

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Case No. 2011-CP-26-7104

Appellate Case No. 2012-212110

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SC Court of Appeals

JEREMIAH DICAPUA,

APPELLANT,

Vs.

THOMAS D. GUEST, JR.,

RESPONDENT.

RECORD ON APPEAL

Jeremiah DiCapua
Inmate No. 00105096
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899
Appellant, pro-se

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	ORDER
)	
vs.)	
)	
Thomas D. Guest, Jr.,)	
)	
Defendant.)	

This matter came before the Court on Defendant Thomas D. Guest, Jr.'s Motion to Dismiss. A hearing was held on Monday, April 9, 2012, and the Court heard arguments from counsel for Defendant Guest and from the Plaintiff. The Court has reviewed the pleadings and memoranda, considered the oral arguments raised at the hearing, and hereby issues an Order granting Defendant Guest's Motion and dismissing with prejudice all claims against Defendant Guest asserted by the Plaintiff.

Findings of Fact

Plaintiff Jeremiah DiCapua alleges legal malpractice against Mr. Guest, who was Plaintiff's court-appointed attorney after Plaintiff was arrested for distribution of crack cocaine and possession with intent to distribute crack cocaine on October 16, 2003. The relevant facts alleged in the Complaint, which are construed in the light most favorable to the Plaintiff are as follows:

Following Plaintiff's arrest on October 16, 2003, a Horry County Grand Jury indicted Plaintiff in January 2004 on the charges of distribution of crack cocaine and possession with intent to distribute crack cocaine arising out the of October 16, 2003 arrest. Plaintiff's criminal trial began on January 10, 2005, and the jury reached a guilty verdict on January 13, 2005. Mr.

[Handwritten signature]

Guest represented Plaintiff at trial, and the first of Plaintiff's allegations of malpractice in the Complaint arise out of alleged actions or omissions of Mr. Guest during that trial.

On January 14, 2005, Judge Baxley, the presiding judge, issued an *sua sponte* Order vacating the guilty verdict and sentence because he believed it was an error to allow into evidence a videotape of the drug transaction involved in Plaintiff's arrest. At trial, Judge Baxley denied Mr. Guest's pre-trial motion to suppress the videotape, and Mr. Guest and the Plaintiff did not object to the introduction of the videotape during the trial. Plaintiff now alleges it was malpractice for Mr. Guest not to renew the objection to the admission of the videotape when the prosecution moved to enter it into the record as evidence. On January 31, 2005 Judge Baxley held a hearing with the parties involved to discuss his Order vacating the verdict and ordering a new trial.

The Horry County Solicitor appealed Judge Baxley's Order vacating the verdict, and, on April 23, 2007, the Court of Appeals reversed the Order, reinstating the jury's guilty verdict. In the Complaint, Plaintiff quotes part of the Court of Appeals Opinion, which states, "As the record reflects, DiCapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, DiCapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue DiCapua had with the videotape."

Shortly after the Court of Appeals reversed the Order, Plaintiff was arrested and placed in prison for a parole violation.¹ Plaintiff filed a petition for rehearing with the Court of Appeals,

¹ The Complaint states that Plaintiff was arrested on April 26, 2007 and placed in the state penitentiary on May 21, 2007.

which was denied, and the Supreme Court of South Carolina ultimately upheld the Court of Appeals' reversal of Judge Baxley's Order reinstating the guilty verdict.

The second act or omission Plaintiff alleges was legal malpractice by Mr. Guest involves a June 6, 2007 hearing. After the Court of Appeals reversed Judge Baxley's Order, Plaintiff appeared in Court for sentencing. Plaintiff claims Mr. Guest failed to object to an improper sentencing or "re-sentencing" process in which Plaintiff received a more severe sentence than he had at trial.

Standard of Review

A defendant may move to dismiss a complaint based upon a failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); Spence v. Spence, 368 S.C. 106-17, 628 S.E.2d 869, 874 (2006). If, in viewing the complaint in the light most favorable to the plaintiff, the court determines the facts in the complaint are insufficient to entitle the plaintiff to the relief it seeks, then the court should grant the motion. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

Conclusions of Law

I. Statute of Limitations

In South Carolina, the statute of limitations for civil actions is three years from the date of accrual. S.C. Code Ann. §§ 15-5-530. Tort actions such as this claim of professional negligence are governed by §§ 15-3-530(5) and 15-3-535, which both establish the "discovery rule" for determination of the date of accrual for a cause of action. The date of accrual for a cause of action is the time when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." Id. The test is whether a person of common

knowledge and experience should have known the operative facts, and it is an objective one. Wilson v. Shannon, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989).

It has been stated that "South Carolina's statute of limitations requires 'very little to start the clock.'" Maher v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (citation omitted). Whether the plaintiff understands the full extent of the damages is immaterial to the issue of whether the statute begins to run. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Furthermore, the statute begins to run on the date the plaintiff discovered or should have discovered the injury, not on the date that the plaintiff discovers the identity of the wrongdoer. Tollison v. B & J Machinery Co., Inc., 812 F. Supp. 618 (D.S.C. 1993).

In professional negligence and breach of contract cases, the Court has rejected the "continuous representation" and "continuous treatment" theories to toll the statute of limitations. Epstein v. Brown, 363 S.C. 372 (2005); Harrison v. Bevilacqua, 354 S.C. 129 (2003). Instead, the court has applied the discovery rule as in other negligence cases to determine when the statute first begins to run, regardless of any continued representation or treatment after the action has first accrued. Epstein, 363 S.C. 372; Harrison, 354 S.C. 129. In Epstein, the court held that an action for legal malpractice first arose at the conclusion of trial, even though the attorney in question continued to represent the plaintiff through the appellate process. The Court held that it was not necessary for a final decision to be made by the appellate court for the cause of action to accrue. Id.

In the Complaint in this case, which was filed on August 24, 2011, Plaintiff complains of two specific and distinct events during which he alleges Mr. Guest failed to act causing injury to Plaintiff. The first event was during the trial on Plaintiff's charges for possession of crack cocaine and possession with intent to distribute crack cocaine, which was held January 10-13,

2005: The second event was during a sentencing hearing on June 6, 2007 after the Court of Appeals reversed Judge Baxley's sua sponte Order vacating the verdict. The Court finds that the allegations in the Complaint demonstrate that in both instances, Plaintiff was aware of, or Plaintiff should have been aware of, the acts or omissions giving rise to his claims well before the three year statute of limitations applicable to this case.

Although Plaintiff's cause of action arising out of the 2005 trial arguably accrued on January 14, 2005, the date of Judge Baxley's Order admitting the videotape evidence, Plaintiff was on notice of the facts allegedly giving rise to this claim of professional malpractice by Mr. Guest no later than April 23, 2007, when the Court of Appeals issued its decision finding that the failure to renew the objection to the admission of the videotape amounted to a waiver. Plaintiff's claim for professional negligence regarding the June 6, 2007 hearing arose immediately after the hearing. Plaintiff was advised of his increased sentence at that hearing and was clearly aware of the circumstances that led to his incarceration and the role, if any, that Mr. Guest played in attempting to prevent the incarceration. Accordingly, Plaintiff knew or should have known of the existence of his cause of action at that point.

Therefore, because the facts, as pled by the Plaintiff in the Complaint, establish that Plaintiff failed to make the allegations of professional negligence against Mr. Guest within the applicable statute of limitations, the Court finds that the Complaint should be dismissed with prejudice.

II. Expert Affidavit.

S.C. Code Ann. § 15-36-100(b), provides that "[i]n an action for damages alleging professional negligence against a professional licensed by... the State of South Carolina..., the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at

least one negligent act or omission claimed to exist and the factual basis for each claim based on the evidence at the time of the filing of the affidavit.” The statute specifically applies to actions alleging legal malpractice against attorneys. S.C. Code Ann. § 15-36-100(G)(2). A complaint failing to meet this requirement is subject to dismissal for failure to state a claim. S.C. Code Ann. § 15-36-100(C)(1)(“[i]f an affidavit is not filed... and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim”). S.C. Code Ann. § 15-36-100 is effective for causes of action arising after July 1, 2005.

The Complaint alleges a cause of action for legal malpractice against Mr. Guest. Thus, S.C. Code Ann. § 15-36-100 applies, unless the cause of action arose prior to July 1, 2005. Plaintiff did not file with the Complaint an affidavit of an expert witness specifying any negligent act of Mr. Guest. The two instances of alleged legal malpractice in the Complaint occurred on or about January 10, 2005 and June 6, 2007. The Court finds that, for Plaintiff to state a claim for legal malpractice arising out of the sentencing hearing on June 6, 2007, an expert affidavit is required, and Plaintiff's failure to file an expert affidavit entitled Defendant Guest to a dismissal with prejudice as to any claim related to that event.

As for the alleged legal malpractice arising out of the trial that began on January 10, 2005, the issue is when the cause of action arose. An exact determination of when the cause of action arose is not required to dismiss this case. If the cause of action arose prior to July 1, 2005, no expert affidavit is required; however, the claim is clearly barred by the statute of limitations. If the cause of action arose after July 1, 2005, an expert affidavit is required, the Plaintiff failed to satisfy this requirement, and dismissal with prejudice is appropriate.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that all claims by the Plaintiff against Defendants Guest are dismissed with prejudice.

IT IS HEREBY ORDERED!

Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Presiding Judge

*April 30, 2012
Georgetown, S.C.*

STATE OF SOUTH CAROLINA
County of Horry

IN THE COURT OF COMMON PLEAS

Case No. #

2 || 7104

Jeremiah DiCapua,
Plaintiff,

VERIFIED

COMPLAINT

V.

(JURY DEMAND)

Thomas D. Guest, Jr., ("Val"),
Defendant.

In His Individual Capacity.

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CLERK OF COURT
FORWARD

COMES NOW, Jeremiah DiCapua, hereinafter referred to as "Plaintiff", who brings this action for damages and declaratory relief against Thomas D. Guest, Jr. ("Val"), hereinafter referred to as "Defendant"; and in support thereof would respectfully show unto the Court the following facts and matters, to wit:

JURISDICTION

1. This Court has jurisdiction of the subject-matter, of the parties hereto, and over all things pertaining hereto, pursuant to Title 15, Chapter 78, of the South Carolina Code of Laws, (1976) and Section § 15-78-10, et.seq., which is the South Carolina Tort Claims Act. Furthermore, this Court has jurisdiction pursuant to Title 15, Chapter 53, and Section § 15-53-10, et.seq., which is the Uniform Declaratory Judgments Act; and

PARTIES

2. Jeremiah DiCapua, the Plaintiff herein, is an adult resident of the United States and of the State of South Carolina,

and is currently a ward of the State residing at the McCormick Correction Institution, located at 336 Redemption Way, McCormick, South Carolina 29899. Plaintiff is domiciled in the State of South Carolina. At all times relevant hereto, Plaintiff was, is, and continues to be innocent of any criminal offense which is referenced herein; and

3. Thomas D. Guest, Jr. ("Val"), the Defendant, is an adult resident of the United States and of the State of South Carolina, and he is domiciled in the State of South Carolina. The Defendant may be found for service of process at his principal place of business, which is his law office, located at Parsons, Overson, Stark, Guest, & Neill, PA, 11915 Plaza Drive, Murrell's Inlet, South Carolina 29576, which is located in Horry County, South Carolina. At all times relevant hereto, Defendant was involved with the Plaintiff in an attorney-client relationship, when he breached numerous duties owed to the Plaintiff, resulting in damages, losses, and injuries which were directly and proximately caused by the Defendant's breach of those duties, his acts or omissions, and whose conduct and performance fell below the standard of care for professional attorneys practicing law in criminal matters similar to the matters involved hereinafter referred to as "Legal Matter"; and

4. Further, the underlying facts of each of the causes of action set forth herein, occurred between the dates of October 16, 2003 and June 6, 2007; and

FACTS

5. On October 16, 2003, the Horry County Police Department and the Myrtle Beach Police Department conducted a drug sting in the Red Roof Inn hotel. One hotel room was a control room where the officers could observe the suspect and an informant. The adjoining hotel room served as the transaction room, which was set up with separate video and audio recording devices. On the day in question, the audio equipment is said to have stopped functioning; leaving only the word of the police officers as the only version of events; and

6. The hotel room is said to have been initially searched, along with the informant. The informant was given one hundred and eighty dollars in marked money by the police. The informant and another woman in the hotel room were prostitutes, who have been arrested earlier that day, and who both were "working off charges" in hopes of leniency from the police. Both were charged with prostitution at the time of the alleged drug buy; and

7. The informant briefly left the room and later reentered with the Plaintiff. The informant counted out some money and placed it on the bed. Next, the Plaintiff is said to have counted the money, and appeared to drop something on the bed. The informant then placed an unknown object in her pocket. After the police entered the transaction room, the police searched the Plaintiff, and asserted that they found drugs. The police are said to have also located drugs on the informant, for a total of 2.4 grams of crack cocaine; and

8. Subsequent to his arrest, Plaintiff was charged with distribution of crack cocaine, and possession with intent to distribute crack cocaine. At the time of Plaintiff's arrest, he was a parolee under the supervision of the South Carolina Department of Probation, Parole, and Pardon Services. He was gainfully employed, earning approximately twenty-five thousand (\$25,000) dollars annually. Plaintiff also worked other jobs, and enjoyed the society of friendship and family in his community. Plaintiff at all times relevant hereto was, is, and continues to be innocent of the charges; and

9. Plaintiff was jailed, and at some point thereafter posted a ten-thousand (\$10,000) bond. Plaintiff was conditionally released, and restricted to remaining in Horry County; and

10. Plaintiff's parole officer informed him that he was in jeopardy of having his parolee status revoked pending the outcome of the charges; and

11. Defendant Thomas D. Guest, Jr., a private attorney, was appointed by the Court to represent the Plaintiff in the criminal proceedings, also referred to herein as "Legal Matter". Thus, the Defendant and the Plaintiff were in a fully established attorney-client relationship; and

12. Defendant Guest, having entered said attorney-client relationship, falsely represented to the Plaintiff that he, the

Defendant, possessed the requisite degree of learning, skills, and ability, which are necessary to the practice of the legal profession in the role of criminal defense attorney. Defendant Guest falsely represented to the Plaintiff that he, the Defendant, would exert his best judgment in defending against the charges Plaintiff faced. Defendant Guest falsely represented that he would exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the Plaintiff's cause. Each of these representations were false; and were made by Defendant Thomas D. Guest, Jr.; and

13. In January 2004, the Horry County grand jury indicted the Plaintiff for distribution of crack cocaine (Indictment No.# 2004-11s-26-303), and in April 2004 said grand jury indicted Plaintiff for possession with intent to distribute crack cocaine (Indictment No# 2004-GS-26-1549). In the interim, Defendant Guest repeatedly failed to keep the Plaintiff reasonably informed about the status of the Legal Matter, failed to promptly comply with reasonable requests for information, and failed to respond to letters, phone calls, and emails. Defendant Guest repeatedly failed to act with reasonable diligence and promptness in representing the Plaintiff, and between the time of his appointment, and the termination of the criminal proceedings, Defendant Guest had only a single face to face consultation with the Plaintiff. Said consultation consisted of the Defendant stating "They've got you on videotape." The entire consultation period lasted approximately twenty-minutes, despite the overwhelming gravity of the charges, and the potential for harm in the event that a sustainable defense was not formulated. The remainder of the meeting consisted of idle banter. Defendant Guest failed to explain matters of concern to the Plaintiff to the extent reasonably necessary for the Plaintiff to make informed decisions regarding the representation. These failures to act with diligence, to communicate, and explain matters fell below an objective standard of reasonableness, breached a duty to care, and violated the standard of care to be applied in the role of professional attorneys acting in the role of defense counsel in criminal matters; and

14. On January 10, 2005 the jury trial commenced at the Horry County Courthouse, Court of General Sessions, with the Honorable J. Michael Baxley, presiding. At the start of the trial, Defendant Guest made a motion in limine to suppress the videotape of the alleged drug transaction, because it did not have any audio. The trial judge refused to suppress the videotape; and

15. On January 10, 2005, the State of South Carolina, through the Senior Assistant Solicitor Donna E. Elder moved to introduce the videotape into evidence as State's Exhibit # 5, and the following colloquy transpired:

Ms. Elder: Your Honor, I would like to move the video into evidence at this time, and publish it to the jury.

