THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Pee Dee Health Care, P.A. ..... Appellant,

v.

Estate of Hugh S. Thompson ..... Respondent.

RETURN TO PETITION FOR REHEARING

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As noted by Appellant's Petition, three cases were disposed of in the Court's consolidated opinion of July 3, 2013 and Appellant's Petition is addressed to the latter two appeals and not the first (although the tracking number on Appellant's Petition is actually that assigned to the first appeal -- tracking number 2011185767). Because this Petition is not addressed to the probate appeal (tracking number 2011185767), Respondent asks that the Remittitur proceed and issue to the trial court on that matter. Likewise, while Appellant offers a very short argument suggesting an overbroad scope of disqualification, nothing in the Petition's prayer ask for relief with regard to this argument. Accordingly, Respondent ask that this Court's issue its remittitur to the trial court in the disqualification appeal (tracking number 2011197671) as well.

Litigation is often time consuming and expensive. This Court's prompt opinion of July 3, 2013 represented the most-welcomed possibility of finality for the Thompson family which has been tediously defending the Respondent Estate from Appellant's claim for over three years. While SCACR 221(a) does allow for the ability to Petition for Rehearing as a matter of right, it requires that any such petition be directed at points "overlooked or misapprehended by the court." Thus, a Petition for Rehearing should not be submitted simply in hopes that the Court will change its mind about matters specifically considered and determined. Notably, Appellant has secured new counsel and that new counsel has brought a new focus on the procedural time-lines involved in this matter; Appellant's arguments, however, are anything but new and have not been ignored.

In this case, everything has been hashed and re-hashed such that Appellant's current Petition does not raise anything "overlooked" or inadequately considered. The issues raised by

the Appellant's Petition have been raised – both formally and informally – both in this Court and the Trial Court -- and they have been denied in every venue. Indeed, the issues raised in the present Petition were the subject of comprehensive questions from this Court at oral argument on June 5, 2013.

In fact, without even waiting on an opinion from this Court, Appellant raised these issues again by making a last-minute (*less than a week after the oral arguments*) motion to vacate the lower court's order of summary judgment based upon some of the same jurisdictional/stay arguments raised in the Appellant's Briefs and now in the instant Petition.[1] Thus, in addition to the consolidated opinion in these appeals, this Court issued a separate order of July 3, 2013 dismissing that last-minute motion after finding that it "raises the same issues as PDHC's appeal." Indeed, these issues were thoroughly addressed by the briefs submitted to the Court in the third appeal (Appellant's Final Brief page 30, Respondent's Final Brief pages 14-19).

ARGUMENT

1. One Lawyer's Disqualification Did NOT Stay The Entire Case[2] or The Issuance of A Projected Formal Order of Summary Judgment

SCACR 205 provides in the last sentence: "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." See also South Carolina National Bank v. Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996). These provisions are consistent with the automatic stay provision found in Rule 241(a) of

[1] The suggestion of that appellate motion was that the lower court was subject to a loss of jurisdiction or stay resulting from the appeal of counsel's disqualification and therefore the trial court should not have entered its order of summary judgment.

[2] Appellant's Petition argues under heading 1 that the entire case was stayed by the appeal of the trial court's order of disqualification. As an alternative, the Appellant suggest that the disqualification order itself was stayed and made unenforceable by the appeal – see footnote 4 of the Petition and accompanying text as well as page 5 of the Petition under item "b" ("there was no enforceable order of disqualification"). Similar arguments have been made before, at both the trial and appellate level, and consistently rejected.

the SCACR which states that "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters *decided in the order*...." (emphasis added). The language of the rule itself limits its application to "matters decided in the order" ; conversely, those matters unrelated to the scope or effect of the appealed order would not be automatically stayed. Appellants seek to squeeze into the former category again although this Court's opinion noted that the trial court "did not otherwise attenuate the order of disqualification." Opinion at 2 (July 3, 2013).

As the trial court observed in its order granting summary judgment, "*Both Rules 205 and 241(a), SCRAP, provide that the trial court has continuing jurisdiction of case issues not affected by the pending appeal. Clearly, the disqualification of counsel issue does not impact the merits of the case addressed by summary judgment.*" R. p. 20 (Summary Judgment Order at page 3 (emphasis added)).[3] Here, nothing about the disqualification of counsel altered the nature and elements of PDHC's claims against Respondent. And nothing prohibited other counsel of record (Mr. Matthews), in the same law firm, from filing timely post-judgment motions in the trial court[4] – and no disqualification in this appellate court prevented either attorney of record from

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[3] Following the lead of Appellant's Petition, Respondent's citations to the Record on Appeal will be to the one-volume Record in Appeal number 2011197671 (the 2nd Appeal) unless otherwise noted. In addition, just as the Appellant has referred to items outside the Record on Appeal – such as trial correspondence (one example is cited in footnote 2 of Appellant's present petition); Respondent will do the same and attach copies pursuant to SCACR 240(c)(3) but only as needed to respond to Appellant's Petition.

