THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-3665

William. F. Tomz and Francis W. Tomz, Individually and as Class Representatives,
. . . . . Respondents,

v.

Capital Investment Funding, LLC, and Arthur M. Field, Defendants,
Of Whom Arthur M. Field is the . . . . . Appellant,
And Capital Investment Funding, LLC is a. . . . . Respondent.

APPELLANT'S FINAL REPLY BRIEF

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I. A FINDING OF WILLFUL DISOBEDIENCE IS MANDATORY FOR CONTEMPT, AND THE LOWER COURT'S ORDER FATALLY LACKS THAT FINDING.

A. Summary of Argument

Reversal must be granted because contempt only results from the willful disobedience of a court order, as stated by the Supreme Court, an act is willful if:

> ..."done **voluntarily** and **intentionally** with the **specific intent** to do something the law forbids, or with the **specific intent** to fail to do something the law requires to be done; that is to say, with **bad purpose** either to disobey or disregard the law." Spartanburg County Dep't of Social Services. v. Padgett, 296 S.C. 79, 82-83, 370 S.E. 2d 872, 874 (1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)) (emphasis added).

This standard for finding contempt must be established by clear and convincing evidence. Poston v. Poston, 331 S.C. 106, 502 S.E. 2d 86 (1998). The evidence here falls short of clearly and convincingly establishing voluntary and intentional actions or failures, with specific intent and bad purpose, that is required for contemptuous conduct. Instead, the record shows that Appellant, Arthur Field, has met his obligations to provide the records he was ordered to provide and to give the cooperation he was ordered to give, which were ordered in the 2009 order approving the Mediated Global Settlement Agreement ("MGSA Order" R. p. 1). The Record shows that:

1) shortly after the 2009 MGSA Order was signed, requiring Field to cooperate and provide records, Field provided voluminous relevant documents and cooperated with Receiver;[1]
2) the Receiver's own report;[2]
3) Field's obligations were established by the MGSA Order, yet the Receiver's attorney purported to serve a "Request for Production of Records" on Field, a nonparty, without a subpoena, in clear violation of SCRCP 34(c);
4) in the absence of a subpoena, the "Request for Production" had no force of law;[3]
5) if the Receiver had not violated SCRCP 34(c), the Receiver would have had, under SCRCP Rule 37, appropriate sanctions for refusal to comply;
6) Thus, the Respondents themselves disregarded the law by failing to give Appellant the protections the law required he be given under the South Carolina Rules of Civil Procedure.[4]

However, the keystone requiring reversal of the lower court is the complete failure to find any instance of any willful conduct by Field. The lower court's order ("Contempt Order" R. p. 66) does not set forth any legal standard upon which the lower court arrived at its conclusions, and does not make even one finding of a willful violation, which inarguably is a condition required before a contempt of court ruling can be issued.

More than four years elapsed from the date of the Receiver's appointment[5] to the day Field appeared to respond to the Rule to Show Cause on September 17, 2013. If the Receiver legitimately thought there had been intentional noncompliance by Field, why did the Receiver fail to promptly procure issuance of a subpoena duces tecum, by which judicial power would have attached to the "Request for Production"? Had the Receiver respected Rule 34(c)'s

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[1] See pages 5-10 of this Reply Brief.
[2] See Report As of September 30, 2009 [dated November 12, 2009], R. p. 84-95, showing meetings with Field, receipts of records from Field, and Field's travel with the Receiver to inspect properties, even in New Jersey.
[3] Field's decision to treat that document as having no force of law was legally correct, therefore cannot constitute contempt of court.
[4] Rule 34(c), SCRCP and Rule 45, SCRCP.
[5] The Receiver was appointed in the MGSA Order signed on August 24, 2009. R. p. 7.

requirement by having a subpoena issued against Field, a non-party,[6] then Appellant would have been legally compelled to respond to the "Request for Production," and had he failed to do so, the Receiver could have appropriately filed a Motion to Compel. With no subpoena, though, there could be no Motion to Compel. The Request for Production went beyond the production requirements of the MGSA Order. Despite that no subpoena was issued, Appellant still tried to satisfy the Receiver's Request, for example, sending three emails on November 28, 2011 that provided 25, 3 and 24 entire files, respectively, as attachments.[7] Another set of thirty-three emails with exhibits was also provided.[8] The Receiver obtained a Rule to Show Cause, signed by the lower court on August 19, 2013, seeking to have Appellant held in contempt.[9]

For the reasons argued in Appellant's Initial Brief and below, it was an abuse of discretion for the Contempt Order to have been issued, on this record, and this Court should not allow it to stand. The Contempt Order cries out for reversal.

B. The Contempt Order is Reversible on Its Face.

Willful disobedience of a court order is required in South Carolina before contempt can be found. The instant case requires the same outcome on appeal as decided in Moseley v. Mosier,[10] wherein the Supreme Court concluded that "We agree with respondent that the family court erred in finding him in contempt for failure to comply fully with the separation agreement.

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[6] Field was dismissed from this case by the August 24, 2009 MGSA Order. See section 8, R. p. 8. The requirement for obtaining a subpoena was mandated by Rule 34(c), otherwise the "Request for Production of Documents" carried no power.

[7] Table III exhibit R. pp. 766-767.

[8] Table IV exhibit R. pp. 768-769.

