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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
MASTER-IN-EQUITY  
Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2021-000426

Jessica Means and Hall & Means, LLC,

Appellants

v.

Donald B. McCutcheon

Respondent.

**[INITIAL] BRIEF OF APPELLANTS**

**C. STEVEN MOSKOS, P.A.  
ATTORNEY FOR APPELLANTS**

C. Steven Moskos  
SC Bar No.: 7938  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
(843) 763-5297  
steve@moskoslawfirm.com

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## STATEMENT OF ISSUES ON APPEAL

1. **AN AWARD OF ATTORNEY'S FEES WILL BE OVERTURNED WHEN THE AWARD IS CONTROLLED BY AN ERROR OF LAW. THE MASTER AWARDED FEES IN PROPORTION TO THE ORIGINAL AMOUNT OF THE DEBT OWED TO MS. MEANS AND HER FIRM. DID THE MASTER COMMIT AN ERROR OF LAW BY CONSIDERING A FACTOR OUTSIDE THE SIX FACTORS USED TO DETERMINE AN ATTORNEY FEE AWARD?**
2. **AN AWARD OF ATTORNEY'S FEES WILL BE OVERTURNED WHEN THE AWARD IS WITHOUT EVIDENTIARY SUPPORT. THE RECORD IS DEVOID OF ANY EVIDENCE WARRANTING A REDUCTION IN FEES OWED TO MS. MEANS AND HER FIRM. SHOULD THE MASTER'S ORDER BE MODIFIED BECAUSE THERE WAS NO EVIDENCE WARRANTING A REDUCTION IN ATTORNEY FEES REQUESTED?**

## STATEMENT OF THE CASE

This case involved Jessica Means' and her law firm's efforts to collect attorney's fees earned while representing Donald McCutcheon in a divorce case. Appellants' and Respondent's contract specifically states that Mr. McCutcheon agrees "to pay any and all costs of collection including reasonable attorney's fees and/or costs". This appeal is of the Master-in-Equity's two Orders filed January 25, 2021 and March 25, 2021 during supplemental proceedings. These Orders were appealed because the Master failed to use the recognized factors for awarding Appellants attorney's fees to compensate their counsel, C. Steven Moskos. (R. pp., Jan 25 Order and March 11 Order. )

On June 22, 2017, Mr. McCutcheon hired attorney Jessica Means and her firm Hall and Means, LLC to represent him a divorce action. (R. pp. Comp Ex 1.) Mr. McCutcheon terminated his employment of Ms. Means and her firm around March 8, 2018. He owed Ms. Means \$3,787.50 for work she had performed on his behalf. (R. pp. Comp Ex 2.) Mr. McCutcheon refused to pay the outstanding balance. Appellants hired C. Steven Moskos to represent them in their claim against Mr. McCutcheon for the

balance of the fees owed. (R. pp. Aff of atty fees 5-30-19.)

Mr. McCutcheon owns several pieces of real estate in the Lowcountry. His main property is a triplex located at 90 Hanover Street in the city of Charleston. He uses this address for his business and to receive mail. He does not live at this location. He rents part of the building to tenants; however, they rarely see him, pay him through electronic means, such as Venmo, and many times have a hard time contacting him. ((R. pp. Affidavit of service ex 39 12-30-20; doc 57 pp. 17-22; Affidavit of Service on Tenants 69.)

On April 10, 2019, suit was filed against Mr. McCutcheon in Small Claims Court. (R. pp. Summons and Complaint.) Appellants made several attempts to serve Mr. McCutcheon with the summons and complaint; however, they were unsuccessful. Finally, the process server located Mr. McCutcheon's mother's home. Mrs. McCutcheon informed the process server that Mr. McCutcheon lived at that address and she accepted the summons and complaint. ((R. pp. Affidavit of service 09.)

Mr. McCutcheon did not respond to the complaint. The Honorable James Turner entered a default judgment against Mr. McCutcheon in the amount of \$3,857.50, \$3,787.50 for the underlying debt and \$70 for costs. (R. pp. May 23, 2019 Transcript of Judgment No. 1.)

On May 30, 2019, Ms. Means moved to amend the judgment so she could request costs and attorney's fees incurred to that point. ((R. pp. Motion to Default Judgment, Affidavit of Attorney's Fees.) Judge Turner granted the motion, amending the judgment to reflect \$3,787.50 for the underlying debt, costs of \$461.70, and attorney's fees of \$2,574.00 for a total judgment of \$6,823.20. The amended judgment was filed in the Small Claims Court as of May 23, 2019. Appellants' counsel filed same with the Charleston

County Clerk of Court on July 11, 2019. (R. pp. Transcript of Judgement No. 2.)

On July 14, 2019, Mr. McCutcheon sent an *ex parte* letter to the Small Claims Court requesting a new hearing. ((R. pp. McCutcheon letter 7/15/19.)

On August 2, 2019, Judge Turner heard Mr. McCutcheon's motion for a new trial. Mr. McCutcheon claimed he did not live with his mother; thus, he had not been properly served. Judge Turner stated he would take the matter under advisement. Judge Turner then informed Mr. McCutcheon that if he proceeded to trial and lost, it was very likely that the judgment against him would be higher due to the increased attorney's fees. Judge Turner suggested that Mr. McCutcheon contact Appellants' counsel to discuss settling the case. Judge Turner also required Mr. McCutcheon to provide his address and email address to the court so that he could be given notice of any court hearings by the court and counsel. Mr. McCutcheon stated that he received his mail at 90 Hanover Street Apt. A in downtown Charleston and he provided the court with his email address. (R. pp. Trans 101 p. 10:4-8; Affidavit for Sanctions hearing Ex. 1.)

After the hearing on August 2, counsel emailed Mr. McCutcheon to discuss settling the case. Mr. McCutcheon did not respond. (R. p. 58 Affidavit of Attorney's Fees from September 11, 2019 Ex 4.)

