

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2019-000330

RECEIVED
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SC Court of Appeals

Joshua Hawkins and Floyd S. Mills, III,..... Appellants,

v.

Secretary of State Mark Hammond, South Carolina Secretary of State's
Office,..... Respondents.

And

Harvey S. Peeler, Jr., in his capacity as President of the South Carolina
Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the
South Carolina House of Representatives,..... Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Joshua Hawkins,	)	Civil Action No. 2018-CP-04-00955
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Consent Order Granting Motion to
Secretary of State Mark Hammond,	)	Intervene
South Carolina Secretary of State's	)	
Office,	)	
	)	
Defendants.	)	
	)	

BEFORE THE COURT, is a motion to intervene filed on July 2, 2018, by Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives. As evidenced by their counsels' signatures on the consent motion, Plaintiff Joshua Hawkins and Defendants Secretary of State Mark Hammond and South Carolina Secretary of State's Office consent to the motion to intervene. Therefore, for the reasons set forth in the motion to intervene, and pursuant to Rule 24 of the South Carolina Rules of Civil Procedure, the Court hereby **GRANTS** the motion to intervene as follows:

1. Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives', motion to intervene is granted and they are hereby made defendants to this action.

2. Within thirty (30) days of receiving notice of the entry of this order, President *Pro Tempore* Leatherman and Speaker Lucas shall respond to the complaint in accordance with Rule 12 of the South Carolina Rules of Civil Procedure.

3. The caption for this action is hereby amended to the following: *Joshua Hawkins v. Secretary of State Mark Hammond, South Carolina Secretary of State's Office, Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, and James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives.*

4. The parties shall use the amended caption in all future filings, and the Clerk of Court is instructed to update the Court's docket and roster sheets accordingly.

IT IS SO ORDERED.

[Electronic signature page to follow.]



Anderson Common Pleas

Case Caption: Joshua Hawkins VS Secretary Of State Mark Hammond , defendant,
et al
Case Number: 2018CP0400955
Type: Order/Intervene

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

FORM 4

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 2018CP0400955

Joshua Hawkins, et al
PLAINTIFF(S)

Secretary of State Mark Hammond, et al
DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After careful consideration, Defendant's motion to change venue is denied. Plaintiff is given leave to amend the Complaint as filed on December 7, 2018. Defendants are given until end of business December 28, 2018 to file responsive pleadings to the Amended Complaint. All other motions in this matter presently before the Court are continued and are to be held in Anderson County Common Pleas on Thursday, January 10, 2018 at 9:30 a.m.

ELECTRONICALLY FILED - 2018 Dec 11 3:53 PM - ANDERSON - COMMON PLEAS - CASE#2018CP0400955

ORDER INFORMATIONThis order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2752

Judge Code

12/11/18

Date

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CLERK OF COURT

[illegible]



Anderson Common Pleas

Case Caption: Joshua Hawkins , plaintiff, et al VS Secretary Of State Mark
Hammond , defendant, et al
Case Number: 2018CP0400955
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

FORM 4

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 2018CP0400955

Joshua Hawkins, et al
PLAINTIFF(S)

Secretary of State Mark Hammond, et al
DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☒ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After careful consideration, Judge Sprouse grants Defendants' motion to dismiss.

ELECTRONICALLY FILED - 2019 Jan 17 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2018CP0400955

ORDER INFORMATIONThis order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2752

Judge Code

1/16/19

Date

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ELECTRONICALLY FILED - 2019 Jan 17 10:25 AM - ANDERSON - COMMON PLEAS - CASE#2018CP0400955

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
	CLERK OF COURT

[illegible]



Anderson Common Pleas

Case Caption: Joshua Hawkins , plaintiff, et al VS Secretary Of State Mark
Hammond , defendant, et al
Case Number: 2018CP0400955
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Joshua Hawkins and Floyd S. Mills, III,) Civil Action No. 2018-CP-04-00955

Plaintiffs,)

vs.)

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

**Order Granting Defendants'
Motion to Dismiss**

Defendants,)

and)

Harvey S. Peeler, Jr., in his capacity as
President of the South Carolina Senate,
and James "Jay" Lucas, in his official
capacity as the Speaker of the South
Carolina House of Representatives,

Defendants/Intervenors.)

The Honorable Harvey S. Peeler, Jr., in his capacity as President of the South Carolina Senate,¹ the Honorable James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives, Secretary of State Mark Hammond, and the South Carolina Secretary of State's Office ("Defendants") moved to dismiss the Amended Complaint. The Court heard arguments of the parties at a hearing held on January 10, 2019.

After a careful review of the filings and all arguments from the parties, the Court **GRANTS** the motion and **DISMISSES** the Complaint with prejudice.

¹ After the Honorable Hugh K. Leatherman, Sr., intervened in his capacity as President *Pro Tempore* of the South Carolina Senate, the Senate elected the Honorable Harvey S. Peeler, Jr. as President of the South Carolina Senate. See Journal of the South Carolina Senate No. 1 at 3, 123rd Session (Jan. 8, 2019). By rule, Senator Peeler is substituted as a party for Senator Leatherman in his official capacity. See Rule 25, SCRPC (establishing automatic substitution of state officials).

INTRODUCTION

Plaintiffs ask the Court to declare 2005 Senate Bill 83, enrolled as 2005 S.C. Acts 32 (the “2005 Act”) and 2011 House Bill 3375, known as the South Carolina Fairness in Civil Justice Act, enrolled as 2011 S.C. Acts 52 (the “2011 Act”) unconstitutional. (Am. Compl. ¶¶ 11–15.) The Amended Complaint challenges the two acts the basis that (1) the two acts are invalid under S.C. Const. art. III, § 18 because the Secretary of State allegedly did not appropriately affix South Carolina’s Great Seal in 2005 and 2011, (Am. Compl. ¶¶ 18–22); and (2) the acts are unconstitutional because they do not comport with due process and violate Plaintiffs’ rights under 42 U.S.C. § 1983, (Am. Compl. ¶¶ 23–28).

ANALYSIS

I. Plaintiffs’ claims are barred by *res judicata*.

The doctrine of *res judicata* bars subsequent litigation involving similar issues. *Res judicata* bars not only claims or issues that were asserted, but also those that could have been asserted, whether by the same parties or their privies. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013); *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). The doctrine “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999).

Plaintiffs allege that the acts have unconstitutionally “reduced” recovery in prior civil actions. (Am. Compl. ¶¶ 4, 17, 19, 24.) The Court is powerless to reopen the prior, ended cases. Had Plaintiffs wished to challenge the acts, they were required to do so in the actual case or controversy in which recovery was allegedly reduced for their clients and by extension them as

the agent of the client.² They failed to do so. Thus, Plaintiffs are barred from doing so here under the doctrine of *res judicata* and the Court dismisses the Amended Complaint, with prejudice.

II. Plaintiffs lack standing to bring the claims.

“Standing to sue is a fundamental requirement in instituting any action.” *Joytime Distribs. & Amus. Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Plaintiffs do not rely on any statute to provide them standing, nor do they plead an exception to standing. (Am. Compl. ¶¶ 4, 17, 19, 24.) That leaves “constitutional” standing. *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). But to have constitutional standing, a plaintiff must have “a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001).

Constitutional standing requires a plaintiff to prove:

- (1) An “injury-in-fact,” that is “concrete and particularized.” *Lujan*, 504 U.S. at 560. For an injury to be particularized, it “must affect the plaintiff in a personal and individual way,” *Sea Pines Ass’n*, 345 S.C. at 603, 550 S.E.2d at 292; to be concrete, the injury “must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016).

² Plaintiff Hawkins has raised such a challenge in an actual case. See *Garrison v. Target Corp.*, No. 2017-000267 (S.C. Ct. App. 2017) (challenging constitutionality of 2005 Act’s punitive damages caps). Moreover, our courts have routinely enforced the two acts Plaintiffs challenge. See *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 175, 758 S.E.2d 501, 503 (2014) (reviewing dismissal for failure to comply with notice of intent and expert witness requirements of Section 5 of the 2005 Act, codified as S.C. Code Ann. § 15-79-125); *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) (enforcing joint and several liability provision of Section 16 of the 2005 Act, codified as S.C. Code Ann. § 15-38-15); *Gov’t Employees Ins. Co. v. Poole*, 424 S.C. 1, 5, 817 S.E.2d 283, 286 (2018) (citing provision implemented under Section two of the 2011 Act, S.C. Code Ann. § 15-32-520(D), and noting that “state law has limited the instances in which punitive damages may be awarded.”). Our Supreme Court has even analyzed the effects of changes complained of by Plaintiffs that were enacted by Act 27, 2005 S.C. Acts 107 as recently as this month. See *Lawrence v. General Panel Corp.*, Op. No. 27856 (S.C. Sup. Ct. filed January 4, 2019) (Shearouse Adv. Sh. No. 1 at 12).

- (2) A “causal connection between the injury and the conduct complained of,” showing that the injury is fairly traceable to the action for which the plaintiff sues. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292.
- (3) That it is “likely . . . that the injury will be ‘redressed by a favorable decision.’” *Id.*

Plaintiffs fail to meet the criteria for standing.

To try and establish standing, Plaintiffs claim they “are in constant danger of being personally affected by the laws at issue,” that they have experienced “reduced recovery in the past,” and have pending and future “cases subject to the laws at issue,” to support their standing argument. (Amend. Compl. ¶ 4.) Nonetheless, the two acts Plaintiffs challenge here do not address attorneys’ fees. Under South Carolina law, attorneys’ fees are a matter of private contract or agreement between Plaintiffs and their clients. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients); *see also Peppertree Resorts, Ltd. v. Cabana Ltd. P’ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 601 (Ct. App. 1993) (“The general rule is an attorney must look to his client for compensation.”). As a result, Plaintiffs lack standing because there is no “causal connection” between their alleged injury and the constitutionality of the two acts. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292 (quoting *Lujan*, 504 U.S. at 559–61).

Similarly, any reduction of money received by Plaintiffs’ clients in prior actions did not affect Plaintiffs personally or individually based on the acts challenged. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292. The former clients are not parties to the present action and the Court cannot address their alleged reduced recovery as strangers to this action. *See Langford v. McLeod*, 269 S.C. 466, 474, 238 S.E.2d 161, 164 (1977) (explaining that Court cannot bind non-parties).

Plaintiffs’ allegation they “will have future cases subject to the laws at issue” is equally unavailing. (Am. Compl. ¶ 4.) The question of recovery in future cases is “conjectural” or

“hypothetical,” rendering such an allegation insufficiently concrete to be redressed or to provide Plaintiffs standing. *Lujan*, 504 U.S. at 560. Therefore, the Court dismisses the Amended Complaint because Plaintiffs lack standing.

III. Plaintiffs’ state law claim is moot because the Secretary of State complied with the Constitutional requirement and the two challenged acts have been codified into the general statutory law of the State.

Plaintiffs’ claim under state law also fails because the claim is moot; courts do not decide moot cases. *S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). A case is moot when “a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.” *Id.*

A. The Secretary of State has complied with the Constitutional requirement because the two challenged acts bear the Great Seal.

The South Carolina Constitution states that no

Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives

S.C. Const. art. III, § 18. When interpreting Article III, § 18, our Supreme Court has recognized the doctrine of substantial compliance. *Smith v. Jennings*, 67 S.C. 324, 332, 45 S.E. 821, 824 (1903) (rejecting argument that “absolutely literal compliance with the form prescribed is essential to valid legislation,” and holding that “substantial compliance with the mandate will be sufficient.”); *see also* S.C. Att’y. Gen. Op., 2017 WL 6189878, at *2, 7 (Dec. 1, 2017).

Further, the two acts Plaintiffs challenge have the Great Seal affixed.³ See Joint Mot. Dismiss, Ex. 1 at 1; Ex. 2 at 1. This is not just substantial compliance, but actual compliance. When the Secretary of State affixed the Great Seal on the acts is immaterial—the acts remain valid even retrospectively. See *State v. Toomer*, 41 S.C.L. (7 Rich.) 216, 229–30 (1854) (upholding appointment of court officer retroactively despite his commission originally lacking seal). Because the Constitution’s Great Seal requirement has been satisfied, Plaintiffs’ declaratory judgment claim under state law is now moot and is dismissed on this basis too. See *Loftis*, 402 S.C. at 384, 741 S.E.2d at 758–59.

B. The codification of the two acts challenged by Plaintiffs also moots the claim.

Plaintiffs’ state law claim is also moot because any defect caused by the alleged failure to affix the seal was cured when the General Assembly passed Act 129 of 2018 and codified the two challenged acts. See *Nexsen v. Ward*, 96 S.C. 313, 320, 80 S.E. 599, 601 (1914) (explaining codification process); *S.C. Tax Comm’n v. York Elec. Coop., Inc.*, 275 S.C. 326, 331–33, 270 S.E. 2d 626, 629–30 (1980) (explaining codification’s cure of potential defects). Act 129 codified revised versions of South Carolina Code Volumes 15A and 18 and the cumulative supplements, declaring them to be “the only general permanent statutory law of the State as of January 1, 2018.” 2018 S.C. Acts 129, § 3.

Plaintiffs argue that such a cure through codification can only be prospective, however, the codification under Act 129 occurred before Plaintiffs filed their complaint on May 16, 2018. Thus,

³ The Court may rely on these certified copies of the two acts from the Department of Archives and History because Plaintiffs expressly reference them in the Amended Complaint. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (permitting reference of material relied upon in the pleadings).

the Court dismisses Plaintiffs' Amended Complaint as moot rather than answering the purely "academic question." *See Loftis*, 402 S.C. at 384, 741 S.E.2d at 758-59.

IV. Plaintiffs' challenge to the two acts under federal law is time-barred.

Any claim, under 42 U.S.C. § 1983 is subject to being dismissed for failing to bring the claim in a timely manner. For § 1983 claims, courts apply the analogous state law personal injury statute of limitations. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a "personal injury" statute of limitations period for § 1983 actions). Under South Carolina law, § 1983 claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530(5); *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 399, 811 S.E.2d 807, 813 (Ct. App. 2018), *cert. denied* (Aug. 3, 2018). The acts challenged were passed thirteen and seven years ago. This § 1983 challenge was not filed until 2018. Therefore, the § 1983 challenge is untimely and is dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above, the Court dismisses the Amended Complaint with prejudice.

IT IS SO ORDERED.

[Electronic signature of the Honorable R. Scott Sprouse to follow.]



Anderson Common Pleas

Case Caption: Joshua Hawkins , plaintiff, et al VS Secretary Of State Mark
Hammond , defendant, et al
Case Number: 2018CP0400955
Type: Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2019-01-25 15:49:45 page 8 of 8

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	C.A. No.: 2018-CP-_____
	)	
Joshua Hawkins,	)	
	)	
Plaintiff,	)	SUMMONS
	)	
vs.	)	
	)	
Secretary of State Mark Hammond, South	)	
Carolina Secretary of State's Office,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS NAMED ABOVE:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscribers at their office at White, Davis & White Law Firm, P.A., Anderson, South Carolina, 29621, within thirty (30) days after the service hereof, exclusive of the date of such service. If you fail to answer the Complaint within that time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

May 16, 2018

/s/Kyle J. White
Druanne D. White (S.C. Bar No. 5991)
Kyle J. White, (S.C. Bar No. 101426)
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Attorneys for the Plaintiffs

ELECTRONICALLY FILED - 2018 May 16 10:20 AM - ANDERSON - COMMON PLEAS - CASE#2018CP0400955

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	C.A. No.: 2018-CP-_____
	)	
Joshua Hawkins,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
vs.	)	
	)	
Secretary of State Mark Hammond, South	)	
Carolina Secretary of State's Office,	)	
	)	
Defendants.	)	

The Plaintiff above named, complaining of the Defendants herein, would respectfully show unto this honorable court and alleges as follows:

I. PARTIES

1. Plaintiff, Joshua Hawkins, is a citizen and resident of the state of South Carolina, and at all relevant times has been a practicing attorney, licensed and in good standing with the state bar of South Carolina.

2. The Defendant, South Carolina Secretary of State's Office (hereinafter referred to as "the Secretary of State"), is a governmental agency/entity existing under the laws of the state of South Carolina and maintains an office located at Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201. At all times herein mentioned in this lawsuit, the Secretary of State acted and carried on its business by and through its agents, servants, and/or employees at this location, which affected litigation throughout the state of South Carolina.

FACTUAL ALLEGATIONS

3. As dictated by the South Carolina Code of Laws, the Secretary of State is responsible for the statewide registration of corporations, Uniform Commercial Code interests, business opportunities, employment agencies, trademarks and notaries.

4. Mark Hammond is the Secretary of State of South Carolina. Upon information and belief, Mr. Hammond is a citizen and resident of the State of South Carolina.

5. The South Carolina Secretary of State's Office ("the Secretary of State") handles the incorporation of municipalities and special purpose districts, the annexations of land, and the escheatment of real property in South Carolina. The Secretary of State is also the administrator and regulator of the Solicitation of Charitable Funds Act handles the publication of positions within certain statewide boards and commissions and issues all state-wide cable franchises. The Secretary of State is an ex officio member of the Legislative Council and the Commission on Consumer Affairs.

6. Additionally, Article 3 Section 18 of the South Carolina Constitution provides that "[n]o Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only." (emphasis added).

7. Upon information and belief, dating back to at least 2004, it has been the job of the Secretary of State to affix the "Great Seal" to each law passed in South Carolina such that it gains the force of law. Upon further information and belief, dating back to at least 2004, the Secretary of State has failed to carry out this function as to numerous bills, meaning that they never became valid law.

8. Upon further information and belief, the Secretary of State is required to transfer all laws to the South Carolina Department of Archives and History within five years of the law's passage, and the Secretary of State has not complied with this requirement since 2004.

9. In 2005, South Carolina Governor Mark Sanford signed the South Carolina Tort Reform Act of 2005 ("the 2005 Act"), which made a number of significant changes to the law and procedure in South Carolina in professional malpractice cases and all other civil cases filed in South Carolina. Among other changes to the tort litigation structure in South Carolina, the 2005 Act: established damages caps; abolished joint and several liability for a defendant whose conduct is determined to be less than fifty percent of the total fault; shortened the statute of limitations from thirteen (13) to eight (8) years for construction defect cases; adjusted the venue laws; and various other changes, which all had the effect of reducing recovery for Plaintiffs in civil lawsuits and artificially protecting insurance companies and large corporations from the consequences of their community endangering conduct.

10. In 2011, additional "tort reform" law was passed in South Carolina in the form of the South Carolina Fairness in Civil Justice Act ("the 2011 Act"). Among other changes to the tort litigation structure in South Carolina, the 2011 Act: added pleading requirements for punitive damages; required a bifurcated trial when punitive damages are requested; instated damages caps; and various other changes, which all had the effect of reducing recovery for Plaintiffs in civil lawsuits and protecting insurance companies and large corporations from the consequences of their community endangering conduct.

11. Upon information and belief, the 2005 Act and the 2011 Act were passed during the period of time that the Secretary of State had a habit and routine of failing to affix the Great Seal to laws. Accordingly, it is more likely than not that the Great Seal was never affixed to either law by the Secretary of State, and that the laws never became valid. Additionally, upon further information and belief, neither the 2005 Act nor the 2011 Act have been given to the SCDH as

required. Accordingly, it appears that the 2005 Act and 2011 Act have never been valid or enforceable pursuant to the South Carolina Constitution.

12. If the 2005 Act and 2011 Act have now had the Great Seal affixed, discovery is necessary to determine when the Great Seal was affixed to the laws, because the laws would not have been valid until the Great Seal was affixed, pursuant to the South Carolina Constitution. If the Great Seal was affixed after the effective date of the laws, the laws would still be invalid and unenforceable retroactively, because the laws diminish the rights of individuals under disability.

13. The Plaintiff has had recovery reduced in litigation in reliance on the Defendants' representations that these laws were enforceable and valid.

14. Even after the Great Seal was affixed to the 2005 Act and the 2011 Act, the laws were unconstitutional pursuant to the United States Constitution, as they violate the 5th, 7th, and 14th amendments to the United States Constitution.

JURISDICTION AND VENUE

15. This action is brought pursuant to South Carolina Code §§ 15-52-20 and Rule 23 of the South Carolina Rules of Civil Procedure, as well as 42 U.S.C. §§ 1981 and 1983, and 28 U.S.C. §§ 2201 and 2202.

16. Venue is proper because the Plaintiff and members of the class have made litigation decisions in this County and/or have had recovery reduced in litigation pending in this County based on the false representation by the Defendant that the 2005 Act and 2011 Act were the valid and enforceable law of the State of South Carolina.

DECLARATORY JUDGMENT

(Pursuant to S.C. Code Ann. § 15-53-10, et. seq.)

17. Plaintiff reiterates each and every allegation above as if repeated verbatim herein.

18. Plaintiff is an interested persons whose rights, status, or other legal relations are affected by the 2005 Act and 2011 Act, and thus he has standing to assert this cause of action for declaratory judgment. Plaintiff has made litigation decisions and has had recovery reduced based on the 2005 Act and 2011 Act.

19. This case presents an actual case or controversy, and this Court's resolution of the following issues will terminate the uncertainty giving rise to this proceeding:

- a. Whether the 2005 Act is invalid and unenforceable due to the failure to affix the Great Seal to the Act;
- b. Whether the 2011 Act is invalid and unenforceable due to the failure to affix the Great Seal to the Act; and
- c. If the Secretary of State has now applied the Great Seal to the 2005 Act and 2011 Act and transferred them to SCDAAH, whether the application of the seal and transfer of the laws to SCDAAH can cure the defect retroactively.

20. Plaintiffs hereby requests a declaratory judgment regarding the aforementioned matters.

21. The Plaintiff respectfully asks for attorneys' fees and costs in pursuing the declaratory relief.

INJUNCTIVE RELIEF
(Pursuant to 42 U.S.C. § 1983)

22. Plaintiff reiterates each and every allegation above as if repeated verbatim herein.

23. Plaintiff is an interested persons whose rights, status, or other legal relations are affected by the 2005 Act and 2011 Act, and thus he has standing to assert this cause of action for declaratory judgment. Plaintiff has made litigation decisions and has had recovery reduced based on the 2005 Act and 2011 Act.

24. The 2005 Act and 2011 Act and similar “tort reform” laws infringe on the rights of citizens afforded by the 4th, 5th, 7th, and 14th Amendments to the United States Constitution by, among other reasons, arbitrarily capping damages awards, imposing additional unconstitutional procedural requirements that make it cost prohibitive to pursue and otherwise viable claim, and various other tort reform measures that are unconstitutional.

25. This case presents an actual case or controversy, and this Court’s resolution of the following issues will terminate the uncertainty giving rise to this proceeding:

- a. Whether the 2005 and 2011 Acts are invalid and unenforceable, because tort reform laws which arbitrarily cap damages and deprive injured individuals of a jury trial, among other arbitrary limitations on injured individuals’ rights, violate the 4th, 5th, 7th, and/or 14th amendments to the United States Constitution.

26. Plaintiffs hereby requests a declaratory judgment regarding the aforementioned matters.

27. The Plaintiff respectfully asks for a judgment declaring that the 2005 and 2011 Acts, and any other similar tort reform laws, are unconstitutional, an injunction preventing any further enforcement of tort reform laws, including the 2005 and 2011 Acts, in South Carolina, and the attorney’s fees and costs incurred in pursuing this action.

WHEREFORE, Plaintiff prays for judgment against the Defendants, in favor of the Plaintiff for the following relief:

- b. Granting Plaintiffs’ request for a declaratory judgment and injunction as to the matters set forth above;
- c. Attorney’s fees and costs; and
- d. Any other relief available to the Plaintiffs.

Respectfully submitted,

May 16, 2018

/s/ Kyle J. White

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Kyle J. White, SC Bar No. 101426
Trevor B. White, SC Bar No. 100791
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Attorneys for the Plaintiffs

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Attorneys for the Plaintiffs

The Plaintiffs demand a trial by jury on all issues so triable.

/s/ Kyle J. White

Kyle J. White, SC Bar No. 101426

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FILE NO.: 2018-CP-04-00955

JOSHUA HAWKINS,

Plaintiff,

v.

SECRETARY OF STATE MARK
HAMMOND, SOUTH CAROLINA
SECRETARY OF STATE'S OFFICE,

Defendants.

**DEFENDANTS' ANSWER TO
PLAINTIFF'S COMPLAINT**

Defendants, Secretary of State Mark Hammond and South Carolina Secretary of State's Office (collectively "Defendants"), by and through counsel, respond to the allegations as follows:

FOR A FIRST DEFENSE

1. Responding to the allegations contained in Paragraph 1, Defendants lack information sufficient to form a belief and, therefore, deny the allegations and demands strict proof thereof.

2. Responding to the allegations contained in Paragraph 2 of the Complaint, Defendants admit the allegations.

3. Responding to the allegations contained in Paragraph 3 of the Complaint, Defendants admit the allegations.

4. Responding to the allegations contained in Paragraph 4 of the Complaint, Defendants admit the allegations.

5. Responding to the allegations contained in Paragraph 5 of the Complaint, Defendants admit the allegations.

6. Responding to the allegations contained in Paragraph 6 of the Complaint, Defendants admit the allegations.

7. Responding to the allegations contained in Paragraph 7, Defendants deny the allegations.

8. Responding to the allegations contained in Paragraph 8 of the Complaint, these allegations call for a legal conclusion and, therefore, no response is warranted.

9. Responding to the allegations contained in Paragraph 9 of the Complaint, Defendants deny the allegations.

10. Responding to the allegations contained in Paragraph 10 of the Complaint, Defendants admit the allegations pertaining to the legislation referenced therein. As to the remaining allegations of this paragraph they call for a legal conclusion and therefore no response is warranted.

11. Responding to the allegations contained in Paragraph 11 of the Complaint, Defendants admit the allegations pertaining to the legislation referenced therein. As to the remaining allegations of this paragraph they call for a legal conclusion and therefore no response is warranted.

12. Responding to the allegations contained in Paragraph 12 of the Complaint, Defendants deny the allegations.

13. Responding to the allegations contained in Paragraph 13 of the Complaint, Defendants deny the allegations.

14. Responding to the allegations contained in Paragraph 14 of the Complaint, Defendants deny the allegations.

15. Responding to the allegations contained in Paragraph 15 of the Complaint, Defendants deny the allegations.

16. Responding to the allegations contained in Paragraph 16 of the Complaint, Defendants deny the allegations.

17. Responding to the allegations contained in Paragraph 17 of the Complaint, Defendants deny the allegations.

18. Responding to the allegations contained in Paragraph 18 of the Complaint, Defendants deny the allegations.

19. Responding to the allegations contained in Paragraph 19 of the Complaint, Defendants deny the allegations.

20. Responding to the allegations contained in Paragraph 20 of the Complaint, Defendants deny the allegations.

21. Responding to the allegations contained in Paragraph 21 of the Complaint, Defendants deny the allegations.

22. Responding to the allegations contained in Paragraph 22 of the Complaint, Defendants deny the allegations.

23. Responding to the allegations contained in Paragraph 23 of the Complaint, Defendants deny the allegations.

24. Responding to the allegations contained in Paragraph 24 of the Complaint, Defendants deny the allegations.

25. Responding to the allegations contained in Paragraph 25 of the Complaint, Defendants deny the allegations.

26. Responding to the allegations contained in Paragraph 26 of the Complaint, Defendants deny the allegations.

27. Responding to the allegations contained in Paragraph 27 of the Complaint, Defendants deny the allegations.

28. Responding to the allegations contained in the "Wherefore" Paragraph, Defendants deny the allegations.

FOR A SECOND DEFENSE

(Estoppel, Waiver, Laches, and Unclean Hands)

29. The allegations and responses to Paragraphs 1 through 28 above are realleged and incorporated herein by reference.

30. Defendants assert that the Plaintiff's claims may be barred by the doctrines of estoppel, waiver, laches, and/or unclean hands, which operates as a complete defense to the claims.

FOR A THIRD DEFENSE

(Mootness)

31. The allegations and response to the Paragraphs 1 through 30 above are realleged and incorporated herein by reference.

32. Defendants assert that some or all of the Plaintiff's claims in the Complaint raise questions that are now moot, which operates as a complete defense to those claims.

WHEREFORE, having fully answered, the Defendants pray that the Plaintiff's Complaint be dismissed, with costs, and for such other and further relief as the Court may deem just and proper.

Signature on the Following Page

Respectfully submitted,

BOWERS LAW OFFICE LLC

s/Karl S. Bowers, Jr.
Karl S. Bowers, Jr.
SC Bar No. 16141
butch@butchbowers.com
P.O. Box 50549
Columbia, South Carolina 29250
(803) 753-1099

Attorney for Defendants

Columbia, South Carolina
June 27, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	C.A. No.: 2018-CP-04-00955
	)	
Joshua Hawkins and Floyd S. Mills, III,	)	
	)	
Plaintiffs,	)	AMENDED SUMMONS
	)	
vs.	)	
	)	
Secretary of State Mark Hammond, South	)	
Carolina Secretary of State's Office,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS NAMED ABOVE:

You are hereby summoned and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscribers at their office at White, Davis & White Law Firm, P.A., Anderson, South Carolina, 29621, within fifteen (15) days after the service hereof, exclusive of the date of such service. If you fail to answer the Amended Complaint within that time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

December 7, 2018

/s/Kyle J. White
Druanne D. White (S.C. Bar No. 5991)
Kyle J. White, (S.C. Bar No. 101426)
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Attorneys for the Plaintiff

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Attorneys for the Plaintiffs

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	C.A. No.: 2018-CP-04-00955
	)	
Joshua Hawkins and Floyd S. Mills, III,	)	
	)	
Plaintiff,	)	AMENDED COMPLAINT
	)	(Jury Trial Demanded)
vs.	)	
	)	
Secretary of State Mark Hammond, South	)	
Carolina Secretary of State's Office	)	
	)	
Defendants.	)	

The Plaintiffs above named, complaining of the Defendants herein, would respectfully show unto this honorable court and alleges as follows:

I. PARTIES

1. Plaintiff, Joshua Hawkins, is a citizen and resident of the state of South Carolina, and at all relevant times has been a practicing attorney, licensed and in good standing with the state bar of South Carolina.