The Court: All right. That is exhibit what?

Ms. Elder: That is State's Exhibit # 5, Your Honor.

The Court: All right. What says the defense?

Mr. Guess: We have no objection, Your Honor. (Emphasis added)

The Court: Without objection, State's # 5 is in evidence.

16. Shortly thereafter, the assistant solicitor questioned Detective Kent Donald about the matters transpiring on the videotape as it was published to the jury. At no point during the State's introduction of the videotape into evidence, nor during the direct testimony of Detective Kent Donald did Defendant Guest object to the videotape, or to Detective Donald's testimony regarding the videotape. Neither the informant, nor the other prostitute testified at trial against the Plaintiff; and

17. After the jury found the Plaintiff guilty of both offenses alleged in the indictments, the trial court on January 13, 2005 imposed two concurrent sentences of thirty (30) months incarceration for each offense, and also imposed a fine of twenty-five thousand (\$25,000) dollars as to each offense. The trial court also credited Plaintiff with two-hundred ninety-seven (297) days jail time credit (approximately ten months); and

18. Then the next day, January 14, 2005, moved by conscious and an acute sense of justice, the trial judge vacated the jury verdicts and the sentences, focusing on the videotape, stating that its admission into evidence was "inappropriate for multiple

reasons"; and

19. The trial court found that the :

(a) "videotape was the primary evidence upon which the defendant (Plaintiff) was convicted;

(b) the audio portion of the taping equipment malfunctioned, and there is no audio;

(c) the video recorded the defendant (Plaintiff) and the informant from a poor angle and it cannot be said with certainty what transaction, if any, occurred, a situation which renders the missing audio most important;

(d) the informant was allowed to make telephone calls from the hotel room and it is not known to whom these calls were placed;

(e) further, in something never seen before this Court, the informant was allowed to leave the hotel room unaccompanied by law enforcement during the sting operation and was completely off camera for a duration of time;

(f) thus, this Court cannot with certainty affirm that the crack cocaine discovered at the scene was the property of the defendant (Plaintiff herein), for neither the informant, nor the female witness testified at trial. In light of those facts, this Court finds that the introduction of the videotape and the admission of Detective Kent Donald's testimony as to what was depicted on the videotape as it was played for the jury was inappropriate evidence;

(g) therefore, this Court sua sponte vacates the jury CONVICTION and SENTENCES on the two charges it is the decision of this Court to suppress the introduction of the videotape in any new trial had on the charges;"

20. On January 31, 2005, Judge Baxley convened a hearing to amplify his reasons and rationale for vacating the convictions and sentences, and to supplement the record; and

21. The State of South Carolina appealed the post-trial order; said appeal ending up in the South Carolina Court of Appeals, Case No. # 4239, State v. DiCapua. On April 23, 2007, the Court of Appeals reversed Judge Baxley's post-trial order, holding that:

"As the record reflects, DiCapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, DiCapua's counsel specifically stated he had 'no objection'. We find this amounted to a waiver of any issue DiCapua had with the videotape.

In Martell v. State, a case similar to the one here, the defendant's counsel not only failed to object to the introduction of evidence that he had previously moved to suppress, but affirmatively stated that he had no objection to its introduction.

Appellant's express waiver of objection to the admission of the evidence now in question was tantamount to a withdrawal of his previous motion to suppress, and . . . consequently the issue of admissibility is not now before us. . . . It is settled law that when an accused is present in court and represented by competent counsel, he is bound by the actions and concessions of counsel, and that even Constitutional rights may be waived in the course of a trial.

We reverse and reinstate DiCapua's sentence.

21. The Court of Appeals, merely reinstated the "sentence", and failed to reinstate the "jury verdicts" or the "convictions". To this very day, no jury verdict nor conviction for the offenses has ever been reinstated by any court; and

22. Thus, the reinstated sentence was precisely the same sentence imposed by the Honorable J. Michael Baxley on January 13, 2005 ; and previously set forth in Paragraph 17 above; and

23. After the April 23, 2007 Court of Appeal's decision reversing the Judge Baxley's post-trial order, the assistant solicitor on April 26, 2007 caused to be issued an arrest warrant for Plaintiff who was taken into custody, placed in jail, thus ending his conditional freedom while on bond. On May 8, 2007, Plaintiff filed a Petition for Rehearing to the South Carolina Court of Appeals. Meanwhile, on May 21, 2007, Plaintiff was thrown into the State Penitentiary without being first lawfully

convicted, and without any jury verdict of guilt having first been had, nor reinstated in violation of due process of law, and the codified law of the State of South Carolina, set forth at § 17-25-10. The Plaintiff thus, begin serving time on the "reinstated sentence"; and

24. Before the remittur was sent, and while the Petition for Rehearing was pending before the Court of Appeals, and despite Plaintiff having already commenced serving prison time on the reinstated sentence, the Plaintiff was hauled from his prison cell, and on June 6, 2007 subjected to yet another imposition of punishment for the exact same offenses. This time however, the sentence imposed was even more harsh and onerous, than that sentence "reinstated" by the Court of Appeals. Moreover, the assistant solicitor sought to have the trial court impose up to fifteen (15) years incarceration as to each charge upon the Plaintiff, and the trial court accepted this as being within the possible range of sentences for purposes of the June 6, 2007 "re-sentencing". At no time during any of these flagrant violations of Plaintiff's Constitutional rights, and statutory rights did Defendant Guest raise a single objection or challenge on behalf of his client, the Plaintiff. These glaring encroachments occurred in the context that the circuit court lacked jurisdiction to impose any additional sentence, a fact the State later admitted. The June 6, 2007 sentence subjected Plaintiff to being twice put in jeopardy for the same offenses, in violation of the Double Jeopardy Clauses of the United States and South Carolina Constitutions. Finally, because the State was seeking to increase the Plaintiff's sentence, it violated the ex post facto clause of the United States Constitution and the Due Process Clause thereof, all without the merest challenge by Defendant Guest; and

25. At the June 6, 2007 proceeding, the trial judge inquired of the assistant solicitor whether the Court of Appeals had "reinstated the jury's verdict". Assistant Solicitor Donna Elder lied to the Court, without any challenge from Defendant Guest, when she responded that it was not clear, and added that "because it did not specify the sentence was reinstated, we felt it necessary to bring it back before Your Honor to make sure it was clarified ... it just said reverse." Although these falsehoods could have been easily refuted by reference to the written

decision from the Court of Appeals, Defendant Guest freely permitted the Assistant Solicitor to lie to the trial court, causing further damages, losses, and injuries; and

26. Additionally, at the June 5, 2007 proceeding, Assistant Solicitor Donna Elder prefabricated the falsehood that "the appeal was reversed and sent back down for sentencing;" yet again, Defendant Guest remained silent, while this glaring falsehood and fraud upon the court was perpetrated; as the truth is in fact that the case was not remanded, nor "sent back down for sentencing" as the Assistant Solicitor asserted falsely as an officer of the court; and

27. During the June 5, 2007 , the following colloquy transpired:

The Court: I believe the State's position is that this is, a new sentencing proceeding with Mr. DiCapua having up to fifteen years exposure on each count, and that we are as if there was not a sentencing previously ? Is that a correct statement of your position, counsel?

Ms. Elder: Yes, sir. Your Honor.

Thus, by the State's own admission, Plaintiff was placed in jeopardy "anew", as if the original sentence had not even occurred. Defendant Thomas D. Guest, again, sat idly by, and watched this double jeopardy "exposure" occur, this time for an even more harsh and onerous possible sentence. The Plaintiff's evidence will show, a longer, harsher, more onerous sentence was actually imposed at this proceeding, in violation of the Double Jeopardy Clause, and the ex post facto clause of the United States Constitution, all with the acquiescence and tacit approval of Defendant Thomas D. Guest, Jr., his trial counsel; and

28. At no point during this "new" sentencing did Defendant Thomas D. Guest, Jr. object to the exposure to a harsher, more onerous sentence, at no time did he object to any imposition of sentence on the ground that the April 23, 2007 decision by South Carolina Court of Appeals had already "reinstated" the original sentence, and that the June 5, 2007 sentence would violate both the Double Jeopardy, due process and ex post facto clause of the

United States Constitution, and their counterparts in the South Carolina Constitution. Moreover, whereas the "reinstated" original sentence included the provision of two-hundred ninety seven (297) days jail time credit, on June 6, 2007, the trial court imposed a set of sentences, which did not include the earlier provision of said jail time credits, thus increasing the Plaintiff's sentence by approximately ten (10) months incarceration. Defendant Guest made not the merest challenge or objection to this flagrantly illegal violation of the Plaintiff's rights to due process, a fair trial, and the right to be free from ex post facto violations under the earlier referenced constitutional provisions. The original "reinstated sentence" is endorsed on South Carolina Court Administration Form SCCA/217, dated January 13, 2005, and the June 6, 2007 sentence is endorsed on an identical form dated June 6, 2007. Additionally, Defendant Guest failed to object on the basis that it is well settled law, that because the appellate court "reinstated" the original sentence, matters decided by the appellate court cannot be reheard, reconsidered, or re-litigated in the trial court, as done at the June 6, 2007 proceeding; and

29. Presently, the illegal conviction obtained due to Defendant Guest's professional negligence, has resulted in the appellate court not having jurisdiction of the Plaintiff's appeal on direct review, due to the failure to object, and it has resulted in the South Carolina Department of Probation, Parole, and Pardon Services twice rejecting Plaintiff for parole release on account of the convictions, thus Plaintiff is in jeopardy of never being release on parole again and remaining in prison for the rest of his natural life; and

30. On June 6, 2007, Plaintiff filed notice of appeal from the June 6, 2007 sentencing proceeding. On June 28, 2007, the South Carolina Court of Appeals issued an order formally denying the earlier filed Petition for Rehearing, mentioned in paragraph 23 above; and

31. On July 25, 2007, the Plaintiff's parole was revoked due to the convictions which but for Defendant Guest's professional negligence, and breach of various duties to care, as well as violation of the applicable standard of care, could have been avoided; such denial of parole being a natural and probable consequence of Defendant Guest's unprofessional and negligent

acts and Commissions; and

32. On July 13, 2009, the South Carolina Supreme Court affirmed the decision of the court of Appeals, holding that:

Moreover, to affirm the grant of a new trial on the waived issue in a criminal case would lend this Court's imprimatur to a trial court's impromptu grant of post-conviction relief. By consenting to the admission of the videotape evidence, DiCapua waived any direct challenge to the admission of the evidence. Concomitantly, the trial court lacked authority to grant relief on the basis of a ground not raised by DiCapua. We hold the granting of a new trial sua sponte on a ground waived by a party is error of law. Affirmed; and

33. On July 29, 2009, the remittur was sent from the clerk of the South Carolina Supreme Court to the Horry County clerk of court; and

34. On March 29, 2010, the Plaintiff filed for post-conviction relief in the Horry County Court of Common Pleas, (Case No.# 2010-CP-26-2664), alleging:

- (a) Ineffective Assistance of Trial Counsel;
- (b) Ineffective Assistance of Appellate Counsel;
- (c) Lack of Subject-matter Jurisdiction;
- (d) Violation of Constitutional and Statutory Rights; and

35. At an evidentiary hearing convened at the Horry County Courthouse on February 1, 2011, the Honorable Benjamin H. Culbertson presided. Plaintiff proceeded on the sole issue to wit: "Ineffective Assistance of Trial Counsel", relating to Defendant Guest's failure to object to the introduction of the videotape and the testimony of Detective Kent Donald. The presiding judge granted relief, and vacated the convictions and sentences. In a footnote, the Court noted that the State admitted that Judge Baxley did not have jurisdiction on June 6, 2007 to sentence Plaintiff, thus making it clear that Defendant Guest was negligent in failing to object to that proceeding. Moreover, the Court noted that the State argued that the June 6, 2007 sentence was null and void, however, the State was not the "applicant" for post-conviction relief, and did not, nor could it raise the issue of whether the trial court had "jurisdiction" on June 6, 2007.

Thus, no court of law has ever ruled that the sentences imposed on June 6, 2007 are null and void. Just as the South Carolina Supreme Court held a "trial court lacks authority" on an issue not before it, in paragraph No.#32 above, no reasonable conclusion can be made that any court has ruled the June 6, 2007 sentences are null and void. That issue simply was not before the Court during the post-conviction relief hearing; and

36. Further, the Court during the post-conviction relief hearing erroneously found that the sentence imposed on June 6, 2007 was exactly the same as that sentence reinstated by the Court of Appeals, however this is untrue, for the sentence of June 6, 2007 failed to provide for the jail time credits, which the "reinstated" sentences included. The June 6, 2007 sentences was in fact two-hundred and ninety seven (297) days longer. Thus, the June 6, 2007 sentences were approximately ten (10) months longer than the reinstated sentences; and

37. During the post-conviction relief hearing, Defendant Thomas D. Guest, stipulated and admitted that as Plaintiff's trial counsel, he did not renew, and thus did not make an objection to the introduction of the videotape of the alleged drug buy. The Court found that there was "no objection" made, and in assessing the issue focused on three exhibits Plaintiff presented to the court; to wit,:

- (a) Judge Baxley's Order Vacating convictions and Sentences;
- (b) the South Carolina Court of Appeal's decision reversing Judge Baxley's Order;
- (c) the South Carolina Supreme Court's Opinion upholding the decision of the Court of Appeals; and

38. The presiding judge, granted post-conviction relief, holding:

"This Court rejects the State's arguments, and finds that trial counsel was ineffective for failing to contemporaneously object to admission of the videotape during trial. This Court finds that counsel should have objected to the videotape using the four reasons set forth in Judge Baxley's Order Vacating Convictions and Sentences. This Court finds the Applicant was prejudiced by trial counsel's failure to object because it is apparent from the post-trial Order that had

counsel contemporaneously objected, Judge Baxley would have excluded the videotape and dismissed the case. "

Based upon the foregoing, this Court finds and concludes that the Applicant has met his burden of proof as to the sole claim raised; therefore, he is entitled to post-conviction [relief]. The Applicant's PCR^{III} application is GRANTED. His convictions are hereby VACATED and the cases are remanded to the trial court so that the Applicant may receive a new trial AND IT IS SO ORDERED this 23rd day of February, 2011;" and

39. Therefore, the Plaintiff is innocent of the offenses previously referenced throughout this pleading, and which are alleged in indictments 2004-GS-26-303 and 2004-GS-26-1549; and

40. Defendant Guest breached multiple duties owed to the Plaintiff, directly and proximately causing Plaintiff damages, losses, and injuries as a result thereof; which would not have occurred "but for" the Defendant's professional negligence, as specifically found by the South Carolina Court of Appeals, the South Carolina Supreme Court, and by the presiding judge at the post-conviction relief hearing. The Plaintiff's damages, losses, and injuries were foreseeable in light of the clearly established standard of care, the prevailing law at the relevant times involved, and under the circumstances at those times. The damages, injuries, and losses sustained by Plaintiff are and were a natural and probable consequence of Defendant Guest's legal malpractice, his professional negligence, breach of duty, breach of fiduciary duty, failure to exercise reasonable and ordinary care in the circumstances, negligence, Constitutional negligence, gross negligence, Constitutional gross negligence; and

41. Plaintiff avers that the damages, losses, and injuries he has sustained, are also a natural and probable consequence of Defendant Guest's fraud and negligent misrepresentations; and