On August 8, 2019, Judge Turner granted Mr. McCutcheon's motion and set aside the judgment. (R. pp. p43 and 44 doc 57, Order filed August 9, 2019.)

On August 25, 2019, the Small Claims Court sent notice to the Parties that a bench trial would be conducted on September 11, 2019. (R. pp. p45 doc 57, Letter of 8-25-19.)

On September 11, 2019, Mr. McCutcheon failed to appear. Judge Turner issued his third transcript of judgment in favor of Ms. Means. This award included the debt owed

to Ms. Means (\$3,787.50), her costs (\$461.70), prejudgment interest (\$670.00), and an award of all attorney's fees incurred through the date of the judgment (\$5,421.00) for a total judgment of \$10,340.20. (R. pp. p 46 doc 57 Transcript of Judgment No. 3 filed 9/11/19.)

On September 17, 2019, Judge Turner issued an order denying a request for a new trial. (R. pp. p 47 doc 57, Order filed 9/17/19.) Appellants had not requested a new trial. Therefore, it is assumed Mr. McCutcheon filed an *ex parte* motion.

On October 3, 2019, the Charleston County clerk of court filed Judge Turner's September 11, 2019 Order. (R. pp. p 48 doc 57 Order filed Oct 3, 2019.)

Ms. Means' counsel realized that the August 9, 2019 Order vacating the May 23, 2019 Order had not been sent to the Charleston County Clerk of Court. To avoid confusion and the appearance of two judgments against Mr. McCutcheon, Ms. Means' counsel sent the August 9 Order to the clerk of court for filing. On October 21, 2019, the clerk of court filed the August 9 Order vacating the May 23, 2019 Order in the amount of \$6,823.20. (R. pp. p 51 doc 57; Order Vacating Judgment Transcript of Judgment No. 2 filed Oct 11, 2019.) The September 11, 2019 Order was unaffected by this filing. The September 11 Order has never been appealed.

On December 19, 2019, Appellants filed their execution against property with the Charleston County clerk of court. (R. pp. p 82 doc 58 Filed execution against judgment.)

On February 3, 2020, the Charleston County Sheriff's Office Returned the judgment *nulla bona*. (R. pp. *Nulla Bona* return 35a.)

On February 21, 2020, Appellants filed a petition for supplemental proceedings. (R. pp. petition and exhibits 35.)

On February 25, 2020, the Honorable Jennifer McCoy filed her Order Of Reference And Rule To Show Cause with the Charleston County clerk of court. (R. pp. Order of Reference 37.) This case was referred to the Charleston County Master-in-Equity, the Honorable Mikell R. Scarborough.

On August 17, 2020, Ms. Means' counsel sent Mr. McCutcheon notice that supplemental proceedings would be held before Judge Scarborough on September 11, 2020. (R. pp. Notice of September 11, 2020 40.)

On September 2, 2020, Mr. McCutcheon was to be deposed regarding any assets he may have to satisfy the judgment. While notice was sent to 90 Hanover Street, he did not appear. (R. p. Doc 58 Ex 23 p 39; Ex 44 p91; doc 58 p. 14.)

On September 11, 2020, Ms. Means appeared before Judge Scarborough. Mr. McCutcheon did not appear. Judge Scarborough reset the supplemental proceedings hearing for December 7, 2020. He directed counsel to serve Mr. McCutcheon by publication to ensure he had notice of the hearing. (R. pp. transcript 101, pp. 3-4.)

On September 14, 2020, counsel mailed to Mr. McCutcheon a filed notice of the hearing scheduled for December 7, 2020. (R. pp. Ex 7 p 19-24 Affidavit of C. Steven Moskos in support of Rule 66, Notice 45.) This notice was sent certified mail and regular mail to 90 Hanover Street Apt. A in Charleston and to Mr. McCutcheon's post office box PO Box 21141, Charleston, SC 29401. The certified mail was returned. The regular mail was not. (R. p. doc 58 p.105, 110.)

On September 23, September 30, and October 7, 2020, notice of the December 7 hearing was placed in the Charleston City Paper. (R. pp. p 25 Affidavit of C. Steven Moskos in support of Rule 66, Affidavit of Service by Publication 49.)

On December 7, 2020, Mr. McCutcheon again failed to appear in court. The Court received testimony regarding notice of the hearing, evidence of Mr. McCutcheon's assets, and Appellants' request for contractual attorney's fees. (R. pp. 3-19 Dec. 11 transcript 101.) While Appellants sought \$21,060 for their attorney's fees, the Master awarded only \$6,146.00 reasoning that the total judgment should not be more than five times the amount of Mr. McCutcheon's debt to Appellants. (R. pp. 10-11 Tran 101.)

On December 30, 2020, Ms. Means' counsel filed an affidavit of attorney's fees in support of Appellants' request for the additional sum of \$21,060.00 for fees and \$589.66 for costs for the hours incurred between September 11, 2019 and December 6, 2020 in pursuing payment of the Small Claims Judgment. (R. pp. Affidavit of Attorney's Fees of C. Steven Moskos filed 12/30/20 doc 58.)

In his January 25, 2021 Order, the Master found that Mr. McCutcheon had notice of the hearing, that he had assets to pay the underlying judgment, and that he should have to pay an additional \$589.66 in costs, \$2,384.73 in post judgment interest, and \$6,146.00 in attorney's fees. This brought the total judgment to \$19,460.59. (R. pp. January 25, 2021 Order 59.)

The January 25, 2021 Order was served on Mr. McCutcheon, again at his 90 Hanover Street address. (R. pp. p 32-47 Aff re sanctions filed 2-18-21 doc 66 .)

On January 27, 2021, the January 25 Order was emailed to United Bank where Mr. McCutcheon had several accounts totaling over \$250,000. (R. pp. p 49-50 Aff re sanctions filed 2-18-21 doc 66.)

On February 4, 2021, Appellants filed their Motion To Amend Or Alter Judgment regarding the Master's January 25 Order, requesting the Court grant them a full award of attorney's fees. (R. pp. 1-5 Motion to Amend Judgment.)