[9] Why had the Receiver not brought Field before the court at an earlier date? Respondent had sought a Rule to Show Cause twice in the past, but never pursued either one to a hearing. See RTSC dated June 5, 2012 and RTSC dated April 1, 2013. R. pp. 35 and 49. Receiver's Reports for years ended 2009, 2010, 2011, and 2012 do not support Respondents' claims of noncompliance and, to the contrary, establish Field's production of records and cooperation. R. pp. 84, 352, 370.

[10] 279 S.C. 348, 351, 306 S.E. 2d 624, 626 (1983).

Contempt results from the willful disobedience of a court's order. The family court order fails to state facts showing that respondent *willfully* failed to pay child support. Before a court finds a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." (citing Curlee v. Howle, 277 S.C. 377, 287 S.E. 2d 915 (1982)). Nowhere in the lower court's Contempt Order is there a finding of "willful" behavior or that appellant "willfully acted or failed to act."[11] Thus, on its face the Contempt Order is defective and must be reversed.

At the hearing the lower court's only stated grounds for finding "contempt" by Field was his admission to not turning over the videotape or "the copy of the check that sat on his bulletin board," and that "he has obstructed the efforts of the Receiver to collect the funds" and "he's just not cooperative." [12] Respondents use the words "willful failure to comply" one time, at the end of their brief, but the lower court's Contempt Order nowhere makes that finding. [13]

II. THERE WAS NO CLEAR AND CONVINCING EVIDENCE OF WILLFUL CONDUCT WITH SPECIFIC INTENT AND BAD PURPOSE.

Only intentional and specific actions or failures to act, with a bad purpose, rise to the level of contemptuous behavior. See Spartanburg County Dep't of Social Services, supra. When this Court examines carefully the ample record, it must conclude that Respondents have not shown, by clear and convincing evidence, that there have been specific willful actions and/or failures by Field that constitute contempt of court.[14] To the contrary, in 2008 Field produced a

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[11] Contempt Order R. pp. 66-78.
[12] R. p. 710, ll. 5-17.
[13] See Contempt Order, R. pp. 66-78, showing a complete absence of legal analysis, case citations, or burden of proof or standards to be met before a contempt ruling can be issued.
[14] Respondent's attempt to throw red herrings at the wall hoping something will "stick." See argument at Subsection F starting on page 14 of this Reply Brief regarding the nonsubstantive items Respondents and the lower court seized upon in an effort to show contemptuous behavior by Field.

large volume of CIF's financial and other records[15] long before the MGSA Order was signed.

A. The "Clear and Convincing" Standard Was Not Met.

To prevail, Respondents must show civil contempt on the part of Field "by clear and convincing evidence."[16] Respondents rely on Ex Parte Cannon[17] and Miller v. Miller[18] to claim it is Arthur Field's burden to prove he was not in contempt. However, it was Respondents' burden to show, by clear and convincing evidence, that Appellant was in willful contempt.[19] Because it is fundamental that a contempt ruling "is a serious matter and should be used sparingly,"[20] this Court must reverse because there is no showing the correct burden and standard were ever considered by the lower court. Thus, Field cannot be shouldered with having to affirmatively prove his compliance.

B. Appellant's Compliance Has Been Shown by Voluminous Evidence.

This appeal examines Appellant's compliance in providing records of Capital Investment Funding ("CIF") as required by the 2009 MGSA Order.[21] The record shows that Legal Eagle, a copier service, took custody of CIF's noteholder files in May 2009,[22] and that the Receiver,

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[15] Field's compliance began even before the MGSA Order. R. p. 664, ll. 18-24.
[16] Poston v. Poston, 331 S.C. 106, 113, 502 S.E. 2d 86, 89 (1998)
[17] 385 S.C. 643, 685 S.E. 2d 814 (Ct. App. 2009)
[18] 375 S.C. 443, 652 S.E. 2d 754 (Ct. App. 2007)
[19] While it is correct that a contempt ruling should be reversed only where the presiding judge abused his discretion or the finding is without evidentiary support, that analysis is not reached until the appellate court first examines whether the lower court has applied both the correct standard and the correct burden of proof. Here, the lower court judge failed on both counts. The Contempt Order does not even mention the burden of proof or standard.
[20] Miller 375 S.C. at 452, 652 S.E. 2d at 759.
[21] The Rule to Show Cause asserted violations of three orders: the MGSA Order, and also the "Production Order" dated (June 29, 2010) and the "Privilege Order" dated (October 10, 2011). On its face, the Production Order nowhere commands anything of Field—it only applies to certain named individuals and defined "Businesses" that do not include Field. (Production Order, R. pp. 24-29). The Privilege Order protected Field's constitutional rights, and did not demand production of records from him. (Privilege Order R. pp. 30-34). Thus, Field could not have been in contempt of either of those orders, and to the extent the Contempt Order so finds, this plainly was an abuse of discretion and without evidentiary support.
[22] Affidavit of Timothy Kelley, CIF Office Manager, R. pp. 497-498.