2. Plaintiff, Floyd S. Mills, III is a citizen and resident of the state of South Carolina, and at all relevant times has been a practicing attorney with his primary office in Anderson County, South Carolina, licensed and in good standing with the state bar of South Carolina.

3. The Defendant, South Carolina Secretary of State's Office (hereinafter referred to as "the Secretary of State"), is a governmental agency/entity existing under the laws of the state of South Carolina and maintains an office located at Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201. At all times herein mentioned in this lawsuit, the Secretary of State acted and carried on its business by and through its agents, servants, and/or employees at this location, which affected litigation throughout the state of South Carolina, including Anderson County, South Carolina.

FACTUAL ALLEGATIONS

4. The Plaintiffs are attorneys practicing in the state of South Carolina whose finances are directly affected by the laws at issue in this case. Further, as residents and taxpayers in the state of South Carolina, the Plaintiffs are in constant danger of being personally affected by the laws at issue in the event that they have an event that results in an insurance claim or litigation. Not only have one or both Plaintiffs experienced reduced recovery in the past, but the Plaintiffs also have pending cases subject to the laws at issue, will have future cases subject to the laws at issue, and have and will be personally affected by the laws at issue as citizens of South Carolina.

5. As dictated by the South Carolina Code of Laws, the Secretary of State is responsible for the statewide registration of corporations, Uniform Commercial Code interests, business opportunities, employment agencies, trademarks and notaries.

6. Mark Hammond is the Secretary of State of South Carolina. Upon information and belief, Mr. Hammond is a citizen and resident of the State of South Carolina.

7. The South Carolina Secretary of State's Office ("the Secretary of State") handles the incorporation of municipalities and special purpose districts, the annexations of land, and the escheatment of real property in South Carolina. The Secretary of State is also the administrator and regulator of the Solicitation of Charitable Funds Act handles the publication of positions within certain statewide boards and commissions and issues all state-wide cable franchises. The Secretary of State is an ex officio member of the Legislative Council and the Commission on Consumer Affairs.

8. Additionally, Article 3 Section 18 of the South Carolina Constitution provides that "[n]o Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and

has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only.” (emphasis added).

9. Upon information and belief, dating back to at least 2004, it has been the job of the Secretary of State to affix the “Great Seal” to each law passed in South Carolina such that it gains the force of law. Upon further information and belief, dating back to at least 2004, the Secretary of State has failed to carry out this function as to numerous bills, meaning that they never became valid law.

10. Upon further information and belief, the Secretary of State is required to transfer all laws to the South Carolina Department of Archives and History within five years of the law’s passage, and the Secretary of State has not complied with this requirement since 2004.

11. In 2005, South Carolina Governor Mark Sanford signed the South Carolina Tort Reform Act of 2005 (“the 2005 Act”), which made a number of significant changes to the law and procedure in South Carolina in professional malpractice cases and all other civil cases filed in South Carolina. Among other changes to the tort litigation structure in South Carolina, the 2005 Act: established damages caps; abolished joint and several liability for a defendant whose conduct is determined to be less than fifty percent of the total fault; shortened the statute of limitations from thirteen (13) to eight (8) years for construction defect cases; adjusted the venue laws; and various other changes, which all had the effect of reducing recovery for Plaintiffs in civil lawsuits and artificially protecting insurance companies and large corporations from the consequences of their community endangering conduct.

12. In 2011, additional “tort reform” law was passed in South Carolina in the form of the South Carolina Fairness in Civil Justice Act (“the 2011 Act”). Among other changes to the

tort litigation structure in South Carolina, the 2011 Act: added pleading requirements for punitive damages; required a bifurcated trial when punitive damages are requested; instated damages caps; and various other changes, which all had the effect of reducing recovery for Plaintiffs in civil lawsuits and protecting insurance companies and large corporations from the consequences of their community-endangering conduct.

13. Upon information and belief, the 2005 Act and the 2011 Act were passed during the period of time that the Secretary of State had a habit and routine of failing to affix the Great Seal to laws. Accordingly, it is more likely than not that the Great Seal was never affixed to either law by the Secretary of State, and that the laws never became valid. Additionally, upon further information and belief, neither the 2005 Act nor the 2011 Act have been given to the SCDH as required. Accordingly, it appears that the 2005 Act and 2011 Act have never been valid or enforceable pursuant to the South Carolina Constitution.

14. If the 2005 Act and 2011 Act have now had the Great Seal affixed, discovery is necessary to determine when the Great Seal was affixed to the laws, because the laws would not have been valid until the Great Seal was affixed, pursuant to the South Carolina Constitution. If the Great Seal was affixed after the effective date of the laws, the laws would still be invalid and unenforceable retroactively, because the laws diminish the rights of individuals under disability.

15. Even after the Great Seal was affixed to the 2005 Act and the 2011 Act, the laws were unconstitutional pursuant to the United States Constitution, as they violate the 5th, 7th, and 14th amendments to the United States Constitution.

JURISDICTION AND VENUE

16. This action is brought pursuant to South Carolina Code §§ 15-52-20 and Rule 23 of the South Carolina Rules of Civil Procedure, as well as 42 U.S.C. §§ 1981 and 1983, and 28 U.S.C. §§ 2201 and 2202.

17. Venue is proper because Plaintiffs practice law in the county, Plaintiff Trey Mills maintains an office in this County, Plaintiffs have had recovery reduced in litigation pending in this County, and Plaintiffs' financial and personal status remain in jeopardy due to the applicability to matters in Anderson County of the laws and conduct at issue in this case.

DECLARATORY JUDGMENT

(Pursuant to S.C. Code Ann. § 15-53-10, et. seq.)

18. Plaintiffs reiterate each and every allegation above as if repeated verbatim herein.

19. Plaintiffs are interested persons whose rights, status, or other legal relations are affected by the 2005 Act and 2011 Act, and thus he has standing to assert this cause of action for declaratory judgment. Plaintiffs have made litigation decisions and have had recovery reduced based on the 2005 Act and 2011 Act. Plaintiffs have been, and continue to be, effected by the laws at issue, personally, professionally, and financially as private citizens of the state, and as practicing lawyers.

20. This case presents an actual case or controversy, and this Court's resolution of the following issues will terminate the uncertainty giving rise to this proceeding:

- a. Whether the 2005 Act is invalid and unenforceable due to the failure to affix the Great Seal to the Act;
- b. Whether the 2011 Act is invalid and unenforceable due to the failure to affix the Great Seal to the Act; and

- c. If the Secretary of State has now applied the Great Seal to the 2005 Act and 2011 Act and transferred them to SCDAH, whether the application of the seal and transfer of the laws to SCDAH can cure the defect retroactively.

21. Plaintiffs hereby requests a declaratory judgment regarding the aforementioned matters.

22. The Plaintiffs respectfully asks for attorneys' fees and costs in pursuing the declaratory relief.

INJUNCTIVE RELIEF

(Pursuant to 42 U.S.C. § 1983)

23. Plaintiffs reiterate each and every allegation above as if repeated verbatim herein.

24. Plaintiffs are an interested persons whose rights, status, or other legal relations are affected by the 2005 Act and 2011 Act, and thus they have standing to assert this cause of action for declaratory judgment. Plaintiffs have made litigation decisions and has had recovery reduced based on the 2005 Act and 2011 Act. Plaintiffs have been, and continue to be, impacted personally, professionally, and financially by the laws at issue, in their personal and professional capacities.

25. The 2005 Act and 2011 Act and similar "tort reform" laws infringe on the rights of citizens afforded by the 4th, 5th, 7th, and 14th Amendments to the United States Constitution by, among other reasons, arbitrarily capping damages awards, imposing additional unconstitutional procedural requirements that make it cost prohibitive to pursue and otherwise viable claim, and various other tort reform measures that are unconstitutional.

26. This case presents an actual case or controversy, and this Court's resolution of the following issues will terminate the uncertainty giving rise to this proceeding:

- a. Whether the 2005 and 2011 Acts are invalid and unenforceable, because tort reform laws which arbitrarily cap damages and deprive injured individuals of a

jury trial, among other arbitrary limitations on injured individuals' rights, violate the 4th, 5th, 7th, and/or 14th amendments to the United States Constitution.

27. Plaintiffs hereby requests a declaratory judgment regarding the aforementioned matters.

28. The Plaintiffs respectfully ask for a judgment declaring that the 2005 and 2011 Acts, and any other similar tort reform laws, are unconstitutional, an injunction preventing any further enforcement of tort reform laws, including the 2005 and 2011 Acts, in South Carolina, and the attorney's fees and costs incurred in pursuing this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants, in favor of the Plaintiffs for the following relief:

- b. Granting Plaintiffs' request for a declaratory judgment and injunction as to the matters set forth above;
- c. Attorney's fees and costs; and
- d. Any other relief available to the Plaintiffs.

Respectfully submitted,

December 7, 2018

/s/ Kyle J. White
 Druanne D. White, SC Bar No. 5991
 Kyle J. White, SC Bar No. 101426
 Trevor B. White, SC Bar No. 100791
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Attorneys for the Plaintiffs

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Attorneys for the Plaintiffs

The Plaintiffs demand a trial by jury on all issues so triable.

/s/ Kyle J. White
Kyle J. White, SC Bar No. 101426

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Joshua Hawkins,)
))
Plaintiff,)
v.)
Secretary of State Mark Hammond,)
South Carolina Secretary of State's)
Office,)
Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-CP-0400955

**NOTICE OF MOTION AND
MOTION TO INTERVENE**

TO: KYLE J. WHITE, ESQUIRE, AND ATTORNEY FOR PLAINTIFF; TO THE PLAINTIFF ABOVE NAMED; AND TO THE DEFENDANT ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE THAT by and through their undersigned counsel, the Honorable Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate, and the Honorable James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives, will move before the Presiding Judge of the Court of Common Pleas for the Tenth Judicial Circuit at the Anderson County Courthouse, located at 100 South Main Street, Anderson, South Carolina, no sooner than ten days of the service of this motion, or at such time as the Court may order, for leave to intervene as Defendants in this proceeding. This motion is made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and is supported by reasons set forth in the attached Memorandum in Support of Motion to Intervene.

[SIGNATURES OF COUNSEL ON FOLLOWING PAGE]

Respectfully submitted,

By: /s/ Kenneth M. Moffitt
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Daina M. Riley
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*Counsel for The Honorable
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President Pro Tempore of the South Carolina Senate*

and

Michael Anzelmo
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*Counsel for The Honorable
James "Jay" Lucas, Speaker of the
South Carolina House of Representatives*

July 2, 2018
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Joshua Hawkins,)
)
Plaintiff,)
)
v.)
)
Secretary of State Mark Hammond,)
South Carolina Secretary of State's)
Office,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-CP-0400955

**MEMORANDUM IN SUPPORT OF
THE HONORABLE MOTION TO
HUGH K. LEATHERMAN, SR.'S AND
THE HONORABLE JAMES "JAY"
LUCAS' MOTION TO INTERVENE**

ARGUMENT

Senator Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* ("President *Pro Tempore* Leatherman") of the South Carolina Senate and Speaker James "Jay" Lucas ("Speaker Lucas"), in his official capacity as the Speaker of the South Carolina House of Representatives, respectfully request this Court grant their motion to intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure. Specifically, President *Pro Tempore* Leatherman and Speaker Lucas request they be granted this intervention as Defendants.

I. This Court Should Grant the Motion to Intervene Pursuant to South Carolina Rule of Civil Procedure 24(a).

Intervention is permitted pursuant to Rule 24(a) either as a matter of right [SCRCP 24(a)], or by permission of the Court [SCRCP 24(b)]. Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as

a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

SCRCP 24(a). The rules for intervention are to be interpreted liberally, particularly in cases where judicial economy will be promoted by the declaration of rights of all parties who may be affected. *See Berkeley Electric Co-op, Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 190, 394 S.E.2d 712, 715 (1990).

Rule 24(a)(1) of the South Carolina Rules of Civil Procedure allows a party to intervene when a statute confers an unconditional right to do so. *See* SCRCP 24(a)(1). The Plaintiff is bringing this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. 15-53-10, et. seq. (Supp. 2017). "When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. 15-53-80 (Supp. 2017). As discussed in more detail below, President *Pro Tempore* Leatherman and Speaker Lucas, as the representative leaders of the Senate and House of Representatives, have a substantial interest in the outcome of this matter and would, therefore, be affected by a declaration as requested by the Plaintiff. This Court should grant President *Pro Tempore* Leatherman's and Speaker Lucas' motion to intervene, because they have an unconditional right to intervention conferred upon them by S.C. Code Ann. 15-53-80 (Supp. 2017).

Alternatively, if this Court determines S.C. Code Ann. 15-53-80 (Supp. 2017) does not confer an unconditional right to intervene in this matter pursuant to Rule 24(a)(1), this Court should grant President *Pro Tempore* Leatherman and Speaker Lucas leave to intervene pursuant to Rule 24(a)(2). When evaluating the merits of parties seeking to intervene in actions pursuant to Rule 24(a)(2), the moving party must:

(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

Berkeley Electrical Cooperative, 302 S.C. at 189, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)); see also *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661 (1993), *In re Horry County State Bank*, 361 S.C. 503, 604 S.E.2d 723 (S.C. App. 2004).

A. Application for Intervention is Timely.

President *Pro Tempore* Leatherman and Speaker Lucas have made a timely application for intervention. The Plaintiff filed his complaint on May 16, 2018. The Defendant filed an answer to the Plaintiff's complaint on June 27, 2018, but there has been no further action in this matter and this Court has not issued any determination in this case. As a result, intervention at this early juncture of the case will not harm any party, and this Court shall not suffer any delay as a result of permitting intervention by the President *Pro Tempore* and the Speaker.

B. President Pro Tempore Leatherman and Speaker Lucas Satisfy the Requirement of an Interest in This Action.

President *Pro Tempore* Leatherman, in his official capacity as the representative leader of the Senate, and Speaker Lucas, in his official capacity as the representative leader of the House of Representatives, possess a significant interest in the issues presented in this matter. The question of an intervenor's interest is determined in relation to the overall subject matter of the action and not in relation to particular issues before the Court. See *Berkeley Elec. Co-op. Inc.*, 302 S.C. at 189-90, 394 S.E.2d at 714 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)).

The Plaintiff alleges that Act 32 of 2005 and Act 52 of 2011 are invalid and unenforceable because of a defect in the procedure of enactment in violation of Article 3, Section 18 of the South

Carolina Constitution. (Compl. ¶¶ 7, 11.) The Plaintiff further alleges that Act 32 of 2005 and Act 52 of 2011 violate the Fifth, Seventh, and Fourteenth Amendments to the United States Constitution. (Compl. ¶ 14.) While the Plaintiff's allegations relate only to Act 32 of 2005 and Act 52 of 2011, this Court's decision in this matter could impact the validity and enforceability of numerous other acts of the General Assembly. The power to legislate is vested solely with the General Assembly. See S.C. Const. art. III §1. The Plaintiff's allegations directly attack not only that authority but also the product of that authority. Therefore, the representative leaders of each house of the General Assembly have a significant interest in defending legislation enacted by the General Assembly against constitutional challenges in general, and further have a significant interest in defending the particular constitutional challenges raised in this matter.

C. Without Intervention, This Court's Decision Might Impair the President Pro Tempore of the Senate's and the Speaker of the House's Ability to Protect the Interest of the Senate and the House of Representatives.

Failure to grant President *Pro Tempore* Leatherman and Speaker Lucas leave to intervene in this action will impair or impede the Senate's ability and the House of Representatives' ability to protect their interests. As the respective leaders of the Senate and the House of Representatives, President *Pro Tempore* Leatherman and Speaker Lucas are best suited to defend the interpretation of the constitutionality of duly enacted legislation.

D. The Senate's and the House of Representatives' Interests Are Not Adequately Represented by Existing Parties.

No existing party to this lawsuit adequately represents the Senate's or the House of Representatives' interests in this litigation. President *Pro Tempore* Leatherman and Speaker Lucas request to intervene as defendants in this action because any resolution in favor of the Plaintiff would likely affect the process through which duly enacted legislation becomes a valid and enforceable law. While arguments may overlap in some respects, the existing Defendant's case

would not likely revolve around the role played by the Senate and the House of Representatives in enacting Act 32 of 2005 and Act 52 of 2011, any of the various other acts of the General Assembly that may be subject to challenge arising from the Court's determination in this case, or subsequent actions taken by the General Assembly that impact the constitutional analysis necessary to make a determination in this case. Moreover, the Senate nor the House of Representatives want another party to argue on their behalf. Only President *Pro Tempore* Leatherman, on behalf of the Senate, and Speaker Lucas, on behalf of the House of Representatives, can adequately represent their respective body's interest in protecting the General Assembly's role in making laws for South Carolina.

This motion for leave to intervene is further supported by prior proceedings. In *Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100 (1990), the Court granted the motion of the President *Pro Tempore* to intervene in proceedings where the Lieutenant Governor, in his capacity as President of the Senate, was a named defendant in an action. In *Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002), and in *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2004), the Court again permitted the President *Pro Tempore* to intervene in the name of the Senate in an action where the Senate was not originally a party. Additionally, in both *Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1998), and *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995), the President *Pro Tempore* brought actions against parties on behalf of the Senate. This history demonstrates that the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives have routinely and consistently been named as representatives of the Senate and House of Representatives in all proceedings where the actions of the respective bodies are called into question or have the potential to be substantially affected, or alternatively the respective leaders were permitted to intervene when either was not originally named a party.

II. This Court Should Grant the Motion to Intervene Pursuant to South Carolina Rule of Civil Procedure 24(b).

Alternatively, this Court should grant permissive intervention pursuant to Rule 24(b). Permissive intervention is permitted if an applicant's claim or defense has a common question of law or fact with the main action. *See* SCRCP 24(b). In this case, the Senate's and the House of Representatives' interest in protecting the constitutionality of the 2005 Act, the 2011 Act, and potentially other Acts is related to and the basis of the Plaintiff's complaint. As such, this Court should exercise its discretion in favor of permitting the Senate and the House of Representatives, through each body's respective elected leader, to intervene as defendants in this proceeding.

III. Conclusion

President *Pro Tempore* Leatherman and Speaker Lucas respectfully request this Court grant their motion to intervene as Defendants in this matter. This Court may grant this motion pursuant to SCRCP 24(a)(1) as S.C. Code Ann. 15-53-80 (Supp. 2017) confers upon them an unconditional right to intervention. Alternatively, this Court may grant this motion pursuant to SCRCP 24(a)(2) as all elements of intervention by right are satisfied. Finally, this Court may also grant this motion pursuant to SCRCP 24(b), because the Senate's and the House of Representatives' interest in protecting the constitutionality of the 2005 Act, the 2011 Act, and potentially other Acts is related to and the basis of the Plaintiff's complaint.

[SIGNATURES OF COUNSEL ON FOLLOWING PAGE]

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July 2, 2018
Columbia, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Joshua Hawkins,) Civil Action No. 2018-CP-04-00955

Plaintiffs,)

vs.)

PRIORITY MOTION

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

**Joint Motion to Transfer Venue and
Memorandum in Support
by the Honorable James H. Lucas and the
Honorable Hugh K. Leatherman, Sr.**

Defendants,)

and)

Hugh K. Leatherman, Sr., in his capacity
as President *Pro Tempore* of the South
Carolina Senate, and James "Jay" Lucas,
in his official capacity as the Speaker of
the South Carolina House of
Representatives,

Intervenors.)

James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the "Speaker") and Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate (the "President *Pro Tempore*") move to transfer venue to Richland County under Rules 12(b)(3) and 82(b), SCRCP.¹

State law requires suits against public officials and agencies be brought where the action arose. S.C. Code Ann. § 15-7-20(2) (venue for suits against public officers); S.C. Code Ann. § 15-77-50 (suits against state agencies and officials). Our Supreme Court has explained that section 15-7-20 "is mandatory, providing that actions against public officers for acts done by them in

¹ The Speaker and the President *Pro Tempore* simultaneously filed a Motion to Dismiss; however, this motion takes priority because of the venue-transfer statute's mandatory application here.

virtue of their offices must be tried in the county where the cause of action or some part thereof arose, subject only to the power of the court to change the place of trial.” *Stalheim v. Doskocil*, 275 S.C. 252, 254, 269 S.E.2d 346, 347 (1980). So too has the court construed section 15-77-50 as mandatory. *Whetstone v. S.C. Dep't of Highways & Pub. Transp.*, 272 S.C. 324, 327, 252 S.E.2d 35, 37 (1979) (rejecting argument that S.C. Code Ann. § 15-77-50 “is permissive and should not operate to mandate the venue of actions against” state agencies).

In *Stalheim*, a plaintiff was attacked in Florence County by an escapee from a state mental health facility. *Id.* at 253-54, 269 S.E.2d 346, 346-47. The facility’s superintendent, the State Commissioner of Mental Health, and the facility’s psychiatrist moved to transfer venue, the circuit court agreed and the plaintiff appealed. *Id.* Our Supreme Court upheld the transfer of an action to Richland County, explaining

Where venue is proper in more than one county, the plaintiff ordinarily is given the rights to elect. However we are persuaded by the reasoning of those courts which have construed substantially identical statutes and have held venue to be in the county in which the public officer allegedly performed the acts giving rise to the action. Otherwise, public servants might be required to defend lawsuits in any distant county of the State and encounter inflamed local feelings and prejudice. At this point the plaintiff’s private convenience must yield to the public good.

Id. at 255, 269 S.E.2d at 347 (citations and footnote omitted).

There is no dispute that Plaintiff sues both a State official and a State agency. Thus, where the cause of action arose, not where the Plaintiff resides or practices law, determines venue here. S.C. Code Ann. § 15-7-20(2); S.C. Code Ann. § 15-77-50.

Plaintiff sues the Secretary of State for failing to comply with Article III, § 18 of the South Carolina Constitution. (Compl. ¶¶ 7–8, 11.)² He also sues to enjoin the application of two separate

² Both the Speaker and the President Pro Tempore have intervened in their official capacities.

state acts as being substantively unconstitutional. (Compl. ¶¶ 14, 23–27.) While Plaintiff claims that venue is proper in Anderson County because he made litigation decisions in Anderson County, the crux of his claim is the procedural and substantive constitutionality of the two legislative acts. (Compl. ¶¶ 16, 18, 23.) Both the passing of these acts and the affixation of the State’s Great Seal occurred in Richland County. Therefore, transfer of venue to Richland County is required.

CONCLUSION

Plaintiff’s claims arose in Richland County—the county in which the two acts he challenges were passed and the county in which he alleges the Secretary of State should have sealed the two acts. Therefore, the Court should transfer venue to Richland County.

[Electronic signatures to follow.]

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Columbia, South Carolina
November 8, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Joshua Hawkins,	)	Civil Action No. 2018-CP-04-00955
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Secretary of State Mark Hammond,	)	Joint Motion to Dismiss and
South Carolina Secretary of State's	)	Memorandum in Support
Office,	)	by the Honorable James H. Lucas and the
	)	Honorable Hugh K. Leatherman, Sr.
Defendants,	)	
and	)	
	)	
Hugh K. Leatherman, Sr., in his capacity	)	
as President <i>Pro Tempore</i> of the South	)	
Carolina Senate, and James "Jay" Lucas,	)	
in his official capacity as the Speaker of	)	
the South Carolina House of	)	
Representatives,	)	
	)	
Intervenors.	)	
	)	

James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the "Speaker") and Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate (the "President *Pro Tempore*") move to dismiss the Complaint filed by Plaintiff Joshua Hawkins pursuant to Rule 12(b)(6), SCRC.P.¹

INTRODUCTION

Plaintiff asks the Court to declare two separate pieces of legislation unconstitutional. He attacks (1) 2005 Senate Bill 83, enrolled as 2005 S.C. Acts 32 (the "2005 Act") and (2) 2011 House Bill 3375, known as the South Carolina Fairness in Civil Justice Act, enrolled as 2011 S.C. Acts

¹ The Speaker and the President *Pro Tempore* also move to transfer venue by separate motion filed contemporaneously with this motion.

52 (the “2011 Act”). The Complaint alleges that because the Secretary of State allegedly did not affix South Carolina’s Great Seal to the acts in 2005 and 2011, those acts are invalid. While the constitution does require the Great Seal to be affixed to acts of the General Assembly, the purpose of doing so is to authenticate the acts. The Great Seal does not become part of the law. Nor can its absence render a law unenforceable.

While the Constitution’s procedural requirements for legislative acts are mandatory, our Supreme Court has recognized the doctrine of substantial compliance. *Smith v. Jennings*, 67 S.C. 324, 332, 45 S.E. 821, 824 (1903). Thus, the laws challenged can be properly authenticated through other means, thereby demonstrating substantial compliance. Moreover, later compliance with the Constitutional provision has retroactive effect. *State v. Toomer*, 41 S.C.L. (7 Rich.) 216, 229–30 (1854). The public records show that the Great Seal is currently affixed to both acts. (See Exhibit 1 – Certified Copy of the 2005 Act; Exhibit 2 – Certified Copy of the 2011 Act.).² Thus, the acts both comply with the Constitution’s Great Seal requirement even if the seal was affixed after the act was passed as Plaintiff suggests and any alleged defect has been cured rendering this case moot. Further, Plaintiff’s claim fails because the Code Commissioner has codified both of the acts Plaintiff challenges here. Their codification further supports the acts’ authenticity and cures any procedural defects, such as the absence of the Great Seal now that the laws are codified.

Plaintiff’s claim is also barred by *res judicata*. The Complaint alleges that monetary recovery was “reduced” by the two challenged acts in unspecified, prior civil actions in which

² The Court may rely on these certified copies from the Department of Archives and History because Plaintiff expressly references them in the Complaint. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (permitting reference of material outside of the pleadings); accord *E.I. duPont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011). Alternatively, the Speaker requests the Court take judicial notice of these certified public records. See Rule 201(b)(2), SCRE; Rule 1005, SCRE.

Plaintiff served as counsel and made litigation decisions based on the laws. Those unspecified cases have ended given that those unnamed plaintiffs gained some form of “recovery.” In those prior civil actions, neither Plaintiff nor his clients argued that the subject acts’ were unconstitutional in those cases, nor did Plaintiff appeal those cases. As a result, the constitutional challenge is foreclosed and *res judicata* bars the action. To the extent that Plaintiff argues the attorneys’ fees he received as counsel in those prior cases were reduced, those fees would have been governed by a private agreement between Plaintiff and his clients, not the statutes challenged here, which have no provision regarding attorneys’ fees. Thus, Plaintiff fails to state a claim for which relief can be granted. *See* Rule 12(b)(6), SCRPC. On similar grounds, he also lacks standing.

For any and all these reasons, the Court should dismiss the Complaint with prejudice.

BACKGROUND

Plaintiff, a licensed South Carolina attorney, filed this action challenging the constitutionality of the 2005 Act and the 2011 Act. (Compl. ¶¶ 1, 9–10.) The 2005 Act placed limits on non-economic damages claimed by plaintiffs in civil lawsuits, modified the state’s application of joint and several liability, imposed penalties for frivolous civil proceedings, imposed requirements for the use of expert witnesses in certain professional malpractice actions, and implemented a mediation program to be utilized prior to instituting medical malpractice claims. (Compl. ¶ 9.) The 2011 Act implemented certain limitations on punitive damages, required insurance companies to provide certain information to licensed attorneys, and revised the types of actions for constructive defect claims. (Compl. ¶ 10.) The Code Commissioner codified these two acts into the State’s general laws in February 2018. *See* 2018 S.C. Acts 129, § 3.

Plaintiff alleges he is entitled to declaratory judgment under state law that the two acts are invalid because the South Carolina Secretary of State failed to affix the State's Great Seal to them when the General Assembly passed them in 2005 and 2011. (Compl. ¶ 11.) He relies on Article III, Section 18 of the South Carolina Constitution, which requires the Great Seal to be affixed to bills and joint resolutions. (Compl. ¶ 6.) Plaintiff further alleges under federal law that the two acts must be enjoined "because tort reform laws which arbitrarily cap damages and deprive injured individuals of a jury trial, among other arbitrary limitations on injured individuals' rights" (Compl. ¶ 25.) Plaintiff alleges the provisions of both laws violate the Fourth, Fifth, Seventh, and Fourteenth Amendments to the United States Constitution, thereby entitling him to injunctive relief under 42 U.S.C. § 1983 (and presumably attorneys' fees under 42 U.S.C. § 1988). (Compl. ¶ 27.) Plaintiff alleges his right to relief is based upon the contention he has "made litigation decisions and has had recovery reduced based on the 2005 Act and 2011 Act." (Compl. ¶¶ 18, 23.)

By consent, the Speaker and President *Pro Tempore* intervened. (Mot. Intervene, July 2, 2018.) This joint motion follows.

ARGUMENT

I. The absence of the Great Seal does not render the challenged acts unconstitutional.

The South Carolina Constitution states that no

Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives

S.C. Const. art. III, § 18 (1895). The South Carolina Supreme Court has explained that the purpose of this provision is the self-authentication of laws passed by the General Assembly. *Wingfield v.*

S.C. Tax Comm'n, 147 S.C. 116, 144 S.E. 846, 850 (1928). The South Carolina Attorney General has opined similarly. S.C. Att'y. Gen Op., 2017 WL 6189878 (Dec. 1, 2017).