On February 12, 2021, counsel was informed by United Bank that Mr. McCutcheon had withdrawn all his money from his bank accounts. The date of that occurrence was not provided. (R. pp. p 48 doc 66, Aff. for sanctions Ex. 16.)

On February 18, 2021, Plaintiff filed her Rule To Show Cause, Motion For Sanctions, Motion For Arrest Of Defendant, And Motion For Attorney's Fees. Counsel filed an affidavit to support the motion. (R. pp. 1-2, Motion for Rule to Show Cause 65 and R. pp. 1-55 Aff. for sanctions 66.)

On February 25, 2021, notice was sent to Mr. McCutcheon that a hearing on the above motions would take place on March 11, 2021. (R. pp. Notice 67.)

On March 7, 2021, Mr. McCutcheon sent to the Master another *ex parte* letter regarding Plaintiffs' Rule to Show Cause and other motions scheduled for March 11. Mr. McCutcheon acknowledged receipt of notice of the hearing as the letter states, "I am Donald McCutcheon responding to a Notice of Hearing scheduled for March 11". (R. pp. 1-3 Letter 70.) His letter, and the others he has sent to the various courts, claimed he does not owe any money because the Small Claims Court vacated its May 23, 2019 Order. He did not state he had a conflict with the scheduled court date. He has never addressed the Court's September 11, 2019 Order.

On March 11, 2021, the Master heard Appellants' Rule to Show Cause and their motion to amend the January 25 Order. Again, Mr. McCutcheon did not appear. (R. pp. 1-24 transcript 102.) Counsel also filed an additional affidavit of attorney's fees for time

spent from December 7, 2020 through March 11, 2021. Counsel requested an additional \$15,522.00 in attorney's fees and \$143.56 for costs. (R. pp. 1-9 Affidavit of Attorney's Fees C. Steven Moskos filed 3/22/21 73.) The Master found Mr. McCutcheon in contempt of two court Orders and awarded Appellants \$10,540 towards their attorney's fees for the December to March time frame. (R. pp. 17, 19, and 21 March 11 transcript 102.) The Master's reasoning was to make the judgment "a nice, smooth \$30,000 and some change".

On March 25, 2021, the Master filed his Order with the clerk of court finding Mr. McCutcheon in contempt of court. (R. pp. 1-6 3-25-21 Order.) The Master issued an arrest warrant for Mr. McCutcheon, denied Appellants' motion to amend the January 25 Order regarding attorney's fees, and added an additional \$10,000.00 to the outstanding judgment for part of the attorney's fees incurred between December 7, 2020 and March 11, 2021. In ruling on fees, the Master's Order stated:

"I find that Petitioners' Counsel has satisfied the six Baron Data factors; however, the amount of the debt and the fact that the basis for a fee award is a contract between the Parties, as opposed to a statutory attorney fee provision, allows the Court to reduce the fees awarded."  
(R. p. March 25 Order page 3 footnote 3.)

Thus, the total judgment as of the March 25 Order was \$27,219.42, consisting of the Small Claims Court judgment of \$10,340.20 (the debt owed to Ms. Means (\$3,787.50), her costs (\$461.70), prejudgment interest (\$670.00), and an award of attorney's fees (\$5,421.00)), and supplemental proceedings' costs of \$733.22, \$6,146.00 for additional attorney's fees from September 2019 until December 7, 2020, and \$10,000.00 for additional attorney's fees from December 7, 2020 until March 11, 2021. (R. p. 6 3-25-21 Order 75.)

On April 23, 2021, Appellants appealed the Master’s January 25 and March 25 Orders awarding them \$16,146.40 towards their attorney’s fees, instead of the full \$36,582 requested, a \$20,435.60 difference. (R. p. 1 Notice of Appeal 77.) The fees awarded by the Master amount to approximately forty-four (44%) of the fees requested.

The chart below reflects the amount of fees requested before and awarded by the two courts and the percentage of fees awarded by each court.

Court	Date	Amount Requested	Amount Awarded	Percentage Awarded
Small Claims Court	March 20, 2019 – September 11, 2019	\$5,421.00	\$5,421.00	100%
Charleston Master-In-Equity	September 12, 2019 - December 6, 2020	\$21,060.00	\$6,146.40	29.18%
Charleston Master-In-Equity	December 7, 2020 - March 11, 2021	\$15,522.00	\$10,000.00	64.42%
TOTAL	March 20, 2019 – March 11, 2021	\$42,003.00	\$21,567.40	51.34%

### STANDARD OF REVIEW

“When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. Baron, supra. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).” Layman v. State, 658 S.E.2d 320, 376 S.C. 434 (2008).

## ARGUMENT

### 1. AN AWARD OF ATTORNEY'S FEES WILL BE OVERTURNED WHEN THE AWARD IS CONTROLLED BY AN ERROR OF LAW. THE MASTER AWARDED FEES IN PROPORTION TO THE ORIGINAL AMOUNT OF THE DEBT OWED TO MS. MEANS AND HER FIRM. DID THE MASTER COMMIT AN ERROR OF LAW BY CONSIDERING A FACTOR OUTSIDE THE SIX FACTORS USED TO DETERMINE AN ATTORNEY FEE AWARD?

In South Carolina, there are six factors to consider in determining an award of attorney's fees:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) professional standing of counsel;
- (4) contingency of compensation;
- (5) beneficial results obtained; and
- (6) customary legal fees for similar services.

Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

"Consideration should be given to all six factors; none of the factors is controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)." Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998).

When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993).

A party requesting fees must produce an itemized affidavit of fees incurred in pursuing the fee shifting claim. The opposing party then has the burden of showing which of the fees are clearly unrelated to the claim which allows for attorney's fees. Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992).

