appellate Procedure (FRAP), upon which the SCACR are based, have long been interpreted to provide for panel review of decisions by a single judge for preservation of the integrity of the process and for the Court's self-preservation as well as other reasons, particularly in South Carolina where judges are subjected to elections and re-elections. See Local Rule 27(e), FRAP. Pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR, the order dismissing this appeal stands before the appellate court as if it had never been decided and the June 27, 2018, Order dismissing this appeal is reviewed de novo. See *Griffin v. State*, 763 N.E.2d 450 (Ind.2002) (citing 5

Arch N. Bobbitt & Frederic C. Sipe, *Bobbitt's Revision, Works' Indiana Practice* § 111.3 (5th ed.1979)). See *Ex parte Northern Pacific Railway Co.*, 280 U.S. 142, 144, 50 S.Ct. 70, 74 L.Ed. 233; *Stratton v. St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15, 51 S.Ct. 8, 75 L.Ed. 135 (The District Judge recognized the rule that if the court was warranted in taking jurisdiction and the case fell within section 266 of the Judicial Code (28 USCA § 380), a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be). "The prior denial of the transfer motion was the order of a single judge. Federal Rule of Appellate Procedure 27(c) provides that 'an action of a single judge may be reviewed by the court.' That order is thus not binding on us as law of the case." *Thompson v. Merit Sys. Protection Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985). Significantly and materially, the necessary element for Rule 240(j), SCACR, panel review is that the order is signed by a single judge; Rule 240(j), SCACR, review is an appeal to a panel which does not include the individual judge who issued the June 27, 2018, order and a panel which does not include retirees. A discerning review establishes a different legal standard of review, i.e., de novo, reflecting a different purpose for Rule 240(j), SCACR, petition or motion for rehearing as opposed to Rule 221, SCACR, petition for rehearing. The legislature enacted S.C. Code § 14-8-220 and Rule 240(j), SCACR, for good cause. Accordingly, the appellant respectfully submits petition for rehearing de novo panel review pursuant to S.C. Code § 14-8-220 and Rule 240(j), SCACR.

Rule 240(j), SCACR, expressly provides for panel appeal and review of order signed by a single judge. The statutory authority underlying Rule 240(j), SCACR, is found in S.C. Code § 14-8-220. That statute is set forth as follows:

S.C. Code § 14-8-220

SECTION 14-8-220. Power of Court and judges to administer oaths and writs; **appeal.**

The Court and each of the judges thereof shall have the same power at chambers or in open court to administer oaths, and to issue such remedial writs as are necessary to give effect to its jurisdiction. **An appeal shall be allowed from decision of any one judge to a panel of the Court.**

S.C. Code § 14-8-220 (emphasis supplied).

HISTORY: 1979 Act No. 164 Part IV-A Section 1, eff July 1, 1979; 1979 Act No. 194 Part III Section 5, apparently effective Aug. 8, 1979; 1983 Act No. 89 Section 1, eff June 2, 1983; 1983 Act No. 90 Section 2, eff July 1, 1985.

That statute which underlies Rule 240(j), SCACR, was renumbered in 2009 from Rule 224(j), SCACR. The previous Rule 224(j), SCACR, included the provision that, "Any party aggrieved by an order of an individual judge or justice may seek review of that order by the appellate court or a panel thereof." That provision was preserved (in 2007) but reworded then re-numbered Rule 240(j), SCACR, to provide that, "Any review of an order issued by an individual judge or justice shall be by petition for rehearing." Significantly and materially, the legislative intent and underlying statutory authority remain the same in S.C. Code § 14-8-220. In contrast to Rule 221, SCACR, petition for rehearing, the legal standard of review for Rule 240(j), SCACR, appeal is de novo.

The appellant respectfully appeals pursuant to S.C. Code § 14-8-220 for de novo review by a panel of judges which does not include the individual judge who issued the order. S.C. Code § 14-8-220 provides statutory authority for Rule 240(j), SCACR, and provides for **appeal** of the order of a single judge to a panel of judges. S.C. Code § 14-8-220. Meaningful review on appeal requires that a judge not participate in appeal of his or her own order. Occasionally, a recently appointed Appellate Court Judge or recent Supreme Court Justice will find him or herself in the position of potentially reviewing an Order that he or she authored while in the court below. In these cases, the Judge or Justice will recuse him or herself from reviewing his or her own order. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Rule 3(E)(1), CJC, Rule 501, SCACR.* Disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978). In the *Rice* case, then Chief Judge Haynsworth further ruled that, "For many years a federal judge has been prohibited from sitting to hear or determine an appeal in a case or issue tried by him. 28 U.S.C.A. § 47. To say the least, it would be

