

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas  
S. Jackson Kimball, Circuit Court Judge

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**RECEIVED**

AUG 22 2013

**SC Court of Appeals**

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Appellate Case No.: 2010-179647

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69509

Kern Stafford and Elizabeth Stafford.....Appellants

v.

Satyanand Prashad, Shridath Prashad, Wells Fargo Bank NA,  
Morris Hardwick Schneider LLC.....Respondents

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Unpublished Opinion No. 2013-UP-339  
Heard September 11, 2012 – Filed August 7, 2013

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**RESPONDENT MORRIS HARDWICK SCHNEIDER, LLC'S  
PETITION FOR REHEARING**

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Respondent Morris Hardwick Schneider, LLC (“MHS”) petitions this Court to rehear and reconsider its decision in the above-captioned matter issued on August 7, 2013 in Unpublished Opinion No. 2013-UP-339 and affirm the Trial Court’s ruling on the issue of sanctions. The grounds for this Petition are as follows:

1. In its Opinion, the Court of Appeals reversed the Trial Court’s Order imposing sanctions pursuant to the South Carolina Frivolous Civil Proceeding Sanctions Act, *S.C. Code Ann.* §15-36-10 (Supp. 2012) (“the Act”), on Appellants Kern and Elizabeth Stafford and their trial counsel, Mitchell Byrd, holding, “[T]he Staffords’ legal theories concerning the Law Firm’s liability remained the same throughout the litigation

and they submitted two affidavits from their expert witness in support of their claims.” Therefore, the Court bases its reversal of the Trial Court’s imposition of sanctions on two findings: a) The Staffords’ legal theories concerning MHS’s liability remained the same throughout the litigation; and b) the Staffords submitted two affidavits from their expert witness in support of their claims.

2. The Court erred when it found the consistency of the Stafford’s legal theories supported a reversal of the Order imposing sanctions. This approach protects lawyers and litigants from sanctions if they are consistent and persistent in their otherwise sanctionable conduct. The Trial Judge granted the benefit of the doubt to the Staffords and their counsel when he hesitantly declined to rule that the action was frivolous from the outset [Trial Court Order For Sanctions, R. 15], but he found the action was frivolous when discovery revealed the true nature of the case and patently showed that there was no legal or factual basis for continuing the action after discovery. He held that the Staffords and their counsel should have known that their claims were frivolous after the parties conducted discovery. The fact that the Staffords still maintained their case theory after discovery was the sanctionable conduct. The Act clearly states that it is sanctionable to *continue* an action when a reasonable attorney or party would believe that *continuation* of the action was without reasonable basis in law or fact. *S.C. Code Ann.* §15-36-10(A)(4) and (C)(1) (Supp. 2012). Therefore, the consistency of their faulty case theory is a basis for sanctions, not a basis for overturning them. A reasonable attorney should not have maintained the same case theory after reviewing the materials submitted at discovery. *See Site Prep, LLC v. Atl. Coast Builders, LLC* 394 S.C. 97, 105, 713 S.E.2d 650, 654 (Ct. App. 2011) (holding that the Act

provides a “reasonable attorney” standard). If the law is established that a party or lawyer is not liable for frivolous proceedings when they maintain the same legal theories throughout the proceedings, the law rewards those who are wrong so long as they are consistently wrong, and if consistently maintaining a frivolous position is not sanctionable, the word “continuation” in the Act becomes meaningless and superfluous.

3. The Court also held that the Staffords’ legal theory was not frivolous because they had two expert affidavits in support of their claims.

4. The existence of a duty is a matter of law. *See Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013). This Court recognized in its Opinion that MHS had no duties to the Staffords. It is not the province of an expert to opine on the existence of duties or any other matters of law. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). Experts are to opine only on the *standard* for performance of a duty (if there is a duty in the first place), breaches of that standard and any proximately caused injury, but if such duties as a matter of law do not exist in the first place, any expert opinion is irrelevant and is not to be considered. That is the fundamental error of this Court’s Opinion. This Court recognized that MHS owed no duties to the Staffords; reliance upon the expert’s affidavits, therefore, is misplaced, and that is why the Trial Court’s Order For Sanctions should be affirmed.

5. The rest of this Petition proceeds in the alternative assuming that there is any relevancy in the expert’s affidavits.

6. Even if it were proper to rely upon the expert’s affidavits, the Court’s Opinion also is in error since it creates a *per se* immunity from sanctions so long as the attorney or party produces an affidavit from an expert, no matter how patently

unreasonable that affidavit may be. That is not correct for several reasons. First, the Act refers to the standard of a “reasonable attorney” throughout. *See S.C. Code Ann. §15-36-10(A)(4) and (C)(1) (Supp. 2012); Site Prep, supra.* An expert witness is not *per se* a “reasonable attorney.” The Trial Court must make that ultimate determination, giving due weight to an expert’s opinion (so long as it does not opine on matters of law, such as the existence of a duty). Second, holding the two affidavits from an expert are sufficient immunity removes absolutely any discretion from the Court and relegates the finding of frivolousness to the expert and removes it from the Court, making the Trial Court a mere functionary to carry into effect whatever the expert says. The Court’s discretion becomes irrelevant no matter how faulty the expert opinion. The expert is essentially given the unfettered ability to declare the law and protect a party from sanctions even if the expert’s analysis is blatantly wrong. The ruling creates an easily obtained shield that makes the Act virtually meaningless. *See Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) holding the Court should not interpret a statute in a manner that renders it meaningless.

