IN THE

GEORGIA COURT OF APPEALS

Alex Higdon
Appellant

Versus

Jane Higdon
Appellee

Docket Number

A12A2188

APPELLANT BRIEF

Alex Higdon, Pro Se
6030 China Rose Lane
Johns Creek, GA. 30097
678.595.2244
alex.higdon@yahoo.com

STATEMENT OF THE CASE

ABREVIATED BACKGROUND

On March 28th – 30th, 2011, the Trial Court conducted a trial and entered its final judgment and decree of divorce on June 13th, 2011. The Appeal before this honorable Court is from the post-judgment phase of that divorce matter where the Appellant's Motion for New Trial is pending. Appellant and Appellee were married on May 15th, 2004. The Appellant is employed as a Licensed Clinical Psychologist specializing in Family Therapy and Couples in Distress while the Appellee is a National Director of Sales for a Children's School Fundraising Company owned by her family. The Appellant earns five (5) times the annual salary of the Appellee. The couple have four (4) children together: A four (4) year old boy named ████ who is Autistic, a three (3) year old boy named ████ who was once diagnosed with Autistic Spectrum Disorder and who has since lost that diagnosis as a result of two (2) years of medical treatment, a two (2) year old twin named ████ who has recently been diagnosed with Childhood Speech Apraxia, Expressive and Receptive language delay, heavy metal toxicity, developmental delay, and certain nutritional deficiencies, and a two (2) year old twin named ████ who has recently been diagnosed with heavy metal toxicity and various nutritional deficiencies.

The appeal in the case sub judice began on April 23rd, 2012, when Judge Gail S. Tusan pronounced her Order on Submission Restriction claiming for the first time that the Appellant's filing submissions were frivolous, vexatious, and inveterate. Not only has he no history of litigious filing, not one single pleading produced by the Appellant has ever been cited as frivolous in Judge Tusan's court. In addition to the glaring substantive contradictions arising from Judge Tusan's order, on the way to pronouncing her global pre-filing injunction restricting the Appellant's submissions to the Court, the Judge violated every due process mandate ever divined by both state and federal courts. The litany of caselaw below highlights just one of the many violated mandates:

> *Weaver v. Leon County Sch. Bd.,* 2006 U.S. App. LEXIS 8128 (11th Cir. 2006) (the Eleventh Circuit held that a litigant was entitled to notice and an opportunity to be heard before a restriction was imposed on his ability to

challenge an injunction.); *U.S. v. Powerstein*, 2006 U.S. App. LEXIS 14928,*;185 Fed. Appx. 811 (11th Cir. 2006)(litigant entitled to notice and an opportunity to be heard before the court imposed the injunctive order); *Sires v. Fair*, 107 F.3d 1;1997 U.S. App. LEXIS 2173 (1st Cir. 1997); *Cok v. Family Court of Rhode Island* , 985 F.2d 32 (C.A.1 (R.I.), 1993) (vacating a pre-fling injunction issued without notice); *MLE Realty Assocs. v. Handler*, 192 F.3d 259, 1999 U.S. App. LEXIS 23362 (2nd Cir. 1999); *Lau v. Meddaugh*, 229 F.3d 121 (2nd Cir. 2000); *Holton v. Oral Surg. Sing Sing* Corr., 24 Fed. Appx. 37; 2001 U.S. App. LEXIS 25151 (2nd Cir. 2001); *Moates v. Barkley*, 147 F.3d 207, 208 (C.A.2 (N.Y.), 1998) (district court may not impose a filing injunction on a litigant without providing the litigant with notice and an opportunity to be heard.); *Gonzales v. Feiner*, 131 Fed. Appx. 373, * 2005 U.S. App. LEXIS 8370, ** (3rd Cir. 2005); *Williams v. Cambridge Integrated Servs. Group* , 148 Fed Appx. 87, 2005 U.S. App. LEXIS 18624 (3rd Cir. 2005); *Brow v. Farrelly*, 994 F.2d 1027 (C.A.3 (Virgin Islands), 1992)(vacating a sua sponte issued injunction stating It is imperative that the court afford the litigant notice and an opportunity to be heard prior to issuing such an injunction.); *In Re Head,* 2006 U.S. App. LEXIS 8265,*;174 Fed. Appx. 167 (4th Cir. 2006)(vacated a 10 yr. old sua sponte injunction); *Cromer v. Kraft Foods N. Am., Inc*., 390 F.3d 812, 819 (4th Cir. 2004)(vacating a pre-filing injunction issued without notice); *Tucker v. Drew*, 1994 U.S. App. LEXIS 11784 (4 th Cir. 1994); *Douglas Baum v Blue Moon Ventures, LLC* , 2008 U.S. App. LEXIS 91,*;513 F.3d 181;49 Bankr. Ct. Dec. 68 (5th Cir. 2008)("Notice and a hearing are required if the district court sua sponte imposes a pre-filing injunction or sua sponte modifies an existing injunction to deter vexatious filings."); *De Long v. Hennessey*, 912 F.2d 1144 (9th Cir.); *Roscoe v. Hansen*, 107 F.3d 880;1997 U.S. App. LEXIS 4996 (10th Cir. 1997); *Molski v. Evergreen Dynasty Corp*., 2007 U.S. App. LEXIS 20966,*;500 F.3d 1047 (9th Cir. 2007)(litigant must be given notice and a chance to be heard before the [injunctive] order is entered.); *Tripati v. Beaman*, 878 F.2d 351,354 (C.A.10 (Wyo.), 1989)(vacated and holding that the litigant is entitled to notice and an opportunity to oppose the court's order before it is instituted.); *Procup v. Strickland*, 567 F.Supp. 146 (M.D. Fla., 1983)(court issued a show cause order); *Procup v. Strickland*, 760 F.2d 1107, 1110 (C.A.11 (Fla.), 1985) (held that district court did give adequate notice and opportunity to be heard before issuance of the injunction); *Cofield v. Alabama Pub. Serv. Comm*., 936 F.2d 512, 514 (11th Cir.1991)(noting that court issued show cause order prior to rendering pre-fling injunction); *In re Powell,* 851 F.2d 427, 431 (D.C.Cir.1988)(reversing and holding If a pro se litigant is to be deprived of such a vital constitutional right as access to the courts, he should, at least, be provided with an opportunity to oppose the entry of an order restricting him before it is entered.); *Martin v. Circuit Court*, 627 So.2d 1298 (Fla.App. 4 Dist., 1993)(reversing a pre-filing order and holding that limiting the constitutional right of access to the courts, essential due process safeguards must first be provided); *In re Lawsuits of Carter,* 510 S.E.2d 91, 95; 235 Ga.App. 551 (Ga. App., 1998)(reversing a pre-filing injunction because notice or an opportunity not given); *Riccard v. Prudential Ins. Co*., 307 F.3d 1277, 1296 (11th Cir. 2002) (holding that injunctions "may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard.").

While caselaw from countless origins forbidding such an abdication of proper due process failed to discourage this Court's unlawful filing, the statutory impediment provided by the plain and unambiguous language of OCGA §9-11-65(a)(1) was equally feckless and unformidable.

ORDER AS INJUNCTION

Both federal and state courts have spent significant resources in pursuit of the proper designation of an order such as the one in the case sub judice. The "writ" most overwhelmingly identified by these courts in cases involving pre-filing orders, particularly those involving their issuance sua sponte, is the injunction. See, e.g., *Martin–Trigona v. Lavien*, 737 F.2d 1254, 1261–62 (2d Cir.1984); *Cromer v. Kraft Foods, Inc*., 390 F.3d 812, 817 (4th Cir.2004); *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 188–89 (5th Cir.2008); *In re Pointer*, 345 Fed.Appx. 204, 205, (2009) U.S.App. LEXIS 18851, at *2 (8th Cir. Aug. 19, 2009). Specifically, the Third Circuit pronounced: "As appellant filed no documents for adjudication prior to the issuance of the district court's sua sponte order, the [pre-filing] order is most aptly considered as an injunction." *In re Oliver*, 682 F.2d 443, 445 (3d Cir.1982).