Though the Great Seal must appear on the act, the Constitution does not require the Great Seal to create the law—that authority rests exclusively with the General Assembly. *See* S.C. Const. art. III, § 18. As a result, its omission from an act cannot invalidate it. A ruling to the contrary would ignore the authenticating purpose of Article III, § 18, and the alternative methods for fulfilling that purpose. A ruling to the contrary would also condone an absurd result: it would grant to the Secretary of State veto power over any acts passed by the General Assembly and signed by the Governor. *See State v. Long*, 406 S.C. 511, 515, 753 S.E.2d 425, 427 (2014) (rejecting interpretation of constitutional provision that would have led to an absurd result); *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (explaining that Courts generally must avoid interpretation statutes to create absurd results). Instead, the record confirms that the two acts substantially comply with the constitutional procedure proscribed by Article III, § 18. Thus, the Court should dismiss Plaintiff's Complaint.

A. Plaintiff's claim fails because the acts substantially comply with the Constitutional provision.

When interpreting Article III, § 18, our Supreme Court has recognized that “literal compliance with certain mandatory formulas is not exacted, but that a substantial compliance is sufficient.” *Jennings*, 67 S.C. at 332, 45 S.E. at 824; *see also* S.C. Att'y. Gen. Op., 2017 WL 6189878, at *2, 7 (Dec. 1, 2017). In *Jennings*, the plaintiff sued to enjoin enforcement of a 1903 bond act requiring the State Treasurer to write-off certain state bonds. *Jennings*, 67 S.C. at 332, 45 S.E. at 824. The plaintiff claimed that the 1903 act was invalid in part because it did not state, “Be it enacted by the General Assembly of the state of South Carolina” as required by the Constitution. *Id.* at 325, 45 S.E. at 822. The Court rejected the plaintiff's argument that

“absolutely literal compliance with the form prescribed is essential to valid legislation,” holding that “while the constitutional provision as to form of enacting clause is mandatory, that a substantial compliance with the mandate will be sufficient.” *Id.*, 67 S.C. at 332, 45 S.E. at 824.

Jennings’ substantial compliance principle applies here. The two acts bear all the other indicia of authenticity: the signatures of the Speaker of the South Carolina House of Representatives and the President of the South Carolina Senate on the date the acts were ratified, and the Governor’s signature days later. *See* 2005 Act, Ex. 1 at 24 (Mar. 31, 2005); 2001 Act, Ex. 2 at 8 (June 8, 2011). The legislative journals also confirm that the two challenged acts went through three readings, received a majority of votes in both chambers, and were enrolled. *See* Journal of the House of Representatives at 25, 116th Session (March 29, 2005) (noting enrollment of 2005 Act); Journal of the House of Representatives at 54, 119th Session (June 2, 2011) (noting enrollment of 2011 Act). Thus, the two acts were properly authenticated regardless of the affixation of the Great Seal.

Cases from other jurisdictions demonstrate similar procedural steps in a legislative process serve to authenticate acts of the legislature, so the omission of a single step in the process does not render the acts invalid. For example, in *Leavenworth County Commissioners v. Higginbotham*, the Kansas Supreme Court was asked to determine whether the failure of the presiding officer of the senate to sign a passed bill rendered it unconstitutional. 17 Kan. 62, 75 (1876). In a section of its opinion titled “authenticating bills,” the court explained that the “only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill. Such signatures are only portions of the many evidences of the due passage and validity of the bill.” *Id.* at 78; *see also* *Amos v. Gunn*, 84 Fla 285 (1922) (“The bills that have been passed in both houses are required to be signed by the stated officers of the respective houses,

not as part of the procedure that is essential to enactment, but for purposes of verity by designated official identification and authentication.”); *Brown v. Morris*, 365 Mo. 946, 952, 290 S.W.2d 160, 164 (1956) (“It is generally recognized that the purpose of requiring legislative enactments to be signed by the presiding officers is to provide a ‘mode of authentication’ evidencing the fact that a particular bill has been passed in due form by the legislative body involved.”) (en banc).

Plaintiff does not allege that the General Assembly did not pass the two acts. To the contrary, the record before the Court confirms that the General Assembly properly passed the acts, that the Governor did not veto them, and that the acts were properly enrolled. Thus, the acts substantially comply with Article III, § 18’s authenticating purpose. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824. As a result, the Court must presume the acts are valid. *See Horry Cnty. Sch. Dist. v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). To defeat that presumption at this juncture, Plaintiff must plead sufficient facts to establish that the two are unconstitutional. Plaintiff has not done so, nor could he do so—the public records confirm the procedural validity of those acts and the General Assembly’s substantial compliance with Article III, § 18. His legal conclusions that the two acts are unconstitutional are not enough. *See Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct. App. 2001). Accordingly, the Court should dismiss Plaintiff’s complaint.

B. South Carolina courts have applied the two challenged acts over the last fourteen years, also confirming their authenticity.

Moreover, state and federal courts have regularly enforced the two acts Plaintiff challenges here. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 175, 758 S.E.2d 501, 503 (2014) (reviewing dismissal for failure to comply with notice of intent and expert witness requirements of Section 5 of the 2005 Act, codified as S.C. Code Ann. § 15–79–125); *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) (enforcing joint and several liability provision of Section 16 of the

2005 Act, codified as S.C. Code Ann. § 15-38-15); *Gov't Employees Ins. Co. v. Poole*, 424 S.C. 1, 5, 817 S.E.2d 283, 286 (2018) (citing provision implemented under Section two of the 2011 Act, S.C. Code Ann. § 15-32-520(D), and noting that “state law has limited the instances in which punitive damages may be awarded.”); *Boyle v. United States*, 948 F. Supp. 2d 577, 581 (D.S.C. 2012) (enforcing noneconomic damages limitations from 2005 Act codified in S.C. Code Ann. § 15-32-220); *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. CV 9:17-1575-RMG, 2018 WL 679454, at *3 (D.S.C. Feb. 2, 2018) (declining to apply exceptions to statute of repose included in Section five of the 2011 Act, codified as S.C. Code Ann. § 15-3-670).

Plaintiff's Complaint even concedes that the two challenged acts have been frequently enforced in cases he has tried before he brought this lawsuit.³ (Compl. ¶ 13.) This pattern of enforcement by state and federal courts for over fourteen years additionally confirms the authenticity of the two challenged acts, regardless of whether the Great Seal had been affixed to them. Therefore, Plaintiff's claim that the two challenged acts are unconstitutional is inconsistent with South Carolina law.

II. The Great Seal is affixed to the challenged acts, rendering Plaintiff's claim moot.

In addition to the other indicia of authenticity of the two acts, the attached certified copies of the 2005 Act and the 2011 Act show that the acts have the Great Seal affixed to them currently. *See* Ex. 1 at 1; Ex. 2 at 1. This further authenticates the acts, but also shows that the acts fully satisfy the requirement of Article III, § 18. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824 (concluding

³ In fact, Plaintiff has an appeal currently pending before the Court of Appeals in which Plaintiff argues on his client's behalf that the 2011 Act's punitive damages caps are unconstitutional. *See Garrison v. Target Corporation*, No. 2017-000267 (S.C. Ct. App.). An argument he failed to make in the unspecified actions alluded to in this Complaint where he claims reduced recovery was had.

“literal compliance” with procedural provision is unnecessary). This is not just substantial compliance, but actual compliance with Article III, § 18.

Moreover, the acts bear the Great Seal. When the Secretary of State fulfilled the constitutional requirement by affixing the Great Seal is immaterial—the two acts remain valid even retrospectively. *See Toomer*, 41 S.C.L. (7 Rich.) at 229–30 (upholding appointment of court officer retroactively despite his commission lacking appropriate seal). The South Carolina Attorney General agrees that the Secretary of State’s sealing of the two acts relates back to the date of enactment. *See S.C. Att’y. Gen Op.*, 2017 WL 6189878, at *8 (Dec. 1, 2017).

The public record upon which the court can consider in a 12(b)(6) motion, shows that today, the two acts Plaintiff challenges have the Great Seal and are both located in the South Carolina Department of Archives and History. *See Ex. 1 at 1; Ex. 2 at 1*. Therefore, the Constitution’s Great Seal requirement has been satisfied and the two acts are properly authenticated. Accordingly, Plaintiff’s declaratory judgment claim is now moot and dismissal is proper. *See S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758–59 (2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. Where there is no actual controversy, this Court will not decide moot or academic questions.”).⁴

⁴ If anything, Plaintiff’s relief lies in mandamus, requiring the Secretary of State to affix the Great Seal to those act previously passed by the General Assembly under his mandatory and ministerial duty. *See Green v. Thornton*, 265 S.C. 436, 440, 219 S.E.2d 827, 828 (1975) (classifying certain duties of the Secretary of State as “mandatory and ministerial,” not discretionary); *Edwards v. State*, 383 S.C. 82, 95–96, 678 S.E.2d 412, 419 (2009) (permitting mandamus relief for failure of public official to take ministerial action). But mandamus relief would be redundant now—the acts Plaintiff challenges now have the Great Seal as Plaintiff concedes. (Compl. ¶ 14.)

III. The codification of the two challenged acts into the state's general law also renders Plaintiff's claims moot.

Codification is a legislative process by which legislative acts become a permanent part of the general statutory law of the State. When the code supplements (recognized by many as the white paperbound portions of the code) become too large and bulky, state law authorizes the Legislative Council and the Code Commissioner to suggest that the General Assembly consider and approve the incorporation of those supplements into new or revised volumes of the code. S.C. Code Ann. § 2-13-90. That approval takes the form of a bill passed under the formalities for the passage of any other laws, meaning three readings of the bill in each chamber, majority vote, and signature by the Governor. *See* S.C. Code Ann. § 2-13-170. The result is that the replacement volume becomes the only general permanent statutory law of the State. *Id.*

Our Supreme Court has recognized that the codification process cures procedural defects in acts passed by the General Assembly, even constitutional defects. In *York Electric Cooperative*, the Court addressed a constitutional challenge to the “South Carolina Uniform Disposition of Unclaimed Property Act” under another procedural constitutional provision. *See S.C. Tax Comm’n v. York Elec. Coop., Inc.*, 275 S.C. 326, 331–33, 270 S.E. 2d 626, 629–30 (1980). The Court found that the Unclaimed Property Act violated a procedural provision of the Constitution—the One Subject Rule under Article III, § 17—because the act was included in the General Appropriations Act of 1971 and was not related to the raising and expenditure of tax monies. *See id.* at 331, 270 S.E.2d at 629. Despite expressly finding that the act was procedurally unconstitutional, the Supreme Court held that the unconstitutionality “at the time of its enactment . . . is now of no consequence, since it was reenacted as a part of the codification of the 1976 Code of Laws.” *Id.* The Court went on to hold further that because the challenged act “was properly incorporated into

the 1976 Code, and declared by the General Assembly to be a part of the general statutory law of the State, the constitutional objection that it originally violated Article III, Section 17, must be overruled.” *Id.* at 331–32, 270 S.E.2d at 629; *see also Wrought-Iron Range Co. v. Carver*, 118 N.C. 328, 24 S.E. 352, 355–56 (1896) (holding that omission presiding officers’ signatures was constitutionally immaterial once the challenged act had been codified). The curing of the procedural defect by codification renders the procedural challenge moot.

York Electric Cooperative requires dismissal here. Even before Plaintiff filed his Complaint, the General Assembly considered and passed Senate Bill 882 to codify and adopt the 2017 Cumulative Supplements as part of the Code of Laws. Specifically, the codification bill states that the

2017 Cumulative Supplements to the Code of Laws of South Carolina, 1976, are adopted as part of the Code of Laws. These supplements, volumes as supplemented by them, and the replacement volumes referred to in Section 2 of this act, constitute the only general permanent statutory law of the State as of January 1, 2018.

2018 S.C. Acts 129, § 3. The bill followed all the formalities for the passage of laws under the South Carolina Constitution, and was ultimately signed into law by Governor McMaster in February 2018, becoming Act 129. *Id.* Following their passage, the two acts Plaintiff challenges here appeared in the paperbound supplements to the Code that have gotten too large for the hardbound volumes. *See, e.g.,* 2005 S.C. Acts 32, § 2, codified a S.C. Code Ann. § 15-32-200 (Supp. 2017). Since then, however, the two acts have become a part of the Code of Laws through the re-codification process. *See id.* Because of this re-codification into the State’s general law, any perceived procedural defect claimed by Plaintiff no longer exists, mooting his claim. Accordingly, the Court should dismiss Plaintiff’s Complaint rather than answering the purely “academic questions” Plaintiff now poses. *See Loftis*, 402 S.C. at 384, 741 S.E.2d at 758–59.

IV. Res Judicata bars Plaintiff's constitutional challenge because he failed to raise the argument in the prior cases he alludes to in the Complaint.

The doctrine of res judicata explains the effect a judgment may have on subsequent litigation involving similar issues. Claim preclusion bars not only claims or issues that were asserted, but also those that could have been asserted. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (“Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”).

Plaintiff repeatedly alleges that the acts have unconstitutionally “reduced” recovery in prior civil actions. (Compl. ¶¶ 13, 16, 18, 23.) Though he does not specify the cases in which the acts reduced the recovery, those cases are over because Plaintiff uses the past tense “reduced.” (*Id.*) This means those actions were adjudicated and are final, yet Plaintiff did not raise the constitutional issue in those cases, nor did he appeal. Because this constitutional challenge was not made in those actions, it is now barred under the doctrine of res judicata.

Because res judicata “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* at 642 (1996)), it is immaterial that the remedy requested in the two actions differs. In *Plum Creek Development Company*, our Supreme Court applied res judicata’s bar to prevent a plaintiff from obtaining damages in a second suit where he had sought only mandamus relief in a prior action. *Plum Creek Dev. Co.*, 334 S.C. at 35, 512 S.E.2d at 109. The Court explained that a “different remedy, however, does not alter the fact that the claims are identical in both the mandamus action and current damage action.” *Id.* Here, Plaintiff’s attempt to obtain declaratory relief—rather than the monetary relief he sought for his clients and himself in prior actions—is no different from the

plaintiff in *Plum Creek* seeking mandamus and then monetary relief. Those cases still act to bar his claims here. The degree of recovery in the prior action is similarly irrelevant. *Judy v. Judy*, 393 S.C. 160, 173–74, 712 S.E.2d 408, 415 (2011) (applying res judicata to bar plaintiff's subsequent action and request for punitive damages even though the forum for prior litigation lacked ability to award punitive damages).

The Court is powerless to reopen the prior judgments in which Plaintiff claims that recovery was reduced, especially because Plaintiff's clients and those he sued are not parties to this action. Even if it could, the Court's revision of those judgments—and the alleged reduction of recovery in those cases—would run contrary to the general principle that all litigation must come to an end. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (noting that the doctrine of res judicata flows “from the principle that public interest requires an end to litigation”); *Price v. City of Georgetown*, 297 S.C. 185, 187, 375 S.E.2d 335, 337 (Ct. App. 1988) (“The res judicata doctrine originated in the principle that the public interest requires an end of litigation.”). South Carolina has a strong policy in favor of finality of judgments and Plaintiff should not be permitted to mount this collateral attack on those judgments. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (emphasizing Court's “longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments.”). Had he truly believed in the unconstitutionality of the two acts, then he should have raised that argument in the prior cases. He failed to do so. As a result, he is barred from doing so here under the doctrine of res judicata.

V. Plaintiff's federal and state law claims fail as a matter of law under Rule 12(b)(6).

Even ignoring the presumptive validity of the two acts Plaintiff challenges here, *see Horry Cnty. Sch. Dist.*, 346 S.C. at 631, 552 S.E.2d at 742, Plaintiff's complaint fails “to state facts

sufficient to constitute a cause of action.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). As a result, the Court should dismiss the complaint under Rule 12(b)(6), SCRCPP.

A. Plaintiff cannot maintain an action based on his reduced collection of attorneys’ fees in unrelated, prior litigation.

Plaintiff claims that he has “had recovery reduced based on the 2005 Act and the 2011 Act.” (Compl. ¶¶ 18, 23.) Assuming this allegation relates to reduction of the attorneys’ fees he collected in prior cases, then he has failed to state a claim as a matter of law.

Under South Carolina law, fee agreements are private agreements between the lawyer and client. Plaintiff would have been required to negotiate with his clients the amount of fees he was going to collect before he undertook the representation in the prior litigation he references in this complaint. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). Whether Plaintiff could have collected a higher fee from his clients in prior, unrelated litigation is wholly divorced from the two acts he challenges here. Those acts do not limit the attorneys’ fees Plaintiff could have charged his clients. Indeed, the acts make no mention of attorneys’ fees.

Accordingly, Plaintiff should look to his clients, and not the parties here, to collect more fees. *See Peppertree Resorts, Ltd. v. Cabana Ltd. P’ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 601 (Ct. App. 1993) (“The general rule is an attorney must look to his client for compensation.”). Any failure of Plaintiff’s clients to abide by the terms of their fee agreements, or any second-thoughts Plaintiff may now have about the fee-amount he negotiated is a matter for Plaintiff to address with his clients—not the parties to this lawsuit.

B. Plaintiff cannot state a § 1983 claim because it is time-barred.

“Section 1983 permits a plaintiff to recover damages when an individual, acting under the color of state law, transgresses a federally created right of the plaintiff.” *Williams v. Condon*, 347

S.C. 227, 248, 553 S.E.2d 496, 507 (Ct. App. 2001) (citations omitted). Like any claim, it is subject to being barred by failing to bring the claim within the applicable statute of limitations. Because § 1983 does not have its own statute of limitations, though, courts apply the analogous state law personal injury statute of limitations in § 1983 actions. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a “personal injury” statute of limitations period for § 1983 actions). Under South Carolina law, § 1983 claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530(5) (providing a three-year limitations period for personal injury actions); *Estate of Mims v. S.C. Dep’t of Disabilities & Special Needs*, 422 S.C. 388, 399, 811 S.E.2d 807, 813 (Ct. App. 2018) (applying statute of limitations in § 1983 action), *cert. denied* (Aug. 3, 2018).

“One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)). The acts Plaintiff challenges were passed thirteen and seven years ago. Yet h did not bring this § 1983 challenge to the substance of the acts until 2018. Plaintiff’s own Complaint shows he has slept on his rights by waiting seven years—more than twice the applicable limitations period—to bring this § 1983 action. *See* S.C. Code Ann. § 15-3-530(5). *Moates*, 322 S.C. at 176, 470 S.E.2d at 404. Instead of rewarding Plaintiff for failing to bring his claim sooner, the Court should instead dismiss his § 1983 challenge as untimely under Rule 12(b)(6).⁵

⁵ Moreover, Plaintiff’s claim against the Secretary of State and his office is subject to dismissal because neither is a “person” under § 1983: *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (explaining that the state, nor a state official acting in an official capacity, are “persons” under § 1983); *Wyatt v. Fowler*, 326 S.C. 97, 101–02, 484 S.E.2d 590, 592–93 (1997). Further, the injunctive relief requested in connection with this claim fails as a matter of law as Plaintiff is not likely to prevail as the acts comply with the constitution as stated in Sections I and II, herein.

VI. Plaintiff lacks standing to raise any procedural defects and to challenge the substance of the two acts.

“Standing to sue is a fundamental requirement in instituting any action.” *Joytime Distribs. & Amus. Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Like subject matter jurisdiction, the parties cannot waive standing. *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998). Whether a plaintiff has standing is a threshold question that must be answered before analyzing the merits of a claim. *See ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 194–95, 669 S.E.2d 337, 339 (2008).

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called ‘constitutional standing’; and (3) under the public importance exception to standing.” *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). Plaintiff does not claim any statute gives him standing, nor does he plead an exception to standing, so he must plead traditional injury-in-fact standing, known as “constitutional” standing. (Compl. ¶¶ 16, 18, 23.)

To have constitutional standing, a plaintiff “must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Under constitutional standing, South Carolina courts apply the same three-prong test as the federal courts apply under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Sea Pines Ass’n*, 345 S.C. at 603, 550 S.E.2d at 292.

The first element under *Lujan* is whether a plaintiff has an “injury-in-fact,” which requires “an invasion of a legally protected interest” that is “concrete and particularized.” *Lujan*, 504 U.S.

at 560. For an injury to be particularized, it “must affect the plaintiff in a personal and individual way,” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292; to be concrete, the injury “must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016). Second, the plaintiff must establish “a causal connection between the injury and the conduct complained of,” showing that the injury is fairly traceable to the action for which the plaintiff sues. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292 (quoting *Lujan*, 504 U.S. at 559–61). Third, the plaintiff must establish that it is “likely . . . that the injury will be ‘redressed by a favorable decision.’” *Id.* These elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation.” *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (quoting *Lujan*, 504 U.S. at 561).

A. Any alleged harm to Plaintiff’s prior clients does not directly affect Plaintiff in an individual way, nor can it be redressed by this Court.

Plaintiff claims that he “has made litigation decisions and has had recovery reduced based on the 2005 Act and the 2011 Act.” (Compl. ¶¶ 18, 23.) Assuming Plaintiff’s “reduced recovery” allegation relates to reduction of damage awards to his clients, Plaintiff can hardly be said to be the real party in interest to seek redress for that claimed injury. *Sea Pines Ass’n.*, 345 S.C. at 600, 550 S.E.2d at 291. The reduction of money received by Plaintiff’s clients did not affect Plaintiff “in a personal and individual way.” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292. Instead, the reduction affected only his clients—Plaintiff’s connection to that alleged harm as his clients’ attorney was only nominal or technical. *Id.* Allowing Plaintiff to proceed under such an attenuated harm would allow him to challenge an infinite number of laws merely because he previously represented a litigant whose case involved that law.

A favorable decision here could offer no redress to his clients for the alleged reduction in their prior recovery—they are not parties. Even assuming those judgments—which are presumably final—could be set aside, Plaintiff cannot establish that his clients would have recovered more had the two challenged acts not been applied in their cases. First, the issue of whether the two acts applied to the damages have since become law of the case. *See Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 542, 201 S.E.2d 245, 247 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case). Second, other factual or legal defenses may very well have changed their recovery. Any suggestion by Plaintiff that his clients' recovery would have increased but for the legislative acts is merely "conjectural" or "hypothetical," rendering such an allegation insufficiently concrete to give Plaintiff standing. *Lujan*, 504 U.S. at 560.

B. Plaintiff fails to establish that his failure to receive higher attorneys' fees in the prior litigation is traceable to the two challenged acts.

If Plaintiff's reference to "reduced recovery" in his Complaint instead means that the attorneys' fees he collected were not high enough, Plaintiff still lacks standing. As set forth above, the amount of fees Plaintiff collected is a private matter between him and his clients that would have been addressed by his fee agreements. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). The two acts challenged here do not address the attorneys' fees Plaintiff could have charged his clients, so to the extent that Plaintiff suggests that this failure to collect as much as he would have liked is a cognizable injury, such an injury is not

caused by the legislative acts Plaintiff challenges. And even if it could be fairly traced to the legislation, a favorable decision here could not give Plaintiff the redress he seeks because the parties to those judgments and fee awards are not before the Court.

Even taking this allegations as true as the Court must do on a motion to dismiss, Plaintiff's claim that recovery was reduced is not sufficiently "concrete and particularized," regardless of whether Plaintiff relies on his clients' recovery or his own enrichment through attorneys' fees. *Lujan*, 504 U.S. at 560. As a result, Plaintiff lacks standing. Thus, the Court need not reach the merits of Plaintiff's claim, *see Lennon*, 330 S.C. at 417–18, 498 S.E.2d at 908 (require a justiciable case or controversy before any decision on the merits can be reached), but should instead dismiss the complaint for failure to state a claim sufficient to constitute a cause of action, Rule 12(b)(6), SCRCPP; *Joytime*, 338 S.C. at 639, 528 S.E.2d at 649.⁶

CONCLUSION

Plaintiff's claims are legally defective in a number of respects. Thus, for the reasons set forth above, the Court should dismiss the Complaint with prejudice.

[Electronic signatures to follow.]

⁶ Because Plaintiff lacks standing, so too does the purported class he references in the complaint. (*See* Compl. ¶¶ 15–16.) Not only is the complaint devoid of any factual allegations regarding this purported class, but also Plaintiff lacks the authority to bind non-parties here. *See Langford v. McLeod*, 269 S.C. 466, 474, 238 S.E.2d 161, 164 (1977) ("Although petitioner purports or speaks for a class of those similarly situated, there has been no notice to class members nor showing that petitioner can properly protect the interests of all alleged class members.").

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Columbia, South Carolina
November 8, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Joshua Hawkins,) Civil Action No. 2018-CP-04-00955

Plaintiffs,)

vs.)

PRIORITY MOTION

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

**Joint Motion to Transfer Venue and
Memorandum in Support
by the Honorable James H. Lucas and the
Honorable Hugh K. Leatherman, Sr.**

Defendants,)

and)

Hugh K. Leatherman, Sr., in his capacity
as President *Pro Tempore* of the South
Carolina Senate, and James "Jay" Lucas,
in his official capacity as the Speaker of
the South Carolina House of
Representatives,

Intervenors.)

James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the "Speaker") and Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate (the "President *Pro Tempore*") move to transfer venue to Richland County under Rules 12(b)(3) and 82(b), SCRCP.¹

State law requires suits against public officials and agencies be brought where the action arose. S.C. Code Ann. § 15-7-20(2) (venue for suits against public officers); S.C. Code Ann. § 15-77-50 (suits against state agencies and officials). Our Supreme Court has explained that section 15-7-20 "is mandatory, providing that actions against public officers for acts done by them in

¹ The Speaker and the President *Pro Tempore* simultaneously filed a Motion to Dismiss; however, this motion takes priority because of the venue-transfer statute's mandatory application here.

virtue of their offices must be tried in the county where the cause of action or some part thereof arose, subject only to the power of the court to change the place of trial.” *Stalheim v. Doskocil*, 275 S.C. 252, 254, 269 S.E.2d 346, 347 (1980). So too has the court construed section 15-77-50 as mandatory. *Whetstone v. S.C. Dep't of Highways & Pub. Transp.*, 272 S.C. 324, 327, 252 S.E.2d 35, 37 (1979) (rejecting argument that S.C. Code Ann. § 15-77-50 “is permissive and should not operate to mandate the venue of actions against” state agencies).

In *Stalheim*, a plaintiff was attacked in Florence County by an escapee from a state mental health facility. *Id.* at 253-54, 269 S.E.2d 346, 346-47. The facility’s superintendent, the State Commissioner of Mental Health, and the facility’s psychiatrist moved to transfer venue, the circuit court agreed and the plaintiff appealed. *Id.* Our Supreme Court upheld the transfer of an action to Richland County, explaining

Where venue is proper in more than one county, the plaintiff ordinarily is given the rights to elect. However we are persuaded by the reasoning of those courts which have construed substantially identical statutes and have held venue to be in the county in which the public officer allegedly performed the acts giving rise to the action. Otherwise, public servants might be required to defend lawsuits in any distant county of the State and encounter inflamed local feelings and prejudice. At this point the plaintiff’s private convenience must yield to the public good.

Id. at 255, 269 S.E.2d at 347 (citations and footnote omitted).

There is no dispute that Plaintiff sues both a State official and a State agency. Thus, where the cause of action arose, not where the Plaintiff resides or practices law, determines venue here. S.C. Code Ann. § 15-7-20(2); S.C. Code Ann. § 15-77-50.

Plaintiff sues the Secretary of State for failing to comply with Article III, § 18 of the South Carolina Constitution. (Compl. ¶¶ 7–8, 11.)² He also sues to enjoin the application of two separate

² Both the Speaker and the President Pro Tempore have intervened in their official capacities.

state acts as being substantively unconstitutional. (Compl. ¶¶ 14, 23–27.) While Plaintiff claims that venue is proper in Anderson County because he made litigation decisions in Anderson County, the crux of his claim is the procedural and substantive constitutionality of the two legislative acts. (Compl. ¶¶ 16, 18, 23.) Both the passing of these acts and the affixation of the State’s Great Seal occurred in Richland County. Therefore, transfer of venue to Richland County is required.

CONCLUSION

Plaintiff’s claims arose in Richland County—the county in which the two acts he challenges were passed and the county in which he alleges the Secretary of State should have sealed the two acts. Therefore, the Court should transfer venue to Richland County.

[Electronic signatures to follow.]

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Columbia, South Carolina
November 8, 2018

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) TENTH JUDICIAL CIRCUIT
 COUNTY OF ANDERSON)

Joshua Hawkins,) Civil Action No. 2018-CP-04-00955
)

Plaintiffs,)
)

vs.)
)

Secretary of State Mark Hammond,)
 South Carolina Secretary of State's)
 Office,)

Defendants,)
)

and)
)

Hugh K. Leatherman, Sr., in his capacity)
 as President *Pro Tempore* of the South)
 Carolina Senate, and James "Jay" Lucas,)
 in his official capacity as the Speaker of)
 the South Carolina House of)
 Representatives,)
)

Intervenors.)
)

**Joint Motion to Dismiss and
 Memorandum in Support
 by the Honorable James H. Lucas and the
 Honorable Hugh K. Leatherman, Sr.**

James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the "Speaker") and Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate (the "President *Pro Tempore*") move to dismiss the Complaint filed by Plaintiff Joshua Hawkins pursuant to Rule 12(b)(6), SCRPC.¹

INTRODUCTION

Plaintiff asks the Court to declare two separate pieces of legislation unconstitutional. He attacks (1) 2005 Senate Bill 83, enrolled as 2005 S.C. Acts 32 (the "2005 Act") and (2) 2011 House Bill 3375, known as the South Carolina Fairness in Civil Justice Act, enrolled as 2011 S.C. Acts

¹ The Speaker and the President *Pro Tempore* also move to transfer venue by separate motion filed contemporaneously with this motion.

