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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2023-000791

A.M.L., and J.J.L., by and through their Next of Friend, John Doe,
R.D.M., by and through his Next of Friend, Jane Snow, J.J.G., and S.T.S.,
.....Appellants,

v.

Wright Directions Family Services, LLC..... Respondent.

INITIAL BRIEF OF RESPONDENT WRIGHT DIRECTIONS FAMILY SERVICES, LLC

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November 15, 2023

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STATEMENT OF THE CASE

Appellants, minors who allege they suffered abuse at the hands of their foster parents, received counseling services from Respondent while in foster care. To explore pursuing legal recourse for their abuse, Appellants, through their counsel, requested their records from Respondent. (See Amended Compl. at 4, March 10, 20222; Answer to Amended Compl. at 2, April 6, 2022; Appellants' Mot. to Show Cause, at 1-2, March 9, 2022.) Respondent first received a records request via fax on or about February 25, 2022.[1] (See Amended Compl. at 4, March 10, 20222; Answer to Amended Compl. at 2, April 6, 2022.) On March 10, 2022, within two weeks of receiving the records request, Respondent provided approximately 580 pages of records to Appellants (the "initial records response"), none of which were privileged or exempt from disclosure under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). (See Emails, Ex. A to Respondent's Memo. in Opposition, April 6, 2022.)

On March 9, 2022, before receiving the initial records response, Appellants filed suit against Respondent seeking specific performance of the records request. (Compl., March 9, 2022.) The same day, Appellants filed their first "Motion to Show Cause and for Expedited Hearing" ("March 9 Motion to Show Cause") requesting, *inter alia*, an order requiring Respondent "appear before the Court with all of [Appellants]' medical records

[1] Appellants contend they submitted numerous records requests prior to February 25, 2022 and Respondent contests this allegation. (*See* Amended Compl. at 4, March 10, 2022; Answer to Amended Compl. at 2.) This factual dispute need not be resolved; it has no bearing on the Court's review of the issue on appeal, which is the trial court's award of Respondent's costs for producing records to Appellants. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

and any other documentation related to the [Appellants]." (Appellants' Mot. to Show Cause at 5-6, March 9, 2022.) Respondent opposed the March 9 Motion to Show Cause and explained the records it withheld from the initial records response were not subject to production under HIPAA because they constituted psychotherapy and counseling records. (Respondent's Mem. in Opposition at 5-6, April 6, 2022.) Following a hearing, the trial court granted in part and denied in part the March 9 Motion to Show Cause, ordering Respondent to produce Appellants' records, including psychotherapy notes, while redacting the impressions of clinicians. (April 12, 2022 Order at 4.) The April 12, 2022 Order further granted Respondent "to seek costs associated with these records as allowed under 45 C.F.R. § 164.524(c)(4)."[2] (April 12, 2022 Order at 4.) Respondent complied with the April 12, 2022 Order by timely producing to Appellants the remaining records with clinician impressions redacted.[3]

Four of Respondent's employees reviewed, redacted, and prepared the Appellants' records for production pursuant to the April 12, 2022 Order and, as permitted by the trial court, Respondent submitted to Appellants an invoice for the costs of this labor. (Invoice, Ex. D to Mot. for Costs, Oct. 26, 2022.) Appellants, however, refused to reimburse Respondent. (May 5, 2022 Email, Ex. F to Mot. for Costs, Oct. 26, 2022.) Accordingly, on October 26, 2022, Respondent filed its Motion for Costs, requesting the trial court order

[2] The April 12, 2022 Order was not appealed. (See Notice of Appeal.)

[3] On April 27, 2022, Appellants filed a second "Motion to Show Cause and For Emergency Hearing," requesting the trial court hold Respondent in contempt for not producing Appellants' "complete, unredacted records" and instead producing redacted records. (Second Mot. to Show Cause at 5-6, April 27, 2022.) An expedited hearing was held on April 29, 2022, and the trial court denied Appellants' Motion, finding Respondent had complied with the April 12, 2022 Order and that the Appellants were not entitled to unredacted psychotherapy records under HIPAA. (Dec. 29, 2022 Order at 1-2.) This December 29, 2022 Order was not appealed. (See Notice of Appeal.)