POINTS AND AUTHORITIES

(1) The trial court abused its discretion and committed reversible err worthy of disqualification when it filed a global pre-filing injunction against the Appellant who has no history of frivolous or vexatious filings in its court. The process of any court curtailing the fundamental constitutional rights of a litigant can only be proper in the most extreme circumstances.

Pre-filing injunctions like the one delivered sua sponte in the case sub judice should in general, rarely ever be ordered. *In re Oliver,* 682 F.2d 443, 445 (3d Cir.1982) (an order imposing an injunction "is an extreme remedy, and should be used only in exigent circumstances"). Furthermore, their utilization in cases involving pro se litigants should be even more scarcely employed. *Pavilonis v. King,* 626 F.2d 1075, 1079 (1st Cir.) ("The use of such measures against a pro se plaintiff should be approached with particular caution."), cert. denied, 449 U.S. 829, 101 S.Ct. 96, 66 L.Ed.2d 34 (1980); *In re Powell*, 851 F.2d 427, 431 (D.C.Cir.1988) (per curiam) (such orders should "remain very much the exception to the general rule of free access to the courts")

(quoting Pavilonis, 626 F.2d at 1079). Not only must these drastic remedies be used sparingly, they must be utilized only when consistent with the constitutional guarantees of due process of law and access to the courts. *U.S. Const. amend. XIV, § 1.* These are longstanding rights of fundamental importance to our legal system which must be honored. "The due process clause requires that every man shall have the protection of his day in court." *Truax v. Corrigan,* 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254 (1921). SCOTUS has been consistent in its affirmation that the particular constitutional protection afforded by access to the courts is "the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co*., 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). Thusly, a judge in no way should limit a litigant's access to the courts absent "exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir.1993).

The global pre-filing injunction laid down by the Trial Court should have been a determination made with the greatest of care as it is an extreme sanction imposed only in the most egregious cases. On this record, such a case is not before the Georgia Court of Appeals. Very simply, there has not been one filing by the Appellant in the Trial Court deemed frivolous over the entirety of the Higdon v. Higdon divorce proceeding which begun on April 21st, 2010. The Appellant humbly requests that the body reviewing this matter refuse to brook the Trial Court's breach of law as his civil rights were clearly abridged by the filing of this unconstitutional order.

(2) The Trial Court abused its discretion and committed reversible err when it knowingly falsified its April 23rd, 2012 global pre-filing injunction by claiming the Appellant's Petitions for Habeas Corpus and Mandamus were "frivolous." This behavior by the Trial Court was both willfully fraudulent and necessitates the Court's immediate disqualification from the instant case.

Enumerated below the Appellant has provided an extended elucidation of two (2) examples of the court's fraudulent claims of frivolity showcased in its April 23rd, 2012 order. Please note that contrary to the Court's contention on page one (1) of its April 23rd, 2012 Order stating that the Appellant "has continuously filed frivolous lawsuits, motions, and other actions and legal

documents," *none* of the Trial Court's orders regarding this Appellant's "voluminous" offerings over a two (2) year period have been deemed frivolous. Ironically, because the evidentiary landscape outlined below clearly reveals an absence of any discernible factual substantiation for the order proffered by the Trial Court, as such it renders the Court claims of Appellant frivolity and vexation therein both frivolous and vexatious.

EXAMPLE 1 - THE APPELLANT'S JANUARY 26TH, WRIT OF HABEAS CORPUS.

On page two (2) of the April 23rd, 2012 order imposing restrictions upon future filing submissions of the Appellant the Court states:

> "Respondent's frivolous lawsuits include: A Writ of Mandamus (*Higdon v. Tusan*), filed January 26th, 2012, dismissed sua sponte on February 7th, 2012, appeal filed by Respondent on March 7th, 2012; and a Writ of Habeas Corpus (*Higdon v. Higdon*), filed January 26th, 2012, order entered March 1st, 2012, appeal filed by Respondent on March 15th, 2012."

Of the two (2) suits named above which are alleged to be "frivolous" by the court, only the Appellant's Writ of Habeas Corpus (currently pending appeal-A12A2145) was actually assigned to the Court for adjudication. Therefore, the Habeas would be the only case for which the Superior Court has both the jurisdiction and purview to even assess frivolity. A brief outline of salient facts is as follows:

> a) The Defendant filed a Motion to Dismiss on February 24th, 2012 replete with claims of frivolity accompanied by six (6) other meritless defenses; one might reasonably say, frivolous defenses.
>
> b) With the Appellee's unanswered dismissal motion in hand, the Court commenced the Habeas hearing on February 28th, 2012 and after a curious thirty eight (38) minutes of maneuvering where the Court gave the Appellant the "opportunity" come back at a later date when he had prepared a traverse of the dismissal**,** the Appellant chose instead to take a risk and defend the bogus dismissal charges extemporaneously. In a peculiar change of heart, however, the Court swiftly stepped in to preempt his defense by reading a written four (4) page dismissal order of the Appellee's Motion to Dismiss the Writ of Habeas Corpus countering every defense and allegation of frivolity therein. Exquisitely composed, the Court's rendering was a forceful repudiation of the Appellee's baseless charges yet bizarrely, runs counter to the Court's recent declaration of Appellant vexation. How could that be?

c) The Court pronounces its March 1st, 2012 Order on Petition for Writ of Habeas Corpus. While it is replete with falsification and obfuscation which can be verified by a reading of the hearing transcript, nowhere in the text is a mention of the Appellant tendering one frivolous or vexatious claim and neither was he warned or accused of frivolity in the hearing which preceded the order.

d) The Court files its April 23rd, 2012 Order Imposing Restrictions on Respondent Alex Higdon's Future Filing Submissions and for the *first and only time* in two (2) years, delivers its inaugural pronouncement of the Appellant's frivolous and vexatious pattern of litigation absent any explanation for its silence on the matter it now deems exigent, yet somehow, serial.

The two (2) month chronology of the events noted above leaves one to ponder what might account for the head-scratchingly staggering transformation in the Court's consciousness that occurred between the time it defended the virtue of the Appellant's Habeas Corpus suit on February 28th, 2012 to the time it pronounced its March 1st, 2012 order followed by the delivery of its April 23rd, 2012 offering which claims the Habeas was "frivolous." How could a court preside over a case for one hundred and seven (107) weeks without even whispering an allegation of frivolity and in the span of only seven (7) weeks steadfastly declare that the Appellant "has continuously and relentlessly filed frivolous lawsuits, motions, and other actions and legal documents" legitimizing an extreme injunction which enjoins a most fundamental constitutional right of free access to the courts for redress of grievances? Was it a case of judicial amnesia? Was it epiphany? Was it the Court benevolently extending to the Appellant that same "benefit of the doubt" it referenced on page four (4) of its order? If we extend this "benefit of doubt" to the Court and accept that it knew of the Appellant's vexatious frivolity over the entire two (2) year period, how are we to view the Court's decision to stand silent while the unmitigated torture of the Appellant's poor ex-wife continued unabated. How could a court continually turn away from a mother's cries for help ignoring the suffering imposed by the weight of injustice levied by the Appellant's penchant for prolific filing? Ironically, an abandonment of such magnitude would itself necessitate the Court's immediate and unconditional removal from the case.

VIOLATING THE JUDICIAL CODE OF ETHICS: CBS NEWS

More than a year ago, the conscience of the Appellant was finally awakened to the fact that many of the Court's actions and decisions in this case, especially those regarding its protection of the Guardian Ad Litem, were not only lacking integrity, but wholly and completely illegal. Upon that realization the Appellant was approached by some in the media who encouraged him to rigorously document all the wrongdoings upon his pleadings and keep them abreast of future instances of injustice. This admonishment by the media coupled with his personal experiences in Court to that date explain the Appellant's more comprehensive approach toward pleadings. He became painfully aware that unless all his issues were documented on the pleading itself, they were in danger of becoming extinct much in the same way earlier issues had vanished from the evidentiary landscape. As the Court's unlawful misconduct increasingly mounted over the last few months before the February 28th, 2012 Habeas Corpus Hearing, representatives from various media outlets begun to formulate a narrative of this case in anticipation of an upcoming expose yet to air. On February 27th, 2012, after the court received CBS Atlanta News' February 22nd, 2012 request to install recording equipment for the upcoming Habeas hearing, the Court pronounced its dubious February 27th, 2012 Order denying Photographic Equipment in the courtroom and thereby stifling any electronic transparency within the proceedings.