[4] ***Indeed, given the language of the Court's ruling on August 12, 2011, both attorneys of record for Appellant in the trial court (Mr. Matthews and Mr. Megna) should have known that Mr. Matthews needed to file any subsequent Rule 59(e) motions in the trial court.*** Specifically, in reaffirming the disqualification, the court dismissed other activity by disqualified counsel as unauthorized – "The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED. " R. p. 13 (August 12, 2011 Order at page 1)(underline added). The order was sent by the Court to Mr. Matthews as "Plaintiff's remaining counsel" with instructions for Matthews to serve the order upon all parties. The trial court's summary judgment letter of the same date was also sent to attorney Matthews alone as counsel for PDHC. R.pp. 584-585.

Foreseeing subsequent claims of surprise or ambiguity, the trial court's original disqualification order had been clear. That Order had provided:

filing[5] a timely notice of appeal in this court.[6] Either option would have avoided the untimeliness of the present appeal.

A More Complete Chronology

In its present Petition, Appellant asserts (footnote 8) that it was "completely surprised when the circuit court entered its order for summary judgment" because the appeal of the disqualification order had been filed. As further asserted (continuing in footnote 8), this "complete surprise" was documented in the October 10th letter of Mr. Megna to Judge Baxley (R.

> The Court orders complete disqualification effective with the execution of this order. The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist even with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

R. p. 12 (Disqualification of Counsel Order, dated April 15, 2011, page 9 (incorporating footnote 11)). Thus, this Court's July 3, 2013 Opinion provided, "Accordingly, the circuit court provided clear and unequivocal notice to PDHC that Mr. Megna was only allowed to orally argue the motions for summary judgment and was disqualified from all other appearances and activities following his disqualification." Opinion at p.2. Of course, the trial court's written order reinforced the directive given even earlier by the Court directly to counsel in the Courtroom on March 16, 2011, "It begins now." R. p. 427 (Transcript at Page 38, lines 5-6 (emphasis added)).

[5] Both attorneys at the firm of Matthews & Megna have signed appellate pleadings in this case. While most have been executed by Mr. Megna, the most recent, last minute, post-argument appellate motion was signed by attorney Ben R. Matthews, who also served as Appellant's co-counsel in the trial court. As noted by this Court's opinion, Mr. Matthews participation in the matter is directly related to the lack of harm caused to Appellant by attorney Megna's prior disqualification. Opinion at No. 3 (Matthews "had previously submitted pleadings on PDHC's behalf. Accordingly, PDHC suffered no hardship from Mr. Megna's pretrial disqualification.").

[6] The motion for reconsideration of summary judgment, not previously included in any of the Records on Appeal but attached hereto(Exhibit A)(without attachments which are duplicated in the Record on Appeal) pursuant to SCACR 240(c)(3), was not really needed – it raised no new issues and no issues had been overlooked by the trial court's summary judgment order. That motion argued that: the trial court had lost jurisdiction or was stayed, the Estate's Answer admitted too much to allow summary judgment for the Estate, the Medicare Administrative Law Judge's adverse order should not be given preclusive effect, the Estate had unclean hands because of his credentialing conduct, the Estate had refused needed depositions, and the Estate's lawyers should be disqualified. All these issues were dealt with in the Court's order of summary judgment -- or waived at the summary judgment hearing. For example, disqualification of Estate counsel was raised at the summary judgment hearing but PDHC declined the Court's invitation to make a motion or formalize any objection. Because these issues were all addressed by the trial court's thorough summary judgment order, Appellant's could have filed an immediate notice of appeal from that formal order -- which either counsel could have signed. See Elam v. South Carolina Dept. of Transportation, 361 S.C. 9, 25, 602 S.E.2d 772, 781 (2004)(footnote 5 noting that a Rule 59(e) motion is not "necessary or desirable in every case.").

p. 352). The assertion may have been documented, but the surprise was disingenuous then and it is disingenuous now.

That October 10th letter of course noted that the Summary Judgment orders[7] followed the notice of appeal regarding disqualification – which was dated August 15, 2011. What that letter *and* the present Petition conveniently chose not to note is the fact that the Court had already announced its decision to grant summary judgment weeks before the formal Order dated August 29, 2011 *and before the notice of appeal regarding disqualification.* Specifically, in a letter to counsel dated August 12, 2011, Judge Baxley announced that the [summary judgment motion] "of the Defendant is granted." (R. pp. 584-585). The letter further provided that the letter itself would serve "as notice of the Court's decision." The letter further provided the trial court's reasoning for summary judgment and legal precedent supporting the decision although it asked for a more complete formal order to be prepared.

Following receipt of this letter from the court announcing its summary judgment decision, no one was surprised by the court's entry of a formal order fully anticipated by that letter. Nevertheless, this announced ruling is left out of Appellant's "Sequence of Dates" and Appellant asserts surprise with regard to the subsequent formal order.