Appellants to pay the invoiced labor associated with producing the records in compliance with the April 12, 2022 Order. (See gen. Mot. for Costs, Oct. 26, 2022.)

As explained in the Motion for Costs and supported by the Affidavit of Ronda Stevens filed therewith, it took four of Respondent's employees 56 hours to produce the records in compliance with the trial court's April 12, 2022 Order. (Mot. for Costs at 4; Ronda Stevens Aff. ¶ 3, Ex. C to Mot. for Costs, Oct. 26, 2022.) Based on those employees' hourly rates, the labor costs associated with the production totaled $7,811.44. (Ronda Stevens Aff. ¶ 3, Ex. C to Mot. for Costs, Oct. 26, 2022.)

Appellants opposed the Motion for Costs and, citing Rule 11 of the South Carolina Rules of Civil Procedure, also requested sanctions against Respondent. (Amended Resp. to Mot. for Costs at 8-12, March 3, 2023.) Specifically, Appellants argued the amount of Respondent's costs was inflated because, according to Appellants, the time it would take to read the 4,576 pages produced by Respondents was far less than the hours used to calculate Respondent's labor costs. Appellants also took issue with the rates of Respondent's employees, arguing Respondent "failed to provide any evidence which would justify the rates" and "failed to provide why each employee's rate was justified and why another employee could have performed the same work at a lower rate."[4] (Amended Resp. to Mot. for Costs at 7, March 3, 2023.)

[4] Without explanation, Appellants also argued in their opposition memorandum that Respondent had a history of Medicaid fraud and Respondent had fraudulently charged appellants for therapeutic services. In support, Appellants attached documentation of a prior Medicaid audit involving Respondent, which Appellants admit was not during the timeframe they received services from Respondent. (Amended Resp. to Mot. for Costs at 12-13, March 3, 2023.) This is a red herring; it had no bearing on the Motion for Costs, and it should have no bearing on this appeal. In any event, Respondent has never been charged with or found guilty of Medicaid fraud, and Respondent denies Appellants' accusations of fraudulent billing.

The trial court granted Respondent's Motion for Costs on March 28, 2023, ordering "the costs of the records to be paid within 30 days" thereof. (March 28, 2023 Form 4 Order.) Appellants moved for reconsideration, which motion was denied by the trial court. (April 6, 2023 Mot. for Reconsideration; May 12, 2023 Order.) Immediately upon the denial of reconsideration, Appellants filed their Notice of Appeal of the March 28, 2023 Order granting Respondent costs, and the May 12, 2023 Order denying reconsideration. (Notice of Appeal, May 12, 2023.)

Following the Notice of Appeal, this Court, on June 2, 2023, requested memoranda on the issue of appealability, noting "[a] preliminary review of the orders challenged on appeal indicates they might not be appealable." (Court of Appeal's June 2, 2023 Letter.) In their memorandum, Appellants stated the April 12, 2022 Order requiring the production of Appellants' records, permitting the Respondent's redaction of clinicians' impressions from the records, and allowing Respondent to seek costs was "an order on the merits" which left "no need for further litigation." (Appellants' Mem. on Appealability at 3, June 12, 2023.) Appellants further confirmed, their "only concern is the lower court's decision to award an extraordinary amount in costs to [Respondent]." (Appellants' Mem. on Appealability at 3, June 12, 2023.)

Based on Appellants' representation that the only issue on appeal was the amount of costs awarded, Respondent argued the matter was not appealable. (Respondent's Mem. on Appealability at 5-6, June 22, 2023.) After considering both parties' memoranda, this Court stated, "it appears the order finally adjudicated all claims pending before the Court and is subject to immediate appeal," noting the appeal may "proceed at this time," but that

its decision was not a final determination "whether the underlying order is subject to immediate review." (Order, July 17, 2023.)

STANDARD OF REVIEW

A. Award of Costs.

An appeal relating to costs alone should not be sustained. Fraser v. Davie, 11 S.C. 56, 63 (1878) ("An appeal relating to costs alone will not be sustained."); Stegall v. Bolt, 11 S.C. 522, 523 (1879) ("No appeal will lie on mere question of costs."); see also, Foster v. Elk Fork Oil & Gas Co., 99 F. 617, 617 (4th Cir. 1900) ("In the courts of the United States an appeal does not lie from a decree for costs.") (citing Glendale Fabrics Co. v. Smith, 100 U.S. 110, 111-12 (1879); In re Paper-Bag Cases, 105 U.S. 766, 772 (1881)).