Later that afternoon of Monday February 27th, 2012, CBS investigative reporter Jeff Chirico and his cameraman Dimitri Lotovski approached Judge Gail S. Tusan as she was exiting an orange Mercedes Benz Sedan. She was asked several questions about her alleged impropriety and misconduct in her cases including, but not limited to the Higdon vs. Higdon case. She was shown a copy of a hand written note she had given to the Defendant Alex Higdon while she was conducting a hearing on December 15th, 2011. The note and accompanying questions to Judge Tusan were about her denying him his right to cross examine the Guardian Ad Litem during a hearing and instead, Judge Tusan forced him to quickly compose for her some impromptu questions for the Guardian Ad Litem in lieu of his right to cross examine her. In theory, with possession of the

Defendant's questions Judge Tusan would then decide which questions were appropriate to cross examine the GAL and then cross examine the Guardian Ad Litem herself. In practice, she carefully culled questions containing those issues least damaging to the Guardian Ad Litem and most damaging to the Defendant's case for her removal due to impropriety and fraud. Consistent with her long held bias against the thorough and sifting cross-examination of a Guardian Ad Litem which she unabashedly declared in a Bar Association's Family Law Newsletter interview published on the internet, Judge Tusan denied the Defendant his right to examine the Guardian Ad litem as is his right given by the Uniform Superior Court Rule 24.9(7). This rule regarding the Appointment, Qualification and Role of a Guardian Ad Litem at Hearing and its corollary in Fulton County Superior Court Family Division Rule 4000-9.7 state the following:

"The GAL shall be subject to examination by the parties and the court."

As the transcripts of this hearing and others clearly indicate, the denial of the Defendant's right to cross examine is exactly what transpired on that day and continued unabated during subsequent hearings. Upon her recognition of the note she wrote to the Defendant, Judge Tusan spoke directly about the Higdon Case to Jeff Chirico of CBS News Channel 46. She stated that Mr. Higdon's rights were "not abridged" and that he was given every opportunity to cross examine the Guardian Ad Litem. The Defendant has extracted the *exact* quotes below from the CBS film clip of Jeff Chirico and Judge Tusan where the Judge is clearly shown violating the law and the Canon of Judicial Ethics:

> ***Judge Tusan****:* Dr. Higdon has filed several appeals in his case, his divorce is over but he has filed several post judgment actions.
>
> ***Mr. Chirico****:* (Fumbling around to locate the Tusan envelop used in trial).
>
> ***Judge Tusan:*** Family court judges spend a lot of time, as I did on the envelope, to explain to the litigant (Mr. Higdon) the best ways to keep his papers organized… You are required to do your own cross examination.
>
> ***Mr. Chirico****:* You didn't allow him to do that.
>
> ***Judge Tusan:*** That's not the case.

> ***Mr. Chirico:*** Well, according to this letter you wrote that's not true. (showing Judge Tusan the Letter she wrote to Mr. Higdon during the hearing denying him cross)
>
> ***Judge Tusan:*** Sir I am telling you that his rights were not abridged. He had the right and he was able to ask plenty of questions in all of the hearings that we had…in his case and in other cases he's been able to ask questions.
>
> ***Mr. Chirico:*** He says he was denied the right four (4) times to cross examine the guardian ad litem
>
> ***Judge Tusan:*** Did you talk to the guardian ad litem or to the other side?

In clear violation of the laws stated in both Canon 3(B)(9) and Uniform Superior Court Rule 24.9(7), Judge Tusan publicly defended the actions she took during a case which is currently pending. These actions by Judge Tusan were unlawful, improper, and necessitate her immediate and unconditional disqualification from this case. Furthermore, in addition to her clear breach of law in answering a reporter's questions about a pending case in which she is presiding, Judge Tusan once again broke the law by lying in her statement to Jeff Chirico of CBS News Channel 46 and violating the Judicial Ethics Canons 1 and 2 of the Georgia Code of Judicial Conduct. More specifically, in her responses to the reporter's questions about the case, Judge Tusan lied when she maintained that she had not abridged the Defendant's rights and allowed him to cross examine the Guardian Ad Litem despite her knowledge of the note and accompanying transcripts which clearly indicate that she denied the Defendant his due process rights to cross examine the Guardian Ad Litem during not only the hearing, but also during three (3) additional hearings highlighted in the recusal and mandamus motions mentioned in her April 23rd, 2012 order.

Pretermitting the fact that Judge Tusan's improprieties in this matter and those preceding it necessitate her immediate disqualification, one might inquire as to what these violations have to do with the Court's sudden realization that the Appellant has been frivolous and vexatious in during his two (2) year tenure in this divorce matter? Upon receipt of the Court's March 1st, 2012 Order denying his Habeas Corpus, the Appellant delivered his March 5th, 2012 Motion to Disqualify/Recuse and thereafter his April 4th, 2012 Amended Version to the March 5th offering. In

that pleading there is an enumeration of the violation outlining the above events which transpired the afternoon of February 27th, 2012.

With the Court's new understanding that the Appellant was in possession of a video displaying the Court's violations of the Code of Judicial Ethics by commenting directly and dishonestly about a case over which it was currently presiding, it was presented with a quandary. If the Court chose to deny the Appellant's accusations and consequently was shown to have lied upon the record, it would be disqualified in disgrace. If it were to choose the truth and openly admit its wrongdoings, then the Court would be immediately required to recuse. While scrambling for a resolution to its dilemma, the Court settled upon its April 23rd, 2012 Order Imposing Restrictions on Respondent Alex Higdon's Future Filing Submissions. With this blanket order procuring all Appellant pleadings, the Court is able to shield itself from scrutiny as in possession of the "request to file" offerings by the Appellant, the Court can not only sentence each pleading to languish as it has with sixteen (16) of the Appellant's thirty-three (33) previous motions, now those motions can be laid out or stomped out indefinitely. Although this strategy of inserting itself as the sole gatekeeper charged with assessing the legitimacy of all of Appellant litigation activities may prove both creative and pragmatic, in the end, the scheme is fundamentally flawed and will soon be shown to embody the prophetic axiom "the cover up is always worse than the crime."

SUBSTANTIVE CONTENT OF THE WRIT OF HABEAS CORPUS

Even worse than the atrocious events outlined above that transpired outside the courtroom was the travesty of justice that occurred inside on February 28th, 2012. It begins with the following provision in the Higdon Divorce Decree pronounced on June 13th, 2011 (para 4, page 8):

> "In the event that Mother becomes ***aware*** of any of the following occurring, Father shall immediately lose his right of visitation for six (6) months or until either party obtains a Court Order modifying visitation:
>
> A. Father directly or indirectly performs ***any medical testing*** or treatment or assessments without the agreement and/or knowledge of Mother; or
>
> B. Father's action is contrary to the direction or recommendations of any of the children's doctor's treatment plans."