52 (the “2011 Act”). The Complaint alleges that because the Secretary of State allegedly did not affix South Carolina’s Great Seal to the acts in 2005 and 2011, those acts are invalid. While the constitution does require the Great Seal to be affixed to acts of the General Assembly, the purpose of doing so is to authenticate the acts. The Great Seal does not become part of the law. Nor can its absence render a law unenforceable.

While the Constitution’s procedural requirements for legislative acts are mandatory, our Supreme Court has recognized the doctrine of substantial compliance. *Smith v. Jennings*, 67 S.C. 324, 332, 45 S.E. 821, 824 (1903). Thus, the laws challenged can be properly authenticated through other means, thereby demonstrating substantial compliance. Moreover, later compliance with the Constitutional provision has retroactive effect. *State v. Toomer*, 41 S.C.L. (7 Rich.) 216, 229–30 (1854). The public records show that the Great Seal is currently affixed to both acts. (See Exhibit 1 – Certified Copy of the 2005 Act; Exhibit 2 – Certified Copy of the 2011 Act.).² Thus, the acts both comply with the Constitution’s Great Seal requirement even if the seal was affixed after the act was passed as Plaintiff suggests and any alleged defect has been cured rendering this case moot. Further, Plaintiff’s claim fails because the Code Commissioner has codified both of the acts Plaintiff challenges here. Their codification further supports the acts’ authenticity and cures any procedural defects, such as the absence of the Great Seal now that the laws are codified.

Plaintiff’s claim is also barred by *res judicata*. The Complaint alleges that monetary recovery was “reduced” by the two challenged acts in unspecified, prior civil actions in which

² The Court may rely on these certified copies from the Department of Archives and History because Plaintiff expressly references them in the Complaint. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (permitting reference of material outside of the pleadings); accord *E.I. duPont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011). Alternatively, the Speaker requests the Court take judicial notice of these certified public records. See Rule 201(b)(2), SCRE; Rule 1005, SCRE.

Plaintiff served as counsel and made litigation decisions based on the laws. Those unspecified cases have ended given that those unnamed plaintiffs gained some form of “recovery.” In those prior civil actions, neither Plaintiff nor his clients argued that the subject acts’ were unconstitutional in those cases, nor did Plaintiff appeal those cases. As a result, the constitutional challenge is foreclosed and *res judicata* bars the action. To the extent that Plaintiff argues the attorneys’ fees he received as counsel in those prior cases were reduced, those fees would have been governed by a private agreement between Plaintiff and his clients, not the statutes challenged here, which have no provision regarding attorneys’ fees. Thus, Plaintiff fails to state a claim for which relief can be granted. *See* Rule 12(b)(6), SCRPC. On similar grounds, he also lacks standing.

For any and all these reasons, the Court should dismiss the Complaint with prejudice.

BACKGROUND

Plaintiff, a licensed South Carolina attorney, filed this action challenging the constitutionality of the 2005 Act and the 2011 Act. (Compl. ¶¶ 1, 9–10.) The 2005 Act placed limits on non-economic damages claimed by plaintiffs in civil lawsuits, modified the state’s application of joint and several liability, imposed penalties for frivolous civil proceedings, imposed requirements for the use of expert witnesses in certain professional malpractice actions, and implemented a mediation program to be utilized prior to instituting medical malpractice claims. (Compl. ¶ 9.) The 2011 Act implemented certain limitations on punitive damages, required insurance companies to provide certain information to licensed attorneys, and revised the types of actions for constructive defect claims. (Compl. ¶ 10.) The Code Commissioner codified these two acts into the State’s general laws in February 2018. *See* 2018 S.C. Acts 129, § 3.

Plaintiff alleges he is entitled to declaratory judgment under state law that the two acts are invalid because the South Carolina Secretary of State failed to affix the State's Great Seal to them when the General Assembly passed them in 2005 and 2011. (Compl. ¶ 11.) He relies on Article III, Section 18 of the South Carolina Constitution, which requires the Great Seal to be affixed to bills and joint resolutions. (Compl. ¶ 6.) Plaintiff further alleges under federal law that the two acts must be enjoined "because tort reform laws which arbitrarily cap damages and deprive injured individuals of a jury trial, among other arbitrary limitations on injured individuals' rights" (Compl. ¶ 25.) Plaintiff alleges the provisions of both laws violate the Fourth, Fifth, Seventh, and Fourteenth Amendments to the United States Constitution, thereby entitling him to injunctive relief under 42 U.S.C. § 1983 (and presumably attorneys' fees under 42 U.S.C. § 1988). (Compl. ¶ 27.) Plaintiff alleges his right to relief is based upon the contention he has "made litigation decisions and has had recovery reduced based on the 2005 Act and 2011 Act." (Compl. ¶¶ 18, 23.)

By consent, the Speaker and President *Pro Tempore* intervened. (Mot. Intervene, July 2, 2018.) This joint motion follows.

ARGUMENT

I. The absence of the Great Seal does not render the challenged acts unconstitutional.

The South Carolina Constitution states that no

Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives

S.C. Const. art. III, § 18 (1895). The South Carolina Supreme Court has explained that the purpose of this provision is the self-authentication of laws passed by the General Assembly. *Wingfield v.*

S.C. Tax Comm'n, 147 S.C. 116, 144 S.E. 846, 850 (1928). The South Carolina Attorney General has opined similarly. S.C. Att'y. Gen Op., 2017 WL 6189878 (Dec. 1, 2017).

Though the Great Seal must appear on the act, the Constitution does not require the Great Seal to create the law—that authority rests exclusively with the General Assembly. *See* S.C. Const. art. III, § 18. As a result, its omission from an act cannot invalidate it. A ruling to the contrary would ignore the authenticating purpose of Article III, § 18, and the alternative methods for fulfilling that purpose. A ruling to the contrary would also condone an absurd result: it would grant to the Secretary of State veto power over any acts passed by the General Assembly and signed by the Governor. *See State v. Long*, 406 S.C. 511, 515, 753 S.E.2d 425, 427 (2014) (rejecting interpretation of constitutional provision that would have led to an absurd result); *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (explaining that Courts generally must avoid interpretation statutes to create absurd results). Instead, the record confirms that the two acts substantially comply with the constitutional procedure proscribed by Article III, § 18. Thus, the Court should dismiss Plaintiff's Complaint.

A. Plaintiff's claim fails because the acts substantially comply with the Constitutional provision.

When interpreting Article III, § 18, our Supreme Court has recognized that “literal compliance with certain mandatory formulas is not exacted, but that a substantial compliance is sufficient.” *Jennings*, 67 S.C. at 332, 45 S.E. at 824; *see also* S.C. Att'y. Gen. Op., 2017 WL 6189878, at *2, 7 (Dec. 1, 2017). In *Jennings*, the plaintiff sued to enjoin enforcement of a 1903 bond act requiring the State Treasurer to write-off certain state bonds. *Jennings*, 67 S.C. at 332, 45 S.E. at 824. The plaintiff claimed that the 1903 act was invalid in part because it did not state, “Be it enacted by the General Assembly of the state of South Carolina” as required by the Constitution. *Id.* at 325, 45 S.E. at 822. The Court rejected the plaintiff's argument that

“absolutely literal compliance with the form prescribed is essential to valid legislation,” holding that “while the constitutional provision as to form of enacting clause is mandatory, that a substantial compliance with the mandate will be sufficient.” *Id.*, 67 S.C. at 332, 45 S.E. at 824.

Jennings’ substantial compliance principle applies here. The two acts bear all the other indicia of authenticity: the signatures of the Speaker of the South Carolina House of Representatives and the President of the South Carolina Senate on the date the acts were ratified, and the Governor’s signature days later. *See* 2005 Act, Ex. 1 at 24 (Mar. 31, 2005); 2001 Act, Ex. 2 at 8 (June 8, 2011). The legislative journals also confirm that the two challenged acts went through three readings, received a majority of votes in both chambers, and were enrolled. *See* Journal of the House of Representatives at 25, 116th Session (March 29, 2005) (noting enrollment of 2005 Act); Journal of the House of Representatives at 54, 119th Session (June 2, 2011) (noting enrollment of 2011 Act). Thus, the two acts were properly authenticated regardless of the affixation of the Great Seal.

Cases from other jurisdictions demonstrate similar procedural steps in a legislative process serve to authenticate acts of the legislature, so the omission of a single step in the process does not render the acts invalid. For example, in *Leavenworth County Commissioners v. Higginbotham*, the Kansas Supreme Court was asked to determine whether the failure of the presiding officer of the senate to sign a passed bill rendered it unconstitutional. 17 Kan. 62, 75 (1876). In a section of its opinion titled “authenticating bills,” the court explained that the “only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill. Such signatures are only portions of the many evidences of the due passage and validity of the bill.” *Id.* at 78; *see also Amos v. Gunn*, 84 Fla 285 (1922) (“The bills that have been passed in both houses are required to be signed by the stated officers of the respective houses,

not as part of the procedure that is essential to enactment, but for purposes of verity by designated official identification and authentication.”); *Brown v. Morris*, 365 Mo. 946, 952, 290 S.W.2d 160, 164 (1956) (“It is generally recognized that the purpose of requiring legislative enactments to be signed by the presiding officers is to provide a ‘mode of authentication’ evidencing the fact that a particular bill has been passed in due form by the legislative body involved.”) (en banc).

Plaintiff does not allege that the General Assembly did not pass the two acts. To the contrary, the record before the Court confirms that the General Assembly properly passed the acts, that the Governor did not veto them, and that the acts were properly enrolled. Thus, the acts substantially comply with Article III, § 18’s authenticating purpose. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824. As a result, the Court must presume the acts are valid. *See Horry Cnty. Sch. Dist. v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). To defeat that presumption at this juncture, Plaintiff must plead sufficient facts to establish that the two are unconstitutional. Plaintiff has not done so, nor could he do so—the public records confirm the procedural validity of those acts and the General Assembly’s substantial compliance with Article III, § 18. His legal conclusions that the two acts are unconstitutional are not enough. *See Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct. App. 2001). Accordingly, the Court should dismiss Plaintiff’s complaint.

B. South Carolina courts have applied the two challenged acts over the last fourteen years, also confirming their authenticity.

Moreover, state and federal courts have regularly enforced the two acts Plaintiff challenges here. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 175, 758 S.E.2d 501, 503 (2014) (reviewing dismissal for failure to comply with notice of intent and expert witness requirements of Section 5 of the 2005 Act, codified as S.C. Code Ann. § 15–79–125); *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) (enforcing joint and several liability provision of Section 16 of the

2005 Act, codified as S.C. Code Ann. § 15-38-15); *Gov't Employees Ins. Co. v. Poole*, 424 S.C. 1, 5, 817 S.E.2d 283, 286 (2018) (citing provision implemented under Section two of the 2011 Act, S.C. Code Ann. § 15-32-520(D), and noting that “state law has limited the instances in which punitive damages may be awarded.”); *Boyle v. United States*, 948 F. Supp. 2d 577, 581 (D.S.C. 2012) (enforcing noneconomic damages limitations from 2005 Act codified in S.C. Code Ann. § 15-32-220); *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. CV 9:17-1575-RMG, 2018 WL 679454, at *3 (D.S.C. Feb. 2, 2018) (declining to apply exceptions to statute of repose included in Section five of the 2011 Act, codified as S.C. Code Ann. § 15-3-670).

Plaintiff's Complaint even concedes that the two challenged acts have been frequently enforced in cases he has tried before he brought this lawsuit.³ (Compl. ¶ 13.) This pattern of enforcement by state and federal courts for over fourteen years additionally confirms the authenticity of the two challenged acts, regardless of whether the Great Seal had been affixed to them. Therefore, Plaintiff's claim that the two challenged acts are unconstitutional is inconsistent with South Carolina law.

II. The Great Seal is affixed to the challenged acts, rendering Plaintiff's claim moot.

In addition to the other indicia of authenticity of the two acts, the attached certified copies of the 2005 Act and the 2011 Act show that the acts have the Great Seal affixed to them currently. *See* Ex. 1 at 1; Ex. 2 at 1. This further authenticates the acts, but also shows that the acts fully satisfy the requirement of Article III, § 18. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824 (concluding

³ In fact, Plaintiff has an appeal currently pending before the Court of Appeals in which Plaintiff argues on his client's behalf that the 2011 Act's punitive damages caps are unconstitutional. *See Garrison v. Target Corporation*, No. 2017-000267 (S.C. Ct. App.). An argument he failed to make in the unspecified actions alluded to in this Complaint where he claims reduced recovery was had:

“literal compliance” with procedural provision is unnecessary). This is not just substantial compliance, but actual compliance with Article III, § 18.

Moreover, the acts bear the Great Seal. When the Secretary of State fulfilled the constitutional requirement by affixing the Great Seal is immaterial—the two acts remain valid even retrospectively. *See Toomer*, 41 S.C.L. (7 Rich.) at 229–30 (upholding appointment of court officer retroactively despite his commission lacking appropriate seal). The South Carolina Attorney General agrees that the Secretary of State’s sealing of the two acts relates back to the date of enactment. *See S.C. Att’y. Gen Op.*, 2017 WL 6189878, at *8 (Dec. 1, 2017).

The public record upon which the court can consider in a 12(b)(6) motion, shows that today, the two acts Plaintiff challenges have the Great Seal and are both located in the South Carolina Department of Archives and History. *See Ex. 1 at 1; Ex. 2 at 1*. Therefore, the Constitution’s Great Seal requirement has been satisfied and the two acts are properly authenticated. Accordingly, Plaintiff’s declaratory judgment claim is now moot and dismissal is proper. *See S.C. Ret. Sys. Inv. Comm’n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758–59 (2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. Where there is no actual controversy, this Court will not decide moot or academic questions.”).⁴

⁴ If anything, Plaintiff’s relief lies in mandamus, requiring the Secretary of State to affix the Great Seal to those act previously passed by the General Assembly under his mandatory and ministerial duty. *See Green v. Thornton*, 265 S.C. 436, 440, 219 S.E.2d 827, 828 (1975) (classifying certain duties of the Secretary of State as “mandatory and ministerial,” not discretionary); *Edwards v. State*, 383 S.C. 82, 95–96, 678 S.E.2d 412, 419 (2009) (permitting mandamus relief for failure of public official to take ministerial action). But mandamus relief would be redundant now—the acts Plaintiff challenges now have the Great Seal as Plaintiff concedes. (Compl. ¶ 14.)

III. The codification of the two challenged acts into the state's general law also renders Plaintiff's claims moot.

Codification is a legislative process by which legislative acts become a permanent part of the general statutory law of the State. When the code supplements (recognized by many as the white paperbound portions of the code) become too large and bulky, state law authorizes the Legislative Council and the Code Commissioner to suggest that the General Assembly consider and approve the incorporation of those supplements into new or revised volumes of the code. S.C. Code Ann. § 2-13-90. That approval takes the form of a bill passed under the formalities for the passage of any other laws, meaning three readings of the bill in each chamber, majority vote, and signature by the Governor. *See* S.C. Code Ann. § 2-13-170. The result is that the replacement volume becomes the only general permanent statutory law of the State. *Id.*

Our Supreme Court has recognized that the codification process cures procedural defects in acts passed by the General Assembly, even constitutional defects. In *York Electric Cooperative*, the Court addressed a constitutional challenge to the “South Carolina Uniform Disposition of Unclaimed Property Act” under another procedural constitutional provision. *See S.C. Tax Comm’n v. York Elec. Coop., Inc.*, 275 S.C. 326, 331–33, 270 S.E. 2d 626, 629–30 (1980). The Court found that the Unclaimed Property Act violated a procedural provision of the Constitution—the One Subject Rule under Article III, § 17—because the act was included in the General Appropriations Act of 1971 and was not related to the raising and expenditure of tax monies. *See id.* at 331, 270 S.E.2d at 629. Despite expressly finding that the act was procedurally unconstitutional, the Supreme Court held that the unconstitutionality “at the time of its enactment . . . is now of no consequence, since it was reenacted as a part of the codification of the 1976 Code of Laws.” *Id.* The Court went on to hold further that because the challenged act “was properly incorporated into

the 1976 Code, and declared by the General Assembly to be a part of the general statutory law of the State, the constitutional objection that it originally violated Article III, Section 17, must be overruled.” *Id.* at 331–32, 270 S.E.2d at 629; *see also Wrought-Iron Range Co. v. Carver*, 118 N.C. 328, 24 S.E. 352, 355–56 (1896) (holding that omission presiding officers’ signatures was constitutionally immaterial once the challenged act had been codified). The curing of the procedural defect by codification renders the procedural challenge moot.

York Electric Cooperative requires dismissal here. Even before Plaintiff filed his Complaint, the General Assembly considered and passed Senate Bill 882 to codify and adopt the 2017 Cumulative Supplements as part of the Code of Laws. Specifically, the codification bill states that the

2017 Cumulative Supplements to the Code of Laws of South Carolina, 1976, are adopted as part of the Code of Laws. These supplements, volumes as supplemented by them, and the replacement volumes referred to in Section 2 of this act, constitute the only general permanent statutory law of the State as of January 1, 2018.

2018 S.C. Acts 129, § 3. The bill followed all the formalities for the passage of laws under the South Carolina Constitution, and was ultimately signed into law by Governor McMaster in February 2018, becoming Act 129. *Id.* Following their passage, the two acts Plaintiff challenges here appeared in the paperbound supplements to the Code that have gotten too large for the hardbound volumes. *See, e.g.,* 2005 S.C. Acts 32, § 2, codified a S.C. Code Ann. § 15-32-200 (Supp. 2017). Since then, however, the two acts have become a part of the Code of Laws through the re-codification process. *See id.* Because of this re-codification into the State’s general law, any perceived procedural defect claimed by Plaintiff no longer exists, mooting his claim. Accordingly, the Court should dismiss Plaintiff’s Complaint rather than answering the purely “academic questions” Plaintiff now poses. *See Loftis*, 402 S.C. at 384, 741 S.E.2d at 758–59.

IV. Res Judicata bars Plaintiff's constitutional challenge because he failed to raise the argument in the prior cases he alludes to in the Complaint.

The doctrine of res judicata explains the effect a judgment may have on subsequent litigation involving similar issues. Claim preclusion bars not only claims or issues that were asserted, but also those that could have been asserted. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (“Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”).

Plaintiff repeatedly alleges that the acts have unconstitutionally “reduced” recovery in prior civil actions. (Compl. ¶¶ 13, 16, 18, 23.) Though he does not specify the cases in which the acts reduced the recovery, those cases are over because Plaintiff uses the past tense “reduced.” (*Id.*) This means those actions were adjudicated and are final, yet Plaintiff did not raise the constitutional issue in those cases, nor did he appeal. Because this constitutional challenge was not made in those actions, it is now barred under the doctrine of res judicata.

Because res judicata “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* at 642 (1996)), it is immaterial that the remedy requested in the two actions differs. In *Plum Creek Development Company*, our Supreme Court applied res judicata’s bar to prevent a plaintiff from obtaining damages in a second suit where he had sought only mandamus relief in a prior action. *Plum Creek Dev. Co.*, 334 S.C. at 35, 512 S.E.2d at 109. The Court explained that a “different remedy, however, does not alter the fact that the claims are identical in both the mandamus action and current damage action.” *Id.* Here, Plaintiff’s attempt to obtain declaratory relief—rather than the monetary relief he sought for his clients and himself in prior actions—is no different from the

plaintiff in *Plum Creek* seeking mandamus and then monetary relief. Those cases still act to bar his claims here. The degree of recovery in the prior action is similarly irrelevant. *Judy v. Judy*, 393 S.C. 160, 173–74, 712 S.E.2d 408, 415 (2011) (applying res judicata to bar plaintiff's subsequent action and request for punitive damages even though the forum for prior litigation lacked ability to award punitive damages).

The Court is powerless to reopen the prior judgments in which Plaintiff claims that recovery was reduced, especially because Plaintiff's clients and those he sued are not parties to this action. Even if it could, the Court's revision of those judgments—and the alleged reduction of recovery in those cases—would run contrary to the general principle that all litigation must come to an end. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (noting that the doctrine of res judicata flows “from the principle that public interest requires an end to litigation”); *Price v. City of Georgetown*, 297 S.C. 185, 187, 375 S.E.2d 335, 337 (Ct. App. 1988) (“The res judicata doctrine originated in the principle that the public interest requires an end of litigation.”). South Carolina has a strong policy in favor of finality of judgments and Plaintiff should not be permitted to mount this collateral attack on those judgments. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (emphasizing Court's “longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments.”). Had he truly believed in the unconstitutionality of the two acts, then he should have raised that argument in the prior cases. He failed to do so. As a result, he is barred from doing so here under the doctrine of res judicata.

V. Plaintiff's federal and state law claims fail as a matter of law under Rule 12(b)(6).

Even ignoring the presumptive validity of the two acts Plaintiff challenges here, *see Horry Cnty. Sch. Dist.*, 346 S.C. at 631, 552 S.E.2d at 742, Plaintiff's complaint fails “to state facts

sufficient to constitute a cause of action.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). As a result, the Court should dismiss the complaint under Rule 12(b)(6), SCRCp.

A. Plaintiff cannot maintain an action based on his reduced collection of attorneys’ fees in unrelated, prior litigation.

Plaintiff claims that he has “had recovery reduced based on the 2005 Act and the 2011 Act.” (Compl. ¶¶ 18, 23.) Assuming this allegation relates to reduction of the attorneys’ fees he collected in prior cases, then he has failed to state a claim as a matter of law.

Under South Carolina law, fee agreements are private agreements between the lawyer and client. Plaintiff would have been required to negotiate with his clients the amount of fees he was going to collect before he undertook the representation in the prior litigation he references in this complaint. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). Whether Plaintiff could have collected a higher fee from his clients in prior, unrelated litigation is wholly divorced from the two acts he challenges here. Those acts do not limit the attorneys’ fees Plaintiff could have charged his clients. Indeed, the acts make no mention of attorneys’ fees.

Accordingly, Plaintiff should look to his clients, and not the parties here, to collect more fees. *See Peppertree Resorts, Ltd. v. Cabana Ltd. P’ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 601 (Ct. App. 1993) (“The general rule is an attorney must look to his client for compensation.”). Any failure of Plaintiff’s clients to abide by the terms of their fee agreements, or any second-thoughts Plaintiff may now have about the fee-amount he negotiated is a matter for Plaintiff to address with his clients—not the parties to this lawsuit.

B. Plaintiff cannot state a § 1983 claim because it is time-barred.

“Section 1983 permits a plaintiff to recover damages when an individual, acting under the color of state law, transgresses a federally created right of the plaintiff.” *Williams v. Condon*, 347

S.C. 227, 248, 553 S.E.2d 496, 507 (Ct. App. 2001) (citations omitted). Like any claim, it is subject to being barred by failing to bring the claim within the applicable statute of limitations. Because § 1983 does not have its own statute of limitations, though, courts apply the analogous state law personal injury statute of limitations in § 1983 actions. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a “personal injury” statute of limitations period for § 1983 actions). Under South Carolina law, § 1983 claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530(5) (providing a three-year limitations period for personal injury actions); *Estate of Mims v. S.C. Dep’t of Disabilities & Special Needs*, 422 S.C. 388, 399, 811 S.E.2d 807, 813 (Ct. App. 2018) (applying statute of limitations in § 1983 action), *cert. denied* (Aug. 3, 2018).

“One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)). The acts Plaintiff challenges were passed thirteen and seven years ago. Yet h did not bring this § 1983 challenge to the substance of the acts until 2018. Plaintiff’s own Complaint shows he has slept on his rights by waiting seven years—more than twice the applicable limitations period—to bring this § 1983 action. *See* S.C. Code Ann. § 15-3-530(5). *Moates*, 322 S.C. at 176, 470 S.E.2d at 404. Instead of rewarding Plaintiff for failing to bring his claim sooner, the Court should instead dismiss his § 1983 challenge as untimely under Rule 12(b)(6).⁵

⁵ Moreover, Plaintiff’s claim against the Secretary of State and his office is subject to dismissal because neither is a “person” under § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (explaining that the state, nor a state official acting in an official capacity, are “persons” under § 1983); *Wyatt v. Fowler*, 326 S.C. 97, 101–02, 484 S.E.2d 590, 592–93 (1997). Further, the injunctive relief requested in connection with this claim fails as a matter of law as Plaintiff is not likely to prevail as the acts comply with the constitution as stated in Sections I and II, herein.

VI. Plaintiff lacks standing to raise any procedural defects and to challenge the substance of the two acts.

“Standing to sue is a fundamental requirement in instituting any action.” *Joytime Distribs. & Amus. Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Like subject matter jurisdiction, the parties cannot waive standing. *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998). Whether a plaintiff has standing is a threshold question that must be answered before analyzing the merits of a claim. *See ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 194–95, 669 S.E.2d 337, 339 (2008).

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called ‘constitutional standing’; and (3) under the public importance exception to standing.” *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). Plaintiff does not claim any statute gives him standing, nor does he plead an exception to standing, so he must plead traditional injury-in-fact standing, known as “constitutional” standing. (Compl. ¶¶ 16, 18, 23.)

To have constitutional standing, a plaintiff “must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Under constitutional standing, South Carolina courts apply the same three-prong test as the federal courts apply under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292.

The first element under *Lujan* is whether a plaintiff has an “injury-in-fact,” which requires “an invasion of a legally protected interest” that is “concrete and particularized.” *Lujan*, 504 U.S.

at 560. For an injury to be particularized, it “must affect the plaintiff in a personal and individual way,” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292; to be concrete, the injury “must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016). Second, the plaintiff must establish “a causal connection between the injury and the conduct complained of,” showing that the injury is fairly traceable to the action for which the plaintiff sues. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292 (quoting *Lujan*, 504 U.S. at 559–61). Third, the plaintiff must establish that it is “likely . . . that the injury will be ‘redressed by a favorable decision.’” *Id.* These elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stage of the litigation.” *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (quoting *Lujan*, 504 U.S. at 561).

A. Any alleged harm to Plaintiff’s prior clients does not directly affect Plaintiff in an individual way, nor can it be redressed by this Court.

Plaintiff claims that he “has made litigation decisions and has had recovery reduced based on the 2005 Act and the 2011 Act.” (Compl. ¶¶ 18, 23.) Assuming Plaintiff’s “reduced recovery” allegation relates to reduction of damage awards to his clients, Plaintiff can hardly be said to be the real party in interest to seek redress for that claimed injury. *Sea Pines Ass’n.*, 345 S.C. at 600, 550 S.E.2d at 291. The reduction of money received by Plaintiff’s clients did not affect Plaintiff “in a personal and individual way.” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292. Instead, the reduction affected only his clients—Plaintiff’s connection to that alleged harm as his clients’ attorney was only nominal or technical. *Id.* Allowing Plaintiff to proceed under such an attenuated harm would allow him to challenge an infinite number of laws merely because he previously represented a litigant whose case involved that law.

A favorable decision here could offer no redress to his clients for the alleged reduction in their prior recovery—they are not parties. Even assuming those judgments—which are presumably final—could be set aside, Plaintiff cannot establish that his clients would have recovered more had the two challenged acts not been applied in their cases. First, the issue of whether the two acts applied to the damages have since become law of the case. *See Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 542, 201 S.E.2d 245, 247 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case). Second, other factual or legal defenses may very well have changed their recovery. Any suggestion by Plaintiff that his clients' recovery would have increased but for the legislative acts is merely "conjectural" or "hypothetical," rendering such an allegation insufficiently concrete to give Plaintiff standing. *Lujan*, 504 U.S. at 560.

B. Plaintiff fails to establish that his failure to receive higher attorneys' fees in the prior litigation is traceable to the two challenged acts.

If Plaintiff's reference to "reduced recovery" in his Complaint instead means that the attorneys' fees he collected were not high enough, Plaintiff still lacks standing. As set forth above, the amount of fees Plaintiff collected is a private matter between him and his clients that would have been addressed by his fee agreements. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). The two acts challenged here do not address the attorneys' fees Plaintiff could have charged his clients, so to the extent that Plaintiff suggests that this failure to collect as much as he would have liked is a cognizable injury, such an injury is not

caused by the legislative acts Plaintiff challenges. And even if it could be fairly traced to the legislation, a favorable decision here could not give Plaintiff the redress he seeks because the parties to those judgments and fee awards are not before the Court.

Even taking this allegations as true as the Court must do on a motion to dismiss, Plaintiff's claim that recovery was reduced is not sufficiently "concrete and particularized," regardless of whether Plaintiff relies on his clients' recovery or his own enrichment through attorneys' fees. *Lujan*, 504 U.S. at 560. As a result, Plaintiff lacks standing. Thus, the Court need not reach the merits of Plaintiff's claim, *see Lennon*, 330 S.C. at 417–18, 498 S.E.2d at 908 (require a justiciable case or controversy before any decision on the merits can be reached), but should instead dismiss the complaint for failure to state a claim sufficient to constitute a cause of action, Rule 12(b)(6), SCRCPP; *Joytime*, 338 S.C. at 639, 528 S.E.2d at 649.⁶

CONCLUSION

Plaintiff's claims are legally defective in a number of respects. Thus, for the reasons set forth above, the Court should dismiss the Complaint with prejudice.