When an appeal on costs is permitted, the trial court's decision to award or deny costs should not be disturbed absent an abuse of discretion. See, e.g., S.C. Dep't of Transp. v. Revels, 411 S.C. 1, 8, 766 S.E.2d 700, 703 (2014) (holding specific amount of fees awarded under a statute authorizing the award is left to the discretion of the trial court). "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." Kiriakides v. Sch. Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) (citation omitted).

B. Sanctions Imposed under Rule 11, SCRCP.

The determination of whether attorney's fees should be awarded under Rule 11 is treated as one in equity. In re Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Id. "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008).

Where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. Id. Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. Id.

ARGUMENT

I. The March 28, 2023 Order awarding Respondent costs should be affirmed.

Respondent's entitlement to costs is not an issue before the Court. In this regard, the law of this case is the April 12, 2022 Order, which Appellants did not appeal, wherein the trial court permitted Respondent to seek its costs for producing Appellants' records with clinician impressions redacted. Instead, the issue before the Court is whether the trial court abused its discretion by ordering Appellants to pay $7,811.44, the amount of Respondent's labor costs for reviewing, redacting, and producing Appellants' records as required by the April 12, 2022 Order. Not only should an appeal of this issue not be sustained, but there is also no basis for reversal.

A. Appeals Relating to Costs Alone Will Not be Sustained.

As an initial matter, on June 12, 2023, Appellants represented to this Court that their only concern on appeal was "the lower court's decision to award an extraordinary amount in costs to the [Respondent]." This is not a matter for appellate courts to consider.

Long-established jurisprudence in South Carolina as well as the United States Supreme Court have held that an appeal relating to costs alone should not be sustained. Jenkins v. Bennett, 40 S.C. 393, 18 S.E. 929, 932 (1894) ("As to the appeal from that portion of the order imposing the costs of the motion upon the defendants, it may be possible that we would have no authority to consider it if it stood alone…."); Fraser v. Davie, 11 S.C. 56, 63 (1878) ("An appeal relating to costs alone will not be sustained."); Stegall v. Bolt, 11 S.C. 522, 523 (1879) ("No appeal will lie on mere question of costs."); see also, Glendale Fabrics Co. v. Smith, 100 U.S. 110, 111-12 (1879); In re Paper-Bag Cases, 105 U.S. 766, 772 (1881); Canter v. Am. Ins. Co., 28 U.S. 307, 319 (1830). Because

Appellants' "only concern is the lower court's decision to award an extraordinary amount in costs to [Respondent]," under the well-established law of both the South Carolina Supreme Court and the United States Supreme Court, there is no appealable issue to consider.

B. The Trial Court Did Not Abuse its Discretion in Awarding Respondent its Costs.

If this appeal may be sustained, the Court should affirm the trial court's March 28, 2023 Order because there has been no abuse of discretion. An abuse of discretion occurs when the trial court's order is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support. Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004). Appellants argue the latter, but they are incorrect.

1. The Affidavit of Ronda Stevens is sufficient evidentiary support for the time spent by Respondent's employees reviewing, redacting, and compiling the production.

While Respondent's Motion for Costs was supported by an affidavit explaining the costs incurred, Appellants assert it "is dubious, at best" "that four employees spent 56 hours each in reviewing 4,576 pages." (Appellant's Br. at 8.) Appellants rely on the affidavit of their "reading" expert, which states, in pertinent part, "It is estimated it should take an average college-educated individual between 60-90 seconds to read and mark substantive pages in [Appellants'] files." (Appellant's Br. at 11-12.) Appellants have not explained how the opinion of someone who Appellants hired to challenge the Motion for Costs, who did not perform any of the review, redactions, or preparations of the production, who has no personal knowledge of the steps necessary to review, redact, and prepare the court ordered production, and who did not interview those with personal knowledge of the steps necessary to review, redact, and prepare the court ordered production is more reliable,

accurate, and trustworthy than the sworn affidavit documenting the actual time spent reviewing, redacting, and compiling the court ordered production. As noted on the expert's CV, he has no experience in the medical industry, nor does it indicate he has any familiarity with HIPAA or psychotherapy records. (Ortlieb C.V., at 5-12, Ex. 1 to Amended Resp. in Opposition to Mot. for Costs, March 3, 2023.) In short, Appellants' hired gun cannot create an abuse of discretion where none otherwise exists.