An Opportunistic Appeal

Because the Court's summary judgment decision of August 12, 2011 was issued by letter the same day as the Court's written order denying reconsideration of the disqualification (R. pp. 13-14), counsel for the Appellant submitted an immediate appeal from the disqualification decision so that Appellant could later assert "complete surprise" that the Court actually issued a formal order of summary judgment. In other words, after the Court's adverse determination of

[7] R.pp. 18-33 (Summary Judgment Order dated August 29, 2011) and R. pp. 35-36 (Order denying reconsideration of Summary Judgment, dated September 28, 2011).

summary judgment on August 12, 2011, Appellant's counsel opportunistically sought to find a way to strip the Court of jurisdiction or to stay the Court's authority before the formal form of the fatal summary judgment order could issue. Thus, that hurried notice of appeal on August 15, 2011 has also served as the basis for Appellant's persistent effort to avoid the Court's adverse determination of the merits.[8]

Of course, this is precisely the piecemeal strategy that the trial judge sought to prevent for this appellate court – as the trial judge stated in his formal summary judgment order after concluding he had continuing jurisdiction, ***"this Court believes that considerations of appellate judicial economy are best served by the rendering of this decision at the present time."*** R.p. 20 (emphasis added). The trial court's effort at judicial economy is echoed in the time allowance of SCACR 203(b)(1), discussed *infra* in this Return, which allows time for the trial court's completion of formal orders.

2. Enforceability of the Disqualification Order Was Not Stayed On September 13th

In its Petition (see footnotes 5 and 6 and accompanying text), Appellant also argues that the finality of the disqualification was removed by the filing of the related Rule 59(e) motion for

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[8] Appellant's piecemeal, divide and delay approach to these issues is not new either. Anticipating the exact effort that has played out, Respondent's counsel wrote to the trial court on May 20, 2011 and urged consolidation of issues and hearings to promote judicial economy – both in the trial court and that of the anticipated appellate court. While Appellant's Petition notes that no objection was made to Mr. Megna filing the motion for reconsideration of his own disqualification (Petition, page 3 sequence item (e)), this letter of May 20th implicitly raises the concern and intentionally draws co-counsel Ben Matthews back into the correspondence loop.

Similarly, in addition to announcing its two decisions (summary judgment and disqualification reconsideration) on the same date (August 12th), the trial court issued its formal order of summary judgment on August 29th with his assistant's cover e-mail advising "Judge Baxley has asked me to advise you that he has considered Plaintiff's position that the Court lost jurisdiction to issue its final order granting summary judgment when Plaintiff appealed the decision to disqualify Attorney Megna. For reasons of judicial economy and prevailing case law, he disagrees with this position, and is today issuing the final Order." That e-mail was also directed to Mr. Matthews and not Mr. Megna.

These two pieces of correspondence were not designated for the record on appeal by Respondent but are submitted as exhibits hereto as allowed by SCACR 240(c)(3). Exhibits B and C.

reconsideration (May 2, 2011; R.p. 332) and that finality was then restored by the Appellant's receipt of the August 12th Order (R.pp.13-14) denying the reconsideration on August 15, 2011. R.p.329 (Notice of Appeal with receipt date). Thus, Appellant contends that during the pendency of the reconsideration, the disqualification was not final and not enforceable. Respondents contend it was absolutely enforceable at all times in the trial court – like any order of restraint – but this discussion is of no moment as only one point in time is critical here.[9]

Of course, it is the alleged un-enforceability of disqualification *at the time of the Rule 59(e) motion regarding summary judgment* that relates to the timeliness of this appeal (not un-enforceability during the pendency of the disqualification reconsideration). There is no question that the disqualification was final when the un-needed[10] summary judgment reconsideration motion was signed by Mr. Megna (September 13th) (Exhibit A hereto). Reconsideration of the disqualification had been denied weeks earlier (August 12th, R.pp. 13-14); thus, that decision was appropriately final for purposes of the hasty interlocutory appeal that was taken. While on

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[9] As noted in the argument above, the semantics of Mr. Megna's status between March 16th and August 12th really are not important as the relevant date in time is September 13, 2011 when Megna submitted the motion to reconsider summary judgment.

Appellant's Brief (page 9) previously suggested that the trial court itself "stayed" its order of disqualification. Admittedly, the trial court itself characterized the disqualification as stayed during the pendency of the related reconsideration (Summary Judgment Order, page 2). In contrast, Mr. Megna wrote on July 8, 2011 that "Plaintiff's 59(e) motion stayed the time for appeal of the court's order disqualifying Plaintiff's choice of counsel, but did not stay the order of the Court disqualifying Plaintiff's choice of counsel." Letter at page 2, item 8 (underlining added). Of course, by the time PDHC had lost on the merits and Mr. Megna signed the motion to reconsider summary judgment, Exhibit A hereto, Mr. Megna had changed his position – footnoting his signature thereon that the disqualification was stayed by the interlocutory appeal.

Issuing its own notice of hearing on June 17, 2011 (not in any Record on Appeal but attached hereto pursuant to SCACR 240(c)(3)) in response to ongoing letter/e-mail dialogue, the trial court advised that both reconsideration of disqualification and summary judgment would be heard on July 19th and "Mr. Megna will be permitted to argue his summary judgment motion, any decision on the motion for disqualification [reconsideration] will be rendered thereafter." Exhibit D. When it reaffirmed its disqualification, the trial court clarified that it did not stay its order of disqualification – it simply allowed disqualified counsel the privilege of a limited appearance to argue dispositive motions. R. p. 13 (August 12, 2011 Order at page 1). Again, the description of Mr. Megna's status during this interim period is not controlling here.

[10] See *infra* note 6.

appeal, however, that disqualification order was not stayed and remained enforceable in the trial court.[11] The trial court's continued authority to act in the matter despite the disqualification appeal is supported by South Carolina case law. See Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (Ct. App. 2000)(noting that civil contempt rulings are not automatically stayed, but this family court's criminal contempt order would be – all occurring in relation to ongoing trial jurisdiction of visitation issues and child support counterclaim). Continuing trial court activities occur in family court all the time despite limited interlocutory appeals.