Jerry Saad, took possession of everything else in CIF's office, including the active loan files Field was ordered to turn over, computers, and office furniture.[23]

C. Field's Demonstrated Compliance Shows the Contempt Order Was an Abuse of Discretion.

Evidence of Field's compliance is overwhelming. As of the end of August 2009, Field had provided all financial records for CIF; a complete listing of all CIF assets, loans, loan status, profit/loss, balance sheet; all QuickBooks accounting records for CIF, MFG, Lion Financial; all bank statements for BB&T, Greenville First and other banks for all CIF, MFG and other related accounts; all checks and records of deposits for CIF and MFG; all CIF files evidencing direct loans; all CIF files evidencing re-lending; all employee files for CIF; all LLC records, including minutes of annual meetings and capital transactions; all audits from LRI for 1999 through 2005; all prospectus documents and amendments for CIF from 1999 through 2007; all disclosure reports issued to Note Holders; all risk disclosures issued to Note Holders; all interim letters or correspondence sent to CIF Note Holders; all correspondence to or from CIF still existing in 2009; all audits for CIF from 1999 through 2007, including semi-annual audits; all regulatory information pertaining to CIF registration from 1999 to 2007; all Regulation D related documents from 2007; all private placement memoranda issued by CIF in 2007; spreadsheets listing every Note Holder and amounts due; spreadsheets listing every CIF loan; Microsoft Access Database of all CIF Note Holders and transactions; emails available to or from CIF; all records for MFG available to Field, 2003-2008; all employee manuals; all records relating to

[23] Affidavit of Timothy Kelley, CIF Office Manager R. pp. 497-498. The Empire services contract for scanning these records, negotiated by Field and consented to by the Receiver, called for Legal Eagle to release the records to Empire, when instructed by CIF. By the time the scanning services were substantially underway by Empire, it was the Receiver who had the authority to act on behalf of CIF, and thus it was his responsibility to take possession of the boxes if he wanted them. (See Empire Contract R. pp. 347-350).

warehouse loans made by CIF; all documents relating to the sale of properties owned by CIF in any location; all documents relating to any legal action involving CIF prior to 2009; all documents relating to the pending 1983 action in U.S. District Court; all documents relating to First Trust Corporation; all documents relating to CIF and IRA accounts; all correspondence with other IRA custodians; all documents relating to acquisition of chose-in-action in New Jersey SRG 457-457 Carlton Road, Wyckoff, NJ including all emails with Westrick; all documents relating to acquisition of condominium units in New Jersey; all correspondence with New Jersey attorneys, including all billings; all records relating to Trazom loans, property acquisition and settlement; all emails from L'Abbate and presentation folder from LRI on 1/15/08; and the report of independent fraud examiner and FBI agent, Tim Huhn. (See Table I exhibit R. pp. 758-759).

Field assisted the Receiver in taking possession of numerous files directly from CIF's offices, including all loan files showing CIF direct loans; all loan files showing 'back loan' from re-lender to CIF; all closed loan files; all applications for loans which were denied by CIF; all correspondence between CIF and LRI, MFG, Cosimo; all correspondence between CIF and any Note Holder; all correspondence between CIF main office and satellites; all correspondence between CIF and IRA Custodian(s); any relevant emails reduced to hard copy; all computers; all Note Holders files not being scanned; all employee records; all furniture; all audit copies; all promotional material and advertising; all CIF audits and disclosure documents; all LRI audit records; all filing cabinets; all bank records, checks, reconciliation reports, deposit slips; and all

archived records.[24] A large number of other files were provided as email attachments.[25] The lower court never makes any findings regarding the voluminous production by Field.[26]

The MGSA Order worded Field's compliance obligations with specificity, yet the lower court appears to have applied a much broader obligation, which leaves Field unfairly at peril of being ruled in contempt, yet with no actual ability to purge himself because he does not know how he has failed to comply and has no records to produce that he has not produced already.[27]

The MGSA Order required:

> "...Arthur Field shall also offer truthful testimony, shall agree to cooperate in any proceeding in state or federal court to include bankruptcy court and such cooperation shall include testimony and/or depositions...; [and] Field ...shall provide *copies* of all records, emails, reports, letters, documents, mortgages, notes and any other materials *which shall support the receiver's right to collect from any individual or corporation which has been loaned any monies by Capital Investment Funding, LLC or its related companies* (emphasis added). MGSA Order section 2, pp. 4-5.

Field was also to produce "a complete listing of any [and] all real property...to the [R]eceiver at his address to include any and all notes, mortgages and other assets of any value ...." MGSA Order section 13, R. p. 10. Field was not ordered to provide anything that dealt with CIF's internal affairs, closed loans, or noteholders. Essential to a correct interpretation of the issues before this Court is the understanding that the MGSA Order was not a general, blanket directive to produce every piece of paper on any conceivable subject connected to CIF.

Field's testimony shows his extensive production of records and cooperation. "From the very first day before the global mediated settlement agreement was signed, Your Honor, I have

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[24] Table I-A Exhibit R. p. 760.
[25] Table III Exhibit R. pp. 766-767; Table IV Exhibit R. pp. 768-770.
[26] See Contempt Order R. pp. 66-74.
[27] Following the Rule to Show Cause hearing, Appellant promptly attempted, yet again, to satisfy the Receiver and the lower court. Through counsel, he again provided voluminous records, which consisted of the records he had already turned over previously to the extent he still had copies of records in his possession. See Response to Judge's Oral Order (September 20, 2013) R. pp. 489-496 including Receipts for delivered documents, R. pp. 499-500.