Before highlighting some of the more troubling decisions made by the Court in this matter of Habeas Corpus, the Appellant mentions the obvious which would clearly debunk any charge of frivolity levied against him. Very simply, a court is not permitted to construct an illegal self-effectuating clause and have it both illegally interpreted and illegally adjudicated. More specifically, this Court was not permitted to insert a self-executing provision into a divorce decree which effectuates a change of custody solely upon the averments of an interested party. This statement is irrefutable and confirmed with only a cursory reading of the caselaw provided below. *Johnson v. Johnson*, Ga. Supreme Court (2012); *Scott v. Scott*, 578, Ga. SE 2d 876, (2003); *Sigal v. Sigal*, 716, Ga. SE2d 206 (2011); *Dellinger v. Dellinger*, 609 Ga. SE2d 331 (2004); *Wrightson v. Wrightson*, 467, Ga. SE2d 578 (1996). Instead of dealing with the fact of this provision's nullity head on, the Court chose to ignore it. No matter how many times the Appellant reminded the court or provided caselaw thereto, it was unwilling to grasp this basic conception and thusly, the hearing somehow went forward on the question of whether the Appellee illegally detained the Appellant's children by denying him visitation rights based upon a *suspicion* of medical testing. To this day the Appellant is still laboring to locate the standard of review employed by the Court legitimizing its Habeas Corpus ruling based on suspicion and bare conclusions where the only evidence presented was exculpatory and entirely favorable to the Appellant. Such a standard of review would truly "shock the conscience."

The specifics are as follows. On the day after Christmas 2011, Appellee received a box of urine testing which was mistakenly sent from Great Plains Laboratory to the Appellant's old home office where the Appellee continues to reside. It is undisputed that the Appellee and the Court have been aware that the Appellant has for two (2) years been supporting families with the treatment of their developmentally delayed and disabled children and as a part of his practice, he often distributes to parents in his Clinical Psychology practice various testing kits from physicians who are apart of a family's team of practitioners. Once the Appellee was in receipt of the ten (10) boxes of urine

testing on the 26th of December 2011, she *claimed* to assume that the boxes themselves which contained blank requisition forms must indicate that the Appellant was medically testing his children without her knowledge or approval. The Counsel for the Appellee stated the following in her December 28th letter to the Appellant:

> "I am writing to inform you that Jane is exercising her right under the Final Judgment and Decree and Parenting Plan Order to suspend your parenting time and visitation rights with the children pursuant to p. 8-9 of the Parenting Plan. As you already know, *Jane has discovered that you have been doing secret testing on the children. You have consulted with Dr. West and requested test kits for the children without informing Jane or consulting with Jane. You would have taken samples and secretly submitted those samples for testing had Jane not intervened*. We have suspected that you have been secretly testing and treating the children for some time, but now, we have some proof and will be investigating further." (Emphasis applied)

In addition to having *no* evidence of tests performed on the children, the Appellant was never discovered doing secret urine testing on any of his children, never consulted with Dr. West about testing kits for the children as he only requested kits from the physician assistant Alexandra Gomez, and never secretly submitted samples of any of his children's urine or blood. Somehow, with only exculpatory evidence in its possession, the Court found that the Appellee was right to deny the Appellant his visitation.

The provision itself states that when the mother becomes "aware" of certain behaviors, then custody rights will be altered. Even the most liberal definition of "awareness" could not be mistaken for mere suspicion experienced by the Appellee because suspicion is a psychological state or feeling absent material evidence constituting proof. It's as if the "any evidence" standard had been employed by both the Appellee and the Court and taken literally in that, any evidence will be used against him to wrongfully deny him his rights, even if all the existing evidence exonerates the Appellant. This whole affair might prompt one to ask, what's the point of material evidence constituting proof when inference and suspicion will suffice? Ironically, if one pauses to closely examine the subtext of the provision itself, instead of penalizing a parent who seeks to deny and

deceive regarding the medical assessment, it seeks to punish the parent clamoring for truth about the health of his children. With the monumental health challenges of the children already established, would not prudence and transparency outweigh all other considerations? Are we to believe that the alleged performance of urine testing by a parent of sick children in some way legitimizes the loss of one's parental rights for six (6) months?

And finally, regarding due process that would be required even to uphold this illegal provision which temporarily terminated the Appellant's parental rights, a trial court is not permitted to impose a condition of forfeiture in a custody award as "the court is not authorized to prejudge a change of conditions which would alter custody." *Daugherty v. Murphy*, 225 Ga. 588 (2) (170 SE2d 428) (1969). A change of custody such as the one enabled by the clause ostensibly legitimizing the Appellee's behavior could only be realized by a Court's finding of a material change in circumstance. *Haberman v. Bivens*, 221 SE 2d 11 (1975). In the instant case, the Appellee acted as trial court by proxy and sua sponte held a holiday hearing. At that closed hearing she found that her *suspicions* about the Appellant's *possible* urine testing of his children constituted a material change in circumstance which adversely affected the children's health and welfare. Soon thereafter, the Appellee enacted the final decree provisions sua sponte. Ironically, during the Habeas Corpus hearing the Court's chosen avenue of relief was to "allow" the Appellant to see his children during normal visitation hours but only when supervised by another; a ruling which essentially becomes a de facto denial of visitation as the Appellant did not have the money to hire a supervisor and "approved" family members could not afford to travel from Cincinnati every Monday and Thursday night and every other weekend to help the Appellant. Taking its lead this time from the Appellee, the Court made this unlawful change without the required hearing ascertaining whether a material change in circumstance occurred that in some way compromised the best interests of the children. For the litany of reasons addressed above and for those eliminated from this text for the sake of brevity, any claim of frivolity against this Appellant must be summarily dismissed.

EXAMPLE 2 - THE APPELLANT'S JANUARY 26TH, 2012 WRIT OF MANDAMUS

As referenced in the first paragraph of this enumeration, the Court also declared the Appellant's January 26th, 2012 Writ of Mandamus "frivolous." It must be noted that like all the other claims in that paragraph and those throughout the text, the Mandamus had never been previously identified as frivolous. Pretermitting the conflict of interest presented when Judge Gail S. Tusan (1) judged frivolous the Appellant's case for which she was not assigned and (2) the fact that she was the sole Defendant in the case, the Appellant will proceed to examine the claim upon its merits. This Appellant hopes that once the honorable body reviewing this appeal closely examines the law and then his Mandamus claim, it will arrive at the inescapable conclusion that not only is his suit *not* frivolous, any previous denial of it could have only been produced by a party (1) oblivious to the statutory mandates of OCGA and/or (2) one committed to violating the laws of this great state.

Regarding the specific content of the January 26th, 2012 Mandamus case in question, the Mandamus Court failed to recognize that the Appellant had a clear legal right to the relief sought in his Writ as there was no other adequate legal remedy left for him to pursue. In order to understand the crux of this issue, one must have a firm grasp of OCGA § 9-15-2. The three (3) provisions of OCGA § 9-15-2 state the following:

> (a) (1) When any party, plaintiff or defendant, in any action or proceeding held in any court in this state is unable to pay any deposit, fee, or other cost which is normally required in the court, if the party shall subscribe an affidavit to the effect that because of his indigence he is unable to pay the costs, the party shall be relieved from paying the costs and his rights shall be the same as if he had paid the costs.
>
> (2) Any other party at interest or his agent or attorney may contest the truth of an affidavit of indigence by verifying affirmatively under oath that the same is untrue. The issue thereby formed shall be heard and determined by the court, under the rules of the court. The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final.
>
> *(b) In the absence of a traverse affidavit contesting the truth of an affidavit of indigence, the court may inquire into the truth of the affidavit of indigence. After a hearing, the court may order the costs to be paid if it finds that the deposit, fee, or other costs can be paid and, if the costs are not paid within the time permitted in such order, may deny the relief sought. (Emphasis applied).*

OCGA § 9-15-2 (b) empowers a Court by giving it license to inquire into the truth of an affidavit absent any traverse from the opposing party. The process by which the court's inquiry takes place is also provided in plain, unambiguous language. It states that "after a hearing" on the matters presented by the movant, a judicial official may order court costs to be paid and deny any relief sought. The smattering of caselaw excerpts below are just a scant few which exist to confirm that a court is statutorily required to hold a hearing on the matter of indigence in the absence of a traverse of a pauper's affidavit. We begin with Judge Pope who offers the following in *Walker v. Crane*, 216 Ga. App. 765 (1995):

> "Under OCGA § 9-15-2 (b) the superior court clearly had the authority to inquire into the validity and truthfulness of Walker's pauper's affidavit on its own even though no traverse affidavit was filed by Crane. However, under the above Code section *any inquiry on the court's part in the absence of a traverse affidavit should have taken place during a separate hearing on the matter. After such a hearing,* if the court determined that the supersedeas bond could have been paid by Walker, it should have entered an order directing that said bond be paid." (Emphasis applied).