unbecoming for a judge to sit in a United States Court of Appeals to participate in the determination of the correctness, propriety and appropriateness of what he did in the trial of the case. After rendering decisions, some judges remain open minded, and some are unreluctant to confess previous error, but a reasonable person has a reasonable basis to question the impartiality of a judge who sits in a United States Court of Appeals to review his own decision as a trial judge." *Id.* at 1117. The inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not whether the judge is in fact impartial. *Id.* at 1116. Granted, this is a Fourth Circuit case, but the principle from this oft-cited case is well stated, sound, and universally accepted as logical and fair. "There is another way to look at the case, however: as one in which the losing litigant appeals from a ruling by Judge X to an appellate panel that includes Judge X; and it is considered improper--indeed is an express ground for recusal, see 28 U.S.C. Sec. 47--**in modern American law** for a judge to sit on the appeal from his own case. On this ground the Fourth Circuit held in *Rice* that section 455(a) required the district judge to recuse himself. [*Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).] We agree with this result." *Russell v. Lane*, .890 F.2d 947 (7th Cir. 1989) (emphasis supplied). Accordingly, the appellant respectfully submits the legislative intent, letter, and spirit of Rule 240(j), SCACR, appeal requires de novo review by a panel of judges, which does not include the individual judge who issued the order.

II. As a threshold matter, Respondents have admitted lack of standing.

Defendants filed motion in this circuit court Case # 2007-CP-10-01444. See attached copy. By that motion, Respondents have now admitted they have no ownership rights or interests herein and, therefore, lack standing. *Georgetown Cty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 713 S.E.2d 287 (S.C. 2011). Further, the attached copy of this Honorable Court's correspondence dated February 24, 2017, memorializes Respondents representations to this Honorable Court that the only Respondents are the Respondents who now admit lack of standing. There has been no order of

substitution and no motion for substitution. Accordingly, Defendants have admitted lack of standing, therefore, the motion to dismiss must be vacated.

III. As a threshold matter, Respondents have admitted lack of standing, therefore, Respondents have admitted lack of jurisdiction to file motion to dismiss.

The Court of Appeals has such jurisdiction as the General Assembly prescribes by general law. S.C. Const. art. V, § 9. Its jurisdiction under S.C. Code §14-8-200(a) is as follows:

> [T]he court shall have jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit or family court. S.C. Code §14-8-200(a).

The Court of Appeals is an error-correction court. S.C. Const. art. V, § 9. In a direct appeal, the focus is on the propriety of rulings made by the circuit court. See *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (1999). Toal *et al., Appellate Practice in South Carolina* (3d ed. 2016), p. 11. The instant matter is a direct appeal. Standing is a prerequisite to jurisdiction. By the attached motion, Respondents have admitted they have no ownership rights or interests herein and, therefore, lack standing. *Georgetown Cty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 713 S.E.2d 287 (S.C. 2011). Without standing, there is no jurisdiction to file motion to dismiss. Lack of jurisdiction may be raised at any time. *Dove v. Goldkist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994). Lack of jurisdiction may not be waived. *Amisub of S.C., Inc., v. Passmore*, 316 S.C. 112, 447 S.E.2d 207 (1994). Accordingly, the motion to dismiss must be vacated. See attached copy of this Honorable Court's correspondence dated February 24, 2017, and Respondents' motion in the circuit court in Case # 2007-CP-10-01444 admitting lack of standing.

IV. As a threshold matter, the record reflects Respondents did not pay the required filing fees that other lawyers, other parties, and other members of the public would be required to pay, therefore, Respondents lower court action shall be dismissed for lack of jurisdiction.

Defendants failed to pay the required fees in the circuit court that other lawyers, other parties, and other members of the public would be required to pay, therefore, Defendants matter in the lower court is unofficial, in individual capacity, unauthorized, and/or without jurisdiction and shall be dismissed. The public index reflects legal malpractice defendants, untrustworthy officers of the court, were given a "pass" and not required to pay the official filing fees that other lawyers, parties, and members of the general public are required to pay. All motions and orders are $25.00 each. There is a $25.00 fee for the petition and there is a $25.00 fee for the referee/master. The attached copy from the public index reveals inadequate fees. Without the requisite fees, the order of reference is invalid and there is no jurisdiction. By analogy, Rule 203(d)(3), SCACR, provides if the filing fee is not paid in full, the matter shall be dismissed and shall not be reinstated except by leave of the court upon good cause shown. Rule 203(d)(3), SCACR; *see Douglas v. State*, 332 S.C. 67, 504 S.E.2d 307 (1998); Toal *et al., Appellate Practice in South Carolina* (2d ed. 2002), p. 124. Accordingly, there is no jurisdiction and Respondents' motion to dismiss the appeal must be vacated.