tried to cooperate ten thousand percent. I have gone way beyond anything this Court requested me to do. .... I can not imagine what I could have done more. I have spent countless hours working with Jerry Saad."[28] Even before the MGSA Order was signed, in May 2008 and July 2008 Field provided "all loans that were held by CIF ... [and] included all loans that I knew to be held by LRI and loans [on] all properties ... held by CIF" and an update of that information was provided in January 2009.[29] Field described meetings with the Receiver and Class Counsel and experts to go through the loans and explain all of the properties.[30] Regarding Lancaster Resources, by 2008 all of those documents were with attorney Westrick, in New Jersey, including "every document that CIF had" regarding Lancaster Resources.[31] The copier service, Legal Eagle, took possession of the boxes of Note Holder files.[32] Often Field had to find the person who had documents, because he did not always have control or possession over all documents. He flew to New Jersey to assist, and even attended hearings he was not required to attend to assist the Receiver.[33] Field plead guilty to securities fraud, not theft, and testified he did not take anyone's money.[34] Field testified that he informed the Receiver where the "96" boxes were located, that they were being scanned, that he gave the scan to the Receiver, and that later in November 2011 he asked if the Receiver had retrieved the boxes, to which the Receiver admitted he had not, and Field suggested that he check to see if the boxes were still with Empire and get them.[35]

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[28] R. p. 664, ll. 18-24.
[29] R. p. 665, ll. 2-10.
[30] R. p. 665, ll. 11-22.
[31] R. p. 666, ll. 4-9.
[32] R. p. 667, ll. 20-22.
[33] R. p. 668, ll. 6-16.
[34] R. p. 668, ll. 17-24.
[35] R. p. 669, ll. 6-23.

Regarding loan documents, Field testified that the Receiver himself personally entered the CIF offices and "cleaned them out."[36] Regarding the "Request for Production," which was handed to him after he had worked with the attorneys "all day." Because Field was no longer a party, he informed counsel that a Subpoena needed to be sent due to ongoing inquiries from the Attorney General who was seeking documents.[37] Despite Field's position that without a subpoena, he was not required to act on the "Request for Production," he said "you know what, I will cooperate any way. I went home and I resent all the documents, 75 attachments. It was thousands of pages more I sent Mr. Saad. [the Receiver]."[38]

The Receiver himself reported to the court that as of October 2009 he had received the documentation on every loan, all Cosimo files, and CIF's QuickBooks.[39] This acknowledgement and the voluminous documents provided by Field, which the Receiver concedes he received,[40] establish that Field cooperated and complied with the MGSA Order, and that the lower court's finding of contempt was without evidentiary support and was an abuse of discretion.

D. The Receiver Wrongfully Claims Field Withheld Boxes of Documents When It Was the Receiver Himself Who Failed to Retrieve the Boxes from the Scanning Services Company.

In May 2009, before the Receiver was officially appointed, Field arranged for a copier service named "Empire" to electronically scan a large volume of boxes, containing noteholder records in the thousands.[41] Receiver has acknowledged he received the electronic scan of the

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[36] R. p. 669, ll. 24 – p. 143, l. 3.
[37] R. p. 670, ll. 17-22.
[38] R. p. 670, ll. 22-25.
[39] Receiver Status Report As of September, 30, 2009 [dated November 12, 2009], R. p. 85.
[40] R. p. 624, l. 19- p. 629, l. 22.
[41] See Empire Contract, R. p. 347.

hard copies files that were in these boxes.[42] Thus, Field has fully complied with regard to these "90 boxes" or "96 boxes" of records, having provided the electronic scan containing these records. Nowhere is he required to produce copies in multiples formats. Yet, remarkably, these boxes are a major portion of Receiver's claim that Field is noncompliant. The copier service had custody of the boxes, the scanned copies were given to the Receiver, Field reminded the Receiver that the boxes should be timely retrieved from Empire if the Receiver wanted them – but the Receiver never did so, and now after all this time he wants to make Arthur Field the scapegoat for that failure.[43] The Receiver's failure to retrieve the boxes of hard copies from Empire cannot be grounds for a contempt finding against Field. Thus, it was an abuse of discretion for the lower court to find Field in contempt for not providing the boxes to the Receiver.

Perhaps the most telling evidence of Field's cooperation and compliance is revealed by the Receiver's own words of December 6, 2011: "Thank you Arthur for the timely update (I am meeting with Judge Miller today)."[44] The Receiver's testimony reveals merely a vague belief he did not have everything, but did not know what he did not have.[45] This vagueness makes it impossible for Field to purge himself of alleged noncompliance. One of Receiver's claims was

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[42] R. p. 581, l. 9- p. 586, l. 6. It is unclear exactly how many boxes were transferred from Legal Eagle to Empire, with the numbers "96" and "90" being used by the parties. The important point is that Appellant cooperated with the Receiver to provide electronically scanned copies of a large number of boxed records, which has been a major focus of Respondent's claim of noncompliance. The so-called "96 boxes" contained the hard copies of the documents that Empire scanned for the Receiver, and that the Receiver admits he has. Field testified that he reminded the Receiver to retrieve them. Field cannot deliver boxes he does not possess.

[43] R. p. 669, ll. 6-23.

[44] Email from Jerry Saad to Arthur Field dated 12/06/11.

[45] Saad: "I'd say I'd got a lot of it and it could be I got all of it but I can't tell you if I did get all of it but a lot of this is what I do have..." "A lot of documents I recognize that are all on here I can't tell you if everything on here is what I got." R. p. 600, ll. 3-10

that he was not given original documents, but originals were not required by the MGSA Order.[46] Mere speculation there might be other documents does not establish, by clear and convincing evidence, a specific intent by Field to engage in contemptuous conduct.

