THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-001224
Case No. 2018-CP-40-5641

Ronald I. Paul, ... Appellant,

v.

South Carolina Department of Transportation; Paul D. de Holczer, individually and as a partner of the law firm of Moses, Koon & Brackett, PC; Michael H. Quinn, individually and as senior lawyer of Quinn Law Firm, LLC; J. Charles Ormond, Jr., individually and as a partner of the Law Firm of Holler, Dennis, Corbett, Ormond, Plante & Garner; Oscar K. Rucker, in his individual capacity as Director, Rights of Way South Carolina Department of Transportation; Macie M. Gresham, in her individual capacity as Eastern Region Right of Way Program Manager South Carolina Department of Transportation; Natalie J. Moore, in her individual capacity as Assistant Chief Counsel, South Carolina Department of Transportation, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This litigation arises from a condemnation action that was commenced in 2002 by the Respondent South Carolina Department of Transportation ("SCDOT") and captioned *South Carolina Department of Transportation v. Buckles*, Civil Action Number 2002-CP-40-4800. That condemnation action was tried by former Circuit Court Judge Reginald I. Lloyd in October 2004. In the Order of Judgment filed March 11, 2005, Judge Lloyd directed the Clerk of Court to disburse $2,450.00 to the Appellant Ronald Paul as the just compensation payable for his leasehold interest.[1] That Order was subsequently appealed by Paul, and the Court of Appeals affirmed on October 23, 2006. The South Carolina Supreme Court later denied a petition for writ of certiorari.

On February 20, 2008, the Appellant Ronald Paul filed a civil action bearing Civil Action Number 2008-CP-40-1259 in the Court of Common Pleas against most of the same Defendants as in this case, including SCDOT, de Holczer, and Quinn. That Complaint included causes of action for civil conspiracy in several particulars. By Order filed March 25, 2009, Special Circuit Court Judge Joseph M. Strickland granted the Defendants' motion to dismiss based on a statute of

[1] The pertinent pleadings and orders filed in the 2002 condemnation action and subsequent litigation commenced by the Appellant were submitted into the record in support of Motions to Dismiss filed by the Defendants.

limitations defense and other defenses. The Appellant appealed to the Court of Appeals which affirmed the dismissal on November 19, 2010. On October 9, 2011, the Supreme Court denied a petition for writ of certiorari.

The Appellant thereafter filed several lawsuits in the United States District Court, including the following:

> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:12-1036-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:13-367-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:13-1852-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation*,
> Civil Action Number 3:15-2178-CMC-PJG
>
> *Paul v. South Carolina Department of Transportation.*,
> Civil Action Number 3:16-1727-CMC-PGJ

In these federal lawsuits, the Appellant alleged causes of action under 42 U.S.C. § 1983 for civil conspiracy in which he sought both declaratory and monetary relief. In the 2012 action, which was brought against the same Defendants as in the present case, the United States District Judge Cameron Currie granted the Defendants' motions to dismiss without prejudice. The Appellant thereafter continued to file the identical or nearly identical Complaints in 2013, 2015, and 2016, and each of those lawsuits were dismissed by Judge Currie without prejudice and without issuance of service of process. In dismissing the 2016 action, Judge

Currie imposed a pre-filing injunction on the Appellant. In those previous lawsuits, the Appellant alleged conspiracy claims under state and federal law against the current Defendants arising from the prosecution of the 2002 condemnation action, including a settlement reached with the Buckles parties as well as actions taken during the trial of that case in October 2004.

On October 26, 2018, the Appellant filed the current lawsuit in state court. This action, like the others, includes federal Section 1983 civil conspiracy claims against the same Defendants. In lieu of filing Answers, the Respondents SCDOT, de Holczer, Moore, and Quinn filed Motions to Dismiss which were ultimately granted by Circuit Court Judge Jocelyn Newman in November 2019.