"Where a contract provides for a reasonable attorney's fee, the judge must determine the appropriate award based on the evidence presented, considering the

appropriate factors. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993)." First Sav. Bank, FSB v. Capital Investors, 459 S.E.2d 307, 318 S.C. 555 (1995).

**a. The Contract Provision**

The contract between the Parties states, "You further agree that if you have not paid our fees and costs in full at the time of our termination as your attorney, that we may initiate collection procedures against you for the purpose of obtaining payment in full for our services provided and you agree to pay any and all costs of collection including reasonable attorney's fees". (R. pp. Comp Ex 1.)

**b. The Court's Determination Of Fees**

During the December 7, 2020 hearing, the court asked, "how do I get to the attorneys fees request of \$25,000 incurred in this particular process?" (R. pp. Trans 1 6:16-18.) Counsel explained that the \$25,584 requested in his affidavit of attorney's fees included time he had spent and the time he expected to spend on the case after the hearing. (R. pp. 8:15-9:13 12-7-20 Transcript.) The Master then stated his feelings on awarding a full attorney's fee in the case.

On this judgment, which the principal amount was \$3,787.50. The Plaintiff seeks over ten times that amount of the judgment which the Court just can't bring himself to do, so what I'm going to give you is five times the amount of the judgment.

I've already stated that based upon the record that I've got, \$12,791.10 would be the judgment amount plus interest plus costs. I'm going to increase that amount by an additional some odd \$6,000, and I'm going to grant you judgment in the amount of \$18,937.50, which is this Court's calculation of exactly five times the amount of the original judgment.<sup>1</sup> I think that should be punishment enough.

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<sup>1</sup> The Master actually capped the judgment at five times the debt owed to appellants. A \$6,000 attorney fee is approximately 1.58 times the original debt and only 28.49% of \$21,060, the value of the time spent. Under the Master's view, attorney's fees are based on the final judgment the Master thinks is fair. This does not comply with the Jackson v. Speed factors. Additionally, five times the original judgment would be \$51,701. \$10,340.20 times five equals \$51,701.

(R. pp. Trans 1 10:21-11:9.)

Shortly thereafter, the Master stated:

Let me cut to the chase. You can make your record, and I understand it, but on a \$3,787 figure, with the amount that this Court's awarding and the amount that the prior court has awarded, the attorney's fees come to \$11,567.40, which is approximately four times the amount of the judgment, and I think that that is reasonable under the circumstances.<sup>2</sup>

(R. pp. Trans 1 13:5-12.)

The Supreme Court has rejected the Master's approach. "[T]here is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment." Taylor v. Medenica, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (affirming fee award of \$500,000 on actual damages of less than \$36,500). Additionally, there are not any cases stating that attorney's fees awarded by another court are to be used to determine other fees requested in the litigation. It is an error of law to tie the attorney's fees to the judgment. Williamson v. Middleton, 649 S.E.2d 57, 64, 374 S.C. 419, 431 (Ct. App. 2007).

Williamson v. Middleton, 649 S.E.2d 57, 374 S.C. 419 (Ct. App. 2007), while overruled at Williamson v. Middleton, 681 S.E.2d 867, 383 S.C. 490 (2009), is especially instructive. Williamson brought four causes of action. All but one were dismissed before trial. Middleton counterclaimed for unpaid commissions of \$906.62. At trial, the jury returned a verdict in favor of Middleton. The jury also found in favor of Middleton on his counterclaim. Middleton's counsel requested \$35,000 in attorney's fees. On appeal, Williamson argued that "the amount of attorneys' fees awarded was unreasonable in light

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<sup>2</sup> The \$11,567.40 for fees as discussed by the Master are actually just over three times the original debt owed to appellants. \$11,567.40 divided by \$3,787 equals 3.05. Nonetheless, the Master's analysis to determine the fees to award for the time spent during supplemental proceedings improperly included time spent before Judge Turner. The analysis should only have related to the time spent during supplemental proceedings.

of the meager verdict Middleton received”. The Court rejected this position finding there was evidence in the record to support the judge’s award. The Court found that Middleton, at Williamson’s request, delayed bringing suit to attempt to settle the case. Within a matter of days, though, Williamson filed suit against Middleton. The Court also found Williamson was dilatory in his handling of the case increasing the time Middleton’s attorney had to spend on the case. Additionally, Williamson’s four causes of action were found to be meritless. The Supreme Court, however, determined that the record was devoid of any evidence that showed Middleton had incurred fees as Middleton’s counsel denied having a fee agreement with Middleton. This meant that Middleton had not actually incurred attorney’s fees as required by §39-65-30 of the wage statute. This was the sole basis for overturning the award of attorney’s fees. That is not the case here. (R. pp. Verified Complaint; Affidavit of Attorney’s Fees 3/22/21 doc 73.)

The present case mirrors Williamson. Ms. Means attempted to get paid by Mr. McCutcheon prior to filing suit. She was unsuccessful. Counsel, on behalf of Appellants, sued Mr. McCutcheon but had an extraordinarily difficult time finding and serving him. (R. pp. doc 57 Ex 2, 3, 4, 5.) Counsel’s process server believed Mr. McCutcheon had been found at his mother’s house in Moncks Corner. Service was made on Mr. McCutcheon at that location. (R. p. Affi of service of complaint 57 Ex 5.) Mr. McCutcheon did not appear to defend himself and was placed in default.

Mr. McCutcheon then made a motion to have the default judgment set aside based on insufficient service of process. (R. p. 1 Notice of Motion 17)

At the motion hearing, Mr. McCutcheon was successful in his request for a new trial. Judge Turner, however, admonished Mr. McCutcheon to contact Appellants’ counsel

to discuss settling this matter. (R. p. Trans 101 p10:4-8.)

After the hearing, Mr. McCutcheon again disappeared. Counsel attempted to resolve this matter with Mr. McCutcheon. Mr. McCutcheon did not respond. (R. p. 58 Ex 4.)