V. When deciding a jurisdictional question based on facts, a reviewing court has the duty to review the entire record and find the jurisdictional facts within the entire record.

When deciding a jurisdictional question based on facts, a reviewing court has the power and the duty to review the entire record, find the jurisdictional facts within the entire record, and decide the jurisdictional question in accord with the preponderance of evidence. *Canady v. Chas. Cty. Sch. Dist.*,

265 S.C. 21, 216 S.E.2d 755 (1975). Accordingly, the appeal should be heard based on the entire record.

VI. The interlocutory discovery order may be reviewed because the order contains appealable issues.

The interlocutory discovery order herein may be reviewed because the order contains appealable issues. *Ferguson v. Charleston Lincoln/Mercury Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001). Specifically, the attached June 21, 2017, form order shows it is a contempt order. It is well-settled that a party can obtain review of the merits of a discovery order only after refusing to comply and being held in contempt. On appeal from the contempt order, the contemnor may argue that the contempt finding must be reversed because the underlying discovery order was itself improper. *Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008). In this case, the efficacy of the order of reference herein is challenged including, but not limited to, the discovery order was itself improper. A contempt order is a final order that is immediately appealable. *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003); *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999). The appellate court may review any intermediate order necessarily affecting the order on appeal including, but not limited to, the ex parte February 9, 2017, order which falsely claims there was a hearing and which wrongfully denies the appellant fundamental rights, equal protection, privileges and immunities guaranteed by the State and federal Constitutions and State and federal statutory rights as well as the right to defend. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999). The interlocutory discovery order herein may be reviewed because it contains appealable issues.

VII. When an order is appealable in part such as the contempt order herein, the entire order is considered on appeal.

When an order is appealable in part such as the contempt order herein, the entire order should be considered on appeal. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). An order not immediately appealable will nonetheless be considered if there is an appealable issue, and a ruling on appeal will avoid unnecessary litigation. *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The interlocutory discovery order herein may be reviewed because it contains appealable issues and the order of dismissal should be vacated/reversed.

VIII. The appellate court may review the intermediate February 9, 2017, order because it necessarily affects the order on appeal by denying the right to defend and denying fundamental rights.

The appellate court may review any intermediate order necessarily affecting the order on appeal including, but not limited to, the ex parte February 9, 2017, order which falsely claims there was a hearing and which wrongfully denies the appellant fundamental rights, equal protection, privileges and immunities guaranteed by the State and federal Constitutions and State and federal statutory rights as well as the right to defend. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999). That ex parte February 9, 2017, order denies substantial rights, denies the right to defend, denies meaningful opportunity to be heard, and denies the right to adequate record for meaningful judicial review on appeal. The interlocutory discovery order herein may be reviewed because it contains appealable issues. "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.

IX. The appellate court may review the intermediate February 9, 2017, order because it necessarily affects the order on appeal by striking another presiding judge's pending Rule 60, SCRCP, and other motion without valid order of reference and without authority which is vested in the presiding judge, not the referee/master; wrongful disposition, wrongful confiscation/taking of unearned filing fees, and/or lack of jurisdiction for pending Rule 60, SCRCP, and other motion is appealable.

The appellate court may review any intermediate order necessarily affecting the order on appeal including, but not limited to, the ex parte February 9, 2017, order which falsely claims there was a hearing and which wrongfully strikes another presiding judge's pending Rule 60, SCRCP, and other motion without valid order of reference and without authority which is vested in the presiding circuit court judge, not the referee/master. See attached true copy of the blank/incomplete order entered January 3, 2017, pending plaintiff's motion to dismiss Respondents' unverified petition. The failure to support the rule to show cause by verified petition is a fatal defect. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 617 (1994). See attached correspondence from the Charleston County Clerk of Court documenting scheduling and jurisdiction with the presiding judge who signed the order, which is not the referee/master. Wrongful disposition of Rule 60, SCRCP, and other motion is appealable and is hereby appealed. Confiscation and/or taking of unearned filing fees is also appealable. Those fees are unaccounted for to date. The interlocutory discovery order herein and any intermediate order necessarily affecting the order on appeal may be reviewed because it contains appealable issues. "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.