E. Appellant's Defending Himself in the New Jersey Litigation Was Not Willful Conduct That Constituted Contempt of the South Carolina MGSA Order.

After working closely with Field going back to 2008, the Receiver decided to be adversarial towards him, rather than use his knowledge to efficiently collect CIF's assets. CIF's business was highly complex, and Field obviously was more valuable to Respondents as an ally than as an adversary in protracted litigation in a foreign state, but nonetheless the Receiver decided to sue Field in New Jersey.[47] By doing so, Respondents caused all available defenses, counterclaims, and crossclaims Field had conditionally waived in the MGSA Order to be revived and fully available to Field.[48] Perhaps the most reasonable inference, which gives a plausible explanation for the Respondents' quixotic, late-in-the-day claims of Field's alleged "noncompliance", is the leverage they hoped to gain over Field to prevent him from defending himself in New Jersey.

Field filed his pro se Motion to Dismiss,[49] arguing that under New Jersey's "first filed doctrine," that the MGSA Order had *res judicata* effect, and he should be dismissed. Previously, based on his understanding of New Jersey law,[50] Appellant believed it was necessary for him to send a particular letter to attorney Westrick to preserve Field's potential claim of vexatious or

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[46] MGSA Order Section 2 R. p. 4. Only copies were required, which had been provided to a voluminous extent.
[47] The actions entitled Capital Investment Funding, LLC v. Calvary Asset Management, LLC et al., Superior Court of N.J. Bergen County Docket No. L. 3790-12
[48] MGSA Order section 9 R. p. 9.
[49] Field Memorandum of Law in Support of Motion to Dismiss (R. pp. 880-900) wherein Field persuasively argues 11 grounds for his dismissal from the case and attorney Westrick's disqualification from representing CIF, due to his being a fact witness as well as conflict of interest.
[50] N.J. Court Rules, R. 1:4 and N.J. Stat. Ann. § 2A:15-59.1.

frivolous litigation, since he believed the suit against him was without merit, and that Westrick had a conflict of interest.[51] The lower court focused on these New Jersey matters as evidence Field was failing to cooperate with the Receiver. The MGSA Order did not require Field to give up his right to defend himself, to the contrary, by its very terms that right was preserved. And significantly, the record does not show that anything Field did in defense of himself in New Jersey was found to be improper by the New Jersey court. To the contrary, on February 15, 2013, New Jersey Superior Court Judge Lisa Perez Friscia dismissed Field, with prejudice, from the New Jersey case.[52] Later, after Judge Perez's ruling in Field's favor, Respondents petitioned the lower court for the Rule to Show Cause, seeking to hold him in contempt in South Carolina, and Field's defense of himself in New Jersey formed a major part of Respondents' claim that Field was in violation of his duty to cooperate.

At the Rule to Show Cause hearing, Respondents attempted to prove Field's actions defending himself in New Jersey were misrepresentations, through the testimony of Field's New Jersey opponent, attorney Westrick, as a surprise witness.[53] However, a close review of Field's written memorandum and affidavit in New Jersey reveals absolutely no wrongdoing by Field.[54]

At the hearing, Respondents submitted as evidence a large notebook containing hundreds of pages of documents, including filings and a transcript in the New Jersey case. Field's counsel objected, as he had had no opportunity to review the notebook.[55] This Court does have that

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[51] Clearly Field was correct in believing he should not have been sued in New Jersey, since Judge Perez Friscia issued an order in Field's favor, dismissing the case against Field, with prejudice.
[52] Order filed February 15, 2013 and Rider to Order. R. pp. 470-488.
[53] Counsel for Field objected, based on Westrick's attorney-client privilege with Field and disqualification of Westrick, based on that, from representing CIF against Field in New Jersey. R. p. 647, l. 13 - p. 648, l. 7.
[54] See Memorandum and Affidavit submitted in New Jersey case. R. pp. 880-917.
[55] Appellant's newly-retained counsel had immediately filed, on September 12, R. p. 119, for a continuance of the Rule to Show Cause hearing to be held September 17, which was denied at the hearing. To afford Appellant's counsel only four days of preparation time was a denial of due process to Appellant with regard to this grave matter.

opportunity, however, and Field's New Jersey brief and affidavit and the New Jersey court's order, establish conclusively that Westrick's testimony before the lower court in South Carolina—that Field engaged in misrepresentations in the New Jersey case—was nothing more than an elaborate "smoke and mirrors" display to make it appear Field had done something improper in New Jersey. To the contrary, it is clear on the face of the order that the New Jersey judge made her own independent review of the MGSA Order, and she agreed with Field's legal arguments. Thus, Field's New Jersey actions cannot constitute contemptuous conduct in South Carolina. Further, it was reasonable for Field to believe that the Receiver's lawsuit against him in New Jersey could be defended without the Respondents accusing him of breaching his obligations under the MGSA Order.

F. Field's Actions Regarding a Non-Cashable "Check," a Video, the Trazom Note, and the "Pfeiffer" Malpractice Records Cannot Constitute Contemptuous Conduct.

The Receiver has relied on several inconsequential irrelevancies as supposed grounds for the lower court to hold Field in contempt. A true understanding of these non-substantive red herrings will make clear the extent to which Respondents are grasping at straws to find fault with Appellant.