A second hearing date was scheduled for September 11, 2019. (R. p. doc 57 Ex 15.) Again, Mr. McCutcheon did not appear. Since Mr. McCutcheon never filed an Answer and failed to appear, Judge Turner again found in favor of Ms. Means and her firm. (R. p. doc 57 Transcript of Judgment No. 3 Ex 16.)

After the September 11, 2019 judgment was filed with the Charleston County clerk of court, counsel attempted to collect on the judgment. While Mr. McCutcheon may receive his mail at 90 Hanover Street Apt A, he does not live there.<sup>3</sup> (R. p. Affidavit Regarding Documents from Proceedings in Small Claims Court 57 Ex 2 and 58 Ex 39, 49.) Certified mail sent to him was returned; however, regular mail was not.<sup>4</sup> (R. p. Affidavit of Attorney's fees 12-30-20 58 pp. 98, 99, 105, 106, 110 111.) Obviously, expenses mount when one party continually must send certified mail to another. Expenses are increased further when two pieces of mail, instead of one, must be sent, when a party has to attempt multiple times to personally serve the other party, and when a party has to serve the other by publication. (R. p. Affidavit Regarding Documents from Proceedings in Small Claims Court 57 Ex 2 p34-37 and 58 Ex 50.) When the courts and the sheriff would begin closing in on him, Mr. McCutcheon would send in Judge Turner's

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<sup>3</sup> Almost all correspondence from Mr. McCutcheon has a return address of 90 Hanover Street.

<sup>4</sup> 90 Hanover Street Apt A is the correct address for Mr. McCutcheon as that is the return address on his correspondence and envelopes sent to the various courts and to appellants' counsel. (R. pp. doc 58 Ex 2, 3, 5, 55 pg. 114, 56 116, Ex Parte to Master 70.)

vacated May 23, 2019 Order in an attempt to convince the courts and the sheriff that the case had been thrown out.<sup>5</sup> (R. p. Affidavit of Attorney's Fees 12-30-20 58 Ex 55 p. 114, 56 116, Letter from Respondent 70. March 11, 2021 Trans 102 pp3:4-5:13.) Counsel then had to expend more time in explaining to the court or the sheriff the progress and status of the case. Because Mr. McCutcheon was hiding and not appearing before the court, counsel had to show that he was serving Mr. McCutcheon with notice of the various court proceedings. This increased the time spent on the case as it required counsel to prepare formal notices to be filed with the Court, hire process servers to serve hearing notices, and send correspondence by regular mail, certified mail, and email. (R. pp. Documents filed re Small Claims Court action 57 p. 17-22; Affidavit of Attorney's fees 12-30-20 58 pp. 94, 98, 99, 102, 105, 106, 110 111; .) Had Mr. McCutcheon had an attorney, the time spent on notice and additional court hearings would not have been incurred.

Counsel has laboriously set out the efforts to resolve this matter with Mr. McCutcheon, efforts to simply communicate with him, efforts to execute on the judgment amount, efforts to give Mr. McCutcheon notice of the proceedings, efforts to find Mr. McCutcheon's assets, and efforts to explain why the Court should award full attorney's fees to Appellants. Under the circumstances of this case, there is evidence in the record compelling a full award of attorney's fees to Appellants. (R. pp. 58 All Affidavit of attorney's fees from 9/11/19 – 12/6/20; 73 Affidavit of Attorney's Fees from 12/7/20 – 3/11/21.)

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<sup>5</sup> On July 6, 2021, Mr. McCutcheon sent the Court of Appeals an *ex parte* communication stating the case had been previously dismissed. This letter was filed July 8, 2021. His return address is 90 Hanover Street. (R. p. July 6 Letter from McCutcheon.) Mr. McCutcheon also copied the Court of Appeals on a letter dated September 1 2021 which showed his return address as 90 Hanover Street, Apt. A. (R. p. Sept. 1 Letter from McCutcheon.)

**c. Reasonable Attorney's Fees**

"[A] reasonable attorney's fee" necessarily implies all work that is reasonable; it would not be "reasonable" to deny payment for work reasonably necessary. This includes time spent during supplemental proceedings. *E.g.*, Renaissance Enters. v. Ocean Resorts, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (contractual provision) (finding "no reason" that such a fee would be excluded) (not needing to reach the governing rules of construction), *rev'd in part on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999); McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991) (wherein the Supreme Court found, where party was entitled to attorney's fees in underlying action pursuant to statute, that party was likewise entitled to attorney's fees for subsequent litigation over such fees incurred in supplemental proceeding).

The Master rejected the Jackson factors. Instead, he relied on the perceived difference between a contractual and statutorily authorized attorney fee provision to find in favor of a proportional attorney fee. This was an error of law.

Appellants provided to the Master detailed briefs and affidavits of attorney's fees with numerous exhibits. (R. p. 58 All Affidavit of attorney's fees from 9/11/19 – 12/6/20; 73 Affidavit of Attorney's Fees from 12/7/20 – 3/11/21.) Mr. McCutcheon did not contest this evidence.<sup>6</sup>

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<sup>6</sup> The Master was concerned with notice being provided to Mr. McCutcheon. So were Appellants. As stated, counsel sent Mr. McCutcheon numerous letters by regular mail, certified mail, and email. The Master also required appellants to serve Mr. McCutcheon by publication. (R. p. Affidavit of Attorney's Fees 12/30/20 58 p 102.) It is apparent Mr. McCutcheon received the notices sent to the address he gave the Small Claims Court. In his *ex parte* letter to the Master, he acknowledged the Notice of the March 11 hearing. His July 6, 2021 *ex parte* letter to the Court of Appeals, acknowledged receipt of "the letter requesting an Appeal" in this case and that he is "in receipt of the transcript date July 01, 2021 from the Court of Appeals". (R. p. Letter of March 8, 2021 doc 70 and Letter of July 6, 2021; See also Letter of September 1, 2021.)