X. An order that effectively forecloses a party from contesting the case on the merits affects a substantial right under section 14-3-330(2) and is immediately appealable.

An order that effectively forecloses a party from contesting the case on the merits affects a substantial right under section 14-3-330(2) and is immediately appealable. *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983). In this case, the ex parte February 9, 2017, order, which falsely claims there was a hearing, wrongfully denies the appellant's fundamental rights, equal protection, privileges and immunities guaranteed by the State and federal Constitutions and State and federal statutory rights as well as the right to defend. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999). Denial of fundamental rights including, but not limited to, denial of the right to defend, denial of the right to make an adequate record for appeal, the striking of all pleadings now and in perpetuity, denial of any discovery, denial of the right to call witnesses and present evidence affects substantial rights which cannot be vindicated on appeal. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11(2000). The orders on appeal affect a substantial right under section 14-3-330(2) and are immediately appealable.

XI. The ex parte February 9, 2017, order is appealable because it strikes all pleadings of one party, it denies that party the right to file any pleadings in perpetuity, it prevents adequate

record for meaningful appeal, and it essentially determines the case.

The Court of Appeals has appellate jurisdiction of an order affecting a substantial right made in an action when such order "strikes out an answer or any part thereof or any pleading." S.C. Code Ann. Section 330(2)(c); Toal *et al., Appellate Practice in South Carolina* (2d ed. 2002), p. 91. The interlocutory discovery order herein may be reviewed because the order contains appealable issues. The attached form order dated June 21, 2018, is a contempt order which is immediately appealable along with any intermediate orders necessarily affecting that order. The ex parte February 9, 2017, order effectively forecloses a party from contesting the case on the merits which affects a substantial right and is immediately appealable. *Mclaughlin v. Strickland*, 279 513, 309 787 (Ct. App. 1983).

XII. The contempt order on appeal affects a substantial right under section 14-3-330(2) because it denies State and federal Constitutional rights and State and federal statutory rights to represent oneself and is immediately appealable.

The case of *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009), supports appeal of the contempt order because this appeal is based on denial of State and federal constitutional rights, including but not limited to, the right to proceed pro se. *See Brooks v. SCCID and OID*, South Carolina Court of Appeals, decided February 15, 2017, App. Case No. 2014-002477 (Remittitur sent March 3, 2017). New case law in *Brooks*, *supra*, is controlling and confirms State and federal constitutional and statutory rights to appear *pro se*. The February 9, 2017, order denying Appellant's right to represent oneself necessarily affects all subsequent orders including the attached June 21, 2017, form order and the June 23, 2017, order. Accordingly, the interlocutory discovery order herein may be reviewed because the orders contain appealable issues.

XIII. The orders on appeal herein, which were entered pending appeal in COA App. Case No. 2017-00266 and before remittitur, violate exclusive appellate jurisdiction and must be

vacated. Rule221, SCACR. The money judgment exception to automatic stay does not apply because the matter herein does not constitute a "money judgment" in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental or collateral to the underlying claim.

The orders on appeal herein, which were entered pending appeal in COA App. Case No. 2017-00266 and before remittitur, violate exclusive appellate jurisdiction and must be vacated. Rule221, SCACR. The money judgment exception to automatic stay does not apply because the matter herein does not constitute a "money judgment" in the underlying claim within the contemplation of S.C. Code Section 18-9-130; rather the matter is incidental/collateral to the underlying claim. *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000); Toal *et al*, *Appellate Practice in South Carolina*, 3rd edition (2016), p. 341. In the instant case, the underlying claims ended with directed verdict for the defendants. Significantly and materially, there was no counterclaim. The "decision of whether to award sanctions is a collateral issue and does not constitute a ruling upon the merits of the case. ...*See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 394, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)." *Pee Dee Health Care, P.A., v. Estate of Thompson*, 418 S.C. 557, 795 S.E.2d 40 (S.C.App. 2016). Accordingly, the matter herein is not a traditional money judgment and, therefore, it is subject to automatic stay under Rule 241(a), SCACR. Toal *et al*, *Appellate Practice in South Carolina*, 3rd edition (2016), p. 340. As a result, the lower court proceeding is stayed; the orders on appeal herein, which were entered pending appeal in COA App. Case No. 2017-00266 and before remittitur, violate exclusive appellate jurisdiction and must be vacated. Rule221, SCACR. Moreover, any dispute regarding the application of automatic stay is resolved in the appellate court and respondents failed to motion the appellate court for the appellate court's permission. *See Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (2014).