The suggestion of these arguments is that the allegedly unenforceable or stayed disqualification of Mr. Megna would not bar his submission of the Rule 59(e) Motion with regard to Summary Judgment – thereby rendering his appeal timely. Appellant notes that Rule 241(a) implicitly suggests that the specific matters on appeal cannot be enforced.[12]

As previously briefed by the Respondent, however, disqualification is no ordinary order -- it is an order of restraint. Thus, even if the automatic stay provision of Rule 241(a) were applicable, the exception found in SCACR 241(b)(8) is precisely on point. This exception provides that restraining orders and injunctions are not subject to an automatic stay – lest those orders be rendered meaningless. Here, the disqualification order enjoins and restrains disqualified counsel from further trial court participation.

Clearly an order regarding the continued involvement of disqualified counsel in trial court proceedings is a matter that is not stayed – otherwise, the trial court's initial determination would be meaningless and the trial court's control over non-stayed proceedings before it would be

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[11] Like Hans Christian Anderson's naked emperor who continued to insist he had on new clothes, Mr. Megna footnoted in his motion to reconsider summary judgment that the trial court's "gracious" accommodation of his appearance in July was continuing -- despite the court's August 12th order to the contrary"! Appellant's present petition is no less bold in its puffery.

[12] Rule 241(a) provides, "The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal *including the authority to enforce any matters not stayed by the appeal.*" (emphasis added).

lost.[13] While the *dicta* offered by the Court in Hagood v. Sommerville,[14] 362 S.C. 191, 607 S.E.2d 707 (2005) (reviewing four reasons for immediate appealability found in out-of-state decisions) supports the proposition that a trial court should not conduct the final trial until the appellate court resolves the alleged disqualification of trial counsel, that does not mean that the trial court could not consider and rule on a summary judgment motion actually argued and briefed, without objection, by the disqualified preferred counsel.

Appellant points to the U. S. Supreme Court decision in Nken v. Holder, 556 U.S. 418 (2009), to support its proposition that there was a stay in the case at bar, temporarily divesting the trial court order of enforceability. Nken involved an immigrant seeking a stay of his removal from the United States; the legal issue for the Supreme Court was to determine what federal law controlled the possibility of such a stay of removal during the pendency of federal appellate review. The immigrant sought to apply traditional concepts of judicial stays under federal common law while the government sought to apply provisions of statutory immigration law found in 8 U.S.C. § 1252. Obviously, this decision has no relevance to the case at bar and offers no guidance.

The cases of Southeastern Housing Foundation v. Smith, 380 S.C. 621,670 S.E.2d 680 (Ct. App. 2008) and Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999), also both cited in Appellant's present Petition, both address the finality of a

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[13] Clearly not everything in trial court is stayed by any appeal as might be suggested by Appellant's arguments, or else SCACR 241(b) would be meaningless and every temporary restraining order could be easily circumvented by a notice of appeal.

[14] The Supreme Court case of Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) was previously cited by the Appellant in its Brief on the issue of disqualification (page 23) for the position that choice of counsel is a substantial right which can and must be appealed immediately to avoid waiver. Hagood in fact involved the proffer of an attorney's full time investigator as an expert accident reconstruction witness. In response to the proffer, the trial court had ruled that the party needed to either get a new expert or get a new attorney. The Supreme Court ultimately determined that disqualification of counsel would not be required because Rule 3.7 of the Rules of Professional Conduct did not reach such a firm employee.

judgment during the pendency of a Rule 59(e) motion – the former for purposes of determining the timeliness of a subsequent Rule 60(b) motion and the latter for purposes of determining the timeliness of a notice of appeal. Neither case suggests that a trial court loses control of the practitioners in that trial court during the pendency of a motion to reconsider disqualification.[15]

3. The Circuit Court Had Jurisdiction To Grant Summary Judgment

Not only does Rule 241 provide for the general continuing jurisdiction of the trial court over matters not affected by an appeal, Rule 203(b)(1), SCACR, specifically provides for the continuing jurisdiction of the Court of Common Pleas to issue final orders on a subject following the issuance of a preliminary decision with regard to that subject. The Rule provides "When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment." Thus, a similarly hasty appeal from a form order calling for a formal order failed to deprive the trial court of jurisdiction to issue the projected formal order in Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996), reversed on other grounds, 329 S.C. 412, 496 S.E.2d 636 (1998)(holding subject matter of privacy action was matter of public significance). While the instant matter differs from Berkeley Publishers in the fact that two orders were issued on the same day and Appellant contends that appeal of order A deprived the court of jurisdiction to issue the projected order B, Rule 203(b)(1) makes no exception for such circumstances.

4. Counsel's Disqualification Is Moot, But Circuit Court Was Correct

Once again, this issue is not new, these arguments are not new, the Court's opinion is not lacking, and the instant Petition in this regard is without merit. In its Petition, Appellant suggests

[15] Appellant's Petition also notes the case of Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 404 S.E.2d 200 (1991) in that same footnote (number 5, Petition page 4). The relevance of this case to the proposition for which it is cited is not clear.

that the Trial Court's disqualification of Counsel Megna was improper because even a lawyer-witness can serve as an advocate in certain pretrial proceedings.[16] Notably, Appellant does not contend that Mr. Megna is not a witness;[17] rather, the Petition merely provides non-South Carolina authority for the proposition that Megna could participate pre-trial even if he is a witness.