The Appellant also named the Respondents Oscar K. Rucker and Macie M. Gresham in the 2018 lawsuit. He claims to have served the Summons and Complaint on Rucker and Gresham by certified mail addressed to SCDOT offices. However, neither Rucker or Gresham received or signed for the certified mail. Importantly, by 2018, when the attempt at service was made, both Rucker and Gresham had been retired from their positions with SCDOT for years. The Appellant nonetheless filed a Motion for Entry of Default and Default Judgment against Rucker and Gresham, which included an Affidavit of Default claiming proper service. The Respondents Rucker and Gresham subsequently filed a Motion to Set Aside Entry of Default and Motion to Dismiss.

Those motion were heard by Circuit Court Judge L. Casey Manning at a hearing on April 16, 2019. By Order entered June 7, 2019, Judge Manning denied the Appellant's Motion for Entry of Default and Default Judgment. With that same order, Judge Manning granted the Respondents' Motion to Set Aside Entry of Default and Motion to Dismiss. The Appellant subsequently filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, which was denied by Judge Manning by an Order filed June 28, 2019.

The Appellant then proceeded to file this appeal.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99, 101 (Ct. App. 2004). "This decision will not be reversed absent an abuse of that discretion." *Id.* "An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support." 602 S.E.2d at 101-102.

ARGUMENT

I. The Circuit Court correctly ruled that Rule 55(e) prohibits the entry of a default judgment against the Respondents Rucker and Gresham.

In his Order filed June 7, 2019, Judge L. Casey Manning recognized that the Respondents Rucker and Gresham are being sued for their alleged conduct when they served as employees of SCDOT. (Order, p. 6). He then cited Rule 55(e), SCRCP, which does not permit a default judgment to be entered "against the State of South Carolina or an officer or agency thereof ... unless the claimant establishes his claim to relief by evidence satisfactory to the Court." *See*, Rule 55(e), SCRCP. Ultimately, Judge Manning ruled that the Appellant made no showing to satisfy the exception in Rule 55(e). He concluded that "this is an additional basis for denying the Plaintiff's request for a default judgment to be entered against Rucker and Gresham." (Order., p. 6).

In the "Statement of Issues on Appeal" in his opening brief, the Appellant fails to challenge this alternative basis for setting aside the entry of default against Rucker and Gresham. As a result, this implicates the two-issue rule as a basis for affirmance. In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903

(2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845. Because the Appellant failed to appeal from Judge Manning's ruling based on Rule 55(e), SCRCP, his appeal is procedurally barred.

In fairness, the Appellant does briefly mention Rule 55(e) in the "Argument" section of his brief. The Appellant writes in a footnote as follows:

> In a footnote in the June 7, 2019 order, the Court stated Rucker and Gresham as former employees of SCDOT, under rule 55(e) SCRCP, the rule does not permit a default judgment to be entered against them. However, this is a 42 U.S.C. 1983 case filed in state court, at this time or point federal law applies. According to the four corners of the Complaint, on page 3 paragraph 6 this action is brought pursuant to 42 U.S.C. Sections 1983 for Rucker and Gresham violating Plaintiff's rights while acting under color of state law in their individual capacities.

See, Appellant's Opening Brief, p. 14. That is the sole mention of Rule 55(e). It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). Therefore, even if the Court finds that the Rule 55(e) ruling was adequately raised on appeal,

the short, conclusory argument relegated to a footnote and without any authorities cited should be deemed abandoned.

Nonetheless, even if the Appellant properly raised the issue and sufficiently argued it, the Appellant's position lacks merit. Even though this action is substantively brought under federal law, namely 42 U.S.C. § 1983, the procedural aspects of the case are governed by the South Carolina Rules of Civil Procedure and not their federal counterparts. *See, Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 567 S.E.2d 851, 853 (2002) (federal claim brought in state court "is controlled by federal substantive law and state procedural law"). Thus, contrary to the Appellant's unsupported position, Rule 55(e), SCRCP, is applicable to this case.