In agreement with his dissenters, Judge Deen offers the following in *D'zesati v. Poole* et al., 174 Ga. App. 142 (S.E.2d 280) (1985):

> "It appears that the court below ruled on the appellant's motion without conducting a hearing, *contrary to the provisions of OCGA § 9-15-2 (b)*." (Emphasis applied)

Judge Sognier's dissenting view in *D'zesati* states:

> "OCGA § 9-15-2 (b) *requires the trial court to hold a hearing* before any action can be taken on a pauper's affidavit." (Emphasis applied)

Judge Beasley's dissenting view in *D'zesati* states:

> "It appearing on the face of the record that the ruling was on the question of indigency and *without a hearing pursuant to OCGA § 9-15-2 (b)*, I would remand for reconsideration in light hereof, for the court had no authority to find "no indigency" when there was no hearing" (Emphasis applied).

Judge Birdsong offers the following in *Barham v. Levy,* 228 Ga. App. (S.E.2d 325) (1997):

> "In this instance no issue of fact was presented because the affidavit of indigence was not contested and there is no evidence in the record showing that Barham was not indigent. Moreover, although the trial court had authority to inquire into the validity and truthfulness of the affidavit even in the absence of a traverse by the other party (*Walker v. Crane,* 216 Ga. App.

> 765, 767, 455 S.E.2d 855), the court did not do so, and there is no evidence supporting the trial court's ruling. Accordingly, the trial court's order denying Barham's pauper's affidavit is reversed, and the case is remanded with instruction to grant indigent status to Barham."

The ruling samples highlighted above confirm that a hearing is required based on the statute OCGA § 9-15-2(b). From a close examination of the full statute, it should become clear that in order for a court to deny a pauper's affidavit absent a traverse, an issue of fact must be formed by a court's holding a hearing with the parties present to form and contest issues. Thusly, it is clear that in the absence of a traverse affidavit in the case sub judice, "no issue was thereby formed" and because there were no issues of fact formed concerning the appellant's ability to pay and no hearing to vet those issues, it was a clear and unequivocal legal error for the Trial Court to deny this Appellant his motion. *Martin v. State*, 258 Ga. App. (SE 2d 711) (1979); See also *Spaulding v. Rich's, Inc*., 144 Ga. App. 467, 469 (241 SE2d 584) (1978); *Ferry v. State,* 147 Ga. App. 642 (1) (249 SE2d 692) (1978).

Beyond its spurious claim of Appellant frivolity regarding this matter, the Trial Court's method of disposition of his motion to proceed informa pauperis was a material breach of his constitutional rights to due process contrary to the very purpose of the statute to which it is beholden, and yet, wholly consistent with the Court's decreasingly subtle agenda to defraud and disenfranchise the Appellant. By all accounts, the evidence in exhibits proffered in the Appellant's Motion for Supersedeas of disconnected utilities and mounting accumulation of debt demonstrate the relative success of this Court's strategy to impoverish the Appellant and throttle him voiceless.

(3) The Trial Court abused its discretion and committed reversible err when it filed a global pre-filing injunction sua sponte without performing the required record of review containing a proper showing of litigiousness.

The lawful distribution of due process in the matter of ordering a pre-filing injunction requires a Court to perform an adequate record of review clearly demonstrating that such extreme remedy is warranted. *Jordan v. State Dep't of Motor Vehicles*, 110 P. 3d 30: Nev. Supreme Ct. (2005); *Safir v. U.S. Lines, Inc*., 792 F.2d 19, 24 (2d Cir.1986). *In re. Lawsuits of Carter*, 235

Ga.App. 551, 510 S.E.2d 91, 95 (1998); *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.1990); *Cok v. Family Ct. of Rhode Island*, 985 F.2d 32, 35–36 (1st Cir.1993). An adequate record for review must include a listing of all the cases and motions that led a court to conclude that a vexatious litigant order was indicated. See *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1260 (2d Cir.1984). At the very least, an adequate record needs to demonstrate that the litigant's activities were numerous or abusive. See, e.g. *Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1524 (9th Cir.1983), cert. denied, 465 U.S. 1081, 104 S.Ct. 1446, 79 L.Ed.2d 765 (1984) (35 related frivolous complaints filed); *In re Oliver*, 682 F.2d 443, 445 (3d Cir.1982) (over 50 frivolous cases filed); In re Green, 669 F.2d 779, 781 (D.C.Cir.1981) (per curiam) (over 600 complaints filed). In fact, it can be said that the most fundamental of due process variables necessary for a court to adhere when constructing an order like the Court's April 23rd global pre-filing injunction is a proper showing of litigiousness.

For the first time in two (2) years presiding in this case, Judge Tusan opines the following about the Appellant's litigious nature in her April 23rd, 2012 Order on Submission Restriction:

> "He has continuously and relentlessly filed frivolous lawsuits, motions, and other actions and legal documents." (page 1)
>
> "Respondent has asserted claims and positions in these filings, with respect to which there existed an absence of any justiciable issue of law or fact, which Respondent could not have reasonably believed that a court would accept said claims and/or positions." (page 1)
>
> "Respondent frivolously filed motions, lawsuits, and other legal documents, which he knows deprives this Court of jurisdiction." (page 3)
>
> "Without rest, Respondent subsequently files emergency motions, and contempt motions, and then relentlessly pursues this Court to act on the same, while he has pending appeals, and pending motions that deprive this Court of Jurisdiction." (page 3)
>
> "Respondent's litigation pattern is not only abusive to the trial courts, but has also caused serious delay at the appellate level of this state, which in turn has had dramatic effects on the lower pending litigation" (page 4)
>
> "Respondent repeatedly and routinely files the same appeal in both the Supreme Court and the Court of Appeals of Georgia." (page 4)

> “Respondent cannot be allowed to take advantage of his pro se status to the point that his adversaries are effectively penalized for being represented.” (page 4)

One would expect that accompanying such audacious claims of litigant frivolity there would be countless examples of abuse glaringly obvious on the face of record. Not so. Indisputably, at no time during the two year pendency of the Higdon divorce decree has the Trial Court ever suggested, much less demonstrated, that this Appellant has a history of litigious filing behavior. When constructing a pre-filing order restricting submissions, it is incumbent upon a court to make "substantive findings as to the frivolous or harassing nature of the litigant's actions." *In re Powell*, 851 F.2d 427, 431 (D.C.Cir.1988). Such an order "cannot issue merely upon a showing of litigiousness" (*Moy v. U.S.*, 906 F.2d 467, 470 (9th Cir.1990)), it must be apart of a pattern of litigant filing which is not only repetitive and abusive, but also without any arguable factual or legal basis, and/or filed with an intent to harass. *De Long v. Hennessey*, 912 F. 2d 1144: Court of Appeals, 9th Circuit (1990). Not only is there is no evidence on any record that the Appellant has a history of litigious filing and no evidence on any record showing the Appellant was ever accused of having a litigious filing history before the Court’s April 23rd, 2012 Order was pronounced, he has never once been shown to be frivolous in a Tusan Court. Therefore, regarding the responsibility to buttress her claims of frivolity with substance, Judge Tusan failed miserably regarding her execution of this most basic of due process mandates.