[Electronic signatures to follow.]

⁶ Because Plaintiff lacks standing, so too does the purported class he references in the complaint. (See Compl. ¶¶ 15–16.) Not only is the complaint devoid of any factual allegations regarding this purported class, but also Plaintiff lacks the authority to bind non-parties here. *See Langford v. McLeod*, 269 S.C. 466, 474, 238 S.E.2d 161, 164 (1977) ("Although petitioner purports or speaks for a class of those similarly situated, there has been no notice to class members nor showing that petitioner can properly protect the interests of all alleged class members.").

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Columbia, South Carolina
November 8, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	C.A. No.: 2018-CP-04-00955
	)	
Joshua Hawkins,	)	
	)	
Plaintiff,	)	
	)	
	)	MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
	)	
Vs.	)	
	)	
Secretary of State Mark Hammond, South	)	
Carolina Secretary of State's Office,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS, AND COUNSEL FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for the Plaintiff, Joshua Hawkins, will move before the Presiding Judge of the Tenth Judicial Circuit at the Anderson County Courthouse, Anderson, South Carolina, for an Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for partial summary judgment as to the validity and enforceability of the 2011 South Carolina Fairness in Civil Justice Act (also cited as Act No. 52 of 2011 and Ratified Act No. 86 of 2011) (hereinafter "the 2011 Act") under the South Carolina Constitution¹. The motion is based on the following grounds:

1. Article 3 Section 18 of the South Carolina Constitution provides that "[n]o Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, **has had the Great Seal of the State affixed to it**, and has been signed

¹ The Plaintiff reserves the right to argue that the 2011 Act and similar "tort reform" laws infringe on the rights of citizens afforded by the 4th, 5th, 7th, and 14th Amendments to the United States Constitution by, among other reasons, arbitrarily capping damages awards, imposing additional unconstitutional procedural requirements that make it cost prohibitive to pursue and otherwise viable claim, and various other tort reform measures that are unconstitutional. Additionally, Plaintiff reserves the right to demonstrate, anecdotally and factually, the fundamentally dangerous and unjust nature of tort reform laws. *See, e.g.* Bail, L. (2018). [podcast] Dr. Death. Available at: <https://wondery.com/shows/dr-death/>; *see also* *Hot Coffee*. (2011). [Film] Directed by S. Saladoff. HBO.

by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only.” (emphasis added).

2. It is now undisputed that the Great Seal of the State was not applied to the 2011 Act until November 7, 2017 at the earliest². As such, the earliest date that the 2011 Act could have been enforceable is November 7, 2017.

3. As the 2011 Act eliminated remedies for existing rights and diminished the rights of persons under disability, the 2011 Act applies only prospectively from the date the Great Seal was applied, and not retroactively. *Wiesart v. Stewart*, 665 S.E.2d 187, 379 S.C. 300 (S.C. App., 2008). Accordingly, the 2011 Act was only operative from November 7, 2017 forward, assuming it is otherwise constitutional³.

4. Therefore, the Plaintiff asks the Court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and S.C. Code. § 15-53-10, et. seq., declaring that the 2011 Act was invalid and unenforceable until the Great Seal was applied on November 7, 2017 (using the earliest possible date), and that it was only prospectively operative from that day forward, assuming *arguendo* that it was otherwise constitutional.

This motion is based on the pleadings, the matters on file with the Court regarding this case, the South Carolina Rules of Civil Procedure, the Laws of the State of South Carolina, the Case Law of the State of South Carolina, discovery materials, and such other matters and materials which may be properly presented to the Court at the time of the hearing.

² The Defendant has responded to the Plaintiff’s discovery requests, indicating that the Great Seal was applied to the 2011 Act “between the dates of November 7, 2017 and November 17, 2017.”

³ See footnote 1.

November 8, 2018

/s/ Kyle J. White

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Joshua Hawkins and Floyd S. Mills, III,) Civil Action No. 2018-CP-04-00955

Plaintiffs,

vs.

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

Defendants,

and

Hugh K. Leatherman, Sr., in his capacity
as President *Pro Tempore* of the South
Carolina Senate, and James "Jay" Lucas,
in his official capacity as the Speaker of
the South Carolina House of
Representatives,

Intervenors.

**Joint Motion to Dismiss Amended
Complaint
and**

**Memorandum in Support
by the Honorable James H. Lucas and the
Honorable Hugh K. Leatherman, Sr.**

James "Jay" Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the "Speaker") and Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate (the "President *Pro Tempore*") jointly move to dismiss the Amended Complaint filed by Plaintiffs Joshua Hawkins and Floyd S. Mills, III, pursuant to Rule 12(b)(6), SCRCP.¹

¹ The Speaker and the President *Pro Tempore* also move to dismiss for improper venue under Rule 12(b)(3), SCRCP. See S.C. Code Ann. § 15-7-20(2); S.C. Code Ann. § 15-77-50; *Stalheim v. Doskocil*, 275 S.C. 252, 254, 269 S.E.2d 346, 347 (1980); *Whetstone v. S.C. Dep't of Highways & Pub. Transp.*, 272 S.C. 324, 327, 252 S.E.2d 35, 37 (1979). The Speaker and the President *Pro Tempore* do not waive their rights to move to transfer venue to the proper venue, under more specific and mandatory venue provisions, prior to the "merits" being undertaken by a court.

INTRODUCTION

Plaintiffs ask the Court to declare two separate pieces of legislation unconstitutional. They attack (1) 2005 Senate Bill 83, enrolled as 2005 S.C. Acts 32 (the “2005 Act”) and (2) 2011 House Bill 3375, known as the South Carolina Fairness in Civil Justice Act, enrolled as 2011 S.C. Acts 52 (the “2011 Act”). The Amended Complaint alleges that because the Secretary of State allegedly did not affix South Carolina’s Great Seal to the acts in 2005 and 2011, those acts are invalid. While the constitution does require the Great Seal to be affixed to acts of the General Assembly, the purpose of doing so is to authenticate the acts. The Great Seal does not become part of the law. Nor can its absence render a law unenforceable.

While the Constitution’s procedural requirements for legislative acts are mandatory, our Supreme Court has recognized the doctrine of substantial compliance. *Smith v. Jennings*, 67 S.C. 324, 332, 45 S.E. 821, 824 (1903). Thus, the laws challenged can be properly authenticated through other means, thereby demonstrating substantial compliance. Moreover, later compliance with the Constitutional provision has retroactive effect. *State v. Toomer*, 41 S.C.L. (7 Rich.) 216, 229–30 (1854). The public records show that the Great Seal is currently affixed to both acts. (See Exhibit 1 – Certified Copy of the 2005 Act; Exhibit 2 – Certified Copy of the 2011 Act.).² Thus, the acts both comply with the Constitution’s Great Seal requirement even if the seal was affixed after the act was passed as Plaintiffs suggest and any alleged defect has been cured rendering this case moot. Further, Plaintiffs’ claim fails because the Code Commissioner has codified both of

² The Court may rely on these certified copies from the Department of Archives and History because Plaintiffs expressly reference them in the Amended Complaint. See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (permitting reference of material outside of the pleadings); accord *E.I. duPont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435 (4th Cir. 2011). Alternatively, the Speaker and President *Pro Tempore* request the Court take judicial notice of these certified public records. See Rule 201(b)(2), SCRE; Rule 1005, SCRE.

the acts Plaintiffs challenge here. Their codification further supports the acts' authenticity and cures any procedural defects, such as the absence of the Great Seal now that the laws are codified.

Plaintiffs' claim are also barred by *res judicata*. The Amended Complaint alleges that monetary recovery was "reduced" by the two challenged acts in unspecified, prior civil actions in which Plaintiffs served as counsel and made litigation decisions based on the laws. Those unspecified cases have ended given that those unnamed plaintiffs gained some form of "recovery." In those cases, Plaintiffs nor their clients raised the issues before this Court. As a result, *res judicata* bars this action. To the extent that Plaintiffs argue the attorneys' fees they received as counsel in those prior cases were reduced, those fees would have been governed by a private agreement between Plaintiffs and their clients, not the statutes challenged here, which have no provision regarding attorneys' fees. Thus, Plaintiffs fail to state a claim for which relief can be granted. *See* Rule 12(b)(6), SCRCP. On similar grounds, they also lack standing.

For any and all of these reasons, the Court should dismiss the Amended Complaint with prejudice.

BACKGROUND

Plaintiffs are licensed South Carolina attorneys, at least one of which practices and has an office in Anderson County. (Amend. Compl. ¶¶ 1–2, 4, 17.) They filed this action challenging the constitutionality of the 2005 Act and the 2011 Act alleging that they have experienced "reduced recovery" because of the laws at issue. (Amend. Compl. ¶¶ 4, 17, 19, 24.) The 2005 Act placed limits on non-economic damages claimed by plaintiffs in civil lawsuits, modified the state's application of joint and several liability, imposed penalties for frivolous civil proceedings, imposed requirements for the use of expert witnesses in certain professional malpractice actions, and implemented a mediation program to be utilized prior to instituting medical malpractice claims.

(Amend. Compl. ¶ 11.) The 2011 Act implemented certain limitations on punitive damages, required insurance companies to provide certain information to licensed attorneys, and revised the types of actions for constructive defect claims. (Amend. Compl. ¶ 12.) The Code Commissioner codified these acts into the State's general laws in February 2018. *See* 2018 S.C. Acts 129, § 3.

Plaintiffs allege they are entitled to declaratory judgment under state law that the two acts are invalid because the South Carolina Secretary of State failed to affix the State's Great Seal to them when the General Assembly passed them in 2005 and 2011. (Amend. Compl. ¶ 13.) They rely on Article III, Section 18 of the South Carolina Constitution, which requires the Great Seal to be affixed to bills and joint resolutions. (Amend. Compl. ¶ 8.) Plaintiffs further allege under federal law that the two acts must be enjoined "because tort reform laws which arbitrarily cap damages and deprive injured individuals of a jury trial, among other arbitrary limitations on injured individuals' rights" (Amend. Compl. ¶ 28.) Plaintiffs allege the provisions of both laws violate the Fourth, Fifth, Seventh, and Fourteenth Amendments to the United States Constitution, thereby entitling him to injunctive relief under 42 U.S.C. § 1983 (and presumably attorneys' fees under 42 U.S.C. § 1988). (Amend. Compl. ¶ 26.) Plaintiffs allege their right to relief is based on their status as residents and taxpayers. (Amend. Compl. ¶ 4.) They also claim they have experienced "reduced recovery in the past, . . . also have pending cases subject to the laws at issue, will have future cases subject to the laws at issue, and have and will be personally affected by the laws at issue as citizens of South Carolina." (Amend. Compl. ¶ 4.) Both Plaintiffs claim to practice law in Anderson County, (Amend. Compl. ¶¶ 4, 17), and Plaintiff Mills argues he has an office in Anderson County, (Amend. Compl. ¶ 2).

By consent, the Speaker and President *Pro Tempore* intervened. (Mot. Intervene, July 2, 2018.) Plaintiffs filed an Amended Complaint. The Speaker and President *Pro Tempore* now jointly move to dismiss the Amended Complaint.

ARGUMENT

I. The absence of the Great Seal does not render the challenged acts unconstitutional.

The South Carolina Constitution states that no

Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives

S.C. Const. art. III, § 18 (1895). The South Carolina Supreme Court has explained that the purpose of this provision is the self-authentication of laws passed by the General Assembly. *Wingfield v. S.C. Tax Comm'n*, 147 S.C. 116, 144 S.E. 846, 850 (1928). The South Carolina Attorney General has opined similarly. S.C. Att'y. Gen Op., 2017 WL 6189878 (Dec. 1, 2017).

Though the Great Seal must appear on the act, the Constitution does not require the Great Seal to create the law—that authority rests exclusively with the General Assembly. *See* S.C. Const. art. III, § 18. As a result, its omission from an act cannot invalidate it. A ruling to the contrary would ignore the authenticating purpose of Article III, § 18, and the alternative methods for fulfilling that purpose. A ruling to the contrary would also condone an absurd result: it would grant to the Secretary of State veto power over any acts passed by the General Assembly and signed by the Governor. *See State v. Long*, 406 S.C. 511, 515, 753 S.E.2d 425, 427 (2014) (rejecting interpretation of constitutional provision that would have led to an absurd result); *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (explaining that Courts generally must avoid interpreting statutes to create absurd

results). Instead, the record confirms that the two acts substantially comply with the constitutional procedure proscribed by Article III, § 18. Thus, the Court should dismiss Plaintiffs' Amended Complaint.

A. Plaintiffs' claim fails because the acts substantially comply with the Constitutional provision.

When interpreting Article III, § 18, our Supreme Court has recognized that "literal compliance with certain mandatory formulas is not exacted, but that a substantial compliance is sufficient." *Jennings*, 67 S.C. at 332, 45 S.E. at 824; *see also* S.C. Att'y. Gen. Op., 2017 WL 6189878, at *2, 7 (Dec. 1, 2017). In *Jennings*, the plaintiff sued to enjoin enforcement of a 1903 bond act requiring the State Treasurer to write-off certain state bonds. *Jennings*, 67 S.C. at 332, 45 S.E. at 824. The plaintiff claimed that the 1903 act was invalid in part because it did not state, "Be it enacted by the General Assembly of the state of South Carolina" as required by the Constitution. *Id.* at 325, 45 S.E. at 822. The Court rejected the plaintiff's argument that "absolutely literal compliance with the form prescribed is essential to valid legislation," holding that "while the constitutional provision as to form of enacting clause is mandatory, that a substantial compliance with the mandate will be sufficient." *Id.*, 67 S.C. at 332, 45 S.E. at 824.

Jennings' substantial compliance principle applies here. The two acts bear all the other indicia of authenticity: the signatures of the Speaker of the South Carolina House of Representatives and the President of the South Carolina Senate on the date the acts were ratified, and the Governor's signature days later. *See* 2005 Act, Ex. 1 at 24 (Mar. 31, 2005); 2001 Act, Ex. 2 at 8 (June 8, 2011). The legislative journals also confirm that the two challenged acts went through three readings, received a majority of votes in both chambers, and were enrolled. *See* Journal of the House of Representatives at 25, 116th Session (March 29, 2005) (noting enrollment of 2005 Act); Journal of the House of Representatives at 54, 119th Session (June 2, 2011) (noting

enrollment of 2011 Act). Thus, the two acts were properly authenticated regardless of the affixation of the Great Seal.

Cases from other jurisdictions demonstrate similar procedural steps in a legislative process serve to authenticate acts of the legislature, so the omission of a single step in the process does not render the acts invalid. For example, in *Leavenworth County Commissioners v. Higginbotham*, the Kansas Supreme Court was asked to determine whether the failure of the presiding officer of the senate to sign a passed bill rendered it unconstitutional. 17 Kan. 62, 75 (1876). In a section of its opinion titled “authenticating bills,” the court explained that the “only office that the signatures of the presiding officers is intended to perform, is to furnish evidence of the due passage and validity of the bill. Such signatures are only portions of the many evidences of the due passage and validity of the bill.” *Id.* at 78; *see also Amos v. Gunn*, 84 Fla 285 (1922) (“The bills that have been passed in both houses are required to be signed by the stated officers of the respective houses, not as part of the procedure that is essential to enactment, but for purposes of verity by designated official identification and authentication.”); *Brown v. Morris*, 365 Mo. 946, 952, 290 S.W.2d 160, 164 (1956) (“It is generally recognized that the purpose of requiring legislative enactments to be signed by the presiding officers is to provide a ‘mode of authentication’ evidencing the fact that a particular bill has been passed in due form by the legislative body involved.”) (en banc).

Plaintiffs do not allege that the two acts failed to pass the General Assembly. To the contrary, the record before the Court confirms that the General Assembly properly passed the acts, that the Governor did not veto them, and that the acts were properly enrolled. Thus, the acts substantially comply with Article III, § 18’s authenticating purpose. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824. As a result, the Court must presume the acts are valid. *See Horry Cnty. Sch. Dist. v. Horry County*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001). To defeat that presumption at

this juncture, Plaintiffs must plead sufficient facts to establish that the two are unconstitutional. Plaintiffs have not done so, nor could they do so—the public records confirm the procedural validity of those acts and the General Assembly’s substantial compliance with Article III, § 18. Their legal conclusions that the two acts are unconstitutional are not enough. *See Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 426, 559 S.E.2d 362, 364–65 (Ct. App. 2001). Accordingly, the Court should dismiss Plaintiffs’ Amended Complaint.

B. South Carolina courts have applied the two challenged acts over the last fourteen years, also confirming their authenticity.

Moreover, state and federal courts have regularly enforced the two acts Plaintiffs challenge here. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 175, 758 S.E.2d 501, 503 (2014) (reviewing dismissal for failure to comply with notice of intent and expert witness requirements of Section 5 of the 2005 Act, codified as S.C. Code Ann. § 15-79-125); *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (2017) (enforcing joint and several liability provision of Section 16 of the 2005 Act, codified as S.C. Code Ann. § 15-38-15); *Gov’t Employees Ins. Co. v. Poole*, 424 S.C. 1, 5, 817 S.E.2d 283, 286 (2018) (citing provision implemented under Section two of the 2011 Act, S.C. Code Ann. § 15-32-520(D), and noting that “state law has limited the instances in which punitive damages may be awarded.”); *Boyle v. United States*, 948 F. Supp. 2d 577, 581 (D.S.C. 2012) (enforcing noneconomic damages limitations from 2005 Act codified in S.C. Code Ann. § 15-32-220); *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, No. CV 9:17-1575-RMG, 2018 WL 679454, at *3 (D.S.C. Feb. 2, 2018) (declining to apply exceptions to statute of repose included in Section five of the 2011 Act, codified as S.C. Code Ann. § 15-3-670).

Plaintiffs’ Amended Complaint even concedes that the two challenged acts have been frequently enforced in cases they have tried before bringing this lawsuit. (Amend Compl. ¶¶ 17,

19.) This pattern of enforcement by state and federal courts for over fourteen years additionally confirms the authenticity of the two challenged acts, regardless of whether the Great Seal had been affixed to them. Therefore, Plaintiffs' claim that the two challenged acts are unconstitutional is inconsistent with South Carolina law.

II. The Great Seal is affixed to the challenged acts, rendering Plaintiffs' claim moot.

In addition to the other indicia of authenticity of the two acts, the attached certified copies of the 2005 Act and the 2011 Act show that the acts have the Great Seal affixed to them currently. *See* Ex. 1 at 1; Ex. 2 at 1. This further authenticates the acts, but also shows that the acts fully satisfy the requirement of Article III, § 18. *See Jennings*, 67 S.C. at 332, 45 S.E. at 824 (concluding "literal compliance" with procedural provision is unnecessary). This is not just substantial compliance, but actual compliance with Article III, § 18.

Moreover, the acts bear the Great Seal. When the Secretary of State fulfilled the constitutional requirement by affixing the Great Seal is immaterial—the two acts remain valid even retrospectively. *See Toomer*, 41 S.C.L. (7 Rich.) at 229–30 (upholding appointment of court officer retroactively despite his commission lacking appropriate seal). The South Carolina Attorney General agrees that the Secretary of State's sealing of the two acts relates back to the date of enactment. *See* S.C. Att'y. Gen Op., 2017 WL 6189878, at *8 (Dec. 1, 2017).

The public record upon which the court can consider in a 12(b)(6) motion, shows that today, the two acts Plaintiffs challenge have the Great Seal and are both located in the South Carolina Department of Archives and History. *See* Ex. 1 at 1; Ex. 2 at 1. Therefore, the Constitution's Great Seal requirement has been satisfied and the two acts are properly authenticated. Accordingly, Plaintiffs' declaratory judgment claim is now moot and dismissal is proper. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758–59

(2013) (“A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court. Where there is no actual controversy, this Court will not decide moot or academic questions.”).

If anything, Plaintiffs’ relief lies in mandamus, requiring the Secretary of State to affix the Great Seal to those act previously passed by the General Assembly under his mandatory and ministerial duty. *See Green v. Thornton*, 265 S.C. 436, 440, 219 S.E.2d 827, 828 (1975) (classifying certain duties of the Secretary of State as “mandatory and ministerial,” not discretionary); *Edwards v. State*, 383 S.C. 82, 95–96, 678 S.E.2d 412, 419 (2009) (permitting mandamus relief for failure of public official to take ministerial action). But mandamus relief would be redundant now—the acts Plaintiffs challenge now have the Great Seal as Plaintiffs concede. (Amend. Compl. ¶ 15.) This too would moot any relief Plaintiffs could seek in mandamus. *See Loftis*, 402 S.C. at 384, 741 S.E.2d at 758–59.

III. The codification of the two challenged acts into the state’s general law also renders Plaintiffs’ claims moot.

Codification is a legislative process by which legislative acts become a permanent part of the general statutory law of the State. When the code supplements (recognized by many as the white paperbound portions of the code) become too large and bulky, state law authorizes the Legislative Council and the Code Commissioner to suggest that the General Assembly consider and approve the incorporation of those supplements into new or revised volumes of the code. S.C. Code Ann. § 2-13-90. That approval takes the form of a bill passed under the formalities for the passage of any other laws, meaning three readings of the bill in each chamber, majority vote, and signature by the Governor. *See* S.C. Code Ann. § 2-13-170. The result is that the replacement volume becomes the only general permanent statutory law of the State. *Id.*

Our Supreme Court has recognized that the codification process cures procedural defects in acts passed by the General Assembly, even constitutional defects. In *York Electric Cooperative*, the Court addressed a constitutional challenge to the “South Carolina Uniform Disposition of Unclaimed Property Act” under another procedural constitutional provision. See *S.C. Tax Comm’n v. York Elec. Coop., Inc.*, 275 S.C. 326, 331–33, 270 S.E. 2d 626, 629–30 (1980). The Court found that the Unclaimed Property Act violated a procedural provision of the Constitution—the One Subject Rule under Article III, § 17—because the act was included in the General Appropriations Act of 1971 and was not related to the raising and expenditure of tax monies. See *id.* at 331, 270 S.E.2d at 629. Despite expressly finding that the act was procedurally unconstitutional, the Supreme Court held that the unconstitutionality “at the time of its enactment . . . is now of no consequence, since it was reenacted as a part of the codification of the 1976 Code of Laws.” *Id.* The Court went on to hold further that because the challenged act “was properly incorporated into the 1976 Code, and declared by the General Assembly to be a part of the general statutory law of the State, the constitutional objection that it originally violated Article III, Section 17, must be overruled.” *Id.* at 331–32, 270 S.E.2d at 629; see also *Wrought-Iron Range Co. v. Carver*, 118 N.C. 328, 24 S.E. 352, 355–56 (1896) (holding that omission presiding officers’ signatures was constitutionally immaterial once the challenged act had been codified). The curing of the procedural defect by codification renders the procedural challenge moot.

York Electric Cooperative requires dismissal here. Even before Plaintiff Joshua Hawkins filed his Complaint, the General Assembly considered and passed Senate Bill 882 to codify and adopt the 2017 Cumulative Supplements as part of the Code of Laws. Specifically, the codification bill states that the

2017 Cumulative Supplements to the Code of Laws of South Carolina, 1976, are adopted as part of the Code of Laws. These

supplements, volumes as supplemented by them, and the replacement volumes referred to in Section 2 of this act, constitute the only general permanent statutory law of the State as of January 1, 2018.

2018 S.C. Acts 129, § 3. The bill followed all the formalities for the passage of laws under the South Carolina Constitution, and was ultimately signed into law by Governor McMaster in February 2018, becoming Act 129. *Id.* Following their passage, the two acts Plaintiffs challenge here appeared in the paperbound supplements to the Code that have gotten too large for the hardbound volumes. *See, e.g.*, 2005 S.C. Acts 32, § 2, codified a S.C. Code Ann. § 15-32-200 (Supp. 2017). Since then, however, the two acts have become a part of the Code of Laws through the re-codification process. *See id.* Because of this re-codification into the State's general law, any perceived procedural defect claimed by Plaintiffs no longer exists, mooted their claim. Accordingly, the Court should dismiss Plaintiffs' Amended Complaint rather than answering the purely "academic questions" Plaintiffs now pose. *See Loftis*, 402 S.C. at 384, 741 S.E.2d at 758–59.

IV. Res Judicata bars Plaintiffs' constitutional challenge because the opportunity to raise the issues challenged herein was in the specific case or controversy in which Plaintiffs claim recovery was reduced.

The doctrine of res judicata bars subsequent litigation involving similar issues. Res judicata bars not only claims or issues that were asserted, but also those that could have been asserted. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) ("Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."). The doctrine bars those in privity from re-litigating issues as well. *See Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). While many courts hold that the attorney-client relationship alone establishes privity, *Weinberger v. Tucker*, 510 F.3d

486, 492–93 (4th Cir. 2007) (collecting cases), the key for privity is not the relationship between the parties, but “each party’s relationship to the subject matter of the litigation,” such that the subsequent litigant’s “legal interests were litigated in the former proceeding.” *Equivest Fin.*, 422 S.C. at 507, 812 S.E.2d at 442.

Plaintiffs repeatedly allege that the acts have unconstitutionally “reduced” recovery in prior civil actions. (Amend. Compl. ¶¶ 4, 17, 19, 24.) Though they do not specify the cases in which the acts reduced the recovery, those cases are over because Plaintiffs use the past tense “reduced.” (*Id.*) This means those actions were adjudicated and are final. Plaintiffs failed to raise this claim in those actions. They are in privity with their clients. Because Plaintiffs failed to plead or raise this claim in the actions of which they now complain, such claim is barred by the doctrine of res judicata.

Because res judicata “ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues,” *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108–09 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* at 642 (1996)), it is immaterial that the remedy requested in the two actions differs. In *Plum Creek Development Company*, our Supreme Court applied res judicata’s bar to prevent a plaintiff from obtaining damages in a second suit where he had sought only mandamus relief in a prior action. *Plum Creek Dev. Co.*, 334 S.C. at 35, 512 S.E.2d at 109. The Court explained that a “different remedy, however, does not alter the fact that the claims are identical in both the mandamus action and current damage action.” *Id.* Here, Plaintiffs’ attempt to obtain declaratory relief—rather than the monetary relief they sought for their clients and themselves in prior actions—is no different from the plaintiff in *Plum Creek* seeking mandamus and then monetary relief. Those cases still act to bar their claims here. The degree of recovery in the prior action is similarly irrelevant. *Judy*

v. *Judy*, 393 S.C. 160, 173–74, 712 S.E.2d 408, 415 (2011) (applying res judicata to bar plaintiff's subsequent action and request for punitive damages even though the forum for prior litigation lacked ability to award punitive damages).

The Court is powerless to reopen the prior judgments in which Plaintiffs claim that recovery was reduced, especially because Plaintiffs' clients and those they sued are not parties to this action. Even if it could, the Court's revision of those judgments—and the alleged reduction of recovery in those cases—would run contrary to the general principle that all litigation must come to an end. *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) (noting that the doctrine of res judicata flows “from the principle that public interest requires an end to litigation”); *Price v. City of Georgetown*, 297 S.C. 185, 187, 375 S.E.2d 335, 337 (Ct. App. 1988) (“The res judicata doctrine originated in the principle that the public interest requires an end of litigation.”). South Carolina has a strong policy in favor of finality of judgments and Plaintiffs should not be permitted to mount this collateral attack on those judgments. *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004) (emphasizing Court's “longstanding policy towards final judgments and that important benefits are achieved by the preservation of final judgments.”). Had they truly believed in the unconstitutionality of the two acts, then they should have raised that argument in the prior cases.³ They failed to do so. As a result, Plaintiffs are barred from doing so here under the doctrine of res judicata.

³ Plaintiffs clearly know how to challenge the constitutionality of the act(s). Plaintiff Joshua Hawkins has an appeal currently pending before the Court of Appeals in which he argues on his client's behalf that the 2011 Act's punitive damages caps are unconstitutional. See *Garrison v. Target Corporation*, No. 2017-000267 (S.C. Ct. App.). An argument Plaintiffs failed to make in the unspecified actions alluded to in this Amended Complaint where Plaintiffs allege reduced recovery was had.

V. Plaintiffs' federal and state law claims fail as a matter of law under Rule 12(b)(6).

Even ignoring the presumptive validity of the two acts Plaintiffs challenge here, *see Horry Cnty. Sch. Dist.*, 346 S.C. at 631, 552 S.E.2d at 742, Plaintiffs' Amended Complaint fails "to state facts sufficient to constitute a cause of action." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). As a result, the Court should dismiss the Amended Complaint under Rule 12(b)(6), SCRPC.

A. Plaintiffs cannot maintain an action based on his reduced collection of attorneys' fees in unrelated, prior litigation.

Plaintiffs claim that they have "had recovery reduced based on the 2005 Act and the 2011 Act." (Amend. Compl. ¶¶ 4, 17, 19, 24.) Assuming the allegations relate to reduction of the attorneys' fees they collected in prior cases, then they have failed to state a claim as a matter of law.

Under South Carolina law, fee agreements are private agreements between the lawyer and client. Plaintiffs would have been required to negotiate with their clients the amount of fees they were going to collect before they undertook the representation in the prior litigation he references in the Amended Complaint. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). Whether Plaintiffs could have collected a higher fee from their clients in prior, unrelated litigation is wholly divorced from the two acts he challenged here. Those acts do not limit the attorneys' fees Plaintiffs could have charged their clients. Indeed, the acts make no mention of attorneys' fees.

Accordingly, Plaintiffs should look to their clients, and not the parties here, to collect more fees. *See Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 40, 431 S.E.2d 598, 601 (Ct. App. 1993) ("The general rule is an attorney must look to his client for compensation."). Any failure of Plaintiffs' clients to abide by the terms of their fee agreements, or any second-thoughts

Plaintiffs may now have about the fee-amount they negotiated is a matter for Plaintiffs to address with their clients—not the parties to this lawsuit.