7. If the Court holds that the Trial Judge does have the right to review an expert’s affidavit to determine the weight that it should be given (e.g., whether it is patently unreasonable or truly probative of the “reasonable attorney” standard) then the Court acknowledges that the expert’s affidavit is not conclusive, and the Court must then necessarily resort to the abuse of discretion standard and determine whether Judge Kimball abused his discretion in rejecting the expert’s affidavits.

8. In that regard, the Staffords’ case theory is that MHS is liable for conducting a closing when the Staffords had a tort lawsuit for pending against the seller

even though that action did not affect title to the property nor have any *Lis Pendens* filed with it. The notion that such a duty exists as a matter of law is absurd. After the voluminous depositions in the case, no reasonable attorney could have ascertained that MHS assumed any such duty, and no expert affidavit could reasonably attest to such a duty. Discovery removed the “benefit of the doubt” that Judge Kimball afforded the Staffords and their attorney at the initiation of the action. See [Trial Court Order For Sanctions, R. 15].

9. This Court identified the law in its Opinion. It did not create new law; it simply recognized the same law that the Staffords, their attorney and the expert should have identified. This Court held

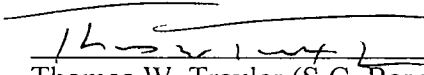
- a) MHS did not owe a duty of care to the Staffords to find and report their pending tort lawsuit against Yeager.
- b) An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client and does not owe a duty to a non-client unless the attorney "breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client."
- c) There must be privity for a malpractice claim.
- d) MHS had no continuing fiduciary duty to the Staffords arising from a prior, unrelated closing.

The Court then cited the case law that had clearly recognized this as the law. This law existed when the present action was filed. This was the law when discovery was complete and the Staffords continued to assert their claims. This was the law when the expert submitted his affidavit.

And this was the law when Judge Kimball rejected the affidavits and found continuation of the Staffords’ case to be frivolous and unreasonable under the Act.

Therefore, Judge Kimball did not err in imposing sanctions against the Staffords and their counsel for continuing to pursue their claims in such direct contradiction of the law.

BASED ON THE FOREGOING, Respondent MHS, respectfully requests that the Court rehear and modify Opinion No. 2013-UP-339 and affirm the Trial Court's ruling on the issue of sanctions.

  
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August 21, 2013

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APPEAL FROM YORK COUNTY  
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**PROOF OF SERVICE**

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I certify that I have served the Respondent Morris Hardwick Schneider, LLC's Petition for Rehearing on the Appellant and other Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2013, addressed as indicated below:

**ATTORNEYS FOR APPELLANT**

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**SC Court of Appeals**

**ATTORNEY FOR DEFENDANTS PRASHAD**

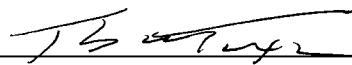
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August 21, 2013

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**SC Court of Appeals**

**VIA- FEDERAL EXPRESS 7965 1366 0045**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

RE: *Kern Stafford and Elizabeth Stafford, Appellants v. Satyanand Prashad, Shridath Prashad, Wells Fargo Bank NA, Morris Hardwick Schneider, LLC, Respondents*  
Case Tracking No.: 2010179647

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is (1) original and seven (7) copies of the Respondent Morris Hardwick Schneider, LLC's Petition for Rehearing in the above-referenced matter, and (2) the original and one copy of the Proof of Service of the same, along with the \$25.00 filing fee. Please return a filed-stamped copy of these documents in the enclosed self-addressed stamped envelope.

By copy of this letter to John S. Nichols and Mitchell K. Byrd, Sr., attorneys for the Appellants, Stanley T. Case, Thomas A. Phillips and J. Kevin Owens the attorneys for Respondents Prashad, and Franklin H. Turner, III the attorney for Wells Fargo, we hereby serve the parties to this action with the Respondent Morris Hardwick Schneider, LLC's Petition for Rehearing and the Proof of Service of same.

Should you have any questions or need anything further from us in this matter, please do not hesitate to contact me.

Yours very truly,

CARTER, SMITH, MERRIAM,  
ROGERS & TRAXLER, P.A.



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TWT/sb

Enclosures

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Mitchell K. Byrd, Sr., Esquire  
Franklin H. Turner, III, Esquire  
Stanley T. Case, Esquire  
Thomas A. Phillips, Esquire  
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