This Court's July 3rd opinion affirmed the discretion of the Trial Court to disqualify Mr. Megna when it did and the opinion noted Appellant's failure to point to any contrary South Carolina authority; that is still the case.

Moreover, Mr. Megna has participated in all pre-trial aspects of the matter; accordingly, not only is the entire issue mooted by summary judgment (as this Court found in its opinion), the issue of any alleged harm or prejudice is completely moot as well.

CONCLUSION

The trial court continued to have subject matter jurisdiction of the merits of the underlying case even after the appeal of counsel's disqualification. Moreover, the trial court's authority to exercise that jurisdiction was not stayed because the merits of the case were not affected by the disqualification of one of Appellant's existing two trial attorneys.

The repeat arguments advanced again by the Appellant in the present petition would render the Trial Court impotent to control the conduct of counsel before it and would likewise

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[16] While Appellant offers a very short argument on this point, nothing in the Petition's prayer ask for relief with regard to this argument. Accordingly, Respondent ask that this Court's issue its' remittitur to the trial court in the disqualification appeal (tracking number 2011197671) as well the probate appeal (tracking number 2011185767).

[17] The Petition does continue to suggest that Megna is not a "necessary" witness because various affidavits suggest that he had no knowledge of Dr. Thompson's disbarred status. Of course, this actual knowledge, or lack thereof, is not all that makes Megna a necessary witness. As this Court noted in its July 3rd opinion, Mr. Megna's position at PDHC would give him "exclusive and first-hand knowledge of many of the facts at issue in the instant case, including, but not limited to, PDHC's communications with Dr. Thompson, PDHC's compliance with Medicare regulations, and PDHC's role in Medicare's administrative action against it to recoup funds paid by Medicare to patients treated by Dr. Thompson."

render Rule 11 meaningless.[18] The instant motion should be dismissed and costs and fees related to responding to the motion should be awarded to Respondent which has already incurred exorbitant legal fees and costs.

Respectfully submitted,

July 25, 2013

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ATTORNEYS FOR RESPONDENT

[18] At oral argument, Mr. Megna suggested that Mr. Matthews really was not familiar with the matter and thus did not execute most of the pleadings. When asked to confirm Mr.Matthew's actual execution of pleadings, such as the complaint, Mr. Megna responded that such execution was only "ministerial." The execution of pleadings in this state is not merely ministerial and correspondingly, Rule 11 should not be meaningless.

EXHIBIT

A

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A., Plaintiff, v. Estate of Hugh S. Thompson, Defendant.	10-CP-16-0332

MOTION TO RECONSIDER

The Plaintiff, by and through undersigned counsel, hereby moves this Court pursuant to Rule 59(e), SCRCP, to amend its' order dated September 1, 2011, received by Plaintiff on September 6, 2011. The grounds for Plaintiff's motion include but are not limited to the following:

a. The order of this court is *void ab initio*. As noted by Exhibit A, attached hereto and incorporated herein by reference, the Plaintiff served its' Notice of Appeal on August 15, 2011, and subsequently filed it with the SC Court of Appeals on August 24, 2011 within the ten day requirements of the appellate rules. Pursuant to Rule 205, SCACR, exclusive jurisdiction of the case was vested in the Supreme Court, and the automatic stay of Rule 241, SCACR, was effective. This Court subsequently indicated its' intent to file an order. The Plaintiff disputed the Court's jurisdiction to do so. When there is a dispute concerning the application of the automatic stay of Rule 225, SCACR, exclusive jurisdiction resides the appellate courts of our state to determine the applicability of the stay. In *State v. Cooper*, 536 SE 2d 870 (2000), our Supreme Court stated:

> In *Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (1985), we held that when there is a dispute as to whether an automatic stay exists under our rule, "authority to resolve such a dispute is vested in the Supreme Court." When *Kearney* was decided, our appellate procedural rules provided that appeals were filed and finalized in the Supreme Court, then transferred to the Court of Appeals. Since disagreements over the meaning of the rules almost always arose while jurisdiction over the appeal was vested in the Supreme Court, it was sensible that the Supreme Court resolve the disputes. Under our current procedure, the vast majority of appeals are filed, processed, and decided by the Court of Appeals. We, therefore, modify *Kearney* and hold the Court of Appeals has the power and the authority to rule upon issues arising under SCACR, including those arising under Rule 225. [*Kearney* involves Rule 41 of the former Supreme Court Rules. Rule 225, SCACR, replaced this rule. *See* Appendix A, Table of Comparative Rules, SCACR].

Based on the forgoing, this Court did not have jurisdiction to enter its' order dated September 1, 2011, and does not have jurisdiction to determine the applicability of the automatic stay of rule 241, SCACR.