B. Plaintiffs cannot state a § 1983 claim because it is time-barred.

“Section 1983 permits a plaintiff to recover damages when an individual, acting under the color of state law, transgresses a federally created right of the plaintiff.” *Williams v. Condon*, 347 S.C. 227, 248, 553 S.E.2d 496, 507 (Ct. App. 2001) (citations omitted). Like any claim, it is subject to being barred by failing to bring the claim within the applicable statute of limitations. Because § 1983 does not have its own statute of limitations, though, courts apply the analogous state law personal injury statute of limitations in § 1983 actions. *See* 42 U.S.C. § 1988; *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (holding that courts must adopt a “personal injury” statute of limitations period for § 1983 actions). Under South Carolina law, § 1983 claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530(5) (providing a three-year limitations period for personal injury actions); *Estate of Mims v. S.C. Dep’t of Disabilities & Special Needs*, 422 S.C. 388, 399, 811 S.E.2d 807, 813 (Ct. App. 2018) (applying statute of limitations in § 1983 action), *cert. denied* (Aug. 3, 2018).

“One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct. App. 1989)). The acts Plaintiffs challenge were passed thirteen and seven years ago. Yet they did not bring this § 1983 challenge to the substance of the acts until 2018. Plaintiffs’ own Amended Complaint shows they have slept on their rights by waiting seven years—more than twice the applicable limitations period—to bring this § 1983 action. *See* S.C. Code Ann. § 15-3-530(5). *Moates*, 322 S.C. at 176, 470 S.E.2d at 404. Instead of rewarding Plaintiffs for failing to

bring their claim sooner, the Court should dismiss his § 1983 challenge as untimely under Rule 12(b)(6).⁴

VI. Plaintiffs lack standing to raise any procedural defects and to challenge the substance of the two acts.

“Standing to sue is a fundamental requirement in instituting any action.” *Joytime Distribs. & Amus. Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Like subject matter jurisdiction, the parties cannot waive standing. *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 908 (Ct. App. 1998). Whether a plaintiff has standing is a threshold question that must be answered before analyzing the merits of a claim. *See ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 194–95, 669 S.E.2d 337, 339 (2008).

“Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called ‘constitutional standing’; and (3) under the public importance exception to standing.” *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). Plaintiffs do not claim any statute gives them standing, nor do they plead an exception to standing, so they must plead traditional injury-in-fact standing, known as “constitutional” standing. (Amend. Compl. ¶¶ 4, 17, 19, 24.) While they make a passing reference to being South Carolina residents and taxpayers, this is insufficient to establish standing. *See Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013) (“[W]e unanimously closed

⁴ Moreover, Plaintiffs’ claim against the Secretary of State and his office is subject to dismissal because neither is a “person” under § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (explaining that the state, nor a state official acting in an official capacity, are “persons” under § 1983); *Wyatt v. Fowler*, 326 S.C. 97, 101–02, 484 S.E.2d 590, 592–93 (1997). Further, the injunctive relief requested in connection with this claim fails as a matter of law as Plaintiffs are not likely to prevail as the acts comply with the constitution as stated in Sections I and II, above.

the door to a litigant asserting standing simply by virtue of his status as a taxpayer[.]”); accord *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012).

To have constitutional standing, a plaintiff “must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). Under constitutional standing, South Carolina courts apply the same three-prong test as the federal courts apply under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292.

The first element under *Lujan* is whether a plaintiff has an “injury-in-fact,” which requires “an invasion of a legally protected interest” that is “concrete and particularized.” *Lujan*, 504 U.S. at 560. For an injury to be particularized, it “must affect the plaintiff in a personal and individual way,” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292; to be concrete, the injury “must actually exist.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016). Second, the plaintiff must establish “a causal connection between the injury and the conduct complained of,” showing that the injury is fairly traceable to the action for which the plaintiff sues. *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292 (quoting *Lujan*, 504 U.S. at 559–61). Third, the plaintiff must establish that it is “likely . . . that the injury will be ‘redressed by a favorable decision.’” *Id.* These elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required

at the successive stage of the litigation.” *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (quoting *Lujan*, 504 U.S. at 561).

A. Any alleged harm to Plaintiffs’ prior clients does not directly affect Plaintiffs in an individual way, nor can it be redressed by this Court.

Plaintiffs claim that they “are in constant danger of being personally affected by the laws at issue in the event that they have an event that results in an insurance claim or litigation. Not only have one or both Plaintiffs experience reduced recovery in the past, but the Plaintiffs also have pending cases subject to the laws at issue, will have future cases subject to the laws at issue, and have and will be personally affected by the laws at issue as citizens of South Carolina.” (Amend. Compl. ¶ 4.) Assuming Plaintiffs’ “reduced recovery” allegation relates to reduction of damage awards to their clients, Plaintiffs can hardly be said to be the real party in interest to seek redress for that claimed injury. *Sea Pines Ass’n.*, 345 S.C. at 600, 550 S.E.2d at 291. The reduction of money received by Plaintiffs’ clients did not affect Plaintiffs “in a personal and individual way.” *Sea Pines Ass’n.*, 345 S.C. at 603, 550 S.E.2d at 292. Instead, the reduction affected only their clients—Plaintiffs’ connection to that alleged harm as the clients’ attorney was only nominal or technical. *Id.* Allowing Plaintiffs to proceed under such an attenuated harm would allow them to challenge an infinite number of laws merely because they previously represented a litigant whose case involved that law.

A favorable decision here could offer no redress to Plaintiffs’ clients for the alleged reduction in their prior recovery—they are not parties. Even assuming those judgments—which are presumably final—could be set aside, Plaintiffs cannot establish that their clients would have recovered more had the two challenged acts not been applied in their cases. First, the issue of whether the two acts applied to the damages have since become law of the case. *See Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003) (holding that a family court judge could

not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry*, 261 S.C. 538, 542, 201 S.E.2d 245, 247 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case). Second, other factual or legal defenses may very well have changed their recovery. Any suggestion by Plaintiffs that their clients' recovery would have increased but for the legislative acts is merely "conjectural" or "hypothetical," rendering such an allegation insufficiently concrete to give Plaintiffs standing. *Lujan*, 504 U.S. at 560. Third, the Court cannot protect against hypothetical future harm in "future cases subject to the laws" Plaintiffs challenge here. (Amend. Compl. ¶ 4.) Plaintiffs' conclusory statement that they could be personally affected in future cases is also "conjectural" or "hypothetical." *Lujan*, 504 U.S. at 560.

B. Plaintiffs fail to establish that their failure to receive higher attorneys' fees in the prior litigation is traceable to the two challenged acts.

If Plaintiffs' references to "reduced recovery" in the Amended Complaint instead mean that the attorneys' fees they collected were not high enough, Plaintiffs still lacks standing. As set forth above, the amount of fees Plaintiffs collected is a private matter between Plaintiffs and their clients that would have been addressed by their fee agreements. *See* Rule 1.5, RPC, Rule 407, SCACR (requiring communication of fee agreements to clients). The two acts challenged here do not address the attorneys' fees Plaintiffs could have charged their clients, so to the extent that Plaintiffs suggests that their failure to collect as much as they would have liked is a cognizable injury, such an injury is not caused by the legislative acts Plaintiffs challenge. And even if it could be fairly traced to the legislation, a favorable decision here could not give Plaintiffs the redress they seek because the parties to those judgments and fee awards are not before the Court. *See*

Langford v. McLeod, 269 S.C. 466, 474, 238 S.E.2d 161, 164 (1977) (explaining that Court cannot bind non-parties).

Even taking this allegation as true as the Court must do on a motion to dismiss, Plaintiffs' claim that recovery was reduced is not sufficiently "concrete and particularized," regardless of whether Plaintiffs rely on their clients' recovery or his own enrichment through attorneys' fees. *Lujan*, 504 U.S. at 560. As a result, Plaintiffs lack standing. Thus, the Court need not reach the merits of Plaintiffs' claims, *see Lennon*, 330 S.C. at 417–18, 498 S.E.2d at 908 (require a justiciable case or controversy before any decision on the merits can be reached), but should instead dismiss the Amended Complaint for failure to state a claim sufficient to constitute a cause of action, Rule 12(b)(6), SCRCPP; *Joytime*, 338 S.C. at 639, 528 S.E.2d at 649.

CONCLUSION

Plaintiffs' claims are legally defective in a number of respects. Thus, for the reasons set forth above, the Court should dismiss the Amended Complaint with prejudice.

[Electronic signature to follow.]

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Columbia, South Carolina
December 20, 2018

Exhibit 1

Certified Copy of 2005 S.C. Acts 32

No. R 33
CLERK OF THE SENATE

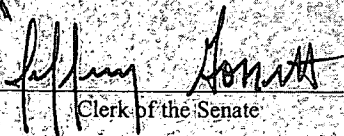
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CODE COMMISSIONER

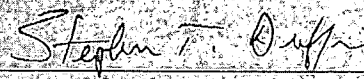
AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 3, CHAPTER 32 TO TITLE 15 SO AS TO ENACT THE "SOUTH CAROLINA NONECONOMIC DAMAGES AWARDS ACT OF 2005", TO DEFINE KEY TERMS, TO ESTABLISH PROCEDURES GOVERNING THE AWARDING OF NONECONOMIC DAMAGES SUCH AS PAIN AND SUFFERING, TO LIMIT THE AMOUNT OF AN AWARD FOR NONECONOMIC DAMAGES TO THREE HUNDRED FIFTY THOUSAND DOLLARS FOR EACH CLAIMANT, AND TO PROVIDE FOR EXCEPTIONS; BY ADDING SECTION 15-35-400, SO AS TO PROVIDE FOR OFFERS OF JUDGMENT AFTER COMMENCEMENT OF A CIVIL ACTION BASED ON CONTRACT OR SEEKING THE RECOVERY OF MONEY DAMAGES AND TO PROVIDE FOR CONSEQUENCES OF NONACCEPTANCE; BY ADDING SECTION 15-36-100, SO AS TO ESTABLISH STANDARDS FOR EXPERT WITNESSES IN PROFESSIONAL MALPRACTICE ACTIONS; BY ADDING CHAPTER 79 TO TITLE 15 SO AS TO DEFINE KEY TERMS, PROVIDE FOR MANDATORY MEDIATION, AND TO PERMIT BINDING ARBITRATION IN MEDICAL MALPRACTICE ACTIONS; BY ADDING SECTION 38-79-40, SO AS TO PROHIBIT A PERSON SERVING ON THE BOARD OF THE JOINT UNDERWRITING ASSOCIATION OR THE BOARD OF GOVERNORS OF THE PATIENTS' COMPENSATION FUND FROM BEING EMPLOYED OR COMPENSATED BY EITHER OF THESE AGENCIES; BY ADDING SECTION 38-79-155 SO AS TO REQUIRE MEDICAL MALPRACTICE INSURANCE CARRIERS TO PROVIDE AND MAINTAIN COVERAGE TO QUALIFIED LICENSED HEALTH CARE PROVIDERS; TO AMEND SECTION 38-79-460, RELATING TO THE PATIENTS' COMPENSATION FUND, SO AS TO PROVIDE THAT THE FUND SHALL BE MANAGED BY THE BOARD OF GOVERNORS RATHER THAN THE STATE TREASURER; TO AMEND SECTION 38-79-470, RELATING TO THE PATIENTS' COMPENSATION FUND, SO AS TO PROVIDE THAT MONEY IS TO BE WITHDRAWN FROM THE FUND UPON SIGNATURE OF THE CHAIRMAN OF THE BOARD OF

I Certify that the Within Originated in the Senate.

Correctly Enrolled


Clerk of the Senate

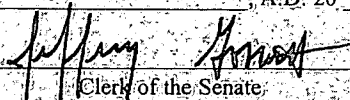

Stephen T. Draffin, Director
Legislative Council

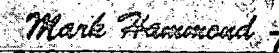
Delivered to the Governor, this MAR 31 2005

FILED
Delivered to the Secretary of State, this

day of _____, A.D. 20

day of APR 04 2005, A.D. 20


Clerk of the Senate


SECRETARY OF STATE

83
ELECTRONICALLY FILED - 2018 Dec 20 3:40 PM - ANDERSON - COMMON PLEAS CASE#2018CGPD0400955

GOVERNORS; TO AMEND SECTION 40-47-200, RELATING TO SUSPENSION OR REVOCATION OF A LICENSE TO PRACTICE MEDICINE OR OSTEOPATHY, SO AS TO REQUIRE NOTIFICATION TO THE PERSON'S LAST KNOWN EMPLOYER AND TO ANY PLACE WHERE THE PERSON HAS PRIVILEGES TO PRACTICE MEDICINE; TO AMEND SECTION 40-47-211, RELATING TO THE BOARD OF MEDICAL EXAMINERS, SO AS TO INCREASE THE MEMBERSHIP OF THE BOARD FROM THIRTY-SIX TO FORTY-EIGHT MEMBERS AND TO PROVIDE FOR LAY MEMBERS IN ADDITION TO THIRTY-SIX LICENSED PHYSICIANS; TO AMEND SECTION 40-71-10, AS AMENDED, RELATING TO MEMBERS OF PROFESSIONAL COMMITTEES EXEMPT FROM TORT LIABILITY, SO AS TO ADD THAT A MEMBER OF A PROFESSIONAL COMMITTEE IS NOT LIABLE FOR DAMAGES IN AN ACTION FOR RESTRAINT OF TRADE, A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT, OR ANOTHER ACTION BASED ON UNFAIR OR ILLEGAL COMPETITION UNLESS THE MEMBER ACTED WITH MALICE; BY ADDING SECTION 40-71-30, SO AS TO ALLOW CONFIDENTIAL DOCUMENTS TO BE FILED UNDER SEAL WITH THE CIRCUIT COURT WITH JURISDICTION OVER THE PENDING ACTION; AND TO AMEND SECTION 15-38-15, RELATING TO CIVIL LIABILITY, SO AS TO PROVIDE THAT INCLUSION OF ANY PERCENTAGE OF THE PLAINTIFF'S FAULT SHALL NOT REDUCE THE AMOUNT OF THE PLAINTIFF'S RECOVERABLE DAMAGES.

50150

33

THE STATE OF SOUTH CAROLINA

At A General Assembly Begun to be Holden, at
Columbia, on the Second Tuesday in January, in the
Year of Our Lord Two Thousand Five, and Thence
Continued by Divers Adjournments to the
_____ of _____

In the Year of Our Lord Two Thousand Five

AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 3, CHAPTER 32 TO TITLE 15 SO AS TO ENACT THE "SOUTH CAROLINA NONECONOMIC DAMAGES AWARDS ACT OF 2005", TO DEFINE KEY TERMS, TO ESTABLISH PROCEDURES GOVERNING THE AWARDING OF NONECONOMIC DAMAGES SUCH AS PAIN AND SUFFERING, TO LIMIT THE AMOUNT OF AN AWARD FOR NONECONOMIC DAMAGES TO THREE HUNDRED FIFTY THOUSAND DOLLARS FOR EACH CLAIMANT, AND TO PROVIDE FOR EXCEPTIONS; BY ADDING SECTION 15-35-400, SO AS TO PROVIDE FOR OFFERS OF JUDGMENT AFTER COMMENCEMENT OF A CIVIL ACTION BASED ON CONTRACT OR SEEKING THE RECOVERY OF MONEY DAMAGES AND TO PROVIDE FOR CONSEQUENCES OF NONACCEPTANCE; BY ADDING SECTION 15-36-100, SO AS TO ESTABLISH STANDARDS FOR EXPERT WITNESSES IN PROFESSIONAL MALPRACTICE ACTIONS; BY ADDING CHAPTER 79 TO TITLE 15 SO AS TO DEFINE KEY TERMS, PROVIDE FOR MANDATORY MEDIATION, AND TO PERMIT BINDING ARBITRATION IN MEDICAL MALPRACTICE ACTIONS; BY ADDING SECTION 38-79-40, SO AS TO PROHIBIT A PERSON SERVING ON THE BOARD OF THE JOINT UNDERWRITING ASSOCIATION OR THE BOARD OF GOVERNORS OF THE PATIENTS'

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COMPENSATION FUND FROM BEING EMPLOYED OR COMPENSATED BY EITHER OF THESE AGENCIES; BY ADDING SECTION 38-79-155 SO AS TO REQUIRE MEDICAL MALPRACTICE INSURANCE CARRIERS TO PROVIDE AND MAINTAIN COVERAGE TO QUALIFIED LICENSED HEALTH CARE PROVIDERS; TO AMEND SECTION 38-79-460, RELATING TO THE PATIENTS' COMPENSATION FUND, SO AS TO PROVIDE THAT THE FUND SHALL BE MANAGED BY THE BOARD OF GOVERNORS, RATHER THAN THE STATE TREASURER; TO AMEND SECTION 38-79-470, RELATING TO THE PATIENTS' COMPENSATION FUND, SO AS TO PROVIDE THAT MONEY IS TO BE WITHDRAWN FROM THE FUND UPON SIGNATURE OF THE CHAIRMAN OF THE BOARD OF GOVERNORS; TO AMEND SECTION 40-47-200, RELATING TO SUSPENSION OR REVOCATION OF A LICENSE TO PRACTICE MEDICINE OR OSTEOPATHY, SO AS TO REQUIRE NOTIFICATION TO THE PERSON'S LAST KNOWN EMPLOYER AND TO ANY PLACE WHERE THE PERSON HAS PRIVILEGES TO PRACTICE MEDICINE; TO AMEND SECTION 40-47-211, RELATING TO THE BOARD OF MEDICAL EXAMINERS, SO AS TO INCREASE THE MEMBERSHIP OF THE BOARD FROM THIRTY-SIX TO FORTY-EIGHT MEMBERS AND TO PROVIDE FOR LAY MEMBERS IN ADDITION TO THIRTY-SIX LICENSED PHYSICIANS; TO AMEND SECTION 40-71-10, AS AMENDED, RELATING TO MEMBERS OF PROFESSIONAL COMMITTEES EXEMPT FROM TORT LIABILITY, SO AS TO ADD THAT A MEMBER OF A PROFESSIONAL COMMITTEE IS NOT LIABLE FOR DAMAGES IN AN ACTION FOR RESTRAINT OF TRADE, A VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT, OR ANOTHER ACTION BASED ON UNFAIR OR ILLEGAL COMPETITION UNLESS THE MEMBER ACTED WITH MALICE; BY ADDING SECTION 40-71-30, SO AS TO ALLOW CONFIDENTIAL DOCUMENTS TO BE FILED UNDER SEAL WITH THE CIRCUIT COURT WITH JURISDICTION OVER THE PENDING ACTION; AND TO AMEND SECTION 15-38-15, RELATING TO CIVIL LIABILITY, SO AS TO PROVIDE THAT INCLUSION OF ANY PERCENTAGE OF THE PLAINTIFF'S FAULT SHALL NOT REDUCE THE AMOUNT OF THE PLAINTIFF'S RECOVERABLE DAMAGES.

Be it enacted by the General Assembly of the State of South Carolina:

PART I
GENERAL ASSEMBLY FINDINGS

General Assembly findings

SECTION 1. The General Assembly finds that the sections presented in this act constitute one subject as required by Article III, Section 17 of the South Carolina Constitution, in particular finding that each change and each topic relates directly to or in conjunction with other sections to the subject of tort and other civil action reform as clearly enumerated in the title.

The General Assembly further finds that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, notwithstanding that reasonable minds might differ in identifying more than one topic contained in the act.

PART II
DAMAGES

Noneconomic damages

SECTION 2. Title 15 of the 1976 Code is amended by adding:

“CHAPTER 32

Article 3
Noneconomic Damage Awards

Section 15-32-200. This article may be cited as the ‘South Carolina Noneconomic Damage Awards Act of 2005’.

Section 15-32-210. As used in this article, unless the context clearly requires otherwise:

(1) ‘Ambulatory surgical facility’ means a licensed, distinct, freestanding, self-contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers, for which patients are scheduled to arrive, receive surgery or related care, treatment,

procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.

(2) 'Claimant' means the person suffering personal injury.

(3) 'Economic damages' means pecuniary damages arising from medical expenses and medical care, rehabilitation services, costs associated with education, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, a claim for loss of spousal services, loss of employment, loss of business or employment opportunities, loss of retirement income, and other monetary losses.

(4) 'Health care institution' means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.

(5) 'Health care provider' means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.

(6) 'Hospital' means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty-four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.

(7) 'Institutional general infirmary' means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents, or inmates with illness, injury, or infirmity for a period exceeding twenty-four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical, and professional nursing care, and in which all diagnoses, treatment or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.

(8) 'Medical malpractice' means doing that which the reasonably prudent health care provider or health care institution would not do or

not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.

(9) 'Noneconomic damages' means nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, other nonpecuniary damages, and any other theory of damages including, but not limited to, fear of loss, illness, or injury.

(10) 'Nursing home' means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.

(11) 'Personal injury' means injuries to the person including, but not limited to, bodily injuries, mental distress or suffering, loss of wages, loss of services, loss of consortium, wrongful death, survival, and other noneconomic damages and actual economic damages.

(12) 'Personal injury action' means an action for personal injury, including a wrongful death action pursuant to Sections 15-51-10 through 15-51-60 and a survival action pursuant to Section 15-5-90.

(13) 'Renal dialysis facility' means an outpatient facility which offers staff assisted dialysis or training and supported services for self-dialysis to end-stage renal disease patients.

(14) 'Skilled nursing services' means services that:

- (a) are ordered by a physician;
- (b) require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and
- (c) are furnished directly by, or under the supervision of such personnel.

Section 15-32-220. (A) In an action on a medical malpractice claim when final judgment is rendered against a single health care provider the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

(B) In an action on a medical malpractice claim when final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

(C) In an action on a medical malpractice claim when final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed one million fifty thousand dollars for each claimant, except as provided in subsection (E).

(D)(1) The provisions of this section do not limit the amount of compensation for economic damages suffered by each claimant in a medical malpractice claim.

(2) The provisions of this section do not limit the amount of punitive damages in cases where the plaintiff is able to prove an entitlement to an award of punitive damages as required by law.

(E) The limitations for noneconomic damages rendered against any health care provider do not apply if the jury or court determines that the defendant was grossly negligent, wilful, wanton, or reckless, and such conduct was the proximate cause of the claimant's noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant.

(F) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December 31 of the previous year, and the limitation on compensation for noneconomic damages pursuant to subsection (A), (B), or (C) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised limitation on compensation to the State Register for publication pursuant to Section 1-23-40(2), and the revised limitation becomes effective upon publication in the State Register. For purposes of this subsection, 'Consumer Price Index' means the Consumer Price Index for All Urban Consumers as

published by the United States Department of Labor, Bureau of Labor Statistics.

Section 15-32-230. (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or, in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.

(B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

- (1) in immediate threat of death; or
- (2) in immediate threat of serious bodily injury.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

Section 15-32-240. The provisions of this article do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33."

PART III PROCEDURAL PROVISIONS

Civil action, judgments, offer of judgment, nonacceptance

SECTION 3. Article 3, Chapter 35, Title 15 of the 1976 Code is amended by adding:

"Section 15-35-400. (A) Offer of Judgment. Except in domestic relations actions, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, any party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney,

directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to the effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, to the offeree himself, in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure. Within twenty days after notification, or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file with the clerk of the court a written acceptance of the offer of judgment. Upon the filing, the clerk shall enter immediately judgment of the stipulation. If the offer of judgment is not accepted within twenty days after notification or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not to be admissible except in a proceeding after the trial to fix costs, interests, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney in accordance with the service rules for motions and other pleadings outlined in the South Carolina Rules of Civil Procedure. Any offeror may file a subsequent offer of judgment in any amount provided that the subsequent offer supercedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing, terminates any rights of interest or costs that may have been applicable to the superceded offer. Notwithstanding this provision, an offer is not considered rejected upon the making of a counteroffer by the offeree, but shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. Any and all offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

(B) Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer; or (3) if the offeror is a defendant, a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer.

(C) This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees or other

monies in accordance with the provisions of any written contract between the parties to the action."

Civil procedure, frivolous civil proceedings, expert witness

SECTION 4. Chapter 36, Title 15 of the 1976 Code is amended by adding:

"Section 15-36-100. (A) As used in this section, 'expert witnesses' means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), 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 available evidence at the time of the filing of the affidavit.

✓ (C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court 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. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure

the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

- (1) architects;
- (2) attorneys at law;
- (3) certified public accountants;
- (4) chiropractors;
- (5) dentists;
- (6) land surveyors;
- (7) medical doctors;
- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;
- (20) radiological technicians;
- (21) respiratory therapists; and
- (22) veterinarians."

Medical malpractice actions, mediation, arbitration

SECTION 5. Title 15 of the 1976 Code is amended by adding:

“CHAPTER 79

Section 15-79-110. As used in this chapter:

(1) ‘Ambulatory surgical facility’ means a licensed, distinct, freestanding, self-contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers, for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.

(2) ‘Health care institution’ means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.

(3) ‘Health care provider’ means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.

(4) ‘Hospital’ means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty-four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.

(5) ‘Institutional general infirmary’ means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents or inmates with illness, injury or infirmity for a period exceeding twenty-four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical and professional nursing care, and in which all diagnoses, treatment or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.

(6) 'Medical malpractice' means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.

(7) 'Nursing home' means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.

(8) 'Renal dialysis facility' means an outpatient facility which offers staff assisted dialysis or training and supported services for self-dialysis to end-stage renal disease patients.

(9) 'Skilled nursing services' means services that:

- (a) are ordered by a physician;
- (b) require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and
- (c) are furnished directly by, or under the supervision of such personnel.

Section 15-79-120. At any time before a medical malpractice action is brought to trial, the parties shall participate in mediation governed by procedures established in the South Carolina Circuit Court Alternative Dispute Resolution Rules in effect at the time for the State or any portion of the State. Parties may also agree to participate in binding arbitration.

Section 15-79-125. (A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to

File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

(B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.

(C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. The action must be filed:

(1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or

(2) prior to expiration of the statute of limitations, whichever is later.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

Section 15-79-130. If a judge finds that an expert health care provider or health care institution in a medical malpractice action in

this State has offered testimony or evidence in bad faith or without a reasonable basis in fact or otherwise acted unethically in conjunction with testifying as an expert in deposition or at trial, the judge must report the expert to the state entity that licenses and regulates the profession of the expert or the type of health care entity represented by the expert."

PART IV JOINT UNDERWRITING ASSOCIATION

Insurance, medical malpractice, Joint Underwriting Association, Board of Governors of Patients' Compensation Fund

SECTION 6. Article 1, Chapter 79, Title 38 of the 1976 Code is amended by adding:

"Section 38-79-40. (A) A person who serves on the Board of the Joint Underwriting Association or the Board of Governors of the Patients' Compensation Fund is prohibited from being employed in any manner or compensated by the Joint Underwriting Association or the Patients' Compensation Fund, and this prohibition continues for one year after the person ceases to be a member of the board.

(B) No provision of this section may be construed to prohibit an insurance agent from selling insurance products from the association or from receiving commissions as a result of selling insurance products from the association."

Insurance, medical malpractice, coverage of licensed health care providers

SECTION 7. Article 3, Chapter 79, Title 38 of the 1976 Code is amended by adding:

"Section 38-79-155. (A) All medical malpractice insurance carriers issuing policies of insurance within South Carolina for licensed health care providers, as defined in Section 38-79-410, shall provide and maintain coverage to all qualified applicants who timely remit payments for the coverage period and who meet and comply with all underwriting criteria of the policy and with applicable federal and state statutes and regulations.

(B) Such policies shall be written on either a 'claims-made' or 'occurrence' basis in compliance with the standard set by the board of

directors of the Joint Underwriters Association pursuant to Section 38-79-190.

(C) The provisions of this section apply only to policies written on or after January 1, 2006."

Insurance, Patients' Compensation Fund, management

SECTION 8. Section 38-79-460 of the 1976 Code is amended to read:

"Section 38-79-460. The fund, and any income from it, must be managed by the board according to its plan of operation developed pursuant to Section 38-79-430."

Insurance, Patients' Compensation Fund, withdrawal of funds

SECTION 9. Section 38-79-470(1) of the 1976 Code is amended to read:

"(1) Monies may be withdrawn from the fund only upon the signature of the Chairman of the Board of Governors or his designee."

**PART V
MEDICAL DISCIPLINARY COMMISSION**

Professions and occupations, physicians, suspension or revocation of license, notification

SECTION 10. Section 40-47-200 of the 1976 Code is amended by adding:

"(K) If a person's license is suspended, reissued, or reinstated by any South Carolina board for any reason, it shall report that action to the licensee's last known employer and, if applicable, to any place where the person has been granted privileges to practice medicine."

Professions and occupations, physicians, Medical Disciplinary Commission, membership

SECTION 11. Section 40-47-211 of the 1976 Code is amended to read:

"Section 40-47-211. (A) There is created the Medical Disciplinary Commission of the State Board of Medical Examiners to be composed of forty-eight members. Of these, thirty-six must be licensed physicians practicing their profession. Five physician commissioners must be elected from each of the six congressional districts, and six physician members of the commission must be elected at large from across the State. The board shall conduct the elections, and the elections for the physician members shall provide for participation by any physician currently licensed and actively practicing medicine in South Carolina and residing in the congressional district in which the election is held. At-large physician members must be currently licensed and actively practicing medicine in South Carolina and must reside within the State at the time of election and throughout their terms. One physician commissioner initially elected from each district shall serve for a term of one year and until his successor is elected and qualifies, one physician commissioner initially elected from each district shall serve for a term of two years and until his successor is elected and qualifies, and one physician commissioner initially elected from each district shall serve for a term of three years and until his successor is elected and qualifies. The successors of the initial physician commissioners shall serve for terms of three years or until their successors are elected and qualify. The members of the commission are limited to three terms. The members appointed to the board may not simultaneously serve as a commissioner. In case of any vacancy by way of death, resignation, or otherwise, the board shall appoint a successor to serve for the unexpired term. Where justice, fairness, or other circumstances so require, the board may appoint past commissioners to hear complaints in individual cases.