42. Defendant Guest did at all times relevant hereto fail to exercise a reasonable and prudent care with regard to the Plaintiff's rights, interests, and concerns, as well as to the performance of his duties as counsel for Plaintiff; which resulted in the Plaintiff sustaining damages, losses, and injuries including, but not limited to loss of liberty, loss of

society with family and friends, isolation and bereavement where Plaintiff's father died while Plaintiff was serving time under the resulting conviction, loss wages and interest thereon, loss future earnings, actual damages in the form of large sums of monies paid to various legal counsels, legal expenses, supplies, postage, loss of intangible property in the form of Constitutional rights secured to him by the Due Process, Double Jeopardy, and Ex Post Facto Clauses of the United States Constitution and their counterparts in the South Carolina Constitution, loss of the right to a fair trial, and being deprived of the First Amendment right to meaningful access to the courts due to loss of appellate jurisdiction during the direct appeal. As a direct and proximate result of Defendant Guest's acts and omissions, Plaintiff continues to be denied parole release, forced to suffer possibly the remainder of his natural life in prison, where the conviction was the direct and proximate result of Defendant's acts and omissions; Plaintiff suffers the rigors of incarceration, psychological and emotional pain and suffering, emotional distress, mental pain and suffering, physical pain and suffering, insomnia, depression, anxiety, headaches, shock, ridicule, loss of dignity, scorn, rejection, shame, and other damages; and

43. Defendant Thomas D. Guest, Jr., did at all times relevant hereto fail to use due care in the circumstances, and did intentionally, consciously fail to object to the introduction of the videotape and testimony of Detective Kent Donald when he ought to have done so, and did intentionally and consciously waive said objections as well as Plaintiff's Constitutional right to challenge said evidence, when he ought not to have done so. Defendant Guest did intentionally and consciously waive Plaintiff's right to direct appeal of the issue, when he ought not to have done so, and failed to object in the trial court, when he ought to have done so; and

44. Defendant Guest breached a binding, valid contract, and express warranty, wherein he and Plaintiff had a meeting of minds as to all essential and material terms of the agreement to provide legal representation to Plaintiff. Defendant had no legal

excuse for failing to act appropriately to protect Plaintiff from a known risks of harm, sufferings, losses, and damages; and

45. At all times relevant hereto, Defendant Guest did falsely hold himself out to be competent in the areas of law dealing with the legal matters entrusted to him by Plaintiff, he did enter into said attorney-client relationship, and was required, but failed to, exercise the same legal skill as a reasonably competent attorney using reasonable care in determining and implementing a strategy to be followed to achieve Plaintiff's legal objectives and goals. As Plaintiff's agent and fiduciary, Defendant Guest was obligated to act in Plaintiff's best interests, to zealously represent Plaintiff's interests, and in the course of handling the legal matter, Defendant Guest negligently failed to act with the degree of competence generally possessed by attorneys in the State of South Carolina who handle legal matters similar to Plaintiff's; and

46. Plaintiff avers that Defendant Guest violated the following standards of care, and Professional Rules of Conduct, and Court Rules, which are relevant to all things herein, and intended to protect or address a client's interest, cause or concern, including protecting Plaintiff from the types of harm, prejudice, damages, losses, and injuries sustained by Plaintiff herein; to wit:

(A) Rules of Professional Conduct, Rule 407 (or similar) of South Carolina Appellate Court Rules, including:

- Rule 1.1 - Competence
- Rule 1.2- Scope of Representation
- Rule 1.3- Diligence
- Rule 1.15 Safekeeping Property
- Rule 2.1 Advisor
- Rule 3.1 Meritorious Claim and Contentions
- Rule 4.1 Truthfulness of Statements To Others
- Rule 8.4 Misconduct; and

(B) South Carolina Rules of Criminal Practice/Procedure (S.C.Crim. P.):

- Rule 4(b) - Motions and Subsequent Applications After Refusal;
- Rule 17 - Reservation of Objections;
- Rule 18 (a) - Argument of Objections After Rulings

(C) South Carolina Code of Laws, (1976):

§ 17-3-10 governing right of accused to have counsel, to produce witnesses, and to confront evidence and witnesses;

§ 17-25-10 Requiring a person be lawfully convicted before punishment is imposed; and

47. FIRST CAUSE OF ACTION
(Declaratory)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-53-10, et. seq., the South Carolina Code of Laws, (1976), Annot., Uniform Declaratory Judgments Act; for declaratory relief; and

48. SECOND CAUSE OF ACTION
(Legal Malpractice/ Professional Negligence)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for legal malpractice and/or professional negligence. At all times relevant hereto, the Plaintiff and Defendant were in an attorney-client relationship, the Defendant had owed to Plaintiff the duties implied and expressly mentioned hereinbefore, and the Defendant breached one or more of those duties, including but not limited to the duty to care, which directly and proximately caused the Plaintiff to sustain damages, losses, and injuries, which Plaintiff sustained as a probable and natural consequence of the Defendant's professional negligence and/or legal malpractice; and but for the Defendant's acts or omissions, legal malpractice, or professional negligence, the Plaintiff would not have suffered said damages, losses, and injuries; which would not have occurred or which could have been avoided. Each of Plaintiff's damages, losses, and injuries was foreseeable in the circumstances, in light of the standard of care, the prevailing law at the time of the events and occurrences, and other clearly established guideposts. The Plaintiff is, was, and continues to be innocent of the criminal offenses hereinbefore referenced, at all relevant times, and but for the Defendant's acts or omissions, Plaintiff would not have

had his parole revoked, would not have been denied direct appellate review, would not have been twice punished, would not have had his sentences increased by approximately ten (10) months, nor would he have been convicted and incarcerated for the alleged criminal offenses which were the subject of the relief granted during the post-conviction relief proceedings previously mentioned; and

49.

THIRD CAUSE OF ACTION

(Breach of Duty)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for breach of duty. The Defendant owed the Plaintiff a duty of care, which the Defendant breached by his acts or omissions, causing Plaintiff damages. Defendant failed to adhere to a standard of reasonable care while performing the herein acts and omissions which foreseeably harmed the Plaintiff. ; and

50.

FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for breach of fiduciary duty. Defendant acted as Plaintiff's fiduciary and alter-ego, and thus had a fiduciary duty to care created by his undertaking to represent the Plaintiff, and acting primarily for the benefit of Plaintiff in matters connected with said undertaking. Defendant held a position of trust and confidence, and acted as Plaintiff's fiduciary as the Plaintiff was his client, and did breach that duty. Plaintiff reposed a belief that Defendant was giving advice or presenting arguments in behalf of Plaintiff; and

51.

FIFTH CAUSE OF ACTION

(Negligence)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the

South Carolina Tort Claims Act; for negligence. Defendant owed Plaintiff a duty to care, the defendant breached that duty by his negligent acts or omissions, and said breach was the actual and proximate cause of Plaintiff's damages, losses, and injuries. The Defendant owed the Plaintiff a duty of care. The Defendant by his acts or omissions breached that duty, and as a proximate result of that breach, the Plaintiff suffered damages, losses, and injuries. The Defendant had a duty of reasonable care to advocate on Plaintiff's behalf and to make challenges to the State's evidence and procedures, where the evidence was improper, or the procedures employed in obtaining the conviction and sentences was improper or illegal, yet Defendant failed to perform those duties. and

52. SIXTH CAUSE OF ACTION

(Constitutional Negligence)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for Constitutional negligence, which resulted in violation of the aforementioned Constitutional rights of Plaintiff. ; and

53. SEVENTH CAUSE OF ACTION

(Gross Negligence)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for gross negligence. The Defendant's acts or omissions were intentional failures to do that which one ought to do or the doing of acts or omissions one ought not to do. Defendant failed to exercise a slight care. ; and

54. EIGHTH CAUSE OF ACTION

(Constitutional Gross Negligence)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for Constitutional gross

negligence, resulting in violation of the aforementioned Constitutional rights of the Plaintiff. ; and

55.

NINTH CAUSE OF ACTION

(Fraud)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1975), the South Carolina Tort Claims Act; for fraud, where as here, Defendant made representations to Plaintiff which were false and material, knowing of their falsity or recklessly disregarded their truth or falsity; with intent that the representations be acted upon by Plaintiff. The Plaintiff was ignorant of the falsity of said misrepresentations, yet relied upon them in continuing the attorney-client relationship with the Defendant. The Plaintiff had a right to rely upon the representations, and Plaintiff suffered consequently and proximately as a result of said representations; and

56.

TENTH CAUSE OF ACTION

(Negligent Misrepresentation)

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

The Defendant is liable to the Plaintiff pursuant to § 15-78-10, et. seq., South Carolina Code of Laws, (1976), the South Carolina Tort Claims Act; for negligent misrepresentation, where as here, the Defendant made false representations to Plaintiff, having a pecuniary interest in making said misrepresentations or statements, and had a duty of care to see that he communicated truthful information to the Plaintiff, and Defendant breached that duty by failing to exercise due care. The Plaintiff justifiably relied on said representations, and suffered pecuniary losses as the proximate result of his reliance on the representations of the Defendant; and

RELIEF DEMANDED

The contents of each preceding page is hereby incorporated by reference herein, as if re-stated verbatim.

57. Plaintiff hereby demands declaratory relief that the

acts and/or omissions of Defendant Guest constituted one or more of the following, to wit: legal malpractice, professional negligence, breach of duty, breach of fiduciary duty, negligence, Constitutional negligence, gross negligence, or Constitutional gross negligence; and

58. Plaintiff hereby demands nominal damages, in an amount not less than one dollar; and

59. Plaintiff hereby demands actual damages in an amount not less than Three-Hundred Thousand (\$300,000) Dollars; and

60. Plaintiff hereby demands compensatory damages in an amount not less than three-hundred thousand (\$300,000) Dollars; and

61. Plaintiff hereby demands punitive damages in an amount not less than Four-Million (\$4,000,000) Dollars; where as here, the Defendant's acts or omissions were willful, wanton, or with reckless disregard for the Plaintiff's rights; and evinced a conscious failure to exercise due care. Defendant was aware of a known risk of harm or dangerous condition, and did not take action to minimize or avoid said known risks of harm or dangerous condition; and

62. Attorney's fees, costs, and expenses; and such other equitable relief as the Court deems just and proper; and

63. Plaintiff hereby demands a jury trial on all triable issues, pursuant to the Article 1, § 14 of the South Carolina Constitution.

The forgoing facts are true and correct to the best of my knowledge, information and belief.

Plaintiff Prays,



Jeremiah DiCapua

Plaintiff, Pro Se

Date: August 23, 2011
McCormick, South Carolina.

McCormick Correction Institution

386 Redemption Way

McCormick, South Carolina 29899

: 11

VERIFICATION

Jeremiah D. Capua the Plaintiff in the foregoing matter, hereby verify that foregoing averments, facts, and matters are true and correct to the best of my knowledge, information and belief.

Date: 8-23-11

Jeremiah D. Capua

Jeremiah DiCapua
McCormick Correction Institution
386 Redemption Way
McCormick, SC 29899

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 23 DAY OF August, 2011.

Joyce L. Young
Notary Public for South Carolina

My Commission Expires: 8 28 2011

CLERK OF COURT
11 AUG 24 AM 11:12

APPLICATION TO PROCEED WITHOUT COST, FEES, & SECURITY
HEREFOR

11

7104

I Jeremiah DiCapua, hereby request to proceed in this action without prepayment of costs, fees, or security therefor.

1. I am indigent, and cannot afford said expenses, nor the required first time payments. I agree to be responsible for the full payment of filing fees and court costs when funds are available. I believe I am entitled to relief; and

2. Accordingly, I have attached hereto a certified copy of my trust account reflecting my balance

Date: August 23, 2011 Jeremiah DiCapua
Jeremiah DiCapua

VERIFICATION

Jeremiah DiCapua, the Plaintiff in the foregoing matter, hereby verify that foregoing averments, facts, and matters are true and correct to the best of my knowledge, information and belief.

Date: August 23, 2011 Jeremiah DiCapua
Jeremiah DiCapua

McCormick Correction Institution
386 Redemption Way
McCormick, SC 29899

SWORN TO AND SUBSCRIBED

BEFORE ME THIS

23 DAY OF August, 2011.

Jayne L Young

Notary Public for South Carolina

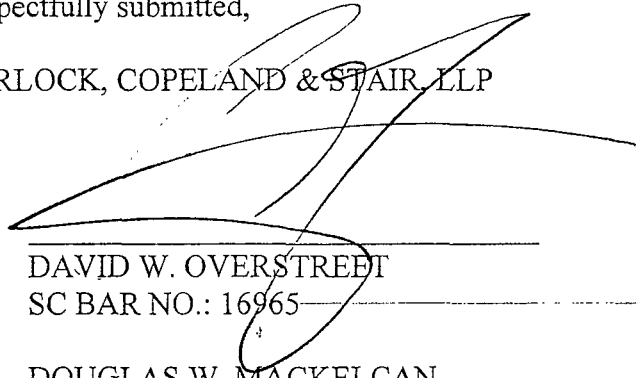
My Commission Expires: 8 28 2011

CLERK OF COURT
11 AUG 24 AM 11:12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	ANSWER
	)	(GENERAL DENIAL)
vs.	)	(JURY TRIAL DEMANDED)
)	
Thomas D. Guest, Jr.)	
)	
Defendant.)	

The Defendant Thomas D. Guest, Jr., hereby responds to the allegations of the Plaintiff's Complaint by stating that he generally denies all allegations in the Complaint, denies any liability to the Plaintiff, and demands a jury trial.

Respectfully submitted,
 CARLOCK, COPELAND & STAIR, LLP

By: 

DAVID W. OVERSTREET
 SC BAR NO.: 16965

DOUGLAS W. MACKELCAN
 SC BAR NO.: 76332

Attorneys for the Defendant


40 Calhoun Street, Suite 400
 Charleston, SC 29401
 (843) 727-0307

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
Thomas D. Guest, Jr.)	
)	
Defendant.)	

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to the following:

Jeremiah DiCapua
 Inmate No. 00105096
 McCormick Correction Institution
 385 Redemption Way
 McCormick, South Carolina 29899
Pro Se Plaintiff

This 7th day of November, 2011.


 Assistant to Douglas W. MacKelcan

Carlock, Copeland & Stair, LLP
 40 Calhoun Street, Suite 400
 Charleston, SC 29401
 (843) 727-0307

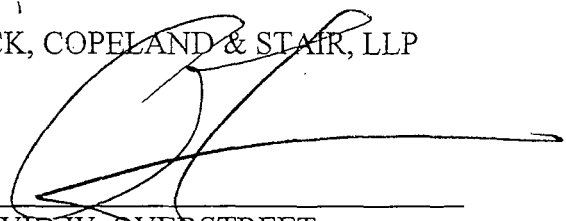
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	MOTION TO DISMISS
)	
vs.)	
)	
Thomas D. Guest, Jr.,)	
)	
Defendant.)	

YOU WILL PLEASE TAKE NOTICE that Defendant Thomas D. Guest, Jr., by and through his undersigned attorneys, will move before the presiding judge in the Court of Common Pleas for an order dismissing this case with prejudice pursuant to SCRPC 12(b)(6). This Motion is based on the following grounds:

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

Defendant Guest may support this Motion with memoranda and affidavits as appropriate.

Respectfully submitted,
 CARLOCK, COPELAND & STAIR, LLP

By: 
 For DAVID W. OVERSTREET
 SC BAR NO.: 16965

DOUGLAS W. MACKELCAN
 SC BAR NO.: 76332

Attorneys for the Defendant

40 Calhoun Street, Suite 400
 Charleston, SC 29401
 (843) 727-0307

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTEENTH JUDICIAL CIRCUIT)
CASE NO.: 2011-CP-26-7104)

COUNTY OF HORRY)

Jeremiah DiCapua,)

Plaintiff,)

CERTIFICATE OF SERVICE

vs.)