The Appellant has not shown that Judge Manning's ruling based on Rule 55(e) was in error. In actuality, the Appellant concedes that he was suing Rucker and Gresham *only* for their alleged conduct as SCDOT employees and not as private citizens.[2] Thus, Rule 55(e) is applicable and requires that he establish "his claim to relief by evidence satisfactory to the Court" or else a default judgment

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[2] In order to state a claim under 42 U.S.C. § 1983, the Appellant must prove that the Respondents Rucker and Gresham were acting under "color of state law" which indicates that their alleged conduct to be actionable must have been committed by them as state employees. *See, Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544, 549 (1992) ("Section 42 U.S.C. § 1983 imposes liability upon any person who, under color of state law, subjects any citizen to the deprivation of any rights, privileges or immunities secured by the constitution").

cannot be entered against state employees. *See*, Rule 55(e), SCRCP. The Appellant has not attempted to do so, nor is he able to do so. In fact, the law of this very case does not allow the Appellant to satisfy that burden. The Court is urged to take judicial notice of the Order Granting Motions to Dismiss issued by Circuit Court Judge Jocelyn Newman on November 13, 2019 in this very case. That order dismissed the Appellant's same Complaint against SCDOT and two other SCDOT employees that he sued, namely Paul D. de Holczer and Natalie J. Moore. Judge Newman dismissed the Complaint with prejudice based on numerous grounds including the expiration of the statute of limitations, res judicata, and collateral estoppel. Those same defenses are available to the Respondents Rucker and Gresham and are likewise a bar to any recovery by the Appellant against them.[3] Certainly, those defenses demonstrate that there is a meritorious defense available to Rucker and Gresham so as to bar the entry of a default judgment against them.

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[3] The Respondents Rucker and Gresham also raise those same defenses as additional sustaining grounds to uphold Judge Manning's decision to dismiss the Appellant's Complaint. In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also

II. The Circuit Court correctly set aside the entry of default against the Respondents Rucker and Gresham.

As his first ground for appeal, the Appellant argues that Judge Manning abused his discretion in refusing to enter default against the Respondents Rucker and Gresham because it is a ministerial duty. The Appellant cites to the case of *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004), in which this Court recognized that, upon the filing of an affidavit of default, a clerk of court will enter default. This Court explained that "[e]ntry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." 602 S.E.2d at 102.

The Appellant, however, confuses the roles of the clerk of court and the circuit court judge. The entry of default is a ministerial function which was presumably accomplished by the clerk when the Appellant filed his affidavit of default. However, it is the role of the judge to issue an order of default and to enter a default judgment. It is likewise the role of a judge to adjudicate a defendant's motion to set aside an entry of default. In the case at bar, Judge Manning properly executed his role as the judge. Judge Manning did not deny the entry of default. Instead, Judge Manning properly set aside the entry of default against Rucker and

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contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

Gresham and denied the Appellant's motion seeking a default judgment. There was no abuse of discretion or error of law committed.

III. The Circuit Court correctly ruled that the service of process on the Respondents Rucker and Gresham was insufficient which required the setting aside of the entry of default and also provided a basis for the dismissal of the Complaint for lack of personal jurisdiction.

The Appellant also contends that Judge Manning erred in ruling that the service of process on the Respondents Rucker and Gresham was insufficient and failed to establish personal jurisdiction. The Appellant's arguments lack merit.

The Appellant argued that he effected service of the Complaint on the Respondents Rucker and Gresham by certified mail sent to the SCDOT Offices located at 955 Park Street, Columbia South Carolina. As Judge Manning determined and the Appellant does not dispute on appeal, the record reflects that the certified mail directed to Gresham was not sent restricted delivery but that the certified mail directed to Rucker was apparently sent restricted delivery. The record includes the U.S. Mail receipt for both certified letters. The receipt for the mailing to Rucker shows a charge of $8.55 for "Certified Mail Restricted Delivery," while the receipt for the mailing to Gresham shows no charge was paid for "Certified Mail Restricted Delivery." The USPS Tracking information, as also submitted by the Appellant, verifies that same conclusion. For Rucker, the USPS

Tracking shows the "features" as "Certified Mail Restricted Delivery," but for Gresham, the USPS Tracking shows the "features" as "Certified Mail."