1. A Non-Cashable "Check"

It is common knowledge that a check is a negotiable instrument, and the "check" in question was not. A potential buyer ("Calvary") of a New Jersey real property which had been secured by a CIF loan had provided a "check" made out for $305,000 that could not be cashed

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The Motion was renewed when the notebook with hundreds of pages of documents was offered, with no opportunity for review before cross-examination of witnesses, and was denied. R. p. 554, l. 18- p. 555, l. 19.

until the title company released it.[56] Field pinned this "check" to his bulletin board, awaiting sales contingencies to be fulfilled. The sales documents governing the potential sale were acknowledged by the Receiver in March 2011, whose 2011 report to the Court showed he had the exact amount of this "check."[57] Further, a copy of the "check" was given to the Receiver, and when he asked for the original "check" itself, in 2012, Field gave it to him.[58] Clearly Field could not have been acting contemptuously by not giving this non-cashable "check" to the Receiver, and the lower court's finding of contempt based on the actions pertaining to this "check" is an abuse of discretion as there is no showing of willful conduct with a bad purpose.

2. The Video Given to the Grand Jury Rather Than to the Receiver.

Field turned over a video of CIF's final board meeting to the state grand jury that was investigating all matters related to CIF, and he testified that he did not have this video until just before he gave it to the state grand jury. Believing that once he had given the video to the state grand jury, he was not permitted to give a copy to anyone else, Appellant did not give this video to Respondents.[59] Field had no reason not to turn over the video and acted as he believed he was required, but even if he was mistaken, his actions were reasonable under the circumstances of

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[56] R. p. 568, l. 10- p. 569, l. 5.

[57] Field sent to CIF's legal counsel and the Class of Noteholder's legal counsel, seven months before the MGSA was mediated, an email outlining the potential sale to Calvary Asset Management, LLC, including the price and other conditions. The email stated that if no objections were received, Field, as CIF manager in winding up, would proceed with the New Jersey sale in the next few days. There can be no issue of CIF having full knowledge of the pending real estate sale and that conditions had to be satisfied.

[58] R. p. 686, l. 22 – p. 687, l. 11.

[59] The State Grand Jury Act forbids disclosure of any material or evidence produced by or to the State Grand Jury to any person, absent the direct order of the presiding judge of the State Grand Jury. S.C. Code Ann. §§14-7-1720 – 1770.

being involved in a secret state grand jury investigation. Therefore, Field's actions regarding the video are not contemptuous conduct.[60]

3. The Trazom Second Amended Note.

The Receiver claimed the information provided about the Trazom documents initially included just two or three pages that "did not include the original copies of documents signed."[61] Field testified that he had given the Receiver, in the fall of 2009, all documents in his possession related to the Trazom loan.[62] The Receiver's own report of 2011 shows he had all the details of the Trazom loan,[63] which he could not have had without possessing the loan documentation. There was no requirement by the MGSA Order to provide "originals," and Field testified he did not have the original but that the document was filed on the public record.[64] Also, based on the fact that the Receiver himself took full possession of CIF's business office and its contents, which is where such "originals" presumably would have been maintained, this cannot be the basis of a contempt finding.

4. The "Pfeiffer" Legal Malpractice Documents

The Receiver testified that defendants in a legal malpractice lawsuit claimed they turned over records to Field. This was rank hearsay, and there was no identification of what specific "records" allegedly were turned over to Field. Respondents have failed to establish, by clear and convincing evidence, that the sued attorneys' hearsay (in response to discovery in another lawsuit, and to which Field's counsel made an objection) created a specific compliance

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[60] Following the September 17, 2013 hearing, upon advice of and through counsel, Appellant provided the video to the Receiver's counsel. R. p. 500.
[61] R. p. 566, ll. 5-14.
[62] R. p. 678, l. 25 – p. 680, l. 15.
[63] Receiver had the terms of the Trazom Notes and Amendments, and his report shows very specific details regarding the history and rates. Receiver's Report 2012 R. pp. 373-374, 381.
[64] R. p. 678, l. 25 – p. 680, l. 15.

obligation of Field, falling within the MGSA Order, which Field has willfully failed to comply with.

In conclusion, Respondents have failed to prove, by clear and convincing evidence, that Appellant willfully acted or failed to act, with specific intent and a bad purpose, constituting contempt of court. A close analysis reveals that the Receiver's complaints against Field, and the judge's Contempt Order, are all fury and no sound. The Contempt Order should be reversed as an abuse of discretion and without evidentiary support.

III. THE AFFIDAVITS OF INDEPENDENT WITNESSES, WHICH SHOULD BE INCLUDED IN THE RECORD ON APPEAL, SHOW THAT THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY WAS NOT UPHELD.

According to affidavits of members of the public present in the courtroom for the hearing, remarks were made by the judge that were not part of the Transcript, and which concern the judge's demeanor and attest to comments he made which show bias against Field. The lower court's Order Settling the Record denied inclusion of the affidavits in the Record (to correct or supplement what was missing from the court reporter's Transcript). Based on the contents of the affidavits and the judge's biased remarks that are in the Transcript, it is clear that a reasonable observer would have perceived the lower court judge failed to exhibit an appearance of impartiality.[65] Citizens such as these should be able to see that a judge's behavior demonstrates integrity and independence.[66] Their observations concerning the judge's demeanor and statements show that the public's confidence and trust in the South Carolina judiciary has been put at risk by the actual bias that was revealed, and the appearance that impartiality was lacking, based on his remarks and demeanor.