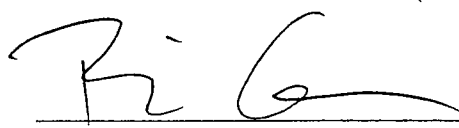
Thomas D. Guest, Jr.,)

Defendant.)

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to the following:

Jeremiah DiCapua
Inmate No. 00105096
McCormick Correction Institution
385 Redemption Way
McCormick, South Carolina 29899
Pro Se Plaintiff

This 2nd day of November, 2011.


Assistant to Douglas W. MacKelcan

Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
)
 JEREMIAH DICAPUA,)
)
 Plaintiff,)
)
 vs.)
)
 THOMAS D. GUEST, JR.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 CASE NO.: 2011-CP-26-7104

MOTION INFORMATION AND COVERSHEET

(check box above indicating submitting party)

<input type="checkbox"/> Pro Se Plaintiff Jeremiah DiCapua Innate No. 00105096 McCormick Correction Institution 385 Redemption Way McCormick, South Carolina 29899	Name, S.C. Bar no. and address of Defendant's attorney David W. Overstreet, Esq. (SC Bar No.: 16965) Douglas W. MacKelcan, Esq. (SC Bar No.: 76332) Carlock Copeland & Stair, LLP 40 Calhoun Street, Suite 400 Charleston, SC 29401
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion to Dismiss Estimated Time Needed: 30 minutes Court Reporter Needed: Yes	
SECTION II: Motion Type	
<input checked="" type="checkbox"/> Written motion <input type="checkbox"/> Form Motion attached I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for Defendant	Date submitted 11/2/11
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: Rule to Show Cause in Child or Spousal Support Domestic Abuse or Abuse and Neglect Indigent Status State Agency v. Indigent Party Sexually Violent Predator Act Post-Conviction Relief Motion for Stay in Bankruptcy Motion for Publication Motion for Execution (Rule 69, SCRPC) Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ Other: _____	
JUDGE'S SECTION	
Motion Fee to be paid upon filing of the attached order. Other: _____	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ (print name) MOTION FEE COLLECTED: _____ CONTESTED - AMOUNT DUE: _____	<u>DATE FILED</u>

Aut. of Sumci 11-2-2011

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Case No. # 2011-CP-26-7104

Jeremiah DiCapua,)
Plaintiff,)

v.)

Thomas D. Guest, Jr., ("Val"),)
Defendant.)

In His Individual Capacity.)

11 NOV 21 AM 8:16
CLEARED COURT

R E P L Y

COMES NOW, Jeremiah Di Capua, the Plaintiff in the above-styled matter, and who hereby submits the following reply to the "Answer (General Denial)" and "Motion To Dismiss". Furthermore, the Plaintiff would reference the herewith and concurrently submitted (1) Motion To Strike The Answer; (2) Objection To Defendant's Motion To Dismiss; and (3) request for the Clerk of Court to enter the Defendant's default upon the calendar (filebook) pursuant to Rule 55(a), SCRCVP. In further such Reply, the Plaintiff submits :

1] The Defendant has failed to comply with Rule 8(b), SCRCVP, and thus by pleading a mere "General Denial", has in effect not filed an "Answer" at all within the applicable period of time. "General Denials" have been abolished in the State of South Carolina civil practice and procedure, unless Defendant can controvert every allegation of the complaint, including jurisdiction.

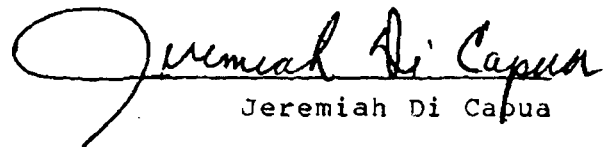
The Defendant fails to state the facts constituting his defenses to each cause of action and fails to admit or deny the averments upon which Plaintiff relies in the Verified Complaint, which was served upon Defendant on October 3, 2011. Defendant fails to assert any denials which fairly meet the substance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

Here, the Defendant is not permitted to make a general

clocked Nov 21, 2011
CLERK OF S.C. NOV 14, 2011

denial unless he can controvert every allegation of the Complaint, including jurisdiction. As a practical matter, Defendant cannot fulfill this task, (much less attempts to do so) in light of Defendant's having filed a "Motion To Dismiss" along with his response. ~~A motion to dismiss conditionally admits truthfulness of the factual allegations set forth in the complaint, including jurisdictional allegations. The Defendant has not controverted the jurisdictional allegations on page 1, ¶ 1, of the Verified Complaint, therefore the general denial is not available as a defense. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999); and accordingly, the "Answer (General Denial)" should be stricken from the record; and~~

- 2] In light of the facts and circumstances set forth in paragraph 1 above, the Defendant is in default; and default judgment should be entered upon the record; and
- 3] Defendant waives certain defenses, as enumerated in Rule 9(b), Rule 8(c); Rule 12(g) and Rule 12(h), all of the South Carolina Rules of Civil Procedure; including but not limited to insufficiency of service of process, and lack of jurisdiction, and
- 4] That because, any bar certified attorney is aware of the fact that "General Denials" are abolished, the pleading filed by the Defendant is a violation of Rule 11, SCRCP, and the pleading denominated "Answer (General Denial)" should be stricken from the record; and
- 5] The Certificate of Service" attached to the Defendant's "Answer (General Denial)" does not bear the correct address of the Plaintiff, and therefore, does not comply with the rules of service. In this light, Defendant has failed to properly serve an Answer within the applicable time period, and is in default.


Jeremiah Di Capua

Date: November 14th, 2011
McCormick, South Carolina.

McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina 29899

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Case No. # 2011-CP-26-7104

Jeremiah DiCapua,)
Plaintiff,)

NOTICE OF MOTION AND

v.)

MOTION TO STRIKE ANSWER)
(Rule 12, SCRCVP))

Thomas D. Guest, Jr., ("Val"),)
Defendant.)

In His Individual Capacity.)

NOV 21 AM 8:16
CLERK OF COURT

TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY given ten (10) days notice of the herein motion to strike the Answer (General Denial) filed in the above-styled case, pursuant to Rule 12(f), SCRCVP, and Plaintiff hereby moves for an order striking the said pleading based on the following grounds:

1] The Defendant has failed to comply with Rule 8(b), SCRCVP, and thus by pleading a mere "General Denial", has in effect not filed an "Answer" at all within the applicable period of time. "General Denials" have been abolished in the State of South Carolina civil practice and procedure, unless Defendant can controvert every allegation of the complaint, including jurisdiction.

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

2] That because, any bar certified attorney is aware of the fact that "General Denials" are abolished, the pleading filed by the Defendant is a violation of Rule 11, SCRCVP, and the pleading

FILED NOV 21 2011
CLERK OF COURT

denominated "Answer (General Denial)" should be stricken from the record; and

3] The Certificate of Service" attached to the Defendant's "Answer (General Denial)" does not bear the correct address of the Plaintiff, and therefore, does not comply with the rules of service. In this light, Defendant has failed to properly serve an Answer within the applicable time period, and is in default.

4] Because the Defendant has 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 has been timely filed with the Court, nor served upon the Plaintiff. The Defendant is in default, and the record should reflect same.

Respectfully Submitted,


Jeremiah Di Capua

Date: November 14th, 2011
McCormick, South Carolina.

Plaintiff,
Pro se

McCormick Correction
Insitution, 386 Redemption
Way, McCormick, S.C. 29899

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)
Case No. # 2011-CF-26-7104

Jeremiah DiCapua,)
Plaintiff,)

v.)

OBJECTIONS TO
MOTION TO DISMISS
ON BEHALF OF PLAINTIFF

Thomas D. Guest, Jr., ("Val"),)
Defendant.)
In His Individual Capacity.)

COMES NOW, Jeremiah Di Capua, the Plaintiff in the above-styled matter, who hereby objects to the Defendant's Motion To Dismiss. In furtherance hereof, the Plaintiff would show:

- 1] The Defendant's motion to dismiss is not properly before the Court, inasmuch as the Defendant has 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, SCRCVP, require 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 is not properly before the Court. The motion should be dismissed as a matter of law; and
- 2] The Defendant does not present with its motion any matter outside of the pleading. Therefore, the Court must limit its consideration to the allegations of the Verified Complaint. The Defendant's motion to dismiss is totally lacking of any 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 Sec. § 15-36-100, et seq.

Both these grounds are frivolous on their face and the motion should be denied.

As a threshold matter, Plaintiff hereby incorporates by reference as if re-stated verbatim the entirety of the

Verified complaint. Moreover, for purposes of the Defendant'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 Plaintiff 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.

To state a valid 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, 499 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)

As to the first element of legal malpractice, Page 3, parag. 11 of the Verified Complaint, clearly alleges that "Defendant Thomas D. Guest, Jr., ... was appointed by the Court to Represent the Plaintiff... in a fully established attorney-client relationship." See also Page 2, ¶ 3; In regard to the second element, breach of a duty by the attorney, the Verified Complaint, on page 2, ¶ 3 alleges that Defendant Guest "breached numerous duties owed to the Plaintiff"; 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 Defendant Guest even stipulated to the fact that he breached a duty to renew the objection which ultimately caused Plaintiff 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, ¶ 3 that Defendant's acts and omissions resulted in "damages, losses, and injuries

which were directly and proximately caused by the Defendant'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 Plaintiff 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 Plaintiff innocent. See page 12, ¶ 37; page 13, ¶ 39. The Defendant's assertion that the Plaintiff fails to state a claim upon which relief may be granted is obviously a sham defense, meant solely for the purposes of delay; concomitantly the motion must be denied as a matter of law as regarding each of the causes of action set forth in the verified complaint; and

- 3] The Defendant's assertion that the action should be dismissed with prejudice due to Plaintiff's failure to comply with S.C. Code Sec. § 15-36-100, et. seq., is equally misplaced and frivolous. Defendant further fails 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 arising after July 1, 2005. Here, facts giving rise to the Plaintiff's 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 Oct. 16, 2003 and January 14, 2005.

Subsequent to these occurrences, the General Assembly passed into law S.C. Code Sec. § 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, Plaintiff'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 file separate complaints involving the same parties, the same

inter-related facts, and same causes of action. In fact, had the Plaintiff done so, then it is fairly predictable that the Defendant would be screaming res judicata, or some other form of issue preclusion.

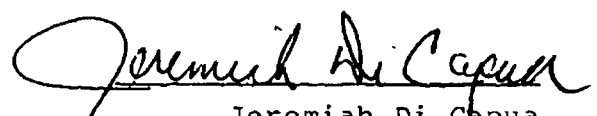
The fact is that the Verified Complaint in this action contains a steady train of elemental facts, each being the impetus and fuel giving rise to later facts. It was Defendant Guest's unprofessional acts and omissions which permitted the State of South Carolina to file a successful appeal, thus delaying Defendant Guest's related albeit later acts and omissions on June 6, 2007. The Defendant is not entitled to the benefit of that delay, as the State's appeal was based squarely on the acts and omissions of Defendant Guest himself. To allow such a benefit would turn the question of justice to stand on its head. The Defendant'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 for post-July 1, 2005 acts and omissions is tantamount to carrying a logical argument to its absurd end. Defendant cites not legal authority for such a proposition, and Plaintiff 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 Defendant 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. Defendant's motion to dismiss must be 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

- 4) The Certificate of Service is not proper, in that it does not bear the correct address of the Plaintiff; and
- 5) Upon information and belief, according to Section II. of the Motion Information and Coversheet, Defendant attached a proposed order to the motion to dismiss. Such proposed order was not served upon the Plaintiff, in violation of Rule 5(b)(3), SCRCVP, which provides that such proposed orders "shall" be served on all counsel of record. Defendant has not complied with this rule, and the proposed order should be stricken and quashed, or otherwise not be considered by the Court. The Certificate of Service attached to the motion only mentions the "foregoing pleadings" and makes no mention of such proposed order, however, the motion coversheet does. Thus, it is clear that proper service is lacking.

ACCORDINGLY, Plaintiff objects to the Defendant's motion to dismiss, as it is not properly before the Court, lacks a legal merit, and is intended solely for the purposes of delay. The answer (General Denial) should be stricken, and default judgment should be entered as a matter of law. The Defendant's motion to dismiss must be denied as a matter of law.

Date: November 14th 2011
McCormick, South Carolina.


Jeremiah Di Capua

McCormick Correction Institution
386 redemption Way
McCormick, South Carolina 29899

CERTIFICATE OF SERVICE

I, the undersigned, Jeremiah Di Capua, hereby certify that I have this 14TH Day of November, 2011, served upon the Defendant Thomas Guest, Jr., a true copy of the foregoing Notice of Motion and Motion To Strike Answer; Reply; Objections To Motion To Dismiss on Behalf of the Plaintiff; and coverletter requesting the Clerk of Court to enter Defendant's default upon the record, by placing a copy of same in the United States Mail receptacle located on McCormick yard, sufficient first-class postage attached thereto, and addressed as follows:

Douglas W. Mackelcan
Carlock, Copeland, & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

Date 14th November 2011
McCormick, South Carolina.



Jeremiah Di Capua
Plaintiff, Pro Se
McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina
29899

To: Melanie Huggins, Ward
Clerk of Court of Henry County

From: Jeremiah Di Capua, #105092
McCormick Court-clerk.

RECEIVED
11 NOV 21 AM 8:15
CLERK OF COURTHOUSE

Subject: Filings for 2011-CP-26-7104

Date: November 14, 2011

Dear Ma'am:

Please return to me a clock stamped copy of the following documents for filing:

1. Cover letter to Clerk of Court,
2. Notice: Motion to Strike Answer,
3. Reply,
4. Objections to Motion to Dismiss on behalf of Plaintiff, &
5. Certificate of Service to all of the above including for Clerk of Court to enter Defendants' default upon the record

All Always, Thank You for your Time,
Jeremiah Di Capua

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	DEFENDANT'S AMENDED ANSWER
)	
vs.)	
)	
Thomas D. Guest, Jr.)	
)	
Defendant.)	

Defendant Thomas D. Guest, Jr. (hereinafter "Defendant") responds to the Plaintiff's Complaint as follows:

1. Defendant denies all allegations not specifically admitted in this Answer.
2. Defendant lacks sufficient information to admit or deny Paragraph 1. Therefore, those allegations can neither be admitted nor denied at this time.
3. Responding to Paragraph 2, Defendant admits only that Plaintiff is an adult resident of the state of South Carolina and the United States of America and is currently a ward of the state, residing at the McCormick Correction Institution, located at 386 Redemption Way, McCormick, South Carolina 29899. Defendant denies that Plaintiff is innocent of the criminal offenses referenced in the Complaint.
4. Responding to Paragraph 3, Defendant admits that he is an adult resident of the state of South Carolina and the United States of America, that his principal place of business is located at 11915 Plaza Drive, Murrels Inlet, South Carolina 29576, which is located in Horry County, South Carolina and that Defendants represented Plaintiff in defense of Plaintiff's arrest

Handwritten signature and date: Jeremiah DiCapua 11/20/11

for distribution and possession with intent to distribute. Defendant denies any remaining allegations contained in Paragraph 3 of the Complaint as stated.

5. Responding to Paragraph 4, Defendant denies that Plaintiff is entitled to the relief requested; however, Defendant admits that all of his involvement with Plaintiff occurred between October 16, 2003 and June 6, 2007.

6. Responding to Paragraph 5, Defendant admits that on October 16, 2003, the Horry County Police Department and the Myrtle Beach Police Department conducted a drug sting in the Red Roof Inn hotel, that two rooms were used in the sting operation, that one room was used by the police and the other was the transaction room, that video and audio equipment was set up by the police, and that the audio did not record. Defendant denies the remaining allegations contained in Paragraph 5 of the Complaint.