However, as Judge Manning recognized, neither certified letter was received or signed for by Rucker or Gresham. The record reflects that neither Rucker nor Gresham was still employed by SCDOT in 2018. The record also includes the affidavit of Sherrie S. Morey, who is employed by SCDOT in the Rights of Way Director's Office. Morey testified that the return receipts were signed by an SCDOT postal employee, and the certified letters were provided to her. Morey further testified that that after consulting with the SCDOT legal office, she handwrote "Return to Sender" on both envelopes and placed them back in the U.S. Mail to be returned to the Plaintiff. Oscar Rucker also submitted an affidavit in which he attests that he never authorized SCDOT or anyone employed by SCDOT to accept service of any legal process on his behalf, including this 2018 lawsuit. At the time of the April 16, 2019 hearing, the Appellant had filed no counter affidavits to dispute the information contained in the Rucker and Morey affidavits.[4]

Under South Carolina law, "[t]he plaintiff has the burden to establish that the court has personal jurisdiction over the defendant." *Moore v. Simpson*, 322 S.C.

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[4] The Appellant did file an affidavit with his Rule 59(e) motion. That affidavit only disputes whether he received the Summons and Complaint back from SCDOT, which is not a material point. Nonetheless, it is well settled that "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693, 695 (2014).

518, 473 S.E.2d 64, 66 (Ct. App. 1996). "The plaintiff need only show compliance with the rules." *Id.* "When the civil rules on service are followed, there is a presumption of proper service." *Id.* "Once the plaintiff has demonstrated compliance with the rules, the defendant can rebut an inference that service was effected only by showing that the return receipt was signed by an unauthorized person." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430, 433 (2012).

Rule 4(d)(8), SCRCP, allows for service of process on an individual by certified mail; however, the service must be made "by registered or certified mail, return receipt requested, and delivery restricted to the addressee." Rule 4(d)(8), SCRCP, further provides:

> Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.

Rule 4(d)(8), SCRCP. In *Graham Law Firm*, *supra*, the Supreme Court held that "[a] rule permitting certain persons to receive service of process on behalf of others does not imply that 'anyone who happens to pick up the mail' can stand in for the defendant. As with corporations, the class of persons who may receive service of process on behalf of an individual is limited." 721 S.E.2d at 434. The Supreme

Court further explained that "an individual is as competent as any other entity to confer authority on an agent. Rule 4(d)(1), SCRCP, itself contemplates service on the agent of an individual, permitting service '[u]pon an individual ... by delivering a copy to an agent authorized by appointment ... to receive service of process.'" *Id.*

In applying this law to the facts presented in this case, Judge Manning found "that the Plaintiff failed to comply with the requirements of Rule 4(d)(8), SCRCP, with respect to the purported service by certified mail on the Defendant Macie Gresham" because "[t]he record clearly shows that the Plaintiff did not restrict delivery to Gresham." (Order, p. 6). He correctly concluded that "for Gresham, no further analysis is needed" and that "[t]he Plaintiff cannot show compliance with Rule 4(d)(8) and has not otherwise demonstrated that the Complaint was received by Gresham nor any person authorized by Gresham to receive service of process on her behalf." (Order, p. 6).

As for Oscar Rucker, Judge Manning correctly ruled that "the Plaintiff did restrict delivery to the addressee, but the certified mail was sent to Rucker's former place of employment and was signed for by an SCDOT employee." (Order, p. 6). He recognized that "Rucker attests in his affidavit that he did not authorize SCDOT or any employee of SCDOT to accept service of process for him" and that "[t]he Plaintiff has presented no evidence to dispute that testimony." (Order, p. 6).

On appeal, the Appellant makes two arguments. First, the Appellant argues that the evidence shows only that the SCDOT Postal Specialist, John Furgess, who signed for the certified mail, was not authorized to accept service of process but does not show that Furgess was not authorized to sign for their certified mail. At most, that is a distinction without a difference. The record clearly reflects that Rucker and Gresham had both been retired from SCDOT for many years. The record clearly shows that Furgess was not authorized to receive certified mail containing civil process for Rucker or Gresham. That showing was sufficient to demonstrate that the service by certified mail sent to Rucker and Gresham at SCDOT headquarters was not sufficient service.