THE LONE “FRIVOLOUS” CITING

Outside of Judge Tusan’s purview, but not dependent of her contributions, the Appellant’s October 21st, 2011 Appeal was cited as frivolous by the Supreme Court on October 25th, 2011. That ruling stands as the one and only piece of litigation ever associating the Appellant’s name with the phrase frivolous. The sordid tale which underlies that ruling is thoroughly addressed below. Please note, however, that from the outset the appeal was mistakenly filed by the Appellant absent all of the evidence of court misconduct outlined below. The decision to exclude the evidence in the Supreme Court filing was due to its inclusion in the Court of Appeals contempt filing (A12A1763)

which is currently pending. The Appellant did not realize at the time that he could appeal both Contempt orders in a single document which would have included all the evidence gathered in the August 15th, 2011 hearing and subsequent order of the same. The Appellant's decision to split the evidence severely truncated his appeal in the Supreme Court of Georgia thereby excluding any exposition of the Trial Court's most egregious behavior.

On August 15th, 2011 the Trial Court held a consolidated hearing for the Appellee's Motion for Contempt against the Appellant for willfully refusing to pay the full amount of monthly child support and the Appellant's Motion for Contempt against the Appellee for her willful neglect of the children's medical needs. During the initial ten (10) minutes of the August 15TH, 2011 hearings (See transcript), Judge Gail S. Tusan is clearly seen attempting to coerce and cajole the Appellant to abandon his Motion for New Trial and pursue modification; an act which is tantamount to practicing law and a clear violation of the Judicial Code of Ethics. The Court understood that if and when the Appellant released his appeal at the trial court level with his Motion for New Trial, he would also immediately lose his appeal at the appellate court level as the thirty (30) day window on filing his appeal to the Supreme Court would have long expired. The following excerpts are a few examples of the Court's attempt to legally "advise" the Appellant: (page 2: lines 19-25)

> ***Judge Tusan:*** "The court has given the case its best judgment, so I'm not prepared to just indefinitely continue going over and around the same issues…And so what you should be doing is going to the next court and having that court review the court's decisions as opposed to trying to convince this court that it's made the wrong decisions"

Judge Tusan continues her instruction and advice giving: (page 5: lines 8-12)

> ***Judge Tusan:*** "You know, another option would be to accept the final judgment and decree of divorce and then just move to modify it, you know, as opposed to trying to convince this court and another court to change the decision, to just modify it."

Further along she adds the following: (page 12: lines 19-25)

> ***Judge Tusan:*** "I'm trying to get us moving forward in a way so that legally you can address and argue and petition for whatever relief is appropriate, including as I have suggested…a modification."

And finally, during an exchange in the last minute of the hearing, Judge Tusan peevishly responds to the Appellant's unfair accumulation of child support arrearages perpetuated by her unwillingness to modify the temporary order to comply with Georgia Law with these suggestions (p.105 - 16-21);

> "I do understand that. The other alternative also remains, which you have decided not to pursue….To withdraw the motion for new trial and move to modify the obligations."

Fortunately for the Appellant, he understood that Judge Tusan's continual claim that he could move onward to another Court and have his modification heard by another Judge was bogus and belied by the Family Division Local Rule 200-1 "One Family One Judge." Frustrated by the foiling of her efforts, the Judge finally abandoned her agenda and then summarily refused to hear any evidence for the Appellant's Contempt Motion against his ex-wife for lying about his children's medical needs and refusing to have them assessed for treatment of their medical maladies. In addition to its unlawful refusal to hear the Contempt for which the Court granted a rule nisi, Judge Tusan immediately moved to make an illegal change of custody during a contempt hearing and did so without holding the mandated evidentiary hearing on the material change of circumstances necessary to legitimize such a change.

After summarily squashing the Appellant's Contempt Motion without holding the agreed upon rule nisi hearing on the matter, the Court enthusiastically turned its gaze to the Appellee's Contempt Motion against the Appellant for his non-payment of the *full* amount of child support. Near the conclusion of evidence, Judge Tusan culled through 12 months of bank statements and found that on the Appellant's May 2011 bank statement he had a surplus of money at the end of the month and the Court held that the surplus was proof, (along with the Court's false claim that the Appellant said he did not fully pay because he felt he should not have to pay) that Appellant had enough money to pay the full $[redacted] a month child support versus the $[redacted] he actually paid. The Court ignored the fact that this "surplus" was in the account to pay for the rent of his home on the first of the month, the rent payments of his offices, his numerous utilities both business and home, his child support payment for the month of June, and his many debts which total over 70k dollars.

At the moment the Court cited the Appellant with Contempt, she understood about his indebtedness and his dire financial situation, she understood that he paid money every month for his children's child support, she understood that based on hardship he has not paid taxes in two years, and yet, she angrily made a very improper determination of willful Contempt.

Newly soiled with the Court's contempt citation against him, the Appellant learned late during the thirty (30) day appellate cycle that the Contempt charge was not considered an interlocutory order and therefore could be appealed during the pendency of his Motion for New Trial. Because it was this pro se Appellant's first appeal and he only had two (2) days over a weekend to draw up the document, the appeal itself was woefully incomplete and devoid of the necessary caselaw. Furthermore, it must be reiterated that *NONE* of the Judge's misconduct mentioned above was entered in the Supreme Court Appeal and without doubt would have made a major difference in Court's decision. The majority of that damning evidence was excluded due to the Appellant's decision to construct separate, non-overlapping contempt appeals.

(4) The Trial Court abused its discretion and committed reversible err when it reviewed for its global pre-filing injunction pleadings that were still pending and made determinations of frivolity related to those filings notwithstanding the fact that most currently languish unruled upon long past the ninety (90) days provided for their construction.

Beginning on page two (2) of the Court's order on submission restrictions, the Trial Court provides a litany of past pleadings filed by the Appellant no doubt suggesting in some way the impropriety of those offerings. Of the sixteen pleadings mentioned (excluding the January 19th, 2012 Contempt order which was mistakenly mentioned twice), ten (10) languish to this day having never been ruled upon. When making a determination as to the frivolity of numerous actions, a Trial Court must be vigilant not to review pending cases. *In re Powell*, 851 F. 2d 427, Court of Appeals, Dist. of Columbia Circuit (1988). The caselaw is clear in its affirmation that pending complaints which predate an imposed injunction should "not have been reviewed for frivolousness in order to issue an injunction." *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C.Cir.1985) (per curiam).

While there exist exceptions to every rule, it would be exceedingly difficult to make a determination as to the frivolity of the action merely from the face of the complaint.

(5) The Trial Court abused its discretion and committed reversible err when it filed a global pre-filing injunction before affording the Appellant his fundamental right to be notified beforehand as is clearly outlined by OCGA § 9-11-65(a)(1).

Procedural due process ensures that the litigant is afforded "reasonable notice" of a restrictive order's issuance. *Jordan v. State, Dep't of Motor Vehicles*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005). Accordingly, the Trial Court in the case sub judice should have provided the Appellant with reasonable notice that it was considering such a restrictive order affecting his due process liberty. No such notice was afforded here. The State of Georgia has statutory guidelines regarding injunctions and restraining orders which affirm this widely held due process right. OCGA § 9-11-65(a)(1) unambiguously states the following:

> *"No interlocutory injunction shall be issued without notice to the adverse party."*

The Trial Court clearly violated this statutory obligation and furthermore, any review of the record would have failed to "show that immediate and irreparable injury would result unless relief was granted before the Appellant could be heard in opposition." See OCGA § 9-11-65 (b) (1) and (2). *Ebon Foundation v. Oatman*, 269 Ga. 340, 343 (498 SE2d 728) (1998).

(6) The Trial Court abused its discretion and committed reversible err when it filed a global pre-filing injunction before affording the Appellant his fundamental right oppose the order.

The very first provision of the Bill of Rights in "[t]he constitution of this state guarantees to all persons due process of law and unfettered access to the courts of this state. These fundamental constitutional rights require that every party to a lawsuit ... be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court." *Morrow v. Vineville United Methodist Church*, 227 Ga.App. 313, 316(1), 489 S.E.2d 310 (1997) quoting *Hart v. Owens-Illinois, Inc.*, 165 Ga.App. 681, 682, 302 S.E.2d 701 (1983). Furthermore, every appellate court that has considered the issue of a pre-filing injunction to combat frivolous litigation has held that before a trial court may sua sponte enter a pre-filing order, fundamental due process rights mandate that it

afford the alleged vexatious litigant ample opportunity to be fully heard. See *In re. Lawsuits of Carter*, 235 Ga.App. 551, 510 S.E.2d 91, 95 (1998); *Cok v. Family Ct. of Rhode Island,* 985 F.2d 32, 35–36 (1st Cir.1993); *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.1990); *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir.1989); *DeNardo v. Maassen,* 200 P.3d at 315 (1995); *Jordan v. State Dep't of Motor Vehicles*, 110 P. 3d 30 - Nev: Supreme Court (2005).