XIV. A corporation is not allowed to appear Pro Se in appellate courts.

Moreover, a corporation is not allowed to appear Pro Se in appellate courts. Black's Law Dictionary defines Pro Se as: "For Himself; in his own behalf." Black's Law Dictionary, 5th Edition. Corporations, which are artificial creatures of state law, do not have a right to appear pro se. See S.C. Code Ann. § 40-5-320 (1986). *See Days Inn Worldwide, Inc. v. JBS, Inc.*, No. 08-1771, 2010 WL 625391, *2 (D.S.C. Feb. 19, 2010) ("It is well-settled that a corporation may not represent itself."). *See Renaissance Enters., Inc. v. Summit Teleservices, Inc., 515 S.E.2d 257, 258 (S.C. 1999)*; *In re Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980); *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995). "In *State v. Wells*, 191 S.C. 468, 5 S.E.2d 181 (1939), this Court held that a corporation must act through licensed attorneys in legal matters. That holding was modified in *In re Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992),* in which the Court held a non-lawyer, officer, agent, or employee may represent a business entity pursuant to S.C.Code Ann. § 40-5-80 (1986) in civil magistrate's court proceedings. The Court stated further that the magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer." *Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705 (SC 2005). Respondent's cover letter reflects it was filed by employee of the corporation and, therefore, Pro Se. In addition, there is no written authorization from corporate executive. In *Renaissance Enters., Inc. v. Summit Teleservices, Inc., supra,* the Court held that a corporation may appear Pro Se only in magistrate's court. As such, Respondents filing is a nullity. *Brown v. Coe, supra.* Accordingly, the motion to dismiss must be vacated/reversed.

XV. 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). 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, respondents have admitted they have no standing thereby "necessarily affecting the judgment." *Link v. School District of Pickens Cty.*, 302 S.C. 1, 393 S.E.2d 176 (1990). Moreover, the ex parte February 9, 2017, order essentially determines the case by denying one side the right to defend and fundamental rights, equal protection, privileges and immunities guaranteed by the State and federal Constitutions and State and federal statutory rights. Accordingly, dismissal must be vacated/reversed.

XVI. 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, 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).

Moreover, 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). 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 is immediately

appealed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). Accordingly, the dismissal of appeal must be reversed.

XVII. 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, the right to assert admitted lack of standing is denial of substantial defense without a full and fair review on the entire record, which affects a substantial right in this special proceeding. Summary application is unconstitutional in this incidental/collateral matter where the right to trial by jury on issues of fact has been denied. "A summary application by rule to show cause is not allowed in that class of cases....(I)t must be of a more formal character than the present rule (*to show cause*), such as would admit of a formal mode of trying any issue of fact that might arise in such proceeding." *Smith v. Lake*, 5 S.C. 341 (S.C., 1874) (emphasis supplied). In this case, the revised FPA statute is unconstitutional under the state and/or Federal Constitutions because it denies the right to jury trial and it denies other Constitutional protections. Further, summary remedy in this case is unconstitutional because the revised FPA is not applicable. In the underlying case, the trial judge denied legal malpractice defendants' motion for summary judgment which precludes sanctions under the prior FPA statute and decisional law in effect at the pertinent time. *See Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). Accordingly, the dismissal of appeal must be reversed. "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.

XVIII. 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 appellate court may review any intermediate order necessarily affecting the order on appeal including, but not limited to, the intermediate March 14, 2017. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999). That intermediate order on appeal entered March 14, 2017, provides "thereafter a receiver will be appointed." Order filed on March, 14, 2017. Accordingly, the order and the intermediate 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).

XIX. New case law in *Brooks, infra*, supports review.

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). The *Brooks* case., *supra*, was decided on February 15, 2017, after the ex parte February 9, 2017, order on appeal herein and this new precedent is controlling. 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 the orders are immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

XX. 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.

XXI. Respondents wrongfully seek to prejudice the case with a remote, inapplicable, and superseded John Doe order in an unrelated case with different case number, different caption, and unrelated issues.