(B) Twelve members of the commission must be lay commissioners who each must have, at a minimum, a baccalaureate degree or the equivalent, and have no ascertainable ties to the health care industry. Two lay commissioners must be appointed by the Governor from each of the six congressional districts, with the advice and consent of the Senate. Each lay commissioner must be a registered voter and reside in the congressional district he represents throughout his term. Each lay commissioner initially elected from each district shall serve for a term of three years and until his successor is elected and qualifies. The lay commissioners are limited to three consecutive terms.

(C) The commission is empowered to investigate and hear those complaints against physicians (medical and osteopathic) filed with the board pursuant to Section 40-47-200. The hearing must be conducted in accordance with Act 176 of 1977 (Administrative Procedures Act)

and with regulations promulgated by the board and must be before a panel composed of at least three commissioners designated by the board, and one of those three commissioners must be a lay member. The panel is empowered to hear the matters complained of and to make findings of fact and recommendations as to disposition of those matters to the board. The panel shall make a certified report of the proceedings before it, including its findings of fact, conclusions, and recommendations, which must be filed together with a transcript of the testimony taken and exhibits as may have been in evidence before it with the administrator of the board, and a copy of the report must be delivered to the office of general counsel and the licensee or his counsel."

PART VI LIABILITY OF MEMBERS OF PROFESSIONAL COMMITTEES

Professions and occupations, members, immunity from liability

SECTION 12. Section 40-71-10, as last amended by Act 296 of 2004, is further amended to read:

"Section 40-71-10. (A) 'Professional society' as used in this chapter includes legal, medical, osteopathic, optometric, chiropractic, psychological, dental, accounting, pharmaceutical, and engineering organizations having as members at least a majority of the eligible licentiates in the area served by the particular society and any foundations composed of members of these societies. It also includes the South Carolina Law Enforcement Accreditation Council.

(B) There is no monetary liability on the part of, and no cause of action for damages arising against, a member of an appointed committee which is formed to maintain professional standards of a state or local professional society as defined in this section or an appointed member of a committee of a medical staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital, or a committee appointed by the Department of Health and Environmental Control to review patient medical and health records in order to study the causes of death and disease for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration, and acts in the belief that the action taken by him is warranted by the facts known to him.

(C) No person acting pursuant to subsection (B) shall be subject to any monetary liability or cause of action for damages for any action for restraint of trade, violation of the South Carolina Unfair Trade Practices Act, or other action predicated upon unfair or illegal competition unless such person acted with malice.

(D) The provisions of this section do not affect the official immunity of an officer or employee of a public corporation."

Professions and occupations, members, confidentiality of documents

SECTION 13. Chapter 71, Title 40 of the 1976 Code is amended by adding:

"Section 40-71-30. When a party asserts a claim of confidentiality over documents pursuant to Section 40-71-20 and the party seeking the documents objects, the documents must be filed under seal with the circuit court having jurisdiction over the pending action and are subject to judicial review by the circuit court judge. If the court determines that any of the documents are not subject to confidentiality pursuant to Section 40-71-20 and are otherwise discoverable, the court shall provide the documents to the requesting party. In the event the court finds that a party acted unreasonably in unsuccessfully asserting the claim of confidentiality, the court shall assess attorney's fees against that party for any fees incurred by the requesting party in obtaining the documents."

PART VII

**DEPARTMENT OF INSURANCE AND GENERAL ASSEMBLY
REVIEW OF INSURER'S REDUCTION OF PREMIUMS TO
REFLECT SAVINGS**

Department of Insurance, report to General Assembly

SECTION 14. The Department of Insurance shall review data reported on annual statements by liability insurers, including, but not limited to, paid claims, reserves, loss adjustment expenses, and such additional data as the department may require by promulgation of bulletin, to determine savings related to a decrease in litigation and claims paid pursuant to litigation after the effective date of this act. The department may require special reports from insurers to determine if savings are realized as a result of the provisions of this act. The department shall compile a report of savings realized and submit it for

General Assembly review upon request. Costs or expenses associated with the compilation of this report of savings shall be paid by the insurers pursuant to the provisions of Chapter 13 of Title 38. The Department of Insurance shall review premium and losses by line of insurance to determine if appropriate adjustments have been made based upon the department estimates of savings realized pursuant to the provisions of this act.

Department of Insurance, South Carolina Medical Malpractice Joint Underwriting Association, Patients' Compensation Fund, report to General Assembly

SECTION 15. As a majority of the health care community is insured through the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and as it is essential for the General Assembly to understand the effects of changes to tort laws, the South Carolina Department of Insurance is given authority to request data regarding changes in claims practices from the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund. Such data may include paid claims, paid loss adjustment expense, case reserves, bulk reserves, and claim counts by quarter for the previous five years. The department may make such a request of the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and such information must be provided within thirty days.

The Department of Insurance shall report annually to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Governor as to whether this and other related enactments have resulted in reductions in premiums and as to any other trends of significance which might impact premium cost.

**PART VIII
MISCELLANEOUS**

Civil procedure, civil liability

SECTION 16. Section 15-38-15, as added by an Act of 2005 bearing Ratification No. 23, is amended to read:

"Section 15-38-15. (A)(1) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation,

or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault ('comparative negligence'), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

(B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).

(C) The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning 'comparative negligence'; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

(a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.

(b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such argument subject to the discretion of the trial judge, on the

determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

(E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

(F) This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs."

Severability clause

SECTION 17. If any provision of SECTION 16 or its application to any person is held invalid, unenforceable, or unconstitutional, this validity, unenforceability, or unconstitutionality shall negate the other provisions or applications of SECTION 16, and to this end, the provisions of SECTION 16 are not severable.

Rights pursuant to the Tort Claims Act

SECTION 18. The provisions of this act do not affect any right, privilege, or provision of the South Carolina Tort Claims Act as contained in Chapter 78, Title 15 of the 1976 Code of South Carolina or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56 of Title 33.

Savings clause

SECTION 19. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this

act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Severability clause

SECTION 20. Except as provided by SECTION 17 if any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

SECTION 21. (A) Section 16 takes effect July 1, 2005, and shall only apply to causes of action arising on or after that date except for causes of actions relating to construction torts which would take effect on July 1, 2005, and apply to improvements to real property that first obtain substantial completion on or after July 1, 2005. For purposes of this section, an improvement to real property obtains substantial completion when a municipality or county issues a certificate of occupancy in the case of new construction, or completes a final inspection in the case of improvements to existing improvements.

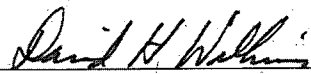
(B) Upon approval by the Governor, this act takes effect July 1, 2005, for causes of action arising after July 1, 2005, except that as of this act's effective date, the State Treasurer shall relinquish the management of funds in the Patients' Compensation Fund, created pursuant to Section 38-79-420, to the Board of Governors of the fund, and premiums paid on or after this act's effective date must be deposited with the Board of Governors of the fund. The fund must be fully transferred to the Board of Governors, and the State Treasurer may not hold any deposits of the fund as of ninety days after this act's effective date.

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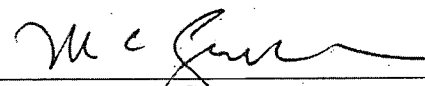
MAR 31 2005

In the Senate House


President of the Senate


Speaker of the House of Representatives

Approved the 4th day of April 2005.


Governor

LEGISLATIVE COUNCIL
of the
GENERAL ASSEMBLY OF SOUTH CAROLINA

Stephen T. Draffin, Director

Attorney: Harwell-BeachHarwell-Beach
Stenographer: SandersSanders
S:8383

Legislative Council No. 605605

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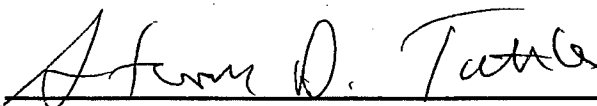
Proofread by

M. L. Kelso *Chaelton*

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of the South Carolina Noneconomic Damages Awards Act of 2005 recorded in Acts of the South Carolina General Assembly 2005 Act No. 32 Ratification No. 33 now on deposit with the South Carolina Department of Archives and History.

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT
This seventh day of September two thousand and eighteen.



Steven D. Tuttle
Deputy Director
Archives & Records Management

LEGISLATIVE COUNCIL
of the
GENERAL ASSEMBLY OF SOUTH CAROLINA

Stephen T. Draffin, Director

Attorney: Harwell-Beach

Stenographer: Sanders

H. 3375

Legislative Council No. (964) 3375AHB11

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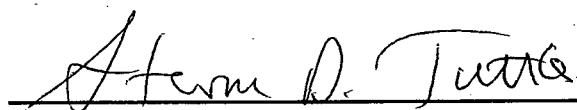
Statewide: ☒ Local: ☐ Temporary: ☐

Proofread by Muller, M. Hille

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of the South Carolina Fairness in Civil Justice Act of 2011 recorded in Acts of the South Carolina General Assembly 2011 Act No. 52 Ratification No. 86 now on deposit with the South Carolina Department of Archives and History.

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT
This seventh day of September two thousand and eighteen.

A handwritten signature in dark ink, appearing to read "Steven D. Tuttle", is written over a horizontal line.

Steven D. Tuttle
Deputy Director
Archives & Records Management

Exhibit 2

Certified Copy of 2011 S.C. Acts 52

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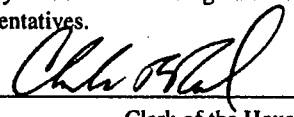
No. R86
CLERK OF THE SENATE

No. 52
CODE COMMISSIONER

AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE "SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT OF 2011" BY ADDING ARTICLE 5, CHAPTER 32 TO TITLE 15 SO AS TO PROVIDE LIMITS ON THE AWARD OF PUNITIVE DAMAGES AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; BY ADDING SECTION 1-7-750 SO AS TO AUTHORIZE CIRCUIT SOLICITORS TO EMPLOY OUTSIDE COUNSEL UNDER CERTAIN CIRCUMSTANCES; BY ADDING SECTION 38-77-250 SO AS TO REQUIRE EVERY INSURER PROVIDING AUTOMOBILE INSURANCE COVERAGE IN THE STATE TO PROVIDE CERTAIN INSURANCE COVERAGE INFORMATION WHEN A WRITTEN REQUEST IS MADE BY A CLAIMANT'S ATTORNEY AND TO AUTHORIZE SANCTIONS BY THE COURT FOR NONCOMPLIANCE; TO AMEND SECTION 15-3-670, RELATING TO LIMITATIONS ON ACTIONS BASED ON UNSAFE OR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY, SO AS TO PROVIDE THAT THE VIOLATION OF A BUILDING CODE DOES NOT CONSTITUTE PER SE FRAUD, GROSS NEGLIGENCE, OR RECKLESSNESS BUT MAY BE ADMISSIBLE AS EVIDENCE; AND TO AMEND SECTION 18-9-130, AS AMENDED, RELATING TO THE EFFECT OF A NOTICE OF APPEAL ON THE EXECUTION OF JUDGMENT, SO AS TO PROVIDE LIMITS FOR APPEAL BONDS.

I Certify that the Within Originated in the House of Representatives.



Clerk of the House

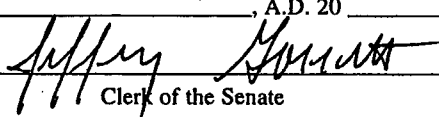
Correctly Enrolled



Stephen T. Draffin, Director
Legislative Council

Delivered to the Governor this JUN 08 2011

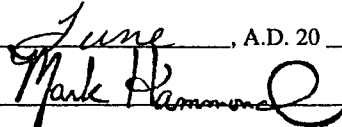
day of _____, A.D. 20



Clerk of the Senate

Delivered to the Secretary of State this 14th

day of _____, A.D. 20 11



THE STATE OF SOUTH CAROLINA

At A General Assembly Begun to be Holden at
Columbia, on the Second Tuesday in January, in the
Year of Our Lord Two Thousand Eleven, and Thence
Continued by Divers Adjournments to the
_____ of _____

In the Year of Our Lord Two Thousand Eleven

AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE "SOUTH CAROLINA FAIRNESS IN CIVIL JUSTICE ACT OF 2011" BY ADDING ARTICLE 5, CHAPTER 32 TO TITLE 15 SO AS TO PROVIDE LIMITS ON THE AWARD OF PUNITIVE DAMAGES AND TO PROVIDE FOR CERTAIN PROCEDURES AND REQUIREMENTS RELATING TO THE AWARD OF THESE DAMAGES; BY ADDING SECTION 1-7-750 SO AS TO AUTHORIZE CIRCUIT SOLICITORS TO EMPLOY OUTSIDE COUNSEL UNDER CERTAIN CIRCUMSTANCES; BY ADDING SECTION 38-77-250 SO AS TO REQUIRE EVERY INSURER PROVIDING AUTOMOBILE INSURANCE COVERAGE IN THE STATE TO PROVIDE CERTAIN INSURANCE COVERAGE INFORMATION WHEN A WRITTEN REQUEST IS MADE BY A CLAIMANT'S ATTORNEY AND TO AUTHORIZE SANCTIONS BY THE COURT FOR NONCOMPLIANCE; TO AMEND SECTION 15-3-670, RELATING TO LIMITATIONS ON ACTIONS BASED ON UNSAFE OR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY, SO AS TO PROVIDE THAT THE VIOLATION OF A BUILDING CODE DOES NOT CONSTITUTE PER SE FRAUD, GROSS NEGLIGENCE, OR RECKLESSNESS BUT MAY BE ADMISSIBLE AS EVIDENCE; AND TO AMEND SECTION 18-9-130, AS AMENDED, RELATING TO THE EFFECT OF A NOTICE OF APPEAL ON THE EXECUTION

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OF JUDGMENT, SO AS TO PROVIDE LIMITS FOR APPEAL BONDS.

Be it enacted by the General Assembly of the State of South Carolina:

Citation

SECTION 1. This act may be cited as the "South Carolina Fairness in Civil Justice Act of 2017".

Punitive damages, limitations

SECTION 2. Chapter 32, Title 15 of the 1976 Code is amended by adding:

"Article 5

Punitive Damages

Section 15-32-510. (A) A claim for punitive damages must be specifically prayed for in the complaint.

(B) The plaintiff shall not specifically plead an amount of punitive damages, only that punitive damages are sought in the action.

Section 15-32-520. (A) All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory or nominal damages. Evidence relevant only to the issues of punitive damages is not admissible at this stage.

(C) Punitive damages may be considered if compensatory or nominal damages have been awarded in the first stage of the trial.

(D) Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct.

(E) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages and, if determined to be liable, the amount of punitive damages. In determining the amount of punitive damages, the jury may consider all relevant evidence, including, but not limited to:

- (1) the defendant's degree of culpability;

- (2) the severity of the harm caused by the defendant;
 - (3) the extent to which the plaintiff's own conduct contributed to the harm;
 - (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;
 - (5) the existence of similar past conduct;
 - (6) the profitability of the conduct to the defendant;
 - (7) the defendant's ability to pay;
 - (8) the likelihood the award will deter the defendant or others from like conduct;
 - (9) the awards of punitive damages against the defendant in any state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff;
 - (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and
 - (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff.
- (F) If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.
- (G) In an action with multiple defendants, a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 15-32-530. (A) Except as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.

(B) The limitation provided in subsection (A) may not be disclosed to the jury. If the jury returns a verdict for punitive damages in excess of the maximum amount specified in subsection (A); the trial court should first determine whether:

- (1) the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant; or

(2) the defendant's actions could subject the defendant to conviction of a felony and that act or course of conduct is a proximate cause of the plaintiff's damages;

If the trial court determines that either item (1) or (2) apply, then punitive damages must not exceed the greater of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars and, if necessary, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by this subsection. If the trial court determines that neither item (1) or (2) apply, then the award of punitive damages shall be subject to the maximum amount provided by subsection (A) and the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount allowed by subsection (A).

(C) However, when the trial court determines one of the following apply, there shall be no cap on punitive damages:

(1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant; or

(2) the defendant has pled guilty to or been convicted of a felony arising out of the same act or course of conduct complained of by the plaintiff and that act or course of conduct is a proximate cause of the plaintiff's damages; or

(3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired.

(D) At the end of each calendar year, the State Budget and Control Board, Board of Economic Advisors must determine the increase or decrease in the ratio of the Consumer Price Index to the index as of December thirty-first of the previous year, and the maximum amount recoverable for punitive damages pursuant to subsection (A) must be increased or decreased accordingly. As soon as practicable after this adjustment is calculated, the Director of the State Budget and Control Board shall submit the revised maximum amount recoverable for punitive damages to the State Register for publication, pursuant to Section 1-23-40(2), and the revised maximum amount recoverable for punitive damages becomes effective upon publication in the State Register. For purposes of this subsection, 'Consumer Price Index' means the Consumer Price Index for All Urban Consumers as published by the United States Department of Labor, Bureau of Labor Statistics.

Section 15-32-540. The provisions of this article do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33."

Circuit solicitors authorized to employ outside counsel

SECTION 3. Article 5, Chapter 7, Title 1 of the 1976 Code is amended by adding:

"Section 1-7-750. A circuit solicitor may employ outside counsel, in his discretion, without approval of the Attorney General, for civil forfeiture proceedings arising from criminal activity or from estreatment of bail bonds. In any other matter, the circuit solicitor must obtain written approval of the Attorney General prior to retaining counsel to or filing a civil cause of action."

Automobile insurance coverage, release of coverage information upon written request of claimant's attorney

SECTION 4. Article 3, Chapter 77, Title 38 of the 1976 Code is amended by adding:

"Section 38-77-250. (A) Every insurer providing automobile insurance coverage in this State and which is or may be liable to pay all or a part of any claim shall provide, within thirty days of receiving a written request from the claimant's attorney, a statement, under oath, of a corporate officer or the insurer's claims manager stating with regard to each known policy of nonfleet private passenger insurance issued by it, the name of the insurer, the name of each insured, and the limits of coverage. The insurer may provide a copy of the declaration page of each such policy in lieu of providing such information. The request shall set forth under oath the specific nature of the claim asserted and shall be mailed to the insurer by certified mail or statutory overnight delivery. The request also must state that the attorney is authorized to make such a request and must be accompanied by a copy of the incident report from which the claim is derived.

(B) If the request provided in subsection (A) contains information insufficient to allow compliance, the insurer upon whom the request was made may so state in writing, stating specifically what additional information is needed and such compliance shall constitute compliance with this section.

(C) The information provided to a claimant or his attorney as required by subsection (A) of this section shall not create a waiver of any defenses to coverage available to the insurer and shall not be admissible in evidence.

(D) The information provided to a claimant or his attorney as required by subsection (A) shall be amended upon the discovery of facts inconsistent with or in addition to the information provided.

(E) The provisions of this section do not require disclosure of limits for fleet policy limits, umbrella coverages, or excess coverages.

(F) The information received pursuant to this section is confidential and must not be disclosed to any outside party. Upon final disposition of the case, the claimant's attorney must destroy all information received pursuant to this section. The court must impose sanctions for a violation of this subsection."

Limitations on actions based on unsafe or defective improvements to real property, evidence of fraud, negligence, gross negligence, or recklessness

SECTION 5. Section 15-3-670 of the 1976 Code is amended to read:

"Section 15-3-670. (A) The limitation provided by Sections 15-3-640 through 15-3-660 may not be asserted as a defense by a person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event the person in actual possession or control knows, or reasonably should have known, of the defective or unsafe condition. The limitations provided by Sections 15-3-640 through 15-3-660 are not available as a defense to a person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

(B) For the purposes of subsection (A), the violation of a building code of a jurisdiction or political subdivision does not constitute per se fraud, gross negligence, or recklessness, but this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.

(C) The limitation provided by Section 15-3-640 may not be asserted as a defense to an action for personal injury, including a personal injury resulting in death, or property damage which is:

- (1) by its nature not discoverable in the exercise of reasonable diligence at the time of its occurrence; and
- (2) the result of ingestion of or exposure to some toxic or harmful or injury producing substance, element, or particle, including radiation, over a period of time as opposed to resulting from a sudden and fortuitous trauma."

Limitations on appeal bonds

SECTION 6. Section 18-9-130(A)(1) of the 1976 Code, as last amended by Act 216 of 2004, is further amended to read:

"(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

- (a) twenty-five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or
- (b) one million dollars, whichever is less, for all other entities or individuals."

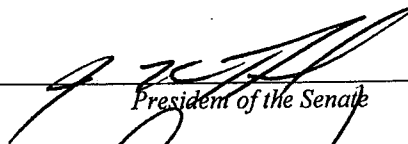
Time effective

SECTION 7. This act takes effect January 1, 2012, and applies to all actions that accrue on or after the effective date except the provisions of SECTION 3 do not apply to any matter pending on the effective date of this act.

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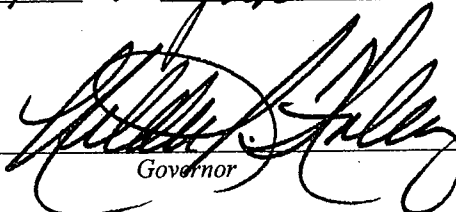
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Council

In the Senate House JUN 08 2011


President of the Senate


Speaker of the House of Representatives

Approved the 14th day of June 2011.


Governor

LEGISLATIVE COUNCIL
of the
GENERAL ASSEMBLY OF SOUTH CAROLINA

Stephen T. Draffin, Director

Attorney: Harwell-Beach

Stenographer: Sanders

H. 3375

Legislative Council No. (964) 3375AHB11

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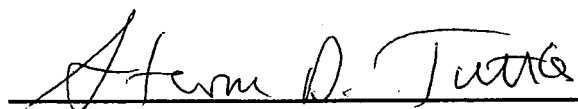
Statewide: ☒ Local: ☐ Temporary: ☐

Proofread by *Miller, M. D.*

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

THIS IS TO CERTIFY THAT This and/or the attached is a true and accurate copy of the South Carolina Fairness in Civil Justice Act of 2011 recorded in Acts of the South Carolina General Assembly 2011 Act No. 52 Ratification No. 86 now on deposit with the South Carolina Department of Archives and History.

GIVEN UNDER MY HAND AND THE SEAL OF THE DEPARTMENT
This seventh day of September two thousand and eighteen.

A handwritten signature in cursive script, reading "Steven D. Tuttle", is written over a horizontal line.

Steven D. Tuttle
Deputy Director
Archives & Records Management

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

FILE NO.: 2018-CP-04-00955

COUNTY OF ANDERSON

Joshua Hawkins and Floyd S. Mills

III,

Plaintiffs,

v.

Secretary of State Mark Hammond, South
Carolina Secretary of State's Office,

Defendants;

and

Hugh K. Leatherman, Sr., in his official
capacity as President *Pro Tempore* of the
South Carolina Senate, and James "Jay"
Lucas, in his official capacity as Speaker
of the South Carolina House of
Representatives;

Intervenors.

**DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

Defendants Secretary of State Mark Hammond and South Carolina Secretary of State's Office (collectively "Defendants"), by and through counsel, hereby join, adopt and incorporate in its entirety the Joint Motion to Dismiss the Amended Complaint and the Memorandum in Support filed by the Honorable Hugh K. Leatherman, Sr. and the Honorable James H. Lucas (collectively "Intervenors") on December 20, 2018. The Defendants have sought and obtained the Intervenors consent to join in their Motion to Dismiss.

WHEREFORE, for the reasons set forth in the Joint Motion to Dismiss, the Defendants pray that the Plaintiff's Amended Complaint be dismissed.

Signature on the Following Page.

Respectfully submitted,

BOWERS LAW OFFICE LLC

s/Karl S. Bowers, Jr.

Karl S. Bowers, Jr.

SC Bar No. 16141

butch@butchbowers.com

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Columbia, South Carolina 29250

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Attorney for Defendants

Columbia, South Carolina
December 28, 2018

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STATE OF SOUTH CAROLINA

JOSHUA HAWKINS, ET AL,

Plaintiff,

-against-

SECRETARY OF STATE MARK HAMMOND, ET AL,

Defendant.

Case No.

2018-CP-40-00955

January 10, 2019

Anderson, S.C.

B E F O R E:

HONORABLE R. SCOTT SPROUSE

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

KYLE JASON WHITE,

Attorney for the Plaintiff

Matthew Abee, Allen M Bogan & Karl S. Bowers,

Attorneys for the Defendant

Aileen Butler

Official Court Reporter

1 THE COURT: Let's go on the record. Madam clerk,
2 call our first case.

3 THE CLERK: The first case is Joshua Hawkins and
4 Floyd S. Mills III versus Secretary of State, Mark
5 Hammond, South Carolina Secretary of State's Office,
6 and Hugh K. Leatherman, Sr., in his official capacity
7 as President Pro Tempore of the South Carolina Senate,
8 and James Jay Lucas in his official capacity as
9 speaker of the South Carolina House of
10 Representatives.

11 THE COURT: This is a motion to dismiss. It looks
12 like a joint motion and memorandum and each side has
13 submitted documents. Any further documents that
14 either side would like to submit before the hearing
15 begins?

16 MR. WHITE: Nothing from the plaintiff, Your
17 Honor.

18 MR. BOWERS: Nothing from the speaker or the
19 president, Your Honor.

20 THE COURT: Okay. All right. Now, I will note
21 for the record this Court issued an interim order
22 after the initial hearing allowing the plaintiff to
23 amend their complaint and the defendants were given
24 until December 28th to file responsive pleadings and
25 this hearing was reset.

1 Are there any other matters before the Court
2 besides motions to dismiss?

3 MR. WHITE: Not from the plaintiff currently, Your
4 Honor.

5 Mr. BOWERS: Just the joint motion to dismiss,
6 Your Honor.

7 THE COURT: All right. Well, let us proceed and I
8 will hear from the defendants first and give
9 plaintiffs an opportunity to respond.

10 MR. BOWERS: Your Honor, may it please the Court.
11 Good morning. My name is Butch Bowers and I'm here on
12 behalf of the Secretary of State. As Your Honor, as
13 the Court recognized a minute ago, we have joined in
14 the motion to dismiss filed by the Intervenors from
15 the Senate and the House. And so what we're going to
16 do is for the sake of time we are going to allow and
17 have Mr. Bogan argue for all of us.

18 I would like to note for the record, Your Honor,
19 if may, I wanted to recognize two folks from the
20 Secretary of State's office that are here in the
21 galley today. We have got Melissa Dunlap who is
22 Deputy Secretary of State and then we also have
23 Shannon Wiley who is general counsel, Secretary of
24 State's Office and I just wanted to let you know for
25 the record. And so with that unless you have any

1 questions for me I will turn it over to my smart
2 lawyer, Mr. Bogan.

3 THE COURT: Mr. Bogan.

4 MR. BOGAN: Thank you.

5 Your Honor, may it please the Court. My name is
6 Matt Bogan. I'm here on behalf of Speaker Lucas and
7 Chairman Leatherman, now President Pro Tempore.

8 THE COURT: All right.

9 MR. BOGAN: Present with me is my colleague, Matt
10 Abee.

11 Your Honor, I know you're familiar with the
12 parties filings in this case as you recognized. But
13 by way of slight background I think it helps us to
14 orient ourselves as we have our discussion here today
15 to talk about the allegations of the suit.

16 We are here on a motion to dismiss and of course if
17 the Court were to accept those allegations as true --
18 and I don't want to in any way discount the
19 allegations in the Complaint that have been made.

20 Smart allegations by talented and creative lawyers.
21 But in my own words I'll do my best to represent those
22 allegations just for simplicity sake so I can walk us
23 through the arguments here today.

24 The challenge in this lawsuit is that because the
25 Secretary of State has alleged, again, believed to be

1 true at this stage, did not place the Great Seal on
2 certain legislature passed in 2005 and 2011 that
3 therefore under our constitution, Article III, section
4 18 those acts are invalid. That's the basic
5 allegations, no seal, law no good. And these two laws
6 are the 2005 and 2011 acts which placed caps on
7 certain damages. Not economic. Punitive damages.
8 And also codified the common law in 2011, punitive
9 damages standards. In 2005 statute of opinion
10 provision. And I won't speak for my friends here that
11 filed the complaint, but in their allegations they
12 focused on the caps, the punitive damage provision and
13 venue provision. So that's why I referenced those.
14 So those are the allegations, Your Honor.

15 So, we're left with the question of, are the acts
16 valid? That's what they basically seek to challenge.
17 And Your Honor, I present to you four reasons today
18 with some sub-reasons and I know we have other motions
19 and I'll be brief, Your Honor, respectful of the time.

20 The four reasons why dismissal is warranted. Any
21 one of those reasons would warrant dismissal of this
22 case. And I'm going if Your Honor will permit me a
23 little bit out of order of the brief we file.