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[65] The three affiants are well-educated community and industry leaders. See Van Dyke Affidavit R. p. 948; Lackey Affidavit R. p. 941; Orfanedes Affidavit R. p. 942.

[66] See Canon 1, CJC, Rule 501, SCACR.

The Judicial Canons are quite clear that a judge shall disqualify himself when his "impartiality might reasonably be questioned ...."[67] The court observers' affidavits establish that these observers questioned the lower court's impartiality. As expressed in In re Dean, 717 A.2d 176,184 (Conn. 1998), "Avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself." Our South Carolina Supreme Court has stated that "under Canon 3(E)(1)(a), a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." Patel v. Patel[68]

IV. THE LOWER COURT JUDGE'S FAILURE TO RECUSE WAS AN ABUSE OF DISCRETION.

Finally, this Court must examine the lower court judge's decision not to recuse himself, which alone provides a sufficient basis for reversal of this case, not only to afford fairness to Appellant, but to protect the reputation of the South Carolina judiciary as a whole. The Code of Judicial Conduct ("Code") makes clear that an independent and honorable judiciary is indispensable to justice in our society. Canon 3 B(4), CJC Rule 501, SCACR of the Code of Judicial Conduct states that a judge "shall be patient, dignified and courteous to litigants, jurors, witnesses, [and] lawyers ...." Unfortunately, the courtroom conduct of the lower court judge did not reflect an "honorable judiciary."[69]

The lower court judge had revealed his lack of impartiality long before the September 2013 Rule to Show Cause hearing, as shown by inappropriate remarks he made at a public

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[67] Canon 3E, CJC, Rule 501, SCACR.
[68] 359 S.C. 515, 524, 599 S.E. 2d 114, 118 (2004). While the lower court in Patel was not reversed for not recusing, the principles enunciated therein are applicable to the facts of the instant case.
[69] Canon 1, CJC, Rule 501, SCACR.

informal hearing on December 14, 2011. The judge remarked on Field using his Fifth Amendment Constitutional right, and that if Field was not guilty, then the judge did not know why Field needed those Fifth Amendment protections.[70] The examples of bias displayed by the judge include the following remarks:

1. Judge: "...I will just tell you some of the most complex dodging and weaving shell game type stuff that I've seen and I've been involved in, when I was a lawyer for 25 years I was a defense lawyer and I've seen quite a few, but this [is] as sophisticated a shell game as I've seen."[71]
2. Judge: "And the other thing I would point out to you is the fact that Mr. Waters [Assistant Attorney General, Criminal Division] is here and you all just have to make a reasonable inference about that. I think that about covers that."[72] This appears to be an obvious, blatant suggestion that Field was a criminal.
3. Judge: "When I say shell game, a lot of these people are connected in other matters and it's moving around and it's hard to keep up with which cup has got the pea under it."[73]
4. Judge: "I don't know if you all remember but we sat in this courtroom when we settled this matter in '09 and that was how we were able to get an agreement was that Mr. Field refused to give up his Fifth Amendment Rights. If he's innocent, I don't know why he would need those but that was written into the agreement ...."[74]

Field had not been charged with any crime at the time the judge made these remarks, although had he been, this would not have made the judge's biased comments any more acceptable.[75] The lower court's remarks actual bias, and certainly there was not an "appearance of impartiality" being maintained. That a United States citizen, presumed innocent until proven guilty, was summarily remarked on in this improper fashion by a presiding judge in open court,

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[70] Appendix p. 6, ll. 5-10 (emphasis added).
[71] Appendix p. 2, ll. 3-8.
[72] Appendix p. 3, ll. 25 – p. 4, ll. 1-3.
[73] Appendix p. 5, ll. 11-14.
[74] Appendix p. 6, ll. 5-10.
[75] Eventually Field pleaded guilty to violations related to securities law, conspiracy and forgery, not embezzlement or stealing money. His guilty plea has no relevance to whether his efforts in compliance with the MGSA Order fell so far short, by clear and convincing evidence, as to constitute willful contempt. Plea Agreement paragraph (1), R. p. 115.

when that citizen had not even been charged with a crime, demonstrates impermissible bias, and such judicial conduct puts the honor and integrity of the entire judiciary at risk.

At the Rule to Show Cause hearing, the judge's lack of an open mind about the proceeding before him was apparent, when he proclaimed, prior to hearing Field's testimony: "all your client has to do is turn over what he agreed to turn over and that's all he's got to do."[76] The judge then said: "So let me get this straight, your client stole forty million dollars and now he's the victim?"[77] Such blatantly inappropriate comments show that the judge failed to conduct himself with the appearance of impartiality, as well as actual bias.[78] This is far from the "patient, dignified and courteous" conduct that is required of South Carolina judges.[79]

For failure to recuse to be an abuse of discretion, it is not required to prove actual bias, however; a showing that the public would have a reasonable doubt of the judge's impartiality is sufficient. See, e.g., Sears v. Nueces County, 28 S.W.3d 611,615 (Tex. App. 2000). As the Sears court expressed the issue, the question is "whether a reasonable member of the public at large... would have a reasonable doubt that the judge is actually impartial."[80]

The courtroom conduct of a judge directly affects the reputation of the judiciary as a whole. The judge laughed at Appellant's counsel.[81] All of Field's counsel's objections were