During the hearing, the Master indicated he was considering factors outside Jackson v. Speed. Counsel pointed out the Master's error of basing counsel's fees on the amount of the underlying judgment. (R. p. 13:15-20.) The Master was not persuaded. (R. p. 14:24.)

The Master's January 25 Order recognized the six Jackson v. Speed factors and that counsel's work satisfied all the factors. (R. p. 1/25/21 Order p 5.) The Master's Order set forth the proof of evidence in the record justifying a full award of fees. The analysis should have ended there with a full award of fees. The Master's Order, however, then cites a different and unapproved factor, the proportion of fees to the underlying debt owed to Appellants. (R. p. p5 1/25/21 Order 59.)

This matter came back before the Master on March 11, 2021 because Mr. McCutcheon had removed all his money from the bank accounts which were to be used to satisfy the outstanding judgment. (R. p. 48 Affidavit of C. Steven Moskos in support of Rule 66.) Appellants' motion for reconsideration of the Master's January 25 Order was also heard. The Master denied Appellants' motion to modify the fee award from \$6,146 to \$21,060. In ruling on Appellants' motion for the remaining \$14,040 in attorney's fees from December 7 until March 11, the Master stated:

"What I'm going to do is I'm going to award you an additional \$10,540, and make it a nice, smooth \$30,000 and some change."  
(R. p. 9:3-5 Transcript - March 11, 2021.)

The Master's reasoning is set out in footnote 3 of his March 25, 2021 Order:

"I find that Petitioners' Counsel has satisfied the six Baron Data factors; however, the amount of the debt and the fact that the basis for a fee award is a contract between the Parties, as opposed to a statutory attorney fee provision, allows the Court to reduce the fees awarded."

As the Master stated, counsel satisfied all the Jackson v. Speed factors<sup>7</sup>. He recognized that Mr. McCutcheon's actions wasted Appellants', counsel's, and the court's time and resources, that the time spent was necessary and reasonable, the result was excellent, especially in light of having to locate funds to compensate Appellants, and that counsel's hourly rate was reasonable. Having found counsel again met all the factors, the Master should have awarded a full fee.

The rationale given for not following Jackson was the "U.S. Supreme Court just in the past week has ruled that when you bring something under a statute, one of the reasons why they allow you to recover your full attorney's fees is so that you go after it." (R. p 19:9-13 Transcript of March 11, 2021.) The Master did not identify which case to which he referred. While the Master is correct that one reason legislatures and Congress include a fee shifting provision is to make a statutory claim economically viable, as explained below, a contractual provision does the same. See Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010) (award of fees under Dealers Act facilitates suits to enforce buyer's rights under the Act.). Contrary to the Master's statement, in South Carolina, the factors used to award fees pursuant to a statute are the same factors used for awarding fees pursuant to a contract. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) (fees awarded per statute using the six enumerated factors); Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1988) (fees awarded per leases using the six enumerated factors). Additionally, South Carolina does not recognize rounding to "a nice, smooth" number as a factor in determining fees. Citing and relying on a nonexistent distinction and an improper factor are errors of law.

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<sup>7</sup> The six attorney's fees factors set forth in Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) and Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989) are identical.

**d. Purpose Of A Contractual Attorney Fee Provision.**

The purpose of a contractual provision for attorney's fees is to make sure that the party asserting the right to fees gets the full benefit of the bargain as agreed to in the contract. In re Jones, 83 B.R. 765 (Bankr. Or. 1988) (attorney fee provision in note assures creditor will be able to collect debt without having recovery diminished by collection costs). Litigation can be very expensive. Without a contractual fee shifting provision, the non-defaulting party has a decision to make. If he chooses to bring suit based on emotion, whether anger, frustration, or even a sense of competition, he may win, but his attorney's fees will cut into the profits he would have received under the contract. He may end up owing more in fees than he ultimately receives from the defendant. This pyrrhic victory is not good for the plaintiff. If the plaintiff is a business, does the business now have to raise prices to make up what it lost, assuming it can raise prices based on the marketplace? Do such losses put the business at an economic disadvantage in the marketplace? Do those losses put the company out of business? Such a course could put a natural person in financial jeopardy from which he might not be able to extricate himself.

On the other hand, if the plaintiff looks at the issue from an economic viewpoint, he may decide that the cost of hiring an attorney is too great, so he should not pursue his claim. This puts the plaintiff in the same position as above in having to determine how to make up the loss caused by the defendant's breach. The plaintiff may determine that his best course of action is to try to negotiate a settlement. The defendant may realize that he can use the leverage he has over the plaintiff to reduce what he owes. While the plaintiff may recover some money, he will more than likely not receive that to which was

originally agreed. Again, the plaintiff is left trying to figure out how to mitigate his losses.

These are not new questions. Parties have learned over the years that, to protect themselves, a provision needs to be included in their contracts so that they may recover all their costs and profit as was agreed when the deal was struck.

A contractual fee shifting provision serves other purposes. First, it operates as a deterrent to a party's attempt to use its default as leverage to renegotiate a contract. If a party knows that he will be responsible for even more money if he defaults, he may choose not to default. This deterrent effect benefits the non-defaulting party and the courts as fewer resources are used by both to insure that contracts are enforced.

Second, parties to contracts are planning for the future. Including a contractual attorney fee agreement plans for a potential default by one of the parties. Thus, the parties know what to expect should a party default. Prior to default, the potential defaulting party must make decisions as to what is in his best interest based on the agreement made. Thus, the defaulting party will know for what he may be responsible should he lose.

Third, upon default, a contractual fee shifting provision allows the non-defaulting party to mitigate his losses and, depending on the situation, allows his business to stay healthy. This benefits the marketplace in general.

Fourth, contractual fee shifting provisions also encourage attorneys to undertake these cases as they become more economically viable. This aids the court by having knowledgeable, efficient counsel working on cases instead of *pro se* litigants who may spend the court's resources on frivolous issues. With competent counsel, the expense to a party and the judiciary is reduced.