The purported John Doe order referenced in the ex parte February 9, 2017, order is unrelated, the caption is not the same, the issues are not the same, it is over broad and not time-limited, there was no notice, no hearing, and no opportunity to respond, and on its face, there is no record to support it, which is the definition of abuse of discretion. Moreover, that order is inapplicable because the "decision of whether to award sanctions is a collateral issue and does not constitute a ruling upon the merits of the case. ...*See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 394, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)." *Pee Dee Health Care, P.A., v. Estate of Thompson*, 418 S.C. 557, 795 S.E.2d 40 (S.C.App. 2016). See *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000); Toal *et al. Appellate Practice in South Carolina*, 3rd edition (2016), p. 341.

The revised FPA, S.C. Code Sec. 15-36-10, is unconstitutional on its face and as applied herein. Controlling precedent establishes that the amended FPA is inapplicable because the cause of action arose prior to its effective date. *See Southeastern Site Prep v. Atlantic Coastal Builders and Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). The presiding judge denied defendants motion for summary judgment which precludes sanctions under the applicable FPA and decisional law in effect at all times material thereto.

Significantly and materially, the less burdensome legal standard in the amended FPA was improperly applied and is reversible as a matter of law. Though that improper circuit court Haynsworth FPA order was stayed pending appeal, it was wrongfully reported to the appellate courts pursuant to the

inapplicable revised FPA reporting provisions. That improper FPA reporting to the appellate courts effectively functioned as impermissible ex parte communication, thereby preventing and/or thwarting objective judicial review and any meaningful appeal. That improper FPA report resulted in the ex parte and unsupported John Doe order, a copy of which is attached for ease of reference. That case is unrelated, it has a different caption, and it involves unrelated issues of conflict of laws and the statute of limitations in a foreign jurisdiction. It is not res judicata or collateral estoppel.

That John Doe order recites and relies on footnote 2 (two), but fails to provide any citation, source, or authority for footnote 2, thereby concealing the Haynsworth FPA order as the source of footnote 2. Thereafter, that unsupported John Doe order in an unrelated case was used to thwart objective, meaningful appellate review of that Haynsworth FPA order then pending appeal. See attached copy of December 16, 2009, order by the former COA Chief Judge documenting use of the Haynsworth FPA order in that footnote 2. What is clear from the record of that December 16, 2009, Court of Appeals Haynsworth order is that the Haynsworth FPA order, then stayed on appeal, was used in that footnote 2 of unrelated John Doe order to prevent appellant from pursuing meritorious appeal of that very Haynsworth FPA order, then stayed pending appeal. That unsupported John Doe order in an unrelated case has been used wrongfully by Legal Malpractice Defendants to prejudice this case and to deny State and federal Constitutional and Statutory rights, including but not limited to, the right to appear *pro se* and to represent oneself. *See Brooks v. SCCID and OID,* South Carolina Court of Appeals, decided February 15, 2017 (Remittitur sent March 3, 2017).

Case law directs that orders be narrowly construed. The Rules of Court shall be construed to do substantial justice and Legal Malpractice Defendants have misused and abused their position as officers of the court to escape the merits and evade objective, meaningful judicial review. Accordingly, the appeal should proceed because the order contains appealable issues. "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

For the foregoing reasons and for substantial justice affecting substantial rights, appellant respectfully enters Rule 240(j), SCACR, Petition for Rehearing *De Novo* Panel Review with abeyance and respectfully requests the June 27, 2018, Order dismissing this appeal be vacated/reversed. In the alternative, appellant requests decision on the motion to dismiss be deferred for consideration with Final Briefs and the Record on Appeal.

Respectfully submitted,

C. Holmes
P.O. Box 187
Sullivans Isd.
SC 29482-0187
(843)883-3010
For Appellant

I certify that I have read the foregoing petition for rehearing and to the best of my knowledge, information, and belief there is good ground to support it.

7/12/18

Chalmers Johnson
Attorney for the Appellant

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. 2017-01717

C. Holmes,

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the foregoing on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to M.M. Caskey, 1201 Main St. #2200, Columbia, SC 29201, on this date.

Date 7/12/18

C. Holmes
P.O. Box 187
Sullivans Isd.,
SC 29482-0187
(843)883-3010
For Appellant

Fax: 803.734.1839

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: COA Case #: 2017-01717

Dear Ms. Kitchings:

Enclosed for filing please find the original and abeyance request in the above case. Also, enclosed please find the following:

1. Seven (7) copies,
2. Original and one (1) copy of proof of service,
3. The filing fee, and
4. A stamped, self-addressed envelope for return of copies.

If you have any questions, please do not hesitate to contact us. Thank you for your kind attention to this matter.

With best regards,

cc