Likewise, Appellants challenge the amount of time expended by Respondent's employees because their counsel and paralegal expended considerably less time "reviewing and redacting" their clients' names from the 4,576 pages of redacted records produced. Ironically, when Appellants challenged the sufficiency of the production of these records, one of their biggest issues with the production was that "80 – 90% of the records were redacted." (Mot. to Show Cause at 1, April 27, 2022.) Thus, the application of time it took Appellants' counsel and paralegal to review and redact their clients' names from the records - 3.6 hours - is nowhere near analogous to the amount of time it would have taken Respondent's employees to review and redact clinical impressions from a substantial portion of 4,576 pages of records.

In sum, the trial court was satisfied with the contents of the affidavit documenting the requested costs, and it did not abuse its discretion in awarding the costs set forth in the affidavit. Accordingly, this Court should affirm.

2. The Affidavit of Ronda Stevens is also sufficient evidentiary support for the labor rates of the employees who compiled, reviewed, and redacted Appellants' records for production.

Appellants claim Respondent "has failed to provide any evidence which would justify the rates" of the employees who compiled, reviewed, and redacted Appellants' records for production, but that simply is untrue. Again, the hourly rates used to calculate

the costs were supported by the Affidavit of Ronda Stevens. While Appellants argue Respondent should have provided "information as to why each employee's rate was justified and why another employee could [sic] have performed the same work at a lower rate," there is no such requirement under the law, and this Court should not adopt one. With respect to the burden they seek to impose on Respondent, Appellants misstate the holding in Wiwa v. Royal Dutch Petroleum Co. (App.'s Brief at 14.) Wiwa, a nearly 20-year-old decision of the Fifth Circuit Court of Appeals, does not state that a party, like Respondent, who is permitted to recover costs, must justify in any particular way the amount of costs sought. Instead, Wiwa discusses who bears the burden in demonstrating "that compliance with [a] subpoena would be 'unreasonable and oppressive,'" 392 F.3d 812, 818 (5th Cir. 2004), an issue not relevant in this appeal.

3. The six factors relevant to an award of attorney's fees have no bearing on the March 28, 2023 Order allowing costs.

Appellants argue, for the first time on appeal, the March 28, 2023 Order awarding costs should be reversed because the trial court failed to provide any factual basis for the reasonableness of the hours spent or the rates used to calculate the costs. (Appellant's Br. at 13.) Specifically, according to Appellants, the six factors our trial courts should consider in determining a reasonable attorney's fee also apply to an award of costs. (Appellant's Br. at 13-14.) Not only is this argument not preserved for review,[5] it is also not the law of this state. Appellants cite no legal authority to support this conclusion, and Respondent is aware of none. In fact, the cases cited by Appellants for their proposition that the trial court should have considered some or all of the six factors are cases addressing attorney's fees, not the

[5] "It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

labor costs incurred by a party when its employees must compile, review, and redact thousands of pages of protected health information for production.

> 4. The award of Respondent's actual labor costs compiling, reviewing, and redacting the records in compliance with the April 12, 2022 Order should not be compared to per page copy costs.

For the first time on appeal, Appellants cite the 2013 rule change to 45 C.F.R. § 164.524(c)(4) as a suggestion[6] that the costs awarded to Respondent were impermissible. See *Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules*, 78 FR 5566-01, 5635-36 (proposed January 25, 2013) ("2013 Omnibus Rule").

Appellants argue that the 2013 Omnibus Rule limits what Respondent can recover to what is allowed under state law. (App. Brief, p. 15). But Appellants fail to identify a state law they believe applies to and was violated by the award of costs to Respondent, and they may not do so for the first time on appeal.

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[6] Appellants quote (though fail to cite) Schutte v. Ciox Health, LLC, 28 F.4th 850, 857 (7th Cir. 2022) as follows:

> "Another regulation clarifies how this provision interacts with state laws regulating fees: 'When a State law provides a limit on the fee that a covered entity may charge for a copy of protected health information, this is relevant in determining whether a covered entity's fee is 'reasonable' under § 164.524(c)(4).' If state law limits the permissible charges to 25 cents per page, for example, then the covered entity may not charge more than that amount even if its costs are higher."