2. *Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 545-46, 694 S.E.2d 1, 4 (2010) ("Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues."). The Defendant admitted the following in its answer filed with this Court:

   a. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]**.

   b. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services. **[Page 5, Paragraph 25 of Defendants Answer filed June 17, 2010]**.

   c. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010]**.

d. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, Paragraph 26 of Defendants Answer filed June 17, 2010]**.

e. Defendant admits a Medicare provider application and an 'reassignment of benefits [application] were prepared so as to permit Decedent to treat Medicare patients and for Plaintiff to receive payments therefore." **[Page 2, Paragraph 9 of Defendants Answer filed June 17, 2010]**.

f. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." **[Page 6, Paragraph 34 of Defendants Answer filed June 17, 2010]**.

3. The order of Medicare Administrative Law Court [the 'Mabry' order] does not have preclusive effect under South Carolina law because:

a. the decedent was not a party to the administrative proceedings between Medicare and the decedent.

b. the Plaintiff was unable to litigate its' state court claims against the Decedent as the Medicare administrative law court has no jurisdiction of state law claims,

c. the Plaintiff was liable to Medicare under federal regulatory law regardless of the decedent's liability to Plaintiff under state law,

d. the 'Mabry' order was directly contrary to a Medicare administrative law court decision obtained several weeks earlier by the decedent [the 'Joe' order] which the decent did not inform Plaintiff although he had agreed to do so.

e. In *Crosby v. Prysmian Communications Cables And Systems USA, LLC*, ____ S.C. ____ (Opinion No. 4876 Decided August 24, 2011), our Court of Appeals stated:

i. In order to determine whether an agency's factual finding is preclusive, we must first determine whether the particular finding meets the traditional elements of collateral estoppel. We must then examine whether there is some countervailing consideration which necessitates relitigation. A party

claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.".

ii. Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

iii. "The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008).

4. The doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party). See generally *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). For instance, in 1998, Dr. Thompson submitted an application to Medicare [Exhibit A previously filed with this Court] of which Plaintiff was not involved. Dr. Thompson certified unequivocally that he was familiar with Medicare laws and regulations and that he was in compliance with such laws and regulations as noted below.

I, the undersigned, certify to the following:

i.) I have read the contents of the application and the information contained herein is true, correct, and complete. If I become aware that any information in this application is not true, correct, or complete, I agree to notify the Medicare Contractor of this fact immediately.

ii.) I authorize the Medicare Contractor to verify the information contained herein. I agree to notify the Medicare Contractor of any changes in this form within 30 days of the effective date of the change. I understand that a change in the incorporation of my organization or my status as an individual or group biller may require a new application.

iii.) I am familiar with and agree to abide by the Medicare laws and regulations that apply to my provider/supplier type. (The Medicare laws and regulations are available through the Medicare Contractor.)

iv.) Neither the individual practitioner, nor the company, nor any owner, director, officer, employee of the company, or any contractor retained by the company or any of the aforementioned persons, currently is subject to sanction under the Medicare/Medicaid program or debarment, suspension, or exclusion under any other Federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.

v.) I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.

vi.) I understand that only the Medicare billing number for the provider/supplier who performed the service or to whom benefits have been reassigned under current Medicare regulations may be used when billing Medicare for services.

vii.) I understand that any omission, misrepresentation or falsification of any information contained in this application or contained in any communication supplying information to Medicare to complete or clarify this application may be punishable by criminal, civil, or other administrative actions including revocation of Medicare billing number(s), fines, penalties, damages and/or imprisonment under Federal law.

viii.) I further certify that I am the individual practitioner who is applying for the billing number, or in the case of a business organization, I am an officer, chief executive officer, or general partner of the business organization that is applying for the Medicare billing number.

Group Member/Partner Name (Please)	First	Middle	Last	Jr., Sr., MD., etc.
	Hiram	S	Thompson	MD
Group Member/Partner Signature	First, Middle, Last, Jr., Sr., M.D., D.O., etc.)		Date (MM/DD/YYYY)	
				06/19/1998

V. For groups/partnerships listing individual practitioners or reporting a change of member/partner status:

5. Additional discovery is necessary for reasons including but not limited to the following:

a. the Defendant's refusal to participate in the taking of depositions has denied Plaintiff the right, *in toto*, to take the depositions of the Personal Representatives of the Defendant who are the children of the deceased and by definition are those in a position to describe their knowledge of the deceased and the facts surrounding the matters complained of by Plaintiff,

b. the Defendant has moved before this Court to amend its answer. The Plaintiff has no reasonable method, other than the taking of depositions and completing needed discovery, of ascertaining why the Defendant would move to amend its answer to deny matters previously admitted unless allowed to take depositions.

c. the Defendant has moved before this Court for summary judgment. The Plaintiff has no reasonable method, other than the taking of depositions and completing needed discovery, of ascertaining the knowledge of the personal representatives and/or others to defend against the motion.

d. the Plaintiff is unable to evaluate the demeanor of the personal representatives, and their knowledge of the facts surrounding the matters complained of by Plaintiff in order to understand to what the personal representatives and/or others can testify,

e. the Plaintiff is unable to evaluate the demeanor of the personal representatives, and their lack of knowledge of the facts surrounding the matters complained of by Plaintiff in order to understand to what the personal representatives and/or others cannot testify,

f. the Court's continuing evaluation of the Plaintiff's pending Rule 59(e) motion,

g. the decisions of our appellate courts that "...[a] defendant cannot take advantage of the uncertainty created by his own wrongdoing..." The Plaintiff must ascertain the factual basis of any additional defenses the Defendant intends to pursue.