Additionally, the Appellant suggests that in one of his other numerous federal lawsuits filed from 2012 through 2016, he had served Rucker and Gresham by mailing the process by certified mail to SCDOT offices, and that they timely appeared and filed an answer on that occasion. The Appellant suggests that scenario establishes "apparent authority." The Appellant is mistaken. At best, that scenario, if true, shows that the pleadings may have been routed on that occasion to Rucker and Gresham (but more likely to the insurer for SCDOT), that counsel was retained to defend, and that Rucker, Gresham, and their counsel chose not to challenge the sufficiency of the purported service of process. That scenario does not constitute some type of waiver of proper service under the South Carolina

Rules of Civil Procedure in any future lawsuits nor does it constitute an admission that service of process on that occasion was sufficient or proper.

Finally, the Appellant also contends that Judge Manning erred in denying him the opportunity to depose Rucker, Gresham, Furgess, and Morey. However, the Appellant has not demonstrated any legal prejudice. In effect, he has not shown that the depositions of these witnesses would alter the circuit court's analysis or the ultimate adjudication. It is important to recognize that the Appellant had received the affidavits of Rucker and Morey when filed on January 31, 2019, along with the Motion to Set Aside Entry of Default which explained in detail that the service of process was insufficient. The motion hearing was not held *until more than ten weeks later* on April 16, 2019. The Appellant had sufficient opportunity to take depositions during that interim if he truly believed that was necessary to oppose the Respondents' motion. No attempt was made to even notice any of those depositions. Further, no request for continuance was made until the middle of the hearing, which was simply too late at that point and not justified under the circumstances. Judge Manning did not abuse his discretion in refusing to grant a continuance.

Nonetheless, it should also be mentioned that the depositions of Rucker, Gresham, Furgess, and Morey will certainly have no impact on the trial court's Rule 55(e) ruling as a basis for setting aside the entry of default. Also, the

dismissal of the Appellant's Complaint is warranted by the additional sustaining grounds discussed above and as detailed in the Order Granting Motions to Dismiss entered by Judge Jocelyn Newman. Thus, a remand for the taking of depositions at this point would be legally futile and would serve only to further prolong this legally frivolous and abusive litigation for the parties.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the orders issued by Judge L. Casey Manning setting aside the entry of default and dismissing the Complaint against the Respondents Rucker and Gresham for lack of personal jurisdiction. In the alternative, the Court is asked to affirm the dismissal of the Complaint against Rucker and Gresham based on the additional sustaining grounds established by the record.

Respectfully submitted,

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December 6, 2019

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondents South Carolina Department of Transportation; Paul D. de Holczer, Oscar K. Rucker, Macie M. Gresham, and Natalie J. Moore, does hereby

certify that service of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon the *pro se* Appellant and all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 6th day of December 2019:

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December 6, 2019

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RE: Ronald I. Paul v. South Carolina Department of Transportations; Paul D. de Holczer, individually and as a partner of the law firm of Moses, Koon & Brackett, PC; Michael H. Quinn, individually and as senior lawyer of Quinn Law Firm, LLC; J. Charles Ormond, Jr. individually and as partner of the Law Finn of Holler, Dennis, Corbett, Ormond, Plante & Garner; Oscar K. Rucker, in his individual capacity as Director, Rights of Way South Carolina Department of Transportation; Macie M. Gresham, in her individual capacity as Eastern Region Right of Way Program Manager South Carolina Department of Transportation; Natalie J. Moore, in her individual capacity as Assistant Chief Counsel, South Carolina Department of Transportation
Court of Appeals Case Number: 2019-001224
Civil Action Number: 2018-CP-40-5641
Our File Number: 79.20087

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope. By copy of this letter, I am serving copies on the *pro se* Appellant and all other counsel of record.

Thank you for your assistance in this matter. If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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