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[76] R. p. 530, ll. 23-25.
[77] R. p. 534, ll. 7-9
[78] Field did not steal, was not accused of doing so, nor did he plead guilty to such a crime or any crime similar to that. R. p. 114-118. Field pleaded guilty to securities fraud for omission of material statements concerning the role of Elliot Salzman and the financial viability of CIF's principal debtor Lancaster Resources, Inc., and the failure to disclose the 2001 membership interest of Bolingbroke United in CIF's re-lender Cosimo, LLC. The two conspiracy counts were based upon Field's involvement with CIF's attorney, Pfeiffer, and the aforesaid failures to disclose. The restitution order entered by Judge Maddox was based upon an estimate of Field's salary and profit distribution from CIF. At no time, did the Attorney General accuse Field of embezzlement or larceny.
[79] Canon 3 B(4), CJC, Rule 501, SCACR.
[80] Sears at 28 S.W. 3d at 615.
[81] R. p. 550, ll. 1-3. After being laughed at while making a serious argument, counsel for Field made his Motion to Recuse, stating: "if you're listening to solid reasonable arguments and laughing at them, I don't think my client can

denied. The judge told counsel he was getting "close to contempt"[82] when counsel was attempting to protect the record with a recusal Motion and Continuance Motion,[83] to ensure his client would receive a fair trial. Such judicial aggressiveness towards counsel, without any provocation, shows that recusal should have occurred in this case. The judge also displayed his umbrage by confronting Field about the judicial grievance he filed after the judge's improper comments in December 2011.[84] Field's concern about the judge's bias also caused him to file a Motion to Recuse on June 13, 2012,[85] which the court never scheduled for a hearing, and which was still pending when the judge signed the Respondents' request for issuance of a Rule to Show Cause. This is similar to the situation presented in Kupersmith v. Winged Foot Golf Club, Inc., 235 N.Y.L.J. 46 (N.Y. Sup. Ct. 2006) (judge angry because Plaintiff filed complaint against him; appellate court found trial judge should have recused himself).

A. Field's Due Process Rights Were Violated by the Lower Court Judge's Failure to Recuse Himself.

The U.S. Supreme Court has found that when the record points to perceived bias, displayed by a judge, as well as facts that show actual bias, that judge's failure to recuse violates the aggrieved party's due process rights. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). Actual bias is not required, merely evidence of a "...risk of actual bias -- based on objective and reasonable perceptions...." Id at 884. In other words, proof of a high probability or serious risk of actual bias on a judge's part not only justifies recusal, but also provides grounds

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get a fair trial .... I have a job to do and I have an unpopular client here. And I have the duty to uphold the integrity of the law and get a fair hearing ...." R. p. 550, ll. 6-13.

[82] R. p. 554, l. 1.

[83] R. p. 552, l. 18 – p. 556, l. 22.

[84] R. p. 694, l. 7 – p. 695, l. 9.

[85] See Motion to Recuse (June 13, 2012) R. pp. 96 and Exhibit A and Request for Hearing Form.

for an appellate challenge to a refusal to recuse under the Due Process Clause. "'Under a realistic appraisal of psychological tendencies and human weakness', the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" Id. at 883-84 (quoting Withrow v. Larkin, 421 US. 35, 47(1975)).

The South Carolina case of Simpson v. Simpson,[86] which required a showing of actual prejudice, must be read in light of this U.S. Supreme Court precedent making clear that the mere appearance of bias is sufficient. The importance is well summarized by Professor John P. Freeman: "The Code of Judicial Conduct defines a good judge as one who avoids the appearance of partiality. There is no more important time for a judge to present with clarity the appearance of complete impartiality than when evaluating and processing a recusal motion targeting his or her ethical behavior."[87]

The lower court judge's December 2011 improper comments in open court, his obvious displeasure about the grievance Field had filed, the many biased comments about and towards Field (and his counsel), and the one-sided evidentiary and procedural rulings all show that the lower court did not have the impartiality required to afford Field a fair hearing and assure that his due process right were protected and in fact establish actual bias. This reversal of the case is warranted for this abuse of discretion.

CONCLUSION

The recusal issue alone supports the reversal of this case, and on remand a different judge

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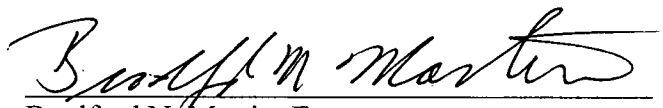
[86] 377 S.C. 519, 660 S.E.2d 274(Ct. App. 2008)
[87] John P. Freeman, Appearance of Impropriety, Recusal and the Segars Andrews Case, 62 S.C. L. Rev. 485, 513 (2011).

must hear the evidence. The complete failure of the Contempt Order to make even one finding of "willful" intent means that, on its face, the ruling of contempt cannot stand. This Court may also determine that, rather than remanding the case for further proceedings by a different judge, the record satisfactorily establishes that Appellant is not in willful contempt of court and that there shall be no further proceedings of this nature against Arthur Field that are based upon the issues set forth in this record.

Respectfully submitted,



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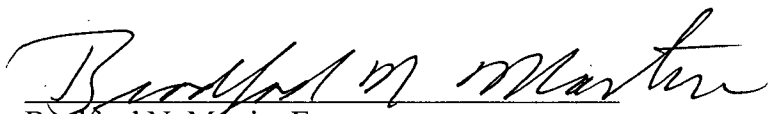
February 29, 2016

ATTORNEY CERTIFICATION

The undersigned, attorney for Appellant, hereby certifies that this Final Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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