4. As noted by Exhibit B, attached hereto and incorporated herein by reference, there is a motion to disqualify counsel for Respondent pending before the SC court of Appeals. The Plaintiff suggests that concepts of administrative efficiency suggest that the Court delay ruling on the matter at bar until the Court of Appeals makes it determination. Alternatively, the Plaintiff requests this Court to disqualify counsel for Respondent for the reasons stated more fully in Exhibit B.

5. In further support of it's' motion to reconsider, the Plaintiff incorporates herein by reference all affidavits, documents and other communications previously filed in this Court.

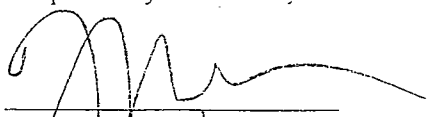
CONCLUSION

This Court lacked jurisdiction to enter its' order dated September 1, 2011. The order is *void ab initio* and should be vacated by the Court for the efficient administration of justice and to avoid an unnecessary appeal between the parties. In addition, there is an existing motion pending before the Court of Appeals to disqualify counsel for Respondent. For the efficient administration of justice, this Court should refrain from issuing further orders until the motion is resolved on appeal.

As a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d) ed. 1990); *see, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F. (2d) 1375 (D.C. Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F. (2d) 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So. (2d) 951 (Ala. 1988). See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete

discovery.").

Respectfully submitted,



Tony R. Megna[1]
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

September 13, 2011.

[1] The previous order of this Court disqualifying counsel is stayed pursuant to the appeal filed by the Appellant. In addition, this Court graciously allowed the continued representation of Appellant in regard to the matters of summary judgment, to which this motion directly pertains.

EXHIBIT

B

TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. RENÉ JOSEY

REPLY TO: FLORENCE OFFICE
E-MAIL: RJOSEY@TURNERPADGET.COM
WRITER'S DIRECT DIAL: (843) 656-4451
WRITER'S DIRECT FAX: (843) 413-5818

May 20, 2011

Honorable J. Michael Baxley
Chief Administrative Judge
Fourth Judicial Circuit
531 East Carolina Avenue
Hartsville, SC 29550

Re: *Pee Dee Health Care, P.A. v Estate of Hugh S. Thompson*
C/A No.: 10-CP-16-0332
TPGL File No.: 10667.101

Dear Judge Baxley:

As you are undoubtedly aware, disqualified Plaintiff's counsel, Tony Megna, has filed a Rule 59(e) Motion for Reconsideration of his disqualification. Enclosed you will find a courtesy copy of the Defendant's response to the Motion for Reconsideration. As you will see, this response not only addresses the merits of reconsideration directly, it also includes a motion to dismiss the Motion for Reconsideration procedurally as well.

This response has been filed with the clerk of court today and by mailed copy of this letter, it is being served on both Mr. Megna and Mr. Matthews. Because the Court's Order directed that the disqualification would be effective immediately, we are mailing separate copies of this correspondence to both Mr. Megna and his partner, Ben Matthews (who remains counsel of record in this matter).

In addition to providing you with the courtesy copy of our 59(e) motion response, we are writing today to request your consideration of other motions in this matter at the same time you are considering Plaintiff's Motion for Reconsideration. We make this request in an effort to more efficiently use both your time, appellate court time, and the resources of the parties.

In particular, we would like the Court to simultaneously consider the Plaintiff's Motion for Summary Judgment and the Defendant's Counter Motion for Summary Judgment (also filed today). A courtesy copy of Defendant's Counter Motion for Summary Judgment is enclosed for the Court and a copy is being served herewith upon both Mr. Megna and Mr. Matthews. Our further research supporting a defensive motion for summary judgment and plaintiff's suspected disqualification appeal led us to file our summary judgment motion today and make this request.

Because we anticipate that the Plaintiff might appeal Mr. Megna's disqualification, it would likely be more efficient for both this Court and then the Court of Appeals to consider the summary judgment issues at the same time. In other words, if this Court were to grant summary judgment for either party, these merits could be considered on appeal at the same time of counsel's disqualification. Moreover, if the Court were to grant summary judgment for the Defendant, that decision, if affirmed, might render the disqualification of Plaintiff's counsel moot for the appellate court.

Naturally, we will make ourselves available for any needed hearings on these matters at the Court's convenience. Other than a family vacation to Alaska June 15 through June 24, Jay James and I will be available at any venue convenient to the Court. We appreciate your consideration of these matters.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:mjs
Enclosures

cc: Benjamin R. Matthews, Esquire (with enclosures)
Tony Megna, Esquire (with enclosures)
John Jay James, II (without enclosures)

EXHIBIT C

Josey, J. Rene

From: Baxley, J. Michael Secretary (Jamie L. Capell) <JBaxleySC@sccourts.org>
Sent: Monday, August 29, 2011 3:10 PM
To: pjlaw507 (pjlaw507@bellsouth.net); Josey, J. Rene; Ben Matthews (benrusmat@gmail.com)
Subject: Pee Dee Health Care v. Estate of Hugh S. Thompson

Gentlemen:

Judge Baxley has asked me to advise you that he has considered Plaintiff's position that the Court lost jurisdiction to issue its final order granting summary judgment when Plaintiff appealed the decision to disqualify Attorney Megna. For reasons of judicial economy and prevailing case law, he disagrees with this position, and is today issuing the final Order. Attorney James is being mailed the Order with a request to file and serve it on all parties. An additional section has been added to the proposed Order that discusses this particular issue. Thank you for your attention to this matter.