Fifth, if a contractual fee shifting provision is not enforced, some people may be

encouraged to breach other contracts with other businesses or people as they will have little fear of the consequences for their actions. This hurts the people involved. If this continues to happen, people will begin to think the economic system is broken. This might result in more people breaking contracts in an effort to compete in the marketplace.

Ultimately, the cost of breaking a promise should be on the defaulting party, not the performing party. A fee shifting provision accomplishes that. In this case, the provision should be fully enforced.

**e. Public Policy In Favor Of Awarding Contractual Attorney's Fees**

"A sound public policy requires the enforcement of contracts deliberately made, which do not clearly contravene some positive law or rule of public morals.... Courts should not annul contracts on doubtful grounds of public policy. In such matters it is better that the legislature should first speak." Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1994). Here the parties discussed an agreement regarding a domestic matter. The contract between the parties was deliberately made. Contracts commonly have provisions that allow the provider of goods or services to receive attorney's fees should that party have to use the legal system to remedy the other party's breach. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000), South Carolina Nat. Bank v. S & L Inv. Partnership, 419 S.E.2d 243, 308 S.C. 511 (Ct. App. 1992) ("personal guaranties signed by all of the individual partners provided for recovery of reasonable attorney fees 'not to exceed 15% of the liabilities of the undersigned hereunder, incurred by the bank in collecting such liabilities.'"), BB&T of South Carolina v. Kindwell, 350 S.C. 382, 565 S.E.2d 316 (Ct. App. 2002) (attorney fees awarded according to the terms of a mortgage agreement), Laser Supply v. Orchard Park Associates, 676 S.E.2d 139, 382 S.C. 326 (Ct.

App. 2009) (contract for exterior wood siding repair and replacement included attorney fee provision).

By limiting Appellants' recovery to a multiple of the actual damages, the Master effectively annulled the full remedy to which the parties agreed. As with punitive damages, actual damages are a separate category of damages from attorney's fees. The approach of tying fees to actual damages has been rejected by our courts which have found fees greater than the actual damages appropriate. Taylor v. Medenica, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (affirming fee award of \$500,000 on actual damages of less than \$36,500), Williamson v. Middleton, 649 S.E.2d 57, 374 S.C. 419 (Ct. App. 2007), Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1988) (\$16,161 actual damages, \$26,000 in attorney fees).

**f. The Master Erroneously Viewed The Award Of Fees As A Punishment.**

The award of attorney's fees is separate from an award of punitive damages. The two cover different subjects and require proof of different factors. "The rationale for this position is that an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010). The Master, however, stated:

I've already stated that based upon the record that I've got, \$12,791.10 would be the judgment amount plus interest plus costs. I'm going to increase that amount by an additional some odd \$6,000, and I'm going to grant you judgment in the amount of \$18,937.50, which is this

Court's calculation of exactly five times the amount of the original judgment.<sup>8</sup>  
I think that should be punishment enough.  
(R. pp. Trans 1 11:1-11:9.)

The Master saw the imposition of attorney's fees not as compensation for an expense of the action but as a punishment, in effect, punitive damages. This was an error of law and should be reversed.

**g. A Recalcitrant Party's Stalingrad Defense**

"Although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost." McGowan v. King, Inc., 661 F.2d 48, 51 (5th Cir. 1981). This militant resistance is referred to as "the Stalingrad defense". It is a tactic designed to wear down an opponent by contesting every issue, delaying the matter, or, in some way, making the case as difficult and costly as possible. It is tantamount to house-to-house fighting in litigation. This defense can be employed in two manners. One is where a party "papers" the other side with frivolous activity such as irrelevant motions or irrelevant discovery. The other is where a party is dilatory, grinding the case to a halt. In either case, the other party's costs and fees are unreasonably increased. Mr. McCutcheon is employing the later. By dragging his feet, Mr. McCutcheon has caused Appellants to expend extra effort and money in locating and notifying him about activity in the case. Mr. McCutcheon's inaction and avoidance also increased fees as Appellants had to make multiple trips to the courthouse for relief. In doing so, he has also caused the court to expend resources notifying Mr. McCutcheon of hearings and

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<sup>8</sup> The Master actually capped the judgment at five times the debt owed to appellants. A \$6,000 attorney fee is approximately 1.58 times the original debt and only 28.49% of \$21,060, the value of the time spent.

conducting three supplemental proceedings hearings when only one was needed. He has violated two court Orders. He has caused a simple breach of contract case to devolve into a game of “cat and mouse”. The court should not condone nor encourage, this behavior.

In determining an award of attorney’s fees in light of a recalcitrant party’s conduct, the question becomes who should bear the burden of Mr. McCutcheon’s dilatory conduct. Should it be Appellants who had the foresight to include in their contract a fee shifting provision? Should Appellants have to pay their Attorney for attorney’s fees incurred in suing on a breach of contract when Mr. McCutcheon had agreed to pay those fees? Should Appellants’ profit be diluted because of Mr. McCutcheon’s dilatory tactics? Should it be Mr. McCutcheon who agreed to the fee shifting provision and, through his breach of the contract, is the cause of the attorney’s fee? Should it be Appellants’ counsel? Should Appellants’ counsel not charge or collect from his client his fee when the court does not award the full fee? Should Appellants’ counsel accept only the fee awarded by the court and suffer a loss because Mr. McCutcheon chose to breach his contract and then chose an expensive dilatory strategy? The Court previously recognized this dilemma when fees are sought. It rejected imposing the cost on either the party seeking fees or her attorney. Rish v. Rish By and Through Barry, 370 S.E.2d 102, 296 S.C. 14 (Ct. App. 1988). Obviously, the person responsible for breaching the contract should be responsible for the fees incurred to remedy that breach so as not to dilute contractual benefit to the non-defaulting party nor the fees earned by counsel.

The court in Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992) explained the cost of the Stalingrad defense to those who use it unsuccessfully.