(App.'s Br. at 15.) Appellants fail to take this argument any further by, for example, identifying a state law they contend provides a limit on the costs Respondent was entitled to recover.

Moreover, while the Schutte example in Appellants' brief refers to per-page copy costs, Respondent is not seeking charges for the copies or electronic submission of the documents. The final rule makes clear that under Section 164.524(c)(4)(i), "labor costs included in a reasonable cost-based fee could include *skilled technical staff time spent to create and copy the electronic file, such as compiling, extracting, scanning and burning protected health information to media, and distributing the media. This could also include the time spent preparing an explanation or summary of the protected health information, if appropriate."* Id. at 5636. (emphasis added).[7] In this regard, the 2013 Omnibus Rule changes are directly on point with what Respondent is seeking to recover. As contemplated by the 2013 Omnibus Rule, Respondent sought and was awarded the labor costs associated with its skilled technical staff time compiling, extracting, scanning and redacting the information as required by the trial court's April 12, 2022 Order.

Furthermore, the amount of costs awarded to Respondent are not as "extraordinary" as Appellants claim. (Appellants' Memo. on Appealability at 3, June 12, 2023.) South Carolina's trial courts have awarded—and this Court has affirmed—costs in much larger amounts. See, e.g., Maybank v. BB&T Corp., 416 S.C. 541, 582, 787 S.E.2d 498, 519 (2016) (affirming trial court's award of costs totaling $245,011, concluding,"[b]ased on the standard of review and the evidence in the record, it was well within the trial court's

[7]On January 23, 2020, a federal court vacated certain portions of the 2013 Omnibus Rule and found that the fee limitation set forth at 45 C.F.R. § 164.524(c)(4) would apply only to an individual's request for access to their own records and does not apply to an individual's request to transmit records to a third party, such as, their attorney. Ciox Health, LLC v. Azar, et al., 435 F Supp 3d 30, 66-69. (D.D.C. 2020); See also United States Department of Health and Human Services, *Important Notice Regarding Individuals' Right of Access to Health Records* <https://www.hhs.gov/hipaa/court-order-right-of-access/index.html> (accessed November 7, 2023).

discretion to grant [respondent] costs"); Lewis v. Lewis, 392 S.C. 381, 394, 709 S.E.2d 650, 656–57 (2011) (upholding family court's award of expert witness fees in the amount of $23,066.25); Taylor v. Medenica, 331 S.C. 575, 579, 503 S.E.2d 458 (1998) (affirming award of costs in the amount $24,068.00).

Simply stated, Appellants have failed to identify any applicable law that supports their challenge of the costs awarded by the circuit court. Accordingly, the circuit court's decision should be affirmed. Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 192–93, 534 S.E.2d 1, 9–10 (Ct. App. 2000) (noting that the failure to provide argument or supporting authority for an issue renders it abandoned).

II. The Trial Court Did Not Abuse its Discretion in Declining to Impose Sanctions Under Rule 11 Against Respondent.

Appellants advised the court in their June 12, 2023, filing that their only concern on appeal was "the lower court's decision to award an extraordinary amount in costs to the Defendant." Yet, in their Initial Brief, Appellants ask this Court to sanction Respondent for submitting a fraudulent invoice in violation of Rule 11, SCRCP and to award Appellants costs and attorney's fees. To the extent this issue was not voluntarily waived by Appellants' failure to mention it in their appealability memorandum, the trial court did not abuse its discretion in declining to impose Rule 11 sanctions against Respondent.

A. Respondent did not Violate Rule 11, SCRCP.

Assuming this issue was preserved for review, this Court should uphold the circuit court's decision to deny Appellants' request for sanctions. The trial court did not abuse its discretion declining to impose Rule 11 sanctions against Respondent.

Appellants argue that Respondent submitted "fraudulent billing" and a "false affidavit" to the circuit court in support of their Motions for Costs. (App. Brief, pp. 18-19).