24 The first argument that I'll make to you as to why
25 this suit should be dismissed is based on res

1 judicata. The allegations of the complaint
2 essentially say this, Your Honor, that because these
3 laws were no good, because there was no seal on the
4 laws, therefore, we settled and try cases and
5 virtually in the past tense have had and settled cases
6 in the past for less money then we could have gotten
7 our plaintiffs because of these tort reform provisions
8 as they call them. We left money on the table and our
9 fees were diminished, and therefore we were personally
10 affected by it. That's the essence of the allegations
11 as familiarized by Matt Bogan.

12 Your Honor, res judicata bars such challenge,
13 okay, for two reasons. Those cases were litigated to
14 finality and they settled those cases and they're
15 gone. So the past is the past. That's the way res
16 judicata works and they're privy with their clients
17 because they settled those cases because they were
18 agents and they can settle those and have binding
19 admissions on their clients as their agents. So the
20 concept of res judicata applies to those cases. And
21 what should have happened, Your Honor, and this is not
22 a criticism, this is again, creative lawyering. What
23 should have happened is in each of those individual
24 actions where they complain they received less money
25 because of this allegedly unconstitutional laws, they

1 should have raised those challenges in those
2 individual actions. And here's how I know so, and
3 here's how I know these lawyers know do that. There's
4 a case on appeal called Garrison verses Target
5 Incorporated where at least some of these lawyers were
6 involved and they've raised the same constitutional
7 challenge to the 2011 cap fact, and that's exactly
8 what they need to do. That's why today's lawsuit
9 should be dismissed. They're suppose to do it in each
10 action either in the the past or in the future if they
11 are going to challenge that law. It's not through a
12 collateral attack, Your Honor, on settled resolved
13 matters. So that's my first argument, Your Honor, is
14 res judicata bars it. They should have brought those
15 actions and they know how to do it based on the
16 Garrison case that's pending in the Court of Appeals
17 right now as we stand here and it's footnoted in our
18 brief. That's my first submission, Your Honor.

19 My second argument to you, relates to the concept
20 as our Supreme Court has called it to be substantial
21 compliance. So Article III, section 18, Your Honor,
22 has certain requirements in it. And one of those is
23 the Great Seal should be on the law of that. It's
24 also got to be passed by the House and the Senate,
25 signed by the speaker and the president. All of the

1 things of giving it a semblance of the law, right,
2 under the constitution.

3 Well, the only thing -- and I shouldn't say the
4 only thing because I don't want to discount what
5 didn't happen allegedly is the seal was not placed on
6 that. Your Honor, just as matter of practical sense,
7 notices to my colleagues at the Secretary of the
8 State's office, but if our Secretary of State by
9 failing to, or neglecting to, or choosing not to stamp
10 a law, can block legislation, he is the most powerful
11 person in our state and I think I would like to be
12 Secretary of State because he can just call all the
13 shots on what's doing and that is not consistent with
14 the powers and duties of the office. It is not
15 consistent with the doctrine of these laws having been
16 passed by both houses elected by the people.

17 So, Your Honor, substantial compliance comes from
18 a case called Jennings. A 1903 Supreme Court case,
19 Your Honor. And it says that in that case because the
20 exact language of be it enacted since the 1903 case,
21 be it enacted that the General Assembly passed the law
22 because that language didn't appear. The Court said
23 that's okay. It had all the markings of being
24 legislation and passed. And the same is true here,
25 Your Honor. That these bills were passed and in fact

1 they've been -- I'm sure Your Honor as a lawyer
2 encountered these. As a Judge you've enforced these
3 caps and they have been in practice and in place and
4 recognized as laws since the time they were passed.
5 So the doctrine of substantial compliance applies had
6 case as well up the Jennings's case.

7 Your Honor, the third argument I would offer to you
8 is the doctrine call codification. And the way I've
9 come myself to understand codification is whenever a
10 bill or act passes in the General Assembly it's like
11 loose playing cards in my mind and they're not
12 organized in the index of the blue books we have, Your
13 Honor, sitting right there on the corner. The blue
14 books that have organized the laws. When the General
15 Assembly codifies the law they take the decks of cards
16 and shuffle them in order and put them in order to
17 where they put them into sections where they are
18 related. These are in Title 15 that relate to causes
19 of action, civil cause of action.

20 The Supreme Court in a case involving York County
21 Electric Cooperative Your Honor, I think it's a 1940's
22 era case, says that once the General Assembly codifies
23 laws and puts them in the book, the reason behind
24 having the Great Seal and all those markings and
25 trappings of law, Your Honor, is so our citizens can

1 trust that the houses and the governor and those
2 officials, that this is a law and they can trust it.
3 It has the markings and trappings of officialty, so to
4 speak.

5 Well, Your Honor, codification is a doctrine in my
6 words, not in the case law, is like magic eyewash.
7 That any infirmity is cleared because the General
8 Assembly passes another law to codify the laws so the
9 public can go to the library and have the law on the
10 books and find it and know it's valid. So these laws
11 were both codified and put in the books thereby
12 redressing any infirmity they allege, Your Honor.
13 That's the doctrine of codification. It was recently
14 in a case in which Matt and I represented Chairman
15 Leatherman, issued last Friday from the Supreme Court.
16 In a footnote they recognized the doctrine of
17 codification. There was a challenge to Act 275
18 involving transportation infrastructure and the
19 Supreme Court -- and I was making this same
20 argument -- recognized that we don't need to address
21 codification but the General Assembly did and it's
22 footnote three in that case. It's a case brought by
23 Ed Sloan out of Greenville, Your Honor, for the South
24 Carolina Public Interest Foundation. I'm sorry to
25 ramble on you, Your Honor. But in that doctrine -- in

1 that case, Your Honor, the General Assembly recognized
2 there are means for the General Assembly to fix an
3 infirmity like the one placed here. So that's my
4 third submission, Your Honor, is codification.

5 My final reason as to why this law should be
6 dismissed is standing, Your Honor. And I'm not going
7 to repeat all of the prior three arguments, Your
8 Honor. But standing requires actual injury and
9 redressability and without conceding whether any of
10 that's properly pled, redressability is what I want to
11 focus on. I'll rest on our papers. But I want to
12 focus on redressability while I have a chance to have
13 a conversation with you here today, Your Honor.

14 The injury they allege can't be redressed for
15 several reasons. One of which is, they acknowledge
16 and allege in their Complaint that the seal is now on
17 these acts. They allege it was done tardy and not at
18 the time of inception of the bills but it's on there.
19 So the relief they seek would be by way of mandamus to
20 have Secretary of State place the stamp on there but
21 it's on there according to their allegations. And
22 secondly, kind of in a cascade of reasons, for the
23 same reasons that I argue to you that res judicas bars
24 it, they don't have standing because they don't have
25 an injury that's capable of readdress under the law

1 because you can not collaterally attack those closed
2 matters. Instead you would need to do, as these fine
3 lawyers did in the Garrison case and challenge it in
4 each individual act and that's what the law requires,
5 Your Honor. So for that reason also is without
6 standing.

7 Similarly, codification the law being in the books
8 and on the books so to speak, moots the issue which is
9 an Article 3 standing concept as well, Your Honor.
10 And I know you're familiar with those so I don't plan
11 to unless you need me to go into those further.

12 Your Honor, I'm happy to address any questions you
13 have. I'm happy if I missed anything if Mr. Bowers
14 has anything he needs to add.

15 Your Honor, for those reasons on behalf of
16 Chairman, Chairman Leatherman, now President Peeler,
17 the Speaker, and the Secretary of the State, we ask
18 Your Honor to dismiss this lawsuit for those reasons,
19 any of which would sustain dismissal.

20 THE COURT: When was the seal actually affixed?

21 MR. BOGAN: They allege in November of 2017 that
22 the seal was affixed to the 2011 bill. Your Honor, I
23 do not know what they allege as to the 2005 bill. So
24 in going on the pleadings that's what they allege is
25 the 2017 the stamp was applied to the 2011 bill.

1 THE COURT: And the Garrison case that you
2 mentioned challenges specifically the 2011 --

3 MR. BOGAN: Yes, sir.

4 THE COURT: -- statute?

5 MR. BOGAN: Yes, sir.

6 THE COURT: Okay.

7 MR. BOGAN: I do not think it addresses 2005, my
8 friends, brothers, can correct me on that case but I
9 think the Garrison case only address that one issue.

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

12 MR. WHITE: Yes, Your Honor. May it please the
13 Court. This is what I would represent to the Court,
14 one of the rare occasions where the plain language of
15 the law and the facts are squarely on our side. The
16 -- and before I kind of address the four reasons
17 raised by defense counsel, I want to point out to the
18 Court that those four reasons focus on one subset of
19 the lawsuit that's been filed. They focus on the
20 application of the Great Seal. They do not address
21 nor can they address or defeat the allegations that
22 the 2005 and 2011 laws violate due process and the
23 Seventh Amendment, and for that reason alone the fact
24 that that portion of the suit is unchallenged should
25 result in denial of the 12(b)(6) motion to dismiss

1 because that essentially has not even been raised by
2 the defendants or the intervenors in this case.

3 But focusing on the narrow issue that the defense
4 and the intervenors have argued today and the four
5 reasons I think the motion should still be denied and
6 I'll hit those points in turn.

7 The first is res judicata. The suit -- the
8 allegations in the complaint were framed by the
9 defense and intervenors as us challenging the reduced
10 recovery of past settlements. And I would like to
11 direct the Court if you have a copy, Your Honor, of
12 our amended Complaint. If not I will hand one up to
13 you if that's easier.

14 THE COURT: I got one but if you have a copy I
15 would appreciate that. (Handed) Thank you.

16 MR. WHITE: If you look, Your Honor, to page four
17 and that's paragraph four of the amended Complaint.
18 If you look at the first sentence the plaintiff's
19 attorney is practicing law in the State of South
20 Carolina. His finances are directly affected by the
21 laws of issue in this case. If you look at the second
22 sentence. Further as residents and tax payers in the
23 State of South Carolina the plaintiffs are in constant
24 danger of being personally affected by the laws. And
25 then you go two lines down further. Not only have one

1 or both plaintiffs experienced reduced recovery in the
2 past, but the plaintiffs also have pending cases
3 subject to the laws at issue. Will have future cases
4 subject to the laws at issue and have and will be
5 personally affected by the laws at issue as citizens
6 of South Carolina. And judge, on this 12(b)(6) motion
7 as the Court and the other folks in the room are aware
8 we're limited to evaluating the allegations in the
9 complaint. And the allegations in the complaint
10 clearly are not limited to reduced recovery and past
11 settlements and verdicts. For that reason alone the
12 res judicata argument rings hollow.

13 The second part of the res judicata argument that
14 the Garrison case has -- it's up on appeal right now
15 and portions of what we have argued in this lawsuit
16 have been raised in that case. That's not dispositive
17 either, Your Honor, and that's for a couple of
18 reasons. The first reason is that in the Garrison
19 lawsuit nothing about the Great Seal is raised. Zero.
20 In terms of the Great Seal being applied. And
21 frankly, I'm not even one hundred percent familiar
22 with the Garrison case. I'm not involved with it.
23 One of the plaintiffs in the case, Josh Hawkins, is
24 involved with that matter. That arose out of a jury
25 verdict against Target in Anderson County. But Trey

1 Mills, my other client, the other plaintiff in this
2 case is not involved in the Garrison matter. He was
3 not involved in the trial. He's not involved in the
4 appeal and he is a plaintiff in the case and he has
5 the right and the standing to challenge not only the
6 validity of the law based on the lacking of the Great
7 Seal but also based on due process and Seventh
8 Amendment grounds. And so for that reason the
9 Garrison -- the existence of the Garrison appeal I
10 don't think forecloses anyone's ability to bring this
11 declaratory judgement action. Especially Trey Miles
12 who is not even involved in that case and especially,
13 you know, even if I was acting as counsel in that case
14 I'm not sure how it would preclude me from acting as
15 counsel in another case to raise this.

16 THE COURT: Let me ask you now, constitutional
17 challenges are based on the law itself, are they not;
18 the caps that are placed on the law?

19 MR. WHITE: That's correct, Your Honor. So the
20 lawsuit kind of has a few different parts. And when I
21 say lawsuit, I mean this lawsuit we're talking about
22 today. It has the -- we're challenging the 2005 and
23 2011 acts based on the fact that the Great Seal was
24 not applied until 2017. We now know -- Your Honor had
25 asked this earlier -- we now know based on responses

1 to request to admit, that it is now undisputed that
2 the earliest date that the Great Seal was applied to
3 the 2011 act was November 7th of 2017.

4 THE COURT: When was it applied to the 2005 act?

5 MR. WHITE: The 2005 act, the request to admit
6 indicates that -- well, the discovery responses
7 indicate that it was applied much earlier which is why
8 we have filed a partial motion for summary judgment
9 on a 2011 act only at this point because there's no
10 additional factual discovery that needs to be done to
11 determine that issue but there maybe as to the 2005
12 act. We may need to dispose somebody to figure out
13 when exactly the seal was applied and kind of test the
14 answer they've given us in the written discovery.

15 THE COURT: Okay.

16 MR. WHITE: But in terms of the 2011 act that's
17 not in dispute. The earliest it was applied was
18 November 7th of 2017. And I will be happy -- I'm not
19 sure that's germane to the 12(b)(6) motion but if Your
20 Honor is just curious and wants to get head start on a
21 partial motion for summary judgment I would happy to
22 hand up their answers to request to admit.

23 THE COURT: I may get that in a minute. Go ahead.
24 I interrupted you in the middle of your argument so go
25 ahead.

1 MR. WHITE: No, you're perfectly fine, Your Honor.
2 Any question you have obviously fire away.

3 So anyway, for those reasons, the first reason for
4 dismissal of the case is not a reason for dismissal of
5 the case. Res judicata does not apply. It is not a
6 bar to this suit and for that reason it does not
7 result in a 12(b)(6) dismissal.

8 The second reason raised by counsel is substantial
9 compliance. In other words, even though the law
10 specifically says what it says, and by law I mean the
11 the constitution, the document that's perhaps the most
12 important set of laws that we have in the whole state.
13 Even though it says what it says, it specifically says
14 that the law is not enforceable or fete (phonetics)
15 until the Great Seal is applied. That it pretty much
16 complied with it. So we can run afoul of the words of
17 the constitution and do something different than what
18 the constitution says. And that's not -- obviously
19 runs afoul of the laws of statutory construction in
20 South Carolina. If the law is clear and unambiguous
21 like the constitution we go with the law. There's not
22 any ambiguity there. And, Your Honor, I think we've
23 cited this in our motion for summary judgement. I
24 think we handed up a copy of the South Carolina
25 constitution during the last hearing but I got another

1 copy.

2 THE COURT: If you want to hand up another copy.
3 Again, I got what you filed here on our system but it
4 is easier for me to look at a hard copy.

5 MR. WHITE: I'm handing up article three.

6 THE COURT: Thank you.

7 MR. WHITE: If you look at Article III section 18,
8 Formalities of Act. The law says -- and I'll just
9 read it. The constitution says -- and I'll read it
10 verbatim, "No Bill or Joint Resolution shall have the
11 force of law until it shall have been read three times
12 and on three several days in each house, has had the
13 Great Seal of the State affixed to it."

14 The constitution says what it says. It shall have
15 -- it shall not have the force of law until the Great
16 Seal is applied to it. And I think that the cases
17 cited by counsel including Jennings that didn't
18 include the word "being enacted". I think it's
19 substantially different here.

20 The fact that the law in that case did not include
21 the "being enacted" words I think is different then
22 whether, you know, the law got enough votes or if the
23 law has the Great Seal applied to it. And I think the
24 substantial compliance argument also creates somewhat
25 of a potential danger, slippery slope where does --

1 you know, where does it end. We almost got enough
2 votes for the laws to be passed. We almost went
3 through other various formalities. I think the
4 constitution says what it says for a reason and it
5 makes it easy for us. We just follow what the words
6 say. So for that reason substantial compliance
7 certainly does not result in a 12(b)(6) dismissal
8 here, Your Honor. And also even if it did it would
9 only pertain to the Great Seal portion of the suit and
10 not the due process or 7th Amendment challenges.

11 The third issue, codification. Again, the
12 constitution says what it says. If the Great Seal is
13 not applied to it it doesn't have the force of law.
14 In order for the motion for dismissal here to be
15 granted and the motion for summary judgment to be
16 denied we have to essentially ignore the plain
17 language of the law and do something different than
18 what the constitution says and I don't think there is
19 any support for that, codification, substantial
20 compliance or otherwise.

21 THE COURT: When was it codified?

22 MR. WHITE: I'll let Mr. Bogan answer this. I know
23 it's in your argument.

24 THE COURT: When was this codified, the 2015 act?

25 MR. BOGAN: In January 2018. January of 2018,

1 Your Honor. This is something the Court can take
2 judicial notice of because I don't want to get out of
3 the pleadings. But since Your Honor has asked, public
4 record reflect January 5th or whenever the legislature
5 went into session one of its first acts last year, a
6 year ago at this time, was to codify and put in the
7 books a whole slew of laws. They use to do it every
8 ten years, Your Honor, and I think they do it more
9 frequently than that now. So to answer your question,
10 a year ago this time.

11 THE COURT: All right. Go ahead Mr. White.

12 MR. WHITE: And that actually -- I actually don't
13 even have a problem with the Court taking judicial
14 notice of that because that's after the January 7th --
15 I mean the November 7, 2017 date and it still doesn't
16 help the argument that the suit should be dismissed
17 and I'll tell you why.

18 We don't dispute that the 2011 act was -- had the
19 force of law under the constitution once the Great
20 Seal was applied in November of 2017. From that point
21 on it's valid prospectively. The argument -- and
22 subject to the other constitutional challenges. But
23 on the Great Seal basis we have no dispute it was
24 valid from November 7th.

25 The issue is that it is not valid retroactively

1 because unlike most laws that are passed by the
2 legislature the punitive damages caps are contained
3 within the 2011 reduced the rights of people under
4 disability. And our laws of -- our laws of
5 retroactive application of statutes clearly indicate
6 that if a law decreases the rights of people under
7 disability it's valid prospectively only. If it
8 increases the rights of people under disability it's
9 valid retroactively to the day of passage. And here
10 the law was not valid until the Great Seal was applied
11 on November 7th of 2017. And so there's a gap there
12 between the time that it was applied. The law was
13 initially passed in November of 2017.

14 As to the Great Seal issue that's the period of
15 time I'm challenging. And so codification,
16 substantial compliance, once the Great Seal is applied
17 that still doesn't defect our argument here, Your
18 Honor.

19 The forth issue, standing. Again, the argument
20 that the Seal is on the bill now so there's no
21 standing kind of misses the mark here. Because what
22 we are arguing as to the 2011 act is that the window
23 of time when that Great Seal was not on there that law
24 was not in force or effect. Also misses the mark
25 because it doesn't touch the other challenges that we

1 have raised to the punitive damages' caps or the
2 portions of the 2005 act which we believe and we've
3 alleged and argued are violative of due process and
4 violative of the Seventh Amendment.

5 THE COURT: But not those arguments you would
6 still be making those arguments had the Seal been
7 placed on it?

8 MR. WHITE: Correct.

9 THE COURT: So whether or not the seal was placed
10 on it that does not affect your position on that?

11 MR. WHITE: Absolutely. The Great Seal is only
12 one of multiple challenges that we have raised.

13 THE COURT: And has that issue not been dealt with
14 by the Appellant Courts in this state ever since this
15 law went into effect?

16 MR. WHITE: Not as to the -- not specifically as
17 to the 2005 or 2011 acts in the way that we're
18 challenging the law.

19 THE COURT: Your challenge on the seal appears to
20 be novel issue but as to the constitutionality of tort
21 reform caps, have those not been challenged a number
22 of times in different courts?

23 MR. WHITE: I'm certainly not aware of a time
24 where they have been challenged on Seventh Amendment
25 grounds. I could be wrong on that. But I think that

1 is a novel and unique challenge to the tort reform
2 laws which I don't know that has been raised which,
3 you know, clearly says that any suit in common law
4 where the amount of controversy is over \$20 there --
5 and I'm kind of quoting off the top of my head -- but
6 the jury shall make the decision. No court of the
7 land shall disturb the verdict. So, we're challenging
8 it on the Seventh Amendment grounds as well which I
9 don't think has gone up.

10 THE COURT: Okay.

11 MR. WHITE: As to any tort reform lawsuit in South
12 Carolina.

13 So the standing issue, the fourth issue that he
14 raised, Your Honor, the Seal is on the bill now. I
15 won't rehash the arguments of why that is not
16 dispositive as to standing.

17 The allegations in the complaint and the standing
18 arguments don't really match up and further that
19 window of time that we talked about is instructive on
20 the standing issue.

21 So again, the argument that the relief -- the
22 proper relief is mandamus and that the bill is on the
23 seal -- or the seal is on the bill now so what's
24 everybody crying about kind of misses what the
25 allegations in the complaint are and this is what the

1 arguments are and for that reason, none of these four
2 reasons should result in the Court granting the
3 12(b)(6) motion to dismiss and we would ask the Court
4 to deny that motion and we can if it suits the Court,
5 we can make our arguments on the partial motion for
6 summary judgement after counsel has another
7 opportunity to talk.

8 THE COURT: All right.

9 MR. BOGAN: First of all, Your Honor, I will
10 reply. Thank you. Very briefly, because Your Honor
11 has already read the papers here in this issue. We
12 can take the procedural issue up later on summary
13 judgement. But I think they filed amended complaint
14 since that motion for summary judgement was filed.
15 But in any event, I'll get back to that. Let's go to
16 the reply. We can put down on the record of what we
17 need to there.

18 Your Honor, as I said, we've filed our papers. We
19 rest on our papers. The law allows you to do that. I
20 didn't want to bore the Court with 20 pages of what I
21 said, but let me be clear for one second. I didn't
22 challenge it only on the seal. Our papers have talked
23 about standing and the Statute of Limitations which
24 bars their 1983 action because the laws were passed in
25 '05 and '11. It's time barred and as Your Honor

1 stated for the last 14 years our Court's including
2 this one, as we sit here have applied these laws and
3 they've been challenged and upheld. Maybe not on the
4 particular grounds they say, but let the record
5 reflect clearly we've opposed it on that ground and
6 they do not have standing and the entire suit should
7 be dismissed there based on that cleanup.

8 I also want to point out, Your Honor, that we're
9 kind of -- the plaintiff not speaking with forked
10 tongue, but they cite to you paragraph four, pending
11 cases, future cases, and they cite that to you and
12 then he said just a minute ago -- and I think it's an
13 omission where he says, well, once the seal is on it
14 we're not challenging that. So, I think there's no
15 more future challenge there. In addition to the fact
16 that Courts don't rule on hypotheticals in future
17 things and do guess work which is a redressability
18 standing.

19 THE COURT: I understand. If he's successful on
20 this constitutional challenges to the cap itself that
21 would apply in the future, would it not?

22 Your argument applies just to the seal.

23 MR. BOGAN: On redressability, Your Honor?

24 THE COURT: On a future action if --

25 MR. BOGAN: Oh, don't take this as a concession,

1 but yes, I see. We're tracking, Your Honor. I agree
2 with what you just said there. I track. But the
3 point I would say to that just for clarities sake is,
4 that goes to the very fact and shows Garrison-- I need
5 to talk about -- you're suppose to challenge in the
6 actual case. This is not a case where we have a
7 plaintiff that has a punitive damages thing for a cap
8 to apply. They're not here. There's no injury to the
9 folks, the folks that have the disability, quote, to
10 use his word, are not here. These are lawyers.
11 They're agents, they're privies to those folks. So I
12 appreciate the point you're making about the future
13 track, but I don't concede that it would give the
14 relief.

15 THE COURT: I didn't expect you to agree with me.

16 MR. BOGAN: But you know, earlier I was apparently
17 too causal with some of my things. I don't want
18 anyone to be confused where I stood. Mainly myself.

19 Your Honor, one thing I will say back to one of the
20 points is the act and the seal being applied. There
21 is case called Toomer we cited, and it's a State
22 Supreme Court from way back when in 1854, Your Honor,
23 and it says that the act of doing that constitutional
24 duty relates back. So I would not agree with him that
25 it's prospective only.

1 I heard counsel attempt to distinguish Jennings and
2 he just said it was different. I didn't hear why.
3 It's not any different. The language of be it enacted
4 and the seal are same thing. They're constitutional
5 provisions and the Supreme Court of our state said it
6 substantially complies. I don't take lightly
7 constitution provisions. I know Your Honor doesn't.
8 But the Supreme Court in the Jennings case said those
9 things. I didn't make it up and I'm arguing to you
10 that this is not just good enough but it complies with
11 the constitution. That provision again would give a
12 super legislative veto. There's no way that the
13 framers in the constitution intended and that's why
14 the Supreme Court in Jennings adopted such a concept
15 to prevent the holdup in the legislation. And again,
16 codification is all part of it anyway, Your Honor.

17 I don't know that there is much else I need to
18 reply, Your Honor, for fear of standing up here and
19 talking to long. If you have any questions, Your
20 Honor, I'm happy to answer. You clearly got where we
21 are and you read and thank you for your time.

22 If we need to take up the procedure pinhead points
23 about the summary judgement let me know.

24 THE COURT: This is one I am going to do. I am
25 going to go back and read through these cases again.

1 We're not going to deal with the partial summary
2 judgement at this point since an amended complaint has
3 been filed and since your motion is dispositive of the
4 case depending on how I rule on that. If we need to
5 we can set another hearing.

6 So, I am going to take this under advisement. I
7 will read everything. I will have my law clerk
8 contact you. I want to thank counsels on both sides
9 for your well prepared arguments. This is a novel
10 issue, an interesting issue. So I will get a ruling
11 to you as soon as I can.

12 MR. BOGAN: Thank you judge. It is pleasure to be
13 here.

14 (End of Transcript)
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CERTIFICATION

I, the undersigned Aileen Butler, Official Court Reporter for the 16TH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for York County, South Carolina, on the 10th day of January, 2019.

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

June 20, 2019

Aileen Butler

NOTICE OF ADR

Joshua Hawkins
Floyd S Mills III

2018CP0400955

PLAINTIFF(S)

Filing Date: May 16, 2018

Vs

Secretary Of State Mark Hammond
South Carolina Secretary Of State'S Office

DEFENDANT(S)

Pursuant to the South Carolina Alternative Dispute Resolution Rules (SCADR), you are required to participate in the following methods of Alternative Dispute Resolution (ADR): mediation or arbitration (binding or non-binding); on or before 300 days from the date of filing of this action. The parties have a right to mutually agree upon the form of ADR and a neutral person(s) to conduct that ADR process. In the event the parties are unable to agree upon the form of ADR, the court hereby designates mediation as the default process of ADR. In the event the parties are unable to agree upon a mediator, the court hereby appoints

John M. Milling, PO Drawer 519, Darlington, SC 29540, Phone (843) 393-4083

to serve as mediator. In the event the aforementioned mediator has a conflict of interest or is unable to serve, the alternate mediator is

James F. Edwards Jr., Sturm And Cont P A, 159 Hall Street, Spartanburg, SC 29302, Phone (864) 580-2017

The parties and/or their lawyers shall contact the court-appointed mediator directly regarding scheduling and payment of the court-mandated fee.

A Rule to Show Cause why sanctions should not be imposed may be issued in all cases that fail to file a Proof of ADR or Exemption form indicating evidence of participation in or exemption from an ADR process within 300 days from the date of filing of the action or 90 days from the date of this notice: **March 10, 2019.**

Date: December 10, 2018

CLERK OF COURT

Notice of this Order was given by facsimile transmission, or if no fax number is shown, by first class mail or email to the attorneys of record on December 10, 2018

Clerk's Initials SEB

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Joshua Hawkins,) Civil Action No. 2018-CP-04-00955

Plaintiff,)

vs.)

Notice of Appearance

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

Defendants.)

Please take notice that Brian M. Barnwell, Esquire, and Matthew A. Abee of the law firm of Nelson Mullins Riley & Scarborough LLP, enter their appearance in the above-captioned action as additional counsel of record for the Honorable James "Jay" Lucas, Speaker of the South Carolina House of Representatives, who is a proposed-intervenor. The Clerk of Court is requested to add the name of Brian M. Barnwell, Esquire, and Matthew A. Abee, to the docket on behalf of Speaker Lucas and it is requested that all parties who have appeared or may subsequently appear add them to their service list.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

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*Attorneys for the Honorable James "Jay" Lucas, Speaker of
the South Carolina House of Representatives*

Columbia, South Carolina
July 26, 2018

Joshua Hawkins,) Civil Action No. 2018-CP-04-00955

Plaintiffs,

VS.

Secretary of State Mark Hammond,
South Carolina Secretary of State's
Office,

Defendants,

and

Hugh K. Leatherman, Sr., in his capacity as President *Pro Tempore* of the South Carolina Senate, and James “Jay” Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives,

Intervenors

NOTICE OF WITHDRAWAL

Pursuant to Rule 11(b) of the South Carolina Rules of Civil Procedure, and with the consent of James “Jay” Lucas, in his official capacity as the Speaker of the South Carolina House of Representatives (the “Speaker”), Brian M. Barnwell, Esq., of Nelson Mullins Riley & Scarborough LLP (“Nelson Mullins”), hereby gives notice of his withdrawal as counsel of record for the Speaker. Allen Mattison Bogan, Esq., also of Nelson Mullins, has noticed his appearance as the new lead counsel for the Speaker. The Speaker will not be prejudiced by this change in counsel because he will continue to be represented by the same law firm.

Accordingly, Brian M. Barnwell should be removed from the court docket as counsel of record for the Speaker.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Brian M. Barnwell

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capacity as Speaker of the South Carolina House of
Representatives*

Columbia, South Carolina
October 31, 2018

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.

January 28, 2020



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SC Court of Appeals