“While this hard-nosed approach to litigation may be viewed as effective trench warfare, it must be pointed out that such tactics have a significant downside. The defendants suffer the adverse effects of that downside here. There is a corollary to the duty to defend to the utmost — the duty to take care to resolve litigation on terms that are, overall, the most favorable to a lawyer’s client. Although tension exists between the two duties, they apply concurrently. When attorneys blindly pursue the former, their chosen course of action may sometimes prove to be at the expense of the latter.”

It is expected that Mr. McCutcheon will not respond to this appeal. If he does, he should not be allowed to complain about the fees being awarded or the size of the fees. He has chosen to act as his own lawyer. He is thus held to the same standard as a lawyer. State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003) (“A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law.”). He has chosen to be dilatory. He was unsuccessful in his attempt to wear down Appellants so they would “just go away”. He now should bear the consequences of his strategy. The court should determine that Appellants are entitled to an award of their full attorney’s fees so they can pay their counsel for the time he spent successfully pursuing Mr. McCutcheon.

**2. AN AWARD OF ATTORNEY’S FEES WILL BE OVERTURNED WHEN THE AWARD IS WITHOUT EVIDENTIARY SUPPORT. THE RECORD IS DEVOID OF ANY EVIDENCE WARRANTING A REDUCTION IN FEES OWED TO MS. MEANS AND HER FIRM. SHOULD THE MASTER’S ORDER BE MODIFIED BECAUSE THERE WAS NO EVIDENCE WARRANTING A REDUCTION IN ATTORNEY FEES REQUESTED?**

A party requesting fees must produce an itemized affidavit of fees incurred related to the contract. The opposing party then has the burden of showing which of the fees are clearly unrelated to the claim which allows for attorney’s fees. Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992). Counsel provided detailed proof of his fees. (R. pp. Affidavit of Attorney’s Fees of C. Steven Moskos filed 12/30/20 doc 58; Affidavit of

Attorney's Fees C. Steven Moskos filed 3/22/21.) Mr. McCutcheon had numerous opportunities to defend himself and to oppose Appellants' request for fees. He did neither. Instead, he chose to hide from the Court. Thus, the only evidence before the Master showed counsel's fees are reasonable.

Since there is no evidence in the record that counsel's fees were unrelated to the contract claim, that they were redundant, or that the fees were unreasonable, the Master's reduction of those fees was improper. The court should review the fees requested and modify the Master's Order by awarding Appellant all fees requested between September 12, 2019 and March 11, 2021.

### **CONCLUSION**

Not awarding the full attorney fee was an error of law by the Master. The Master found for Appellants on all the factors. The Master then disregarded all the factors by basing his determination of attorney's fees on the arbitrary position that the attorney's fees were too high a multiple of the actual damages. Our courts have found this approach inappropriate.

Appellants request the court modify the Master's Orders and award Appellants their full attorney's fees from September 11, 2019 through March 11, 2021 in the amount of \$20,435.40. In the alternative, the court should remand this matter to the Master with instructions to award full attorney's fees consistent with South Carolina law.

Respectfully submitted,  
/s/ C. Steven Moskos  
SC Bar No. 007938  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
(843) 763-5297  
[steve@moskoslawfirm.com](mailto:steve@moskoslawfirm.com)  
**ATTORNEY FOR APPELLANTS**

RECEIVED

Sep 07 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
MASTER-IN-EQUITY  
Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2021-000426

Jessica Means and Hall & Means, LLC,

Appellants

v.

Donald B. McCutcheon

Respondent.

PROOF OF SERVICE

I certify that on September 7, 2021, I have caused the below referenced documents to be served via electronic submission to all parties of record. I have served Donald B. McCutcheon via email and by U.S. Mail, postage prepaid, or by other delivery as indicated, at Donald B. McCutcheon, 90 Hanover St., Apt A, Charleston, SC 29403.

1. Appellants' Initial Brief;
2. Appellants' Designation Of Matter To Be Included In The Record On Appeal;
3. Proof of Service of Appellants' Initial Brief, Designation Of Matter To Be Included In The Record On Appeal;

s/ C. Steven Moskos  
SC Bar # 7938  
ATTORNEY FOR APPELLANTS

September 7, 2021

## Steve Moskos

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**From:** Steve Moskos  
**Sent:** Tuesday, September 7, 2021 4:47 PM  
**To:** donaldrmccutcheon23@gmail.com; 'mccdee@bellsouth.net'  
**Subject:** Means v McCutcheon Appellate Case No. 2021-000426  
**Attachments:** 10 Initial Brief of Appellants 9-7-21.pdf; 11 Designation of Matter to Be Included in the Record.pdf; 12 Proof of Service of Initial Brief and Designation of Matter 9-7-21.pdf

Mr. McCutcheon,

Please find attached a copy of Appellants' Initial Brief, Appellants' Designation Of Matters To Be Included In The Record, and Proof of Service.

C. Steven Moskos  
4000 Faber Place Dr., Ste 300  
North Charleston, SC 29405  
843-763-5297  
[steve@moskoslawfirm.com](mailto:steve@moskoslawfirm.com)  
<https://www.moskoslawfirm.com>

**C. STEVEN MOSKOS, P.A.**  
**ATTORNEY AND COUNSELOR AT LAW**

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Supreme Court of South Carolina Certified Mediator

**M**

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
steve@moskoslawfirm.com

September 7, 2021

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**

**Sep 07 2021**

**SC Court of Appeals**

**Re: Means v. McCutcheon**  
**Appellate Case No.: 2021-000426**

Dear Ms. Kitchings:

Enclosed please find Appellants' Initial Brief, Designation Of Matter To Be Included In The Record On Appeal, and my Proof of Service.

I am also enclosing a copy of the email wherein I served Mr. McCutcheon by e-mail. I will be serving him with a copy by regular mail at his 90 Hanover Street, Apt. A address in Charleston.

If you have any questions, please do not hesitate to contact me.

Sincerely,



**C. STEVEN MOSKOS**

CSM/slf

Enclosures

cc: Donald B. McCutcheon