At no time during the pendency of this case was the Appellant afforded notice of a blanket pre-filing order restricting submissions much less granted a hearing to contest the Court's dubious intentions. Because the court violated this well established due process mandate thereby denying the Appellant an opportunity to be heard or to dispute the facts upon which the order was grounded, the order stands as a violation of his constitutional rights and must be immediately discarded as a manifest abuse of discretion.

(7) The Trial Court abused its discretion and committed reversible err when it penned a global pre-filing injunction that was exceedingly overbroad which inappropriately encompassed territory for which the Court possessed no jurisdiction.

Assuming arguendo that there was actual substance to the Court's false claims that the Appellant is a frequent frivolous filing offender, because restrictive orders implicate an individual's constitutional right to access the courts, such orders must be narrowly tailored. *Moy v. U.S.*, 906 F.2d 467, 470 (9th Cir.1990) ("[A]n injunction ... restrict[ing] an individual's access to the court system ... is an extraordinary remedy that should be narrowly tailored and rarely used."); Accord *De Long v. Hennessey*, 912 F. 2d 1144 - Court of Appeals, 9th Circuit (1990) ("We expect that injunctions against litigants will remain very much the exception to the general rule of free access to the courts."); *Hooper v. Harris,* 236 Ga.App. 651, 512 S.E.2d 312, 315 (1999) (recognizing that order restricting an inmate's right to access the courts must be "clearly warranted by the particular circumstances"). *Procup v. Strickland*, 792 F.2d 1069, 1070, 1074 (11th Cir.1986) (en banc); *Safir v. U.S. Lines, Inc.,* 792 F.2d 19, 24 (2d Cir.1986); *Castro v. United States*, 775 F.2d 399, 410 (1st Cir.1985). Absent this narrowing, a pre-filing injunction, like any other injunction, will not survive

appellate review. *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir.2001); *Cromer v. Kraft Foods North America, Inc*., 390 F. 3d 812 - Court of Appeals, 4th Circuit (2004).

Nothing about the Court's order speaks of a careful, narrow tailoring mindful of the monumental rights implicated therein. It asserts the Appellant "shall not be permitted to file any further new actions" and then reiterates the required filing process over consecutive paragraphs without the courtesy of extending any tautological flair. Even if it could somehow become legitimately substantiated, the Court's order is grossly overbroad in that it not only prevents the Appellant from filing any other claims based upon the facts and issues involved in his divorce proceeding, it also prevents him from filing actions without leave of court based upon all other disputes in which he might be involved. There is wide consensus, and it should go without saying, that absent finding a broader pattern of pleading misconduct beyond a case for which a Court is assigned, a sanction needs to be limited to the case and those matters properly arising within that case before the court. (*Jordan*, *Moy*, and *Safir*, supra). Of course, it makes little sense to even address this violation of due process by the Court as not only has there never been a finding of a pattern of pleading misconduct in the Higdon divorce case from which this Court files its order, it would be impossible to locate such pattern anywhere beyond the confines of the instant divorce suit.

(8) The Trial Court abused its discretion and committed reversible err when it knowingly falsified its April 23rd, 2012 Order on Submission Restrictions with its deliberate use of defamatory statements falsely accusing the Appellant of abusing the judicial system through the use of frivolous litigation.

Judge Gail S. Tusan made the following false and defamatory statements about the Appellant's litigious nature in her April 23rd, 2012 Order on Submission Restrictions:

> "He has continuously and relentlessly filed frivolous lawsuits, motions, and other actions and legal documents." (page 1)
>
> "Respondent has asserted claims and positions in these filings, with respect to which there existed an absence of any justiciable issue of law or fact, which Respondent could not have reasonably believed that a court would accept said claims and/or positions." (page 1)
>
> "Respondent's frivolous lawsuits include: A Writ of Mandamus (*Higdon v. Tusan*), filed January 26th, 2012, dismissed sua sponte on February 7th,

> 2012, appeal filed by Respondent on March 7th, 2012; and a Writ of Habeas Corpus (*Higdon v. Higdon*), filed January 26th, 2012, order entered March 1st, 2012, appeal filed by Respondent on March 15th, 2012." (page 2)
>
> "To date, the type of conduct exhibited by Respondent constitutes abuse of his right to have unfettered access to the courts of this state." (page 3)
>
> "Respondent frivolously filed motions, lawsuits, and other legal documents, which he knows deprives this Court of jurisdiction." (page 3)

At no time during the two (2) year pendency of the Higdon divorce case has the Trial Court ever suggested, much less demonstrated, that this Appellant has a history of litigious filing behavior Very simply, not once has he been shown to be frivolous in a Tusan Court. But for the saving grace of judicial immunity, the Trial Court's irrefutable defamatory statements would yield a swift and immediate criminal prosecution. As it is, the only legal consequences currently available for the Court to experience would be its immediate disqualification from the case at bar. The Appellant humbly requests that the Trial Court no longer be deprived of its responsibility to experience these consequences which should result from its continued violation of the rule of law.

(9) The Trial Court abused its discretion and committed reversible err when it provided a litany of Appellant motions and wrongly suggested that he, and not the Court and/or the opposing party, was responsible for their "numerous" and "voluminous" nature.

In its listing of the Appellant's "numerous motions" on paragraph two (2) page two (2) of the April 23rd 2012 Order, the Court is more than intimating that his pleadings were in some way unwarranted and instigated by something other than the Court's wrongdoing and/or that of the opposing party. The paragraph in question includes the Appellant's January 6th and January 19th Contempt motions along with his consolidated January 19th Emergency Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Motion for Declaratory Judgment. All five (5) of those pleadings were listed in such a way as to suggest the Appellant's filings were both litigious and prolific. It must be noted, however, that all five (5) of those filings were concerning one issue. That one issue addressed the illegal detainment of the Appellant's children via the use of

an illegally self-effectuating divorce provision carelessly inserted by the Trial Court. Furthermore, the troubling, yet indisputable back story behind these filings is as follows.

The Appellant filed his January 6th, 2012 Motion for Contempt to force his wife to relinquish the Higdon Children because the Court refused to respond to any of his phone calls for help. After the court failed to respond with a rule nisi for his January 6th, 2012 Contempt and ignored his calls and emails to that effect, he then filed a January 19th, 2011 Emergency Motion for Contempt and his Emergency Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Motion for Declaratory Judgment in hopes the court would follow the law and address the matter. After several unrequited calls and emails to the court imploring it to intervene, the Appellant was then forced to file his Writ of Habeas Corpus which would statutorily force the court to address the issue it had been wrongly ignoring before any issues became moot.

From his first call to the Judge on December 27th, 2012, up until the Court received its mid-February Habeas invitation, all the Trial Court had to do was return a call and set up a conference to put an end to the matter. Instead, it chose to punish the Appellant by remaining silent while his holiday visitation with his four (4) small children was stolen. Judge Gail S. Tusan understood in January, as anyone can understand by reading the above treatment of the Habeas Corpus in enumeration number two (2), that the Appellee was using an illegal self-effectuating clause to deny the Appellant his visitation without any proof of the Appellant even violating the illegal provision.

When later confronted about her silence on the emergency matters, Judge Tusan claimed she thought she was deprived of jurisdiction by the pendency of previous appeals. (A canard belied by her attendance and participation at the February 28th, 2012 Habeas Corpus hearing that like the five (5) forlorn pleadings that preceded it, had nothing to do with the matters on appeal.) Curiously, the incapacitation experienced by the Court's alleged jurisdictional deprivation not only prevented it from generating written responses to his emergency pleadings, the Court was also stricken of its ability to explain its state of "deprivation" or to return the Appellant's phone calls and emails requesting aid and guidance regarding his wife's unlawful decision to deny him visitation.