7. Responding to Paragraphs 6 and 7, Defendant lacks sufficient information to admit or deny the factual allegations contained in these Paragraphs and craves reference to the trial transcript or the event described in Paragraphs 6 and 7 of the Complaint.

8. Responding to Paragraph 8, Defendant admits that, subsequent to Plaintiff's arrest, Plaintiff was charged with distribution of crack cocaine and possession with intent to distribute crack cocaine, Plaintiff was a parolee under the supervision of the South Carolina Department of Probation, Parole, and Pardon Services. Upon information and belief, Defendant admits that Plaintiff was employed but lacks sufficient information to admit or deny Plaintiff's annual income. Defendant denies the remaining allegations contained in Paragraph 8 of the Complaint.

9. Upon information and belief, Defendant admits Paragraph 9.

10. Defendant lacks sufficient information to admit or deny Paragraph 10.

Therefore, those allegations can neither be admitted nor denied at this time.

11. Responding to Paragraph 11, Defendant admits that he is an attorney who was appointed to represent the Plaintiff in the criminal proceedings related to the Plaintiff's arrest for distribution of crack cocaine and possession with intent to distribute crack cocaine. Defendant denies the remaining allegations contained in Paragraph 11 as stated.

12. Defendant denies Paragraph 12.

13. Responding to Paragraph 13, Defendant admits that the Horry County Grand Jury indicted the Plaintiff for distribution of crack cocaine and for possession with intent to distribute crack cocaine. Defendant denies the remaining allegations contained in Paragraph 13 as stated.

14. Defendant admits Paragraphs 14, 15, 16, and 17.

15. Responding to Paragraph 18, Defendant admits only that the trial judge vacated the jury verdict on January 14, 2005. ~~Defendant is without sufficient information to admit or deny why the trial judge vacated the jury verdicts and sentences.~~ Therefore, those allegations can neither be admitted nor denied at this time.

16. Responding to Paragraph 19, Defendant admits only that Plaintiff has quoted portions of the trial judge's order vacating the jury verdict and sentences and craves reference to the official document for the exact language of the Court.

17. Responding to Paragraph 20, Defendant admits only that Judge Baxley convened a hearing on January 31, 2005. ~~The Defendant is without sufficient information to admit or deny any remaining allegations.~~

18. Responding to both paragraphs labeled Paragraph 21, Defendant admits only that Plaintiff has quoted portions of the Court of Appeals Opinion reversing Judge Baxley's Order vacating the jury verdict and craves reference to the official document for the exact language of the Court.

19. Defendant admits Paragraph 22.

20. Responding to Paragraph 23, Defendant admits that Plaintiff was arrested and taken into custody on April 26, 2007, that Plaintiff filed a petition for rehearing on May 8, 2007, and that Plaintiff was placed in the state penitentiary on May 21, 2007. Defendant denies any remaining allegations contained in Paragraph 23 of the Complaint.

21. Defendant denies Paragraph 24 as stated.

22. Defendant denies Paragraphs 25 and 26 as stated.

23. Responding to Paragraph 27, Defendant craves reference to the transcript of the hearing as to the quoted portion and denies any remaining allegations contained in Paragraph 27.

24. Defendant denies Paragraphs 28 and 29 as stated.

25. Defendant admits the Paragraph 30.

26. Responding to Paragraph 31, Defendant admits only that Plaintiff's parole was revoked on July 25, 2007. Defendant denies any remaining allegations contained in Paragraph 31.

27. Defendant admits Paragraphs 32 and 33.

28. Responding to Paragraph 34, Defendant admits that Plaintiff filed for Post Conviction Relief, but denies that Plaintiff received ineffective assistance of counsel at trial.

29. Responding to Paragraphs 35 and 36, Defendant craves reference to the transcript fo the evidentiary hearing on February 1, 2011. Further responding to allegations contained in Paragraphs 35 and 36, Defendant denies Plaintiff's allegations that he was negligent in failing to object and any other allegations which places liability on the Defendant.

30. Defendant denies Paragraph 37 as stated.

31. Defendant admits Paragraph 38.

32. Defendant denies Paragraph 39 as stated.

33. Defendant denies Paragraphs 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57.

34. Responding to Paragraphs 58, 59, 60, 61 and 62, Defendant denies that Plaintiff is entitled to any of the relief requested in these Paragraphs.

35. Paragraph 63 of the Complaint does not contain allegations requiring a response from Defendant; Defendant neither admits nor denies the allegations contained therein.

FIRST AFFIRMATIVE DEFENSE

That the Complaint fails to state facts sufficient to constitute a cause of action against Defendant and the Complaint against him should be dismissed pursuant to the provisions of SCRPC 12(b)(6).

SECOND AFFIRMATIVE DEFENSE

Defendant exercised ordinary care and that degree of skill and care required of him by law at all times relevant to the matters complained of in the Complaint.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has suffered no damages as a result of any alleged act or omission of Defendant.

FOURTH AFFIRMATIVE DEFENSE

That the Plaintiff has failed to commence this action within the time required by the applicable statute of limitations, and the failure of the Plaintiff to timely commence the action constitutes a bar and complete defense to the claims of the Plaintiff.

FIFTH AFFIRMATIVE DEFENSE

That the Plaintiff, to the extent that he seeks punitive damages or exemplary damages, if any, is in violation of the rights of the Defendant under the United States Constitution and the Constitution of the State of South Carolina, and therefore, fails to state a cause of action upon which either punitive or exemplary damages may be awarded.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of laches.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are or may be barred by the doctrines of waiver and/or estoppel.

EIGHTH AFFIRMATIVE DEFENSE

The court should dismiss the Complaint because it fails to comply with S.C. Code § 15-36-100, *et seq.* The Plaintiff filed no expert affidavit with the Complaint.

NINTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery from Defendant pursuant to the doctrine of unclean hands.

TENTH AFFIRMATIVE DEFENSE

Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the allegations of the Plaintiffs' Complaint, Defendant prays for a trial by jury and that the Plaintiffs' Complaint be dismissed, together with the costs and disbursement of this action and for such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]

This 2 day of December, 2011.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

For DAVID W. OVERSTREET
SC BAR NO.: 16965

DOUGLAS W. MACKELCAN
SC BAR NO.: 76332

Attorneys for Defendant

40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2011-CP-26-7104

COUNTY OF HORRY

Jeremiah DiCapua,

Plaintiff,

CERTIFICATE OF SERVICE

vs.

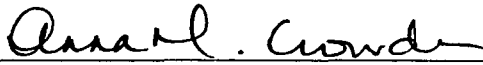
Thomas D. Guest, Jr.

Defendant.

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to the following:

Jeremiah DiCapua
Inmate No. 00105096
McCormick Correction Institution, J4B-214
386 Redemption Way
McCormick, South Carolina 29899
Pro Se Plaintiff

This 2nd day of December, 2011.


Assistant to Douglas W. MacKelcan

Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

State of South Carolina) In The Court of Common Pleas
 County of Horry)
) Case No.# 2011-CP-26-7104

Jeremiah Di Capua,)
 Plaintiff,)
 V)
 Thomas D. Guest, Jr., ("Val"))
 Defendant.)
 In his Individual Capacity.)
)
)
)
)

NOTICE OF MOTION AND MOTION TO
 STRIKE AMENDED ANSWER AND FOR
 ENTRY OF DEFAULT JUDGMENT

2011 DEC 19 PM 4:52
 KELLANIE HUGGINS-WARD
 CLERK OF COURT
 COUNTY

TO THE ABOVE-NAMED DEFENDANT:
 YOU ARE HEREBY given ten (10) days notice of the herein motion to strike the Amended Answer filed in the above-styled case and for entry of default judgment, made pursuant to Rule 12(f) and Rule 55, SCRCVP, and Plaintiff hereby moves for an order striking the Amended Answer and for entry of default judgment, based upon the following grounds:

- 1] The Defendant 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 Defendant, whose authorized agent accepted service thereof on October 3, 2011; and no other answer is permitted pursuant to Rule 7(a), SCRCVP; and
- 2] The Amended Answer clearly makes 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
- 3] The Amended Answer raises 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; and

- 4] 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 Compliant 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), SCRCVP, 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 has clearly been abandoned and the general denial defense no longer exists; and
- 5] 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), SCRCVP; and
- 6] Because the Defendant has 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
- 7] That because the sole general denial defense raised in the prior pleading has been abanoned 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 Defendant is 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 defendant is 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) SCRCVP, provides that a defendant "shall" serve his answer within thirty (30) days of the service of the Complaint upon him; and

8] The Plaintiff has suffered unfair prejudice and and is unduly surprised by the Amended Answer, inasmuch as the Defendant 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. Now, the Defendant 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

9] The Defendant 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 persue them. Pursuant to Rule 7(a); Rule 8, and Rule 12(a), SCRCVP, Plaintiff was vested with a right to proper notice of these newly raised defenses and new matters within thirty (30) days; and

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

11] Because the newly raised defenses and new matters do not 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 the purposes of delay and the Defendant is in default. A defense asserted by a defendant 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

12] The Plaintiff also has 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.

Accordingly, Plaintiff hereby moves for an order striking the Amended Answer, and for entry of default judgment.

Respectfully Submitted,

Date: December 12, 2011
McCormick, South Carolina.

Jeremiah Di Capua
Jeremiah Di Capua

Plaintiff, Pro se
McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina
29899

Certificate of Service

I, Jeremiah Di Capua, the Plaintiff in the herein matter, hereby certify that I have this 12th day of December, 2011, served upon the Defendant a true copy of the Notice of Motion and Motion To Strike the Amended Answer and for default judgment, by depositing same in the United States postal receptacle located on McCormick yard, sufficient first-class postage attached thereto and addressed as follows:

Douglas W. Mackelcan
Carlock, Copeland and Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401

CLERK OF COURT
LANIE HUGGINS-WARD
DEC 19 PM 4:52
COUNTY

Jeremiah Di Capua
Jeremiah Di Capua

Plaintiff, Pro se
McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina
29899

R.P. 59

State of South Carolina) In the Court of Common Pleas
County Of Horry) 2011-CP-26-7104
)

Jeremiah Di Capua,)
Plaintiff,)

EX PARTE
MOTION FOR APPOINTMENT
OF COUNSEL OR
GUARDIAN AD LITEM AND
EXPERT WITNESS

V.)
Thomas D. Guest, Jr. (Val))
Defendant,)
In his individual capacity.)
)

COMES NOW, Jeremiah Di Capua, the Plaintiff in the above-captioned matter, by and through pro se, who hereby moves for appointment of legal counsel, or in the alternative for guardian ad litem. Further, the Plaintiff hereby moves for court-appointed legal expert in the matter pending before the Court. The Plaintiff submits the following grounds for these motions:

- 1) Plaintiff believes his claims are meritorious, and that he is entitled to relief on the matters before the Court; and
- 2) ~~That because of Plaintiff'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); and~~
- 3) ~~that because of the physical restraint placed upon Plaintiff due to his incarceration, the appointment of counsel or guardian ad litem and legal expert would be appropriate in the circumstances, since an adverse judgment against a prisoner will affect present or future rights of the Plaintiff to redress and the spirit of the law demands no less. In re Bishop, 272 S.C. 306, 251 S.E.2d 748 (1979); and~~
- 4) That because the issues presented by the case are sufficiently complex, and extraordinary; and Plaintiff is 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

5] That the case itself is extraordinary because it appears that appointment of counsel and a legal expert is necessary to render justice; and the Plaintiff is unable to secure a lawyer on his own. Plaintiff has exercised reasonable diligence in attempting to retain both legal counsel, and an expert, to no avail; and

6] That Plaintiff, due to his poverty, is 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 Plaintiff's behalf; and

7] That although Plaintiff is not entitled to the appointment of legal counsel, nor to the appointment of a legal expert, ~~(this Court has 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 Plaintiff believes that because in a legal malpractice case, the Plaintiff bears the burden of coming forward with expert testimony, to show the standard of care, ~~Plaintiff'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; and,~~

8] 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)

Accordingly, Plaintiff hereby moves for appointment of legal

counsel, or in the alternative for guardian ad litem, and for appointment of an expert witness in the action pending before this Court.

Respectfully Submitted,

Jeremiah Di Capua

Jeremiah Di Capua
Plaintiff, Pro Se

McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina
29899

Date: January 10, 2012
McCormick, South Carolina.

Jeremiah Di Capua, #105069
McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina 29899

Melanie Huggins-Ward
Clerk of Court of
Horry County
P. O. BOX 677
Conway, South Carolina
29528-0677

RR. 6
12 JAN 17 AM 9:37
MELANIE HUGGINS-WARD
CLERK OF COURT

Date: January 10th, 2012

Re: Enclosure for Filing Purposes
Jeremiah Di Capua v. Thomas Guest, Jr.
2011-CP-26-7104

Dear Ms. Huggins-Ward,

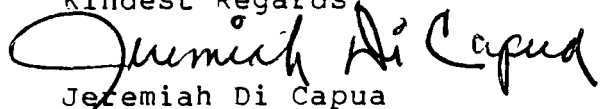
Please find enclosed for filing purposes the following matters on behalf of the Plaintiff in the above-referenced matter:

One Original Motion for Appointment of Counsel, or Guardian Ad Litem, and Expert Witness

Please file with the record, and at your convenience please return a clocked-in/filed to me.

JD/

Kindest Regards


Jeremiah Di Capua
Plaintiff, pro se

Enclosures

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 
DAVID W. OVERSTREET
SC BAR NO.: 16965

DOUGLAS W. MACKELCAN
SC BAR NO.: 76332

40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

Attorneys for the Defendant

State of South Carolina)
County of Horry,)
)

In The Court of Common Pleas

Case No. # 2011-CP-26-7104

Jeremiah Di Capua,)
)
v.)
)
Thomas D. Guest, Jr. (Val))
)
Defendant.)
)
)
In His Individual Capacity.)
_____)

Plaintiff's Objections To
Amended Motion To Dismiss

FILED
MELANIE HUGGINS-WARD
CLERK OF COURT
FEB 27 PM 3:25
HARRIS COUNTY

COMES NOW, the plaintiff herein, who hereby submits the following in response to the Amended Motion To Dismiss filed by the Defendant on or about January 17, 2012.

Plaintiff hereby incorporates by reference the previously filed "Objections To Motion To Dismiss on Behalf of Plaintiff" and the "Reply", as if re-stated verbatim herein, and hereby objects to the Amended Motion To Dismiss, and moves to strike said motion from the record, or to otherwise deny the amended motion as not properly before the Court. Additionally, the following grounds are submitted:

A] Defendant 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 Sec. § 15-36-100, et seq.

Thereafter, Plaintiff filed two responsive pleadings thereto on November 14, 2011 in the form of a Reply, and also the "Objections To Motion To Dismiss". Thus, the Defendant 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 Defendant could therefore amend the motion within thirty (30) days of Plaintiff's November 14, 2011 responses, if the said responses are deemed by the Court to be permissive in nature rather than required. Rule 15(a), SCRCP. Defendant does not assert that Plaintiff's responses were not required, and the Court is not Defendant's advocate; the issue has not been raised by the Defendant thusly constituting a waiver of any such assertion. Accordingly, Defendant was only permitted under the Rule to amend his motion to dismiss within thirty (30) days of Plaintiff's responses; and failing that, the Defendant could only amend by proper motion to the Court seeking leave to amend. That did not occur in this case.