Appellants argue that Respondent's motion and exhibits "failed to inform the circuit court in any manner why its claimed costs were so exorbitant." (Id. p.16). Appellants argue that Respondent (specifically their counsel) should be sanctioned for violating Rule 11, SCRCP in submitting a fraudulent invoice to the court. Appellants attack Respondent's costs of $7,811.44 as being "laughable" (Id. p.19) but also ask this Court to sanction Respondent by awarding Appellants attorney's fees and the costs of their reading expert, Dr. Ortlieb in the amount of $9,860.00 as well as paralegal fees of $4,700.00, which is nearly double the amount of costs sought by Respondent for complying with an unappealed court order that awarded Respondent costs. (Ex. 17 to Amended Resp. to Mot. for Costs at 6, March 3, 2023; Suppl. Affidavit of Attorney's Fees and Costs at 4, March 8, 2023).

Under Rule 11, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. See Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it. Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). The sanction may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. Rule 11(a), SCRCP.

As discussed above in Section I.B., there are no grounds for sanctions because Respondent was permitted by the April 12, 2022 Order to seek its costs, Respondent supported its Motion for Costs with a sworn affidavit, and while Appellants insist the labor could have been more efficient, that insistence does not establish that the affidavit of Stevens was fraudulent. Appellants have not, and presumably cannot, point to any relevant statute or case law that supports their position that the hours submitted, or the labor rates of Respondent's employees were fraudulently represented in the affidavit. The affidavit of their expert, who has only seen the redacted records, has no healthcare or HIPAA compliance background, and has no personal knowledge of the work performed by Respondent, opined only about reading speeds – not reasonable times to conduct redactions and ensure compliance with HIPAA. Likewise, work performed by Appellants' legal team, who reviewed and redacted Appellants' names from the already redacted records, was not analogous to the work performed by Respondent, who compiled Appellants' records, reviewed each page for clinician impressions, and redacted the clinician impressions. Appellants' lawyers' time spent is not the benchmark against which Respondent's time spent must be judged.

In short, the record is devoid of conduct warranting sanctions from this Court. See Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 645, 760 S.E.2d 399, 412 (2014), abrogated by Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016) (affirming circuit court in determining that Appellant engaged in "dilatory litigation tactics," lodged "frivolous and dilatory appeals," filed affidavits and memoranda "without reasonable basis," and moved for reconsideration after nearly every ruling made by the circuit court); Runyon v. Wright, 322 S.C. 15, 20, 471 S.E.2d 160, 162 (1996)

(affirming Rule 11 sanctions against an attorney who brought interpleader action alleging in bad faith his attorney's fees were paid using illegal drug money, in which the circuit court determined the interpleader action was to prevent or delay satisfaction of the $6,000 judgment entered against him); Russell v. Wachovia Bank, N.A., 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) (affirming Rule 11 sanctions against a party for submitting an affidavit that the trial court later described as "false" based on deposition testimony that directly contradicts statements made in the affidavit); but see Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 109, 713 S.E.2d 650, 656 (Ct. App. 2011) (because Respondents survived summary judgment motions, but subsequently withdrew their claims after Appellant-Defendants presented their case, they were not subject to sanctions).

As Respondent's entitlement to an award of costs was upheld twice by the circuit court and the amount of fees was likewise affirmed twice by the circuit court, Appellants have failed to establish that Respondent's conduct is sanctionable.

B. Appellants abandoned this issue on appeal.

Based on Appellants representations to this Court on June 12, 2023, in their "Memorandum on Appealability," the only issue they preserved for appeal was "the lower court's decision to award an extraordinary amount in costs to the [Respondent]."

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009); see also State v. Jones, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

Here, Appellants, in their Memorandum to this Court providing clarification about what was being appealed, not only failed to mention the denial of sanctions but also made no reference to any case law to support that it was properly on appeal. Thus, this Court should deem the issue of sanctions abandoned and decline to consider this argument.

CONCLUSION

The circuit court properly held that Respondent was entitled to costs as allowed under the unappealed April 12, 2022, Order and did not abuse its discretion in awarding the amount Respondent requested as it was supported by an affidavit. Further, Appellants have failed to establish that the trial court abused its discretion in denying Appellants' request for sanctions against Respondent pursuant to Rule 11, SCRCP. Accordingly, the Order of the trial court should be affirmed.

Respectfully submitted,

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