(10) The Trial Court abused its discretion and committed reversible err when it referenced the Appellant's subpoena of Judge Tusan suggesting it somehow constitutes an act of impropriety.

On paragraph two (2) of page three (3) of the Court's Order it mentions its quashing of the Appellant's January 3rd, 2012 Subpoena for the Deposition of Judge Gail S. Tusan that he allowed to go unanswered. The Appellant assumes that the Court's naked reference to these events is somehow suggesting impropriety on the part of the Appellant. The real story behind the Subpoena is that on December 15th, 2011 during the end of an Emergency Hearing addressing the medical needs of the children, Judge Tusan initiated what eventually constituted an ex parte communication between the Court and the parties regarding issues of child support determination. The Court offered the following displayed in an exhibit contained in his Emergency Motion 40(b):

> "I will consider the two worksheets. If you want to have on top of it just a short memo, whatever it is you're criticizing about the other, and then I will review the transcript from the last hearing and will be in a position to make a decision quickly about the support. Is that clear?" (Page 148: lines 1-6)

Seconds later, Judge Tusan continued to explain why these short memos "criticizing" the other side would be helpful:

> "And then I intuitively will be able to read the worksheets to a certain extent, but to the extent that you can explain to me why the worksheet is the way it is or why it shouldn't be the way they have it, vice versa, that would be helpful." (p. 148: lines 12-17)

Despite his verbal requests to obtain them, his motion to compel discovery requests, and an emergency conference call to compel with Judge Tusan, those written criticisms by attorney Stone and any accompanying information and communications were not shared with this Appellant. Those criticisms were the last pieces of evidence given to Judge Tusan before she made her ruling for child support; a ruling made in legal error based upon OCGA §19-6-5. In her February 4th, 2011 order addressing child support, Judge Tusan ruled to give the Appellee $[redacted] a month in child support while confirming this Appellant's monthly gross income was only $[redacted]. That is roughly 53% of this Appellant's Gross income. She gave no findings of fact or conclusions of law and none of the required data which would justify such a profound deviation. What the Court did do was

severely inflate the Appellee's child support number allowing the Appellant to claim 48k of extraordinary educational expenses for which no more than 10k could be divined with a straight face during the period between May 2011- April 2012. There had been no evidence given in any hearing to justify such a ruling as it clearly exceeded this Appellant's ability to pay and was inconsistent with his prior eight (8) years of earnings and inconsistent with the government's statistics on what a psychologist of his experience and expertise earns ($60,000 dollars a year). What might have accounted for a child support determination so far removed from the evidence in the case? In his quest to better understand this question, this Appellant's discovery efforts were ignored as his pleadings, emails, and judicial phone conferences were time and again thwarted.

After several efforts discharged, neither Judge Tusan nor the ex-wife's Counsel Erin Stone ever advised this Appellant of the nature of *ex parte* communications between themselves regarding the child support determination despite his many efforts which include question 23 of this Appellant's Amended Motion for the Production of documents sent just 10 days before trial requesting that:

> "all communications written by Jane Higdon or her counsel to Judge Tusan or anyone on her staff including staff attorneys Gallette and Moore"

Therefore, because Judge Tusan is the only person who can confirm receipt and subsequent utilization of the "criticisms" she requested, it is right and proper to ask her to bear witness to what information she received from the Appellee in a deposition requested by the Appellant.

(11) The Trial Court abused its discretion and committed reversible err when it knowingly and falsely accused the Appellant of perpetuating a litigation pattern that (1) caused serious delays at the state's appellate level and (2) caused unnecessary expenditures for his adversaries.

On page four (4) of the Trial Court's April 23rd, 2012 Order the Court claims the following:

> "Respondent's litigation pattern is not only abusive to the trial courts, but has also caused serious delay at the appellate level of this state, which in turn has had dramatic effects on the lower pending litigation"

> "Respondent repeatedly and routinely files the same appeal in both the Supreme Court and the Court of Appeals of Georgia. The dual filings result

in transfers between the two appellate courts, causing unnecessary delay in the above-styled litigation and expense to the adversaries of the appeals"

Similar to numerous other claims in the order, these statements are patently false. The Appellant never filed the same appeal in both houses simultaneously and neither did he ever file the same appeal in both houses at different times. The Appellant can only assume that the Court is referring to the Appellant's September 29th, 2011 Contempt Appeal of the trial Court's August 30th, 2011 wrongful denial of his Contempt Motion against the Appellee that was accepted by the Court of Appeals and currently awaits decision, and the Appellee's separate Contempt Motion against the Appellant for his alleged willful refusal to pay the full amount of monthly child support.

A close examination of the appellate court's orders reveal the true journey of the Appellant's Contempt Appeals. The appellate orders clearly demonstrate that the document's sojourn begins at the Court of Appeals, abruptly shifts to the Supreme Court only to be transferred back to the Court of Appeals. The appellate buck passing that ensued after the Appellant properly placed his appeal was the responsibility of Court employees who failed to accurately assess each appeal's jurisdictional qualifications. While this pro se litigant may have in the past committed good faith errs while navigating through the minefield of jurisdictional technicalities that is our appellate courts, this Appellant has NEVER filed the same appeal in both appellate courts.

CONCLUSION

The irrefutable facts adduced in this appeal clearly demonstrate that the Trial Court is utilizing its April 23rd, 2012 Order as both a shield and a sword. Instead of candidly confronting the truth laid down in the legitimate litigation languishing before it, the court wielded a slanderous sword and attacked the veracity of the Appellant's thoroughly substantiated claims. As a shield, the Court's order deployed the use of defamation to deny the Appellant his fundamental right to protest Court injustice. The cruel irony is this. If the damage and devastation described in the Court's de facto six (6) page judicial complaint delivered on April 23rd did in fact occur, it was solely a creation penned by its own unclean hand. The Appellant's lone responsibility regarding the

dilemma now entangling the Court was that in his response to the accumulation of Court misconduct and malfeasance, he decided to fight back fairly and invite the Court to experience the natural consequences of its unjust behavior. Regarding the fight back, it is his duty to his children, to himself, and to his fellow citizens to stand up in the face of Court injustice. What was the Court's duty? Its charge was to seek, tell, and adjudicate the truth according to the rule of law. If the Court had faithfully executed that duty, it would have been free from ensnarement by its own devices. Now, in a mad effort to extricate itself from its embroilments and avoid any accountability for the catastrophe it created, the Court has mounted a campaign seeking to shift the blame for its abuse of the system to an innocent party while efforting fiercely to muzzle even the slightest sounds of resistance.

PRAYER

WHEREFORE, the Trial Court's April 23rd, 2012 Order is an abomination of due process replete with falsification and misrepresentation that the Appellant respectfully prays be summarily reversed, and the judicial official who penned it, severely sanctioned subsequent to a swift and proper disqualification from the case bar.

This the 17th day of July, 2012

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Alex Higdon, Pro se
6030 China Rose Lane
Johns Creek, Georgia, 30097
678.595.2244

CERTIFICATE OF SERVICE

This is to certify that I, Alex Higdon, have on this day served the Respondent Jane Reid Higdon in the above captioned matter with a copy of this **APPEAL OF THE APRIL 23RD, 2012 ORDER ON SUBMISSIONS RESTRICTIONS.** It has been delivered to Erin Stone, counsel to Jane Reid Higdon.

Erin S. Stone
SCHULTEN, WARD & TURNER, LLP
260 Peachtree Street, Suite 2700
Atlanta, Georgia 30303
404.668.6800

This 17th day of July, 2012.

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Alex Higdon, Pro Se

Alex Higdon, Pro se
6030 China Rose Lane
Johns Creek, Georgia, 30097
678.595.2244