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

Moreover, because the Defendant's amended motion to dismiss is out of time, Defendant's only proper recourse was to apply to the court for leave to amend. Rule 15(a), SCRCP, and the Defendant clearly has not sought leave of this Court to amend his original motion. The amended motion must be denied and dismissed, as a matter of law; and

- B] The amended motion to dismiss, raises for the first time in the entire proceedings new defenses (Amended Motion To Dismiss, paragraphs 2 and 3) which were previously waived by the Defendant, as pleaded in the Reply, (page 2, paragraph #3) filed by the Plaintiff. 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 mention 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 must be denied as a matter of law,

and should be stricken from the record; and

- C) No "notice of motion" is attached to the amended motion, as was the case with the original motion, and this violates Plaintiff's due process right to proper notice, and violates the "notice pleading" requirements of South Carolina state practice and procedure;
- D) Defendant persists, as with the original motion, in submitting proposed orders to the court, which Defendant has not bothered to serve upon the Plaintiff. This improper ex parte communication is illegal, and violates the Plaintiff's right to be privy to the assertions of the Defendant in this case. The Defendant should be firmly warned that these ex parte communications should cease; and
- E) 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 Defendant has grossly shunned our state practices and procedures, disregarded Plaintiff'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. Defendant is bound by his own decisions to not timely secure those opportunities for amendment of pleadings as provided by the rules of court. Defendant effectively even disregards the Court's authority, by out of hand amending his motion to dismiss, when the Court itself is the final arbiter of whether such amendment is even possible, or required in the interest of justice. Defendant has not asserted any such interest, and this Court shall not act as Defendant's advocate by sua sponte raising and disposing of said issue.

Accordingly, the amended motion to dismiss must be denied, as justice requires same, and otherwise stricken from the record, as it is not even cognizable by this Court.

February 10, 2012
McCormick, South Carolina.

Respectfully Submitted,
Jeremiah Di Capua
Jeremiah Di Capua
Plaintiff, Pro Se

R.P 70

McCormick Correction Institution
386 Redemption Way
McCormick, South Carolina
29899

CERTIFICATE OF SERVICE

I, Jeremiah Di Capua, the undersigned party, hereby certify that I have this 22 day of February 2012, served upon the Defendant in the foregoing matter, a true copy of the Plaintiff's Objections to the Amended Motion To Dismiss, by depositing a copy of same in the United States postal receptacle located on McCormick yard, sufficient first-class postage attached, and addressed as follows:

Douglas W. Mackelcan
Carlock, Copeland, & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401

McCormick, South Carolina.

Jeremiah Di Capua
Jeremiah Di Capua
Plaintiff, Pro Se

FILED
COUNTY
2012 FEB 27 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
County of Horry)

IN THE COURT OF COMMON PLEAS

2011-CP-26-7104

Jeremiah DiCapua,)
Plaintiff,)
V.)
Thomas Guest, Jr.,)
Defendant,)
In his individual capacity.)

NOTICE OF MOTION
AND
MOTION FOR RECUSAL

MELANIE HUGGINS-IMBRI
CLERK OF COURT
2012 MAR 29 PM 3:12
COMMUNITY

Plaintiff, Jeremiah DiCapua, hereby gives ten (10) days Notice of Motion, and hereby moves for Honorable Benjamin Culbertson, to recuse himself from the pending motion hearing scheduled to occur between the dates of April 9, 2012 through April 11, 2012; and for an order effectuating same at any other proceeding in the instant case. See Motion Roster Number # 76, page 3 More specifically, the Plaintiff offers the following grounds for said motion, pursuant to Rule 501, South Carolina Appellate Court Rules, (SCACR) and Canon 3 (E)(1) and Commentary of Canon 3(1)(a):

- 1] That this Court has scheduled a hearing for Monday April 9th, 2012, on the Defendant's Motion to Dismiss and/or Amended Motion To Dismiss at 2:00 PM before the Honorable Benjamin Culbertson; and
- 2] That it appears that the Honorable Benjamin Culbertson is 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 Plaintiff'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 Defendant'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 Plaintiff in the instant action was signed by Judge Culbertson on February 23, 2011; and

5] Accordingly, Judge Culbertson has personal knowledge of disputed facts in the instant proceeding before this Court, and the Defendant has denied the factual allegations setforth in the Verified Complaint. Thus those facts are in dispute, and the Honorable Benjamin H. Culbertson has personal knowledge of those disputed facts, having been the judicial officer who specifically found such facts to exist. Plaintiff moves for Judge Culbertson to recuse himself, and otherwise moves for an order disqualifying Judge Culbertson from acting in a judicial capacity at any point in the instant case. Plaintiff anticipates calling Judge Culbertson as a material witness in the instant case, and it appears his acting in the role of a judicial officer in this case would violate the judicial canons and Rule 501, SCACR.

Respectfully Submitted,

Jeremiah DiCapua
Jeremiah DiCapua
Plaintiff, Pro Se

Date: March 27, 2012
McCormick, South Carolina.

CERTIFICATE OF SERVICE BY MAIL

I the undersigned, Jeremiah DiCapua, hereby certify that I have this 27th day of March, 2012, served upon the Defendant a true copy of the foregoing Notice of Motion and Motion For Recusal, by attaching sufficient first class postage thereto and depositing same in the United States Mail, addressed as follows:

Douglas Mackelcan
Carlock, Copeland and Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401-3001

Date: March 27, 2012
McCormick, South Carolina.

Jeremiah DiCapua
Jeremiah Di Capua
Plaintiff, Pro se

2012 MAR 29 PM 3:12
CLERK OF COURT
CLANIE HUGGINS-WARD
COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO.: 2011-CP-26-7104
)	
Jeremiah DiCapua,)	
)	
Plaintiff,	)	DEFENDANT THOMAS D. GUEST, JR.'S
	)	MEMORANDUM IN SUPPORT OF HIS
vs.	)	MOTION TO DISMISS
)	
Thomas D. Guest, Jr.,)	
)	
Defendant.)	

This matter is before the court on Defendant Thomas D. Guest, Jr.'s Motion to Dismiss, and the Defendant hereby submits this memorandum in support thereof.

BACKGROUND FACTS

This is a legal malpractice action Plaintiff Jeremiah DiCapua has brought against Mr. Guest, who was Plaintiff's court-appointed attorney after Plaintiff was arrested for distribution of crack cocaine and possession with intent to distribute crack cocaine on October 16, 2003. The relevant facts alleged in the Complaint, which are construed in the light most favorable to the Plaintiff for the purpose of this motion, are as follows:

Following Plaintiff's arrest on October 16, 2003, a Horry County Grand Jury indicted Plaintiff in January 2004 on the charges of distribution of crack cocaine and possession with intent to distribute crack cocaine arising out the of October 16, 2003 arrest. At some point following the indictment, Mr. Guest was appointed to represent Plaintiff at trial. Plaintiff's criminal trial for these charges began on January 10, 2005, and the jury reached a guilty verdict on January 13, 2005. Mr. Guest represented Plaintiff at trial, and the first of Plaintiff's allegations of malpractice in this case arise out of actions or omissions of Mr. Guest during that trial.

On January 14, 2005, Judge Baxley, the presiding judge, issued an *sua sponde* Order vacating the guilty verdict and sentence because he believed it was an error to allow into evidence a videotape of the drug transaction involved in Plaintiff's arrest. At trial, Judge Baxley had denied Mr. Guest's pre-trial motion to suppress the videotape, and Mr. Guest and the Plaintiff chose not to object to the introduction of the videotape during the trial. Plaintiff alleges it was malpractice for Mr. Guest not to renew the objection when the prosecution moved to enter the videotape into the record as evidence. On January 31, 2005 Judge Baxley held a hearing with the parties involved to discuss his Order vacating the verdict.

The Horry County Solicitor appealed Judge Baxley's Order vacating the verdict, and, on April 23, 2007, the Court of Appeals reversed the Order, thus reinstating the verdict. In the Complaint, Plaintiff quotes part of the Court of Appeals Opinion, which states, "As the record reflects, DiCapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, DiCapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue DiCapua had with the videotape."

Shortly after the Court of Appeals reversed the Order, Plaintiff was arrested and placed in prison for a parole violation.¹ Plaintiff filed a petition for rehearing with the Court of Appeals, which was denied, and the Supreme Court of South Carolina ultimately upheld the Court of Appeals' reversal of Judge Baxley's Order.

The second act or omission Plaintiff alleges was malpractice by Mr. Guest involves a June 6, 2007 hearing. After the Court of Appeals reversed Judge Baxley's Order, Plaintiff

¹ The Complaint states that Plaintiff was arrested on April 26, 2007 and placed in the state penitentiary on May 21, 2007.

appeared in Court for sentencing. Plaintiff claims Mr. Guest failed to object to an improper sentencing or "re-sentencing" process in which Plaintiff received a more severe sentence. Plaintiff was already in prison at the time of this hearing, and Plaintiff remains in prison while his application for post-conviction relief is pending before the Court of Appeals.

APPLICABLE LAW & ANALYSIS

Any party may move for a judgment on the pleadings. S.C. R. Civ. P. 12(c). When considering such a motion, the court regards all properly pleaded factual allegations as admitted. Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 354 (Ct. App. 2000). Information outside the pleadings shall not be considered. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). The determination, therefore, depends only upon the sufficiency of those facts pleaded. Wooten v. Standard Life & Cas. Ins. Co., 239 S.C. 243, 245 122 S.E.2d 637, 639 (1961). The court should grant the motion "when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined." Brown v. United Ins. Co. of America, 268 S.C. 254, 257, 233 S.E.2d 298, 300 (1977).

Furthermore, a defendant may move alternatively to dismiss a complaint based upon a failure to state facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6); Spence v. Spence, 368 S.C. 106-17, 628 S.E.2d 869, 874 (2006). If, in viewing the complaint in the light most favorable to the plaintiff, the court determines the facts in the complaint are insufficient to entitle the plaintiff to the relief it seeks, then the court should grant the motion. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

I. Statute of Limitations

In South Carolina, the statute of limitations for civil actions is three years from the date of accrual. S.C. Code Ann. §§ 15-5-530. Tort actions such as this claim of professional negligence are governed by §§ 15-3-530(5) and 15-3-535, which both establish the "discovery rule" for determination of the date of accrual for a cause of action. The date of accrual for a cause of action is the time when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." *Id.* The test is whether a person of common knowledge and experience should have known the operative facts, and it is an objective one. Wilson v. Shannon, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989).

It has been stated that "South Carolina's statute of limitations requires 'very little to start the clock.'" Maier v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998) (citation omitted). Whether the plaintiff understands the full extent of the damages is immaterial to the issue of whether the statute begins to run. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Furthermore, the statute begins to run on the date the plaintiff discovered or should have discovered the injury, not on the date that the plaintiff discovers the identity of the wrongdoer. Tollison v. B & J Machinery Co., Inc., 812 F. Supp. 618 (D.S.C. 1993).

In professional negligence and breach of contract cases, the Court has rejected the "continuous representation" and "continuous treatment" theories to toll the statute of limitations. Epstein v. Brown, 363 S.C. 372 (2005); Harrison v. Bevilacqua, 354 S.C. 129 (2003). Instead, the court has applied the discovery rule as in other negligence cases to determine when the statute first begins to run, regardless of any continued representation or treatment after the action has first accrued. Epstein, 363 S.C. 372; Harrison, 354 S.C. 129. In Epstein, the court held that an action for legal malpractice first arose at the conclusion of trial, even though the attorney in

question continued to represent the plaintiff through the appellate process. The Court held that it was not necessary for a final decision to be made by the appellate court for the cause of action to accrue. Id.

In Dillon County School District Number Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207 (1985) (hereinafter "Dillon Co."), the court refused to apply the "continuous treatment" exception to architects and other construction professionals. Id., at 217. The court rejected the plaintiff's argument that the parties' attempts to repair roof leaks tolled the running of the statute, holding that "'the unacceptable consequence of [the plaintiff's] argument is that a cause of action for breach of warranty or negligent performance ... would never accrue so long as the defendants periodically did some repair work, however ineffectual.'" Id. (citing Cluett, Peabody & Company, Inc. v. Campbell, Rea, Hayes & Large, 492 F.Supp. 67, 77 (M.D.Pa.1980)).

In the Complaint in this case, which was filed on August 24, 2011, Plaintiff complains of two distinct events during which he alleges Mr. Guest failed to act to Plaintiff's detriment. The first was during the trial, held January 10-13, 2005. The second was during sentencing on June 6, 2007 after the Court of Appeals had reversed Judge Baxley's sua sponte Order vacating the verdict. In both instances Plaintiff was aware of the acts or omissions giving rise to his claims well before August 24, 2008, the last day that Plaintiff could have discovered facts giving rise to a cause of action based on the filing date.

Although Judge Baxley's Order on January 14, 2005 made Plaintiff aware of the impact of the admission of the videotape evidence and should be the date of accrual of a cause of action related to the admission of the videotape evidence; without question, the Opinion of the Court of Appeals, which indicated not renewing the objection amounted to a waiver of any objection to

the admission of the videotape, put Plaintiff on notice of the facts allegedly giving rise to his claim of professional malpractice by Mr. Guest.

Any possible allegation of professional negligence involving Mr. Guest's alleged failure to intervene in the sentencing of the Plaintiff on June 6, 2007 arose immediately after the hearing for the purpose of the statute of limitations. Although Plaintiff was already in prison at the time of the hearing, he left the hearing with the knowledge of his sentence and returned to prison. Plaintiff's parole was revoked shortly thereafter, and he remained in prison. Thus, Plaintiff was clearly aware of the circumstances that led to his incarceration and the role, if any, that Mr. Guest played in attempting to prevent the incarceration.

In sum, because the facts, as pled by the Plaintiff himself, establish that Plaintiff failed to make the allegations of professional negligence against Mr. Guest within the South Carolina statute of limitations, Plaintiff's Complaint should be dismissed with prejudice.

II. Plaintiff's Complaint fails as a matter of law because it lacks the requisite supporting expert affidavit.

S.C. Code Ann. § 15-36-100(b), provides that "[i]n an action for damages alleging professional negligence against a professional licensed by... the State of South Carolina..., the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the evidence at the time of the filing of the affidavit." The statute specifically applies to actions alleging legal malpractice against attorneys. S.C. Code Ann. § 15-36-100(G)(2). A complaint failing to meet this requirement is subject to dismissal for failure to state a claim. S.C. Code Ann. § 15-36-100(C)(1)("[i]f an affidavit is not filed... and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its

initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim”). S.C. Code Ann. § 15-36-100 is effective for causes of action arising after July 1, 2005.

The Complaint alleges a cause of action for legal malpractice against Mr. Guest, and therefore, the statute applies. However, Plaintiff did not file with the Complaint an affidavit of an expert witness specifying any negligent act of Mr. Guest, as is required by S.C. Code Ann. § 15-36-100(b). As a result, the Court should dismiss the Complaint in its entirety with prejudice.

It is imperative that the Court dismiss the Complaint with prejudice. The Complaint is not subject to renewal after the expiration of the applicable period of limitation established by the statute. Under S.C. Code § 15-36-100(E), the applicable period of limitation is established as 30 days from the filing of Complaint to cure any deficiencies in the affidavit. Again, that time period has clearly expired in the present case. The purpose of the Tort Reform Act is to limit litigation in situations where a plaintiff lacks the basis for a claim. A dismissal with prejudice when an expert affidavit is not filed with the Complaint is consistent with the intent of the Tort Reform Act. Accordingly, the only means by which the statute can be strictly enforced and for the legislative intent to be met is for the dismissal to be entered with prejudice.²

² Although there are no South Carolina appellate decisions on point, South Carolina trial judges have dismissed actions with prejudice for failure to comply with S.C. Code § 15-36-100 (Orders attached). Further, Georgia Appellate Courts interpreting an almost identical statute have ruled that the dismissal should be with prejudice. See generally Abe Engineering, Inc. v. Griffin, Cochran & Marshall, 443 S.E.2d 1 (Ga. Ct. App. 1994) (holding that the trial court correctly dismissed the case with prejudice for failure to file an expert affidavit); Stamps v. Johnson, 535 S.E.2d 1 (Ga. Ct. App. 2000) (holding that dismissal with prejudice was appropriate where plaintiff's complaint set forth a cause of action for legal malpractice, but failed to include an expert affidavit with the complaint); Jordan, Jones & Goulding, Inc. v. Balfour Beatty Construction, Inc., 539 S.E.2d 828 (Ga. Ct. App. 2000) (stating that "the construction of a statute must square with common sense and sound reasoning" in dismissing the claim against the design professional with prejudice); and Bardo v. Liss, 614 S.E.2d 101, 106 (Ga. Ct. App. 2005) (holding that trial court's dismissal of plaintiff's claims for failure "to contemporaneously file the required affidavit with the original complaint" was a dismissal with prejudice).