Jamie L. Capell
Administrative Assistant to
Judge J. Michael Baxley

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2010-CP-16-0332
COUNTY OF DARLINGTON	)	
Pee Dee Health Care, P.A.,	)	
	)	
Plaintiff,	)	
	)	**NOTICE OF HEARING**
v	)	
	)	
Estate of Hugh S. Thompson,	)	
	)	
Defendant.	)	

TO: TONY R. MEGNA, ESQ., AND BENJAMIN R. MATTHEWS, ESQ., FOR PLAINTIFF
JOHN JAY JAMES, II, ESQ., AND J. RENE JOSEY, ESQ., FOR DEFENDANT

A MOTIONS HEARING has been set in the above entitled action for the 19th day of July, 2011, at 4:00 o'clock p.m., in the fifth floor courtroom of the Darlington County Courthouse. The Court attempted to set the date and time of this hearing by consent, but was unable, after multiple attempts, to reach Mr. Megna. At the hearing, the Court will consider Plaintiff's motion to reconsider the Court's decision disqualifying Plaintiff's counsel Mr. Megna, as well as both parties' motions for summary judgment. Mr. Megna will be permitted to argue his summary judgment motion, any decision on the motion for disqualification will be rendered thereafter.

You are hereby notified to be present on the fifth floor of the Darlington County Courthouse at the aforesaid time. A copy of this Notice is being served on the following parties/counsel this 17th June, 2011, by being placed in the United States mails, first class postage paid, addressed as follows:

J. Michael Baxley
Chief Administrative Judge
Fourth Judicial Circuit

Hartsville, South Carolina
June 17, 2011

Attorneys for Plaintiff
Tony R. Megna, Esq.
3400 West Avenue
Columbia, S.C. 29203

Benjamin R. Matthews, Esq.
3400 West Avenue
Columbia, S.C. 29203

Attorneys for Defendant
J. Rene Josey, Esq.
1831 West Evans Street
Florence, S.C. 29501

John Jay James, II, Esq.
Post Office Box 507
Darlington, S.C. 29540

CC:
Honorable Scott B. Suggs, Clerk of Court, Darlington County (by mail)

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Pee Dee Health Care, P.A. ..... Appellant,

v.

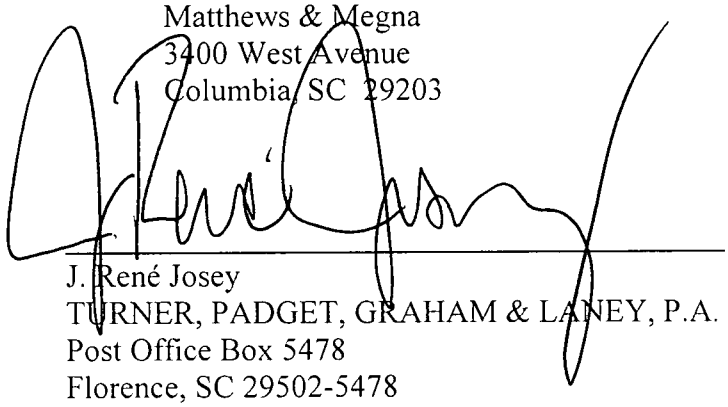
Estate of Hugh S. Thompson ..... Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the ***Respondent Estate of Thompson's Response To The Petition for Rehearing*** by depositing copies of the same in the United States mail, postage prepaid, on July 26th, 2013, to all counsel for Appellant at the following addresses:

Benjamin R. Matthews, Esquire
Matthews & Megna
3400 West Avenue
Columbia, SC 29203

Tony R. Megna, Esquire
Matthews & Megna
3400 West Avenue
Columbia, SC 29203



J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENT

TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. RENÉ JOSEY

REPLY TO: FLORENCE OFFICE
E-MAIL: RJOSEY@TURNERPADGET.COM
WRITER'S DIRECT DIAL: (843) 656-4451
WRITER'S DIRECT FAX: (843) 413-5818

July 26, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Pee Dee Health Care, P.A. v. Estate of Hugh S. Thompson*
Case No.: 2010-CP-16-0332
Tracking No.: 2011-185767 (1st appeal), 2011-197671 (2nd appeal), and 2011203391(3rd appeal)
TPGL File No.: 10667.101

Dear Ms. Kitchings:

Enclosed for filing is ***Respondent Estate of Thompson's Response To The Petition for Rehearing***. In accordance with SCACR 240, I am enclosing the original (unbound) and 7 copies of our Response. Also enclosed you will find the original and one copy of the Certificate of Service. I ask that one copy of each be stamped as filed and returned to us in the self-addressed, stamped envelope which is also enclosed. By copy of this letter to all other counsel of record, we are serving all parties with this Response and the Certificate of Service.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ/
Enclosures

Cc: Tony R. Megna, Esquire (w/enclosures)
Ben R. Matthews, Esquire (w/enclosures)
John J. James, II, Esquire (w/enclosures)