III. Plaintiff's Claims Should Be Dismissed Because the Defendant is Protected Under the Doctrine of Quasi-Judicial Immunity.

The doctrine of qualified immunity is an affirmative defense shielding certain state actors from liability under 42 U.S.C. § 1983. Camden v. Hilton, 360 S.C. 164, 177, 600 S.E.2d 88, 95 (Ct. App. 2004). The common law immunity has traditionally been available to individuals like police officers. Id.; Williams v. Condon, 347 S.C. 227, 238, 553 S.E.2d 496, 502 (Ct. App. 2001). The purpose is to allow the police to fulfill their duties without "fear of personal monetary liability." Williams v. Goord, 142 F. Supp. 2d 416, 428 (2001).

Furthermore, judicial and quasi-judicial officers like prosecutors and judges are afforded greater immunity than police officers. In Williams v. Condon, the South Carolina Court of Appeals held that a prosecutor and the Attorney General enjoyed absolute immunity from personal liability for suits arising out of the good faith performance of their duties. 347 S.C. at 238, 553 S.E.2d at 502. The court reasoned that "if the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 347 S.C. at 241, 553 S.E.2d at 504. See Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) ("[It is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

In South Carolina, common law immunities have been preserved by the South Carolina Tort Claims Act. In O'Laughlin v. Windham, the South Carolina Court of Appeals held the doctrines of immunity created by the common law were not supplanted by the Tort Claims Act. 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998). If an individual is found to be an agent or employee of the State, as defined by the Act, then they are extended the common law immunities preserved by the act. The Act defines an employee as:

Any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation

S.C. Code Ann. § 15-78-30(c).

Mr. Guest is entitled to quasi-judicial immunity in this case. The present case is analogous to and can be decided upon the precedent of Fleming v. Asbill, 329 S.C. 49, 483 S.E.2d 751 (1997). In Fleming, a South Carolina Family Court appointed Asbill to serve as guardian ad litem for a minor child in a private custody action. Asbill did so for three years until she requested to be relieved of her duties, and the court granted the relief requested. 326 S.C. at 53, 483 S.E.2d at 753.

Thereafter, the minor child and father, Fleming, filed an action against Asbill, claiming breach of fiduciary duty and alleging negligence. The District Court dismissed the action, and the Plaintiffs subsequently appealed to the Fourth Circuit Court of Appeals. Reversing in part and affirming in part, the Fourth Circuit held a ward may sue his guardian ad litem for negligence arising out of the performance of her duties.

On remand, the court interpreted Section 15-78-30(c), S.C. Code and found, even though court-appointed guardian ad litem are representatives of the court that appointed them, they are not agents of the court because they do not act on behalf of the court. 326 S.C. at 53, 483 S.E.2d at 753-54. The court also found court-appointed guardians ad litem were not employees of the state because the employer-employee relationship is lacking. Id.

That notwithstanding, the Court held that court-appointed guardian ad litem deserved the protection afforded by absolute quasi-judicial immunity because (1) it protects children's rights by preserving freedom of speech without fear of monetary retribution and (2) the guardians *were*

not volunteers. Id. at 55, 483 S.E.2d at 755. See Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990) ("To safeguard the best interest of the children . . . the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp the judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents.").

In the case *sub judice*, Mr. Guest clearly is not a guardian ad litem. He was, however, court appointed. The second rationale for extending immunity in Fleming focused on the non-voluntary nature of court-appointed representation, wherein the court recognized the blatant inequity inherent in holding one liable for something she did not choose to do in the first place. Specifically, the court in Fleming wrote:

In addition to preserving the independence and neutrality of the guardian ad litem, a grant of immunity also is reasonable in light of the fact that many court-appointed guardians have not volunteered for the position. It would be inequitable for persons who did not ask to be appointed as guardian to be exposed to unlimited liability.

326 S.C. at 56, 483 S.E.2d at 755.

Mr. Guest should be afforded the same quasi-judicial immunity, and both of the Plaintiff's claims should, therefore, be dismissed. To permit Plaintiff to pursue his causes of action would be contrary to public policy and would open the door for all similarly situated litigants to file suit against their court-appointed attorneys.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Court dismiss all claims made by the Plaintiff against the Defendant.

[SIGNATURE TO FOLLOW]

This __ day of April, 2012.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

DAVID W. OVERSTREET
SC BAR NO.: 16965

DOUGLAS W. MACKELCAN
SC BAR NO.: 76332

Attorneys for the Defendant

40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2011-CP-26-7104

Jeremiah DiCapua,)

Plaintiff,)

vs.)

Thomas D. Guest, Jr.,)

Defendant.)

Transcript of Record

Hearing

April 9, 2012

B E F O R E :

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Plaintiff Appearing Pro Se

Douglas W. MacKelcan, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

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SC Court of Appeals

1 (There were no exhibits marked during the hearing.)

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1 (On the record, April 9, 2012.)

2 THE COURT: All right, let's go ahead and do
3 2011-CP-26-7104, Jeremiah DiCapua versus Thomas D. Guest, Jr.

4 According to my roster this is a motion to dismiss.
5 Please give the court reporter your name and who you
6 represent.

7 MR. MACKELCAN: I'm Doug MacKelcan here on behalf of
8 Mr. Guest, the Defendant.

9 THE COURT: All right, is Mr. DiCapua here?

10 MR. MACKELCAN: I'm not sure. He - I would think he
11 would either be here in person or appear over the phone, but
12 ---

13 THE COURT: Is he ---

14 MR. GUEST: He's incarcerated.

15 MR. MACKELCAN: --- he's incarcerated.

16 THE COURT: Oh, he's incarcerated?

17 MR. MACKELCAN: Yeah.

18 THE COURT: Let's check, check and see if they've
19 transported him.

20 Well, let's stand this down till we find out if he's been
21 transported or not; okay?

22 OFF THE RECORD

23 (On the record.)

24 THE COURT: All right, this is case number 2011-CP-26-
25 7104, Jeremiah DiCapua versus Thomas D. Guest, Jr. According

1 to my roster the matter is - well, I'm looking on - oh, here
2 it is, all right, the matter is before the Court on a motion
3 to dismiss.

4 All right, Mr. MacKelcan is present representing Mr.
5 Guest, and you are Mr. DiCapua?

6 MR. DICAPUA: Yes, sir.

7 THE COURT: All right, all right, Mr. MacKelcan, this
8 is your motion?

9 MR. MACKELCAN: It is. May it please the Court?

10 THE COURT: All right, let me hear from you.

11 MR. MACKELCAN: I'm Doug MacKelcan, M-A-C-K-E-L-C-A-
12 N, here on behalf of the Defendant.

13 This is a fairly straightforward motion to dismiss,
14 although admittedly that the case is quite, facts go back
15 quite a ways and there certainly are facts alleged in the
16 complaint that, that continue through present day, but for the
17 purpose of - this is an attorney malpractice case that was
18 filed by Mr. DiCapua. It was filed on August 24th, 2011, and a
19 couple of grounds for the motion to dismiss but first it's on
20 statute of limitations. Second is on failure to file an
21 expert affidavit with the complaint, and the third is
22 qualified judicial immunity.

23 This is - this stems out of a court-appointed
24 representation in, in 2005 was when, when the trial happened.
25 The appointment was earlier than that. It stems out of an

1 October 16th, 2003, arrest for possession with intent to
2 distribute and possession of crack cocaine. The trial was
3 held January 10th through 13th, 2005 and the jury returned a
4 guilty verdict.

5 On the day after or shortly after the trial judge, who I
6 was believe was Judge Baxley, issued a sua sponte order
7 essentially vacating the verdict as a result of an evidentiary
8 issue and that's important to this motion because it's that
9 exact evidentiary issue that is the grounds for the
10 malpractice case now, you know, six, six, seven years later
11 and it had to do with objecting to the inclusion of a
12 videotape in evidence.

13 To get through the facts somewhat quickly but the -
14 obviously that went up on appeal. The Court of Appeals
15 reversed the order saying that the judge could not issue
16 that sua sponte order and that there was no objection to
17 this evidence and that you couldn't waive, any objection was
18 waived and they reversed it and reinstated the guilty
19 verdict.

20 THE COURT: So, Judge Baxley's order sua sponte
21 suppressed evidence and set aside the conviction?

22 MR. MACKELCAN: It didn't suppress the evidence.
23 What it did was it vacated the verdict but it specifically
24 identified the reason and basically to paraphrase his order it
25 just said it should have not been allowed into evidence. Now

1 ---

2 THE COURT: But I mean, did he reverse the conviction
3 or did he grant a new trial?

4 MR. MACKELCAN: I believe he granted a, granted a new
5 trial.

6 THE COURT: Okay, all right, I'm following you now.

7 MR. MACKELCAN: Right.

8 THE COURT: Okay, go ahead.

9 MR. MACKELCAN: Yes.

10 THE COURT: All right, and so, the State appealed his
11 order granting a new trial?

12 MR. MACKELCAN: Right.

13 THE COURT: Okay.

14 MR. MACKELCAN: Right.

15 THE COURT: I got you.

16 MR. MACKELCAN: But the focus of his order was this
17 admission of the videotape. Now, there had been a motion to
18 suppress at pretrial which was denied by the Court. When it
19 was entered or when the State moved to enter it it was entered
20 without objection; and so, the whole basis of this case is
21 that it was malpractice not to renew the objection. Now,
22 substantively we're not here to argue the substance of whether
23 that was malpractice or not. We're purely here to discuss
24 whether or not this was brought within the time that it should
25 have been brought, and if you look at the dates it clearly

1 wasn't, again, you know, this case was filed August 24th,
2 2011. That order was issued the day after. Even if you give
3 until when the Court of Appeals, and the Court of Appeals
4 discussed this, this videotape at length, the Court of
5 Appeals' opinion was issued on April 23rd, 2007. So, you know,
6 we're still even a year and a half before the 2008 cutoff date
7 there.

8 There's a second ground substantive mention in the
9 complaint as to negligence and it relates to the - a hearing
10 that was held, a sentencing hearing that was held after this,
11 the Court of Appeals reversed the order and, and there was a -
12 there's an allegation that it was, it was negligence to not
13 object to some procedure that wasn't, I think the complaint
14 refers to it as a re-sentencing or something but, but the key
15 part of that is that that hearing was June 6th, 2007, again,
16 well, well in front of when it would have need, needed to be
17 brought. So, and again, in terms of the discovery rule, you
18 know, we're talking about easily discovered shortly
19 thereafter. He's been in prison. I take it from his filings
20 that he's quite competent in terms of the - we have dealt with
21 cases similar to this before and his, his filings in this case
22 have been well done, well written. It's not as though he is
23 someone that would - well, that's not even the standard. The
24 standard is a person I believe of ordinary, ordinary
25 intelligence when they would discover that they would have a

1 cause of action. So, I think based on that it's fairly clear
2 that the time had run well before this case was filed on
3 statute of limitations grounds.

4 As a second, second grounds for this motion is the expert
5 affidavit statute, 15-36-100. There was no, there was no
6 expert affidavit filed with this case and there has not been
7 one to date. There was a responsive document filed after our
8 motion to which he said, "Well, everything happened before
9 July 1st, 2005. So, I don't need to file an affidavit." Well,
10 that helps my statute of limitations argument, if everything
11 happened before 2005 in an effort to get out of the expert
12 affidavit statute. I guess what I would say is you can't
13 really have it both ways. I think that if - I would, I would
14 concede the expert affidavit argument as to the trial
15 objection, which happened in January of 2005, that that would
16 not - because of that there would be no expert affidavit
17 required. However, there is a clear allegation in the
18 complaint to this June hearing, June 2007 hearing which
19 clearly falls after and there's no relation back of that. I
20 mean, if it's a, two distinct claims you would need an expert
21 affidavit for that; and so, for those, for those reasons
22 dismissal with prejudice is appropriate as well, and the last
23 argument is a quasi-judicial immunity which has not been
24 granted for attorneys in this state. However, there is a case
25 for a guardian ad litem that I think is on point where there

1 was immunity granted for a court-appointed guardian ad litem
2 and the rationale in this case I think applies and it's
3 just, it says, you know, that this was an, this was an
4 appointment that was not volunteer. It's a requirement that
5 all lawyers in this state clearly have to, have to do and
6 because of that they're entitled to immunity from suits such
7 as this.

8 THE COURT: All right.

9 MR. MACKELCAN: Thank you.

10 THE COURT: Thank you.

11 All right, Mr. DiCapua.

12 MR. DICAPUA: Good morning, Judge, may I ask your name,
13 please?

14 THE COURT: Ben Culbertson.

15 MR. DICAPUA: Okay, Mr. Culbertson, I believe I have a,
16 I have a motion for recusal - these are not my glasses; I left
17 them in the van - pertaining to this case.

18 THE COURT: All right.

19 MR. DICAPUA: This case comes on the back of granting a
20 post conviction relief ---

21 THE COURT: All right.

22 MR. DICAPUA: --- that you granted on July - on February
23 23rd, 2011.

24 THE COURT: Okay.

25 MR. DICAPUA: And so, I just want to make you and the

1 Defendant aware that this case came from the granting of that
2 post conviction relief, which in effect say, what you did
3 say vacated my sentence and also granted that it was
4 ineffective assistance of counsel and I just feels it's a
5 - I'd like ---

6 THE COURT: So, you've got a, you've got a post
7 conviction relief action?

8 MR. DICAPUA: You granted my post conviction relief a
9 year ago and this case came to light off the back of that.
10 That - the motion for recusal was filed on the 29th of last,
11 the last month and I asked the Court to make sure that you're
12 aware of this and Judge John was made aware of this.

13 THE COURT: Okay, so, I - yeah, I see the order where
14 I granted your request for post conviction relief.

15 MR. DICAPUA: February 23rd, 2011.

16 THE COURT: Okay, and so ---

17 MR. DICAPUA: This case, this case is squarely off the
18 back of that.

19 THE COURT: All right, so, but how does that ---

20 MR. DICAPUA: I just wanted to make you aware of that
21 so there's no, you know, no gripes later on that, you know,
22 that maybe something was prejudicial or something is not
23 proper.

24 THE COURT: Oh, okay, I understand. I
25 understand.

1 MR. DICAPUA: I mean, I read the canons, I read, I'm not
2 up here pretending to be any lawyer.

3 THE COURT: Okay.

4 MR. DICAPUA: I feel wronged, and therefore, I went
5 into the law books. My back was against the wall and I was
6 left with no choice other than to do what I had to do here
7 today.

8 THE COURT: Okay, all right, well, what he's saying is
9 that you just didn't file your lawsuit in the time.

10 MR. DICAPUA: That's not correct. Also, I have another
11 motion before the Court, Your Honor, a motion for ex parte, ex
12 parte motion that I filed with this Court for appointment of
13 counsel and also for a guardian ad litem and an expert witness
14 and that was filed with this court on January 17th.

15 THE COURT: Of this year?

16 MR. DICAPUA: Yes, sir.

17 THE COURT: Okay, anything else?

18 MR. DICAPUA: Oh, I have a lot. Can I get a ruling on
19 this ex parte motion, Your Honor?

20 THE COURT: Okay, yes, sir, I'm not - right now it
21 looks to me as though they are correct, that you have a
22 statute of limitations that limits, that says when you have to
23 bring the action.

24 MR. DICAPUA: Your Honor, the statute of limitations
25 runs from the date of injury resulting from the wrongful

1 conduct. That's clear in Dillon County School District Number
2 Two versus Lewis Sheet Metal Works. The date of injury was
3 2011 when this Court granted post conviction relief.

4 THE COURT: Oh, okay, I see what you're saying. So,
5 you're saying you didn't have a cause of action until the post
6 conviction relief was granted.

7 MR. DICAPUA: Correct, sir; correct, sir. I have, I
8 have to be innocent. I have to come - innocence on this case
9 to bring this action. Mr., Mr. MacKelcan knows this. Mr.
10 Overstreet knew this.

11 THE COURT: Let me ---

12 MR. DICAPUA: I can't believe they'd argue this in front
13 of the Court.

14 THE COURT: All right, let me - well, let me get them
15 to respond to that. He's saying that he didn't have a viable
16 cause of action until the post conviction relief petition was
17 granted.

18 MR. DICAPUA: And before - I can further stress that
19 before we even get there.

20 THE COURT: Well, no, let me ---

21 MR. DICAPUA: All right, okay.

22 THE COURT: --- hear his response to that.

23 MR. DICAPUA: Okay.

24 MR. MACKELCAN: I think the two things are separate
25 and distinct. He has the post conviction relief. Certainly

1 we have seen cases, I mean, as we all know post conviction
2 relief is not granted all that often. We've seen lots of
3 cases where post conviction relief is never granted and they
4 still have a claim for malpractice; and so, the claim arises
5 when, when the person knew by the exercise of reasonable
6 diligence that they have a cause of action. That cause of
7 action he's sitting in jail since 2005. It arises then.
8 Now, post conviction relief is an absolutely separate
9 situation.

10 THE COURT: Okay, all right. Go ahead, Mr.
11 DiCapua.

12 MR. DICAPUA: Your Honor, South Carolina provisions
13 governing statute of limitations under South Carolina law are
14 found in 15-3-10, the general, the general rule is that the
15 civil action must be commenced within the state, within the -
16 with these glasses I can't see. I'm sorry, within the stated
17 period the cause of action has occurred, 17, South Carolina
18 Code 15-3-20. The cause of action is said to have occurred at
19 the moment when the Plaintiff has the legal right to institute
20 and maintain the action, Brown v. Finger.

21 THE COURT: All right.

22 MR. DICAPUA: I couldn't bring this action till I had
23 the cause to bring it legally and there's also another case
24 that backs it up. It's Theo [spelled phonetically] versus -
25 I'll get that for you in a minute. I have it here. I mean

1 that's, that's - the cause of action is said to have occurred
2 at the moment when the Plaintiff has a legal right to
3 institute and maintain the action. So, you know, I don't
4 understand what he's saying there.

5 THE COURT: All right.

6 MR. DICAPUA: The statute of limitations runs from date
7 of injury resulting from the wrongful conduct.

8 THE COURT: All right, sir, anything else?

9 MR. DICAPUA: Oh, yes, sir, I have a lot.

10 Firstly, Your Honor, concerning the, concerning the first
11 complaint, concerning my complaint, he filed, in 30 days he
12 filed a, he filed his answer and somebody get my notes right
13 here. Firstly the Defendant he shall serve his answer within
14 30 days of the complaint, which he did. Secondly, no other
15 answer is permitted outside of the service within 30 days.
16 That's Rule 7-A. After that Defendant failure to attach
17 proper notice of the motion which he sent me. There's no
18 notice on his motion, no ten day notice, no time or nothing on
19 his motion to dismiss and that, that, that clearly violates
20 Rule 7-B.

21 THE COURT: But when did you get the motion?

22 MR. DICAPUA: The motion certificate of service was 11-
23 2-2011. He simultaneously filed a motion to discover, I mean
24 a motion to dismiss and his answer at the same time.

25 THE COURT: Okay.

1 MR. DICAPUA: And that's contrary to law, too.
2 Defendant failed to - he failed in his, in his answer, he
3 failed to address each cause of action. Upon information and
4 belief which really has me upset on his motion here he says
5 that he filed an order, which I never received a copy of that
6 either. It says here though, "I hereby move for relief an
7 action by the Court as set forth in the attached proposed
8 order," and that seems to me if he did that that's ex parte in
9 both motions that he filed with the Court.

10 I have some more here, Your Honor. Firstly, let me just
11 do this, he filed a general answer. General answers in this -
12 he filed a general answer 30 days later to my verified
13 complaint stating he denies everything. My understanding is
14 general denials in the State of South Carolina have been
15 abolished unless he can contravene every allegation in that
16 complaint including jurisdiction. Clearly he cannot
17 contravene jurisdiction in this case. This case belongs in
18 the Fifteenth Judicial Circuit. He knows subject matter
19 jurisdiction is the power of the court to hear and determine
20 cases of the general class to which the proceedings belong.
21 That's a 2002 ruling in Pierce versus State. Gentry in 2005
22 came back the Circuit Court is a general trial court with
23 original jurisdiction in all criminal and civil matters. So,
24 he can't contravene the jurisdiction on this. He has no
25 grounds for his motion to dismiss.

1 He came back later on and what he's saying here, I'm just
2 a little upset today. I first should have started the court
3 by telling you this is not a personal matter against Mr.
4 Guest. I believe Mr. Guest to be a good person. I know he's
5 a good person. I know he's a good family man. That's why I'm
6 a little upset about this. Mr. Guest after this just come
7 recently to my knowledge has done work for my family after
8 this. That's why I haven't asked my family to be here today.
9 I didn't want no conflict between them and that's why I
10 wanted to come out and tell the Court it's not a personal
11 matter. It's just a legally matter. My back is against the
12 wall now with all this stuff. I just - I have nowhere to
13 go.

14 So, I guess my next - I just wanted to get that out
15 first. I should have brought it out first.

16 THE COURT: All right.

17 MR. DICAPUA: What, what Mr. MacKelcan is saying 15-36
18 this case should be dismissed because of South Carolina Code
19 of Laws 15-36-100 it's not applicable in this case. That
20 statute came into effect July 1st, 2005. This Court here -
21 these proceedings here was in January 2005 this case was
22 overturned. Judge Baxley over - I was found guilty in January
23 2005. He came back and threw it out the next day. What may
24 better help this Court, I think, Your Honor, if I give you
25 this here. I prepared a timeline of events for the Court and

1 for Mr. MacKelcan, Mr. Overstreet, and may it please the Court
2 so you can better understand what's going on here.

3 THE COURT: All right, let's hand it up.

4 MR. DICAPUA: I think I gave somebody one page too many.
5 Anybody have two page ones?

6 THE COURT: Yeah, you gave me two page ones. All
7 right.

8 MR. DICAPUA: I probably should have started out here
9 first, Your Honor. I understand everything the Defendant's
10 attorneys are saying and as far as jurisdiction goes, January
11 13th I was sentenced to 30 months and here's the sentencing
12 sheet on that and this is clearly - can I put something into
13 evidence, Your Honor? Is that possible?

14 THE COURT: Well, I don't know what it is. You've got
15 to ---

16 MR. DICAPUA: Well, this is sentencing sheets showing
17 that this case is immune to statute of 15-36-100. This case
18 preceded the enactment.

19 THE COURT: No, I understand your argument.

20 MR. DICAPUA: Okay.

21 THE COURT: Your argument is is that because the cause
22 of action arose prior to the enactment of that statute you're
23 not required to have an affidavit.

24 MR. DICAPUA: Correct, Your Honor.

25 THE COURT: I don't know that that's the case. My

1 understanding is is it doesn't go when the cause of action
 2 arose. It goes on when you file the malpractice action, that
 3 as of the date of the enactment of that statute if you filed a
 4 malpractice action after that date you have to have your
 5 affidavit.

6 MR. DICAPUA: Your Honor ---

7 THE COURT: Even if it, the cause of action may have
 8 arose prior to it, the statute, my understanding is the
 9 statute required an affidavit for all malpractice actions
 10 filed after the enactment of the statute regardless of when
 11 the cause of action arose.

12 MR. DICAPUA: I respectfully disagree, Your Honor. I
 13 just, I mean I wasn't able to bring this. If I would have
 14 brought this this straight up would have been a bar without,
 15 with that right to bring this case. I just went through this
 16 on law ---

17 THE COURT: But still when you brought it you could
 18 have filed an affidavit in support of your action at that
 19 time.

20 MR. DICAPUA: I had no ---

21 THE COURT: He's, he's saying there's - you - that you
 22 - your case fails on two grounds, number one you didn't bring
 23 it within the three years of when the cause of action arose
 24 and then he's saying even if he's wrong on that that your
 25 cause of action is not supported by an affidavit from an

1 expert that attests that it was a legal malpractice.

2 MR. DICAPUA: Your Honor, 15-36 is not applicable to me.
3 I don't need an expert witness at this time.

4 THE COURT: Okay.

5 MR. DICAPUA: When I filed - this, this case goes back
6 to 2005, Your Honor. I have court documents.

7 THE COURT: I understand you.

8 MR. DICAPUA: Okay.

9 THE COURT: But you're not listening to me.

10 MR. DICAPUA: I am.

11 THE COURT: His argument is it doesn't go by when
12 the cause of action arose. It goes by when you file the
13 lawsuit.

14 MR. DICAPUA: Well, I was only able to file this lawsuit
15 in 2011.

16 THE COURT: Okay.

17 MR. DICAPUA: That's when we came through the - I had, I
18 had cause - I had action to do that. Otherwise it would have
19 not been applicable law for me - it would have been dismissed
20 and barred with prejudice for doing that. I had no cause of
21 action. I had, I had no right. I had - didn't know that I
22 had ineffective assistance of counsel till then.

23 THE COURT: All right, so, when did your cause of
24 action arise?

25 MR. DICAPUA: When you ruled that there was ineffective

1 assistance of counsel.

2 THE COURT: All right, so, if your cause of action
3 arose when I made that ruling which was on February 2nd, 2011,
4 that arose, that means it arose after the enactment of the
5 statute that requires you to have an affidavit in support of
6 your case.

7 MR. DICAPUA: I just don't see it that way, Your
8 Honor.

9 THE COURT: So, when do you say ---

10 MR. DICAPUA: This case, this case extended from 2005 on
11 up with different rulings with different courts.

12 THE COURT: Well, let me ask you this, did your cause
13 of action arise in 2005 or in 2011?

14 MR. DICAPUA: It arose in 2005.

15 THE COURT: Okay, then why is it not barred by the
16 statute of limitations that says you have to file it within
17 three years?

18 MR. DICAPUA: Because I have to be able to plead
19 innocence before I can file this, Your Honor.

20 THE COURT: Okay.

21 MR. DICAPUA: There's a statute also there. I
22 believe it's Theo [spelled phonetically] versus somebody
23 which I can get out for you. Until I can plead innocence I
24 cannot file a legal malpractice claim, my understanding of
25 the law.

1 THE COURT: All right.

2 MR. DICAPUA: And I'm not trying to be the lawyer, not
3 trying to be, you understand, I'm just, I mean from what I've
4 researched that's, that's what it says.

5 THE COURT: All right, sir, anything else?

6 MR. DICAPUA: Yes, sir, anything after, anything
7 after this, his answer, his general denial, his general
8 denial is personally I have a problem with his, with his
9 general denial, Your Honor. He just says I failed to state a
10 cause of action.

11 THE COURT: All right.

12 MR. DICAPUA: He didn't put me on notice to say what it
13 was, what's, what was the cause of action and I object to him
14 now coming forward and making a claim.

15 THE COURT: All right, sir.

16 All right, thank you.

17 MR. DICAPUA: Might I have, might I have one more
18 minute, Your Honor?

19 THE COURT: All right, sir.

20 MR. DICAPUA: This is just - I just want to bring back
21 to the Court one more time and I'll leave this alone, the
22 general rule is that the civil action must be commenced within
23 the stated period after the cause of action has occurred,
24 South Carolina Code 15-3-20. The cause of action is said to
25 have occurred at the moment when the Plaintiff has the legal

1 right to institute and maintain the action. I cannot
2 institute this action unless I can plead innocence and I
3 cannot plead innocence until my conviction was vacated, and
4 anything else that he files after this answer I have an
5 objection to. He came back with an amended answer, an amended
6 motion to dismiss which was not properly before the court. He
7 had 30 days and I don't see anything where the Court gave him
8 leave to come back and answer all that stuff. He dropped the
9 general denial and then came back with assertive claims after
10 the 30 days and I'd like to also - I should have brought this
11 out at the beginning, I just really don't know how to say
12 this, he, he's just - the facts arise from the law, Your
13 Honor, and he just clearly violated all the Rules of Civil
14 Procedure filing all this stuff here and I just, I'm just kind
15 of upset that this Court would even consider this kind of a
16 motion.

17 THE COURT: All right, sir. All right, thank
18 you.

19 MR. DICAPUA: Okay.

20 THE COURT: All right, I'm going to grant your motion.
21 I think it is a case - cause of action if it arose in 2005 he
22 had three years to file it. He didn't file it. So, it's
23 prohibited by the statute of limitations or if you follow Mr.
24 DiCapua's rationale that the cause of action didn't arise
25 until 2011 when I granted his post conviction relief then

1 you've got the statute that requires an affidavit to be filed
2 with the action. So, you're kind of in a catch-22. If you're
3 going by the 2011 date you've got to have your affidavit. If
4 you're going by the 2005 date you don't, you didn't bring it
5 in time. So, I'm going to grant the motion to dismiss. All
6 right. Thank you.

7 MR. DICAPUA: This motion to dismiss was with prejudice?
8 I have a, I have a right to appeal this; don't I?

9 THE COURT: Well, you can appeal it, yes, sir, if you
10 want to.

11 MR. DICAPUA: Okay, okay.

12 THE COURT: All right.

13 MR. DICAPUA: May I get the information from the court
14 reporter, please? So, I mean, do I - so I can get a
15 transcript?

16 THE COURT: You'll need to write her ---

17 MR. DICAPUA: Okay.

18 THE COURT: --- to get a transcript. You'll have to
19 pay whatever the, whatever the deposit is. I don't know all
20 that, but you contact her and she'll give you all that
21 information; okay?

22 MR. DICAPUA: All right, thank you, Your Honor.

23 THE COURT: All right, thank you.

24 MR. DICAPUA: Thank you again.

25 THE COURT: All right, thank you.

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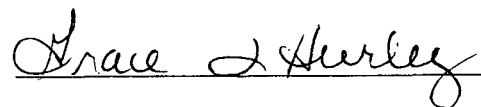
(Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Jeremiah DiCapua versus Thomas D. Guest, Jr., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on April 9, 2012.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM-M

Official Reporter

August 8, 2012.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Case No. 2011-CP-26-7104

Appellate Case No. 2012-212110

RECEIVED

NOV 19 2012

SC Court of Appeals

JEREMIAH DICAPUA,

APPELLANT,

Vs.

THOMAS D. GUEST, JR.,

RESPONDENT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

This 15TH day of November, 2012

s/ Jeremiah DiCapua
Jeremiah DiCapua
Inmate No. 00105096
McCormick Correctional 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
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Benjamin H. Culbertson, Circuit Court Judge

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Vs.


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RESPONDENT.

PROOF OF SERVICE

I certify that I have served Appellant's Record of Appeal on Thomas D. Guest, Jr., by depositing 3 copies of it in the United States Mail Service provided here at McCormick Correctional Institution on November 15TH, 2012, addressed to his Attorneys of Record, Douglas W. MacKelcan and David W. Overstreet of Carlock, Copeland & Stair, LLP, located at 40 Calhoun Street, Suite 400, Charleston, South Carolina 29201.

November 15TH, 2012


Jeremiah DiCapua
Inmate No. 00105096
McCormick Corr. Inst.
386 Redemption Way
McCormick, S.C. 29899
Appellant, pro-se