THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Thomas Hughston, Jr , Circuit Court Judge
The Honorable R Markley Dennis, Jr , Circuit Court Judge
The Honorable James Barber, Circuit Court Judge
The Honorable Deadra Jefferson, Circuit Court Judge

Case No 2007-CP-10-1444

Cynthia Holmes,

Appellant,

v

James Y Becker, Manton Grier, and
Haynsworth Sinkler Boyd, P A , as
successor to Sinkler & Boyd, P A ,

Respondents

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Dr Holmes, the Appellant in this case, is a licensed physician in South Carolina who is also an attorney She maintains her license to practice, but does not represent clients (R p 1197 lines 4-23) The Respondents in this case are a law firm and two of the attorneys from the firm who represented Dr Holmes Hereinafter, unless specifically identified individually, the Respondents will be referred to, collectively, as Haynsworth Dr Holmes hired Haynsworth to represent her in a case against East Cooper Hospital Dr Holmes is an ophthalmologist She had applied for privileges to do surgery on patients at East Cooper Hospital, and, after enjoying privileges for a period of time, was facing a decision by the Hospital to deny her continuation of privileges (R p 1198 line 8 - p 1199, line 4) This would have deprived her of the ability to offer surgery to her patients, and would have translated into an economic loss for her and her practice (R P 7-8, 9-11) Dr Holmes had filed against East Cooper under State and Federal claims (R p 8) Her case was initially in the United States District Court Dr Holmes had petitioned the Court for a preliminary injunction, which would maintain her status quo at East Cooper and allow her to continue to perform surgeries there while the injunction was in effect (R p 1-17, p 1199, lines 10-18) Haynsworth agreed to represent Dr Holmes in seeking a preliminary injunction, and then to take the case on a contingency basis once the preliminary injunction was successfully in place (R p 1528, p 1204, lines 1-4, p 1205, lines 9-17) On October 21, 1999, the Honorable R Patrick Duffy, United States District Court Judge, specifically commented on Haynsworth's delay in seeking relief after exhausting administrative remedies for Dr Holmes but, nevertheless, granted an injunction reinstating the Dr Holmes' admitting privileges (R p 967, line 24 - p 968,

line 10) Judge Duffy imposed an expedited scheduling order (R p 17) Thereafter, Dr Holmes' patients were scheduled for surgery at East Cooper

Thereafter, Haynsworth continued with a series of disappointing failures to engage in the prosecution of Dr Holmes' case against East Cooper Dr Holmes has alleged, in the case against Haynsworth, that Haynsworth failed to timely file suit after exhaustion of an administrative appeal of the Hospital's decision to deny re-appointment (R p 1199, lines 10-12), delayed unnecessarily for a year before requesting injunctive relief at hearing after exhausting administrative appeal, failed to timely respond to discovery requests during litigation, failed to comply with Federal Court orders mandating timely response, failure to oppose East Cooper's motion to compel (R pp 127, 129, p 1203, lines 15-22) Finally, East Cooper filed a motion asking the Federal Court to dissolve the preliminary injunction (R p 18)Under the applicable federal rules, Haynsworth had 14 days to respond to the motion, and failed to timely submit a response (R p 19) Instead, Haynsworth filed a notice of intent to withdraw from the case on February 2, 2000 As East Cooper's motion to dissolve approached a hearing date, Haynsworth offered Dr Holmes an addendum to their fee agreement (which had originally had Haynsworth working on a contingency basis) (R p 941, line 15 - p 943, line 2, P 1204, lines 1-4, P 1205, Lines 9-17) The addendum called for Dr Holmes to pay Haynes worth $43,000 00 in fees, to be used if the case against East Cooper went to trial (R p 1206, lines 12-17, p 1244, lines 1-4) Haynsworth told Dr Holmes that if she agreed to the addendum, Haynsworth would withdraw its motion to be relieved as counsel and represent her at the hearing on East Cooper's motion to dissolve the preliminary injunction (R p 966, lines 3-21, p 967, lines 3-7, pp 1528-1531) Dr

Holmes agreed, signed the addendum, and paid the $43,000 00 (R p 948, line 13 - p 949, line 2, p 1532) Under the Federal rules, the Court is allowed to grant a motion which has not had a timely response from the opposing party East Cooper's motion to dissolve the preliminary injunction was granted (R p 1203, lines 9-11) As a result, East Cooper began to cancel Dr Holmes' appointments for surgery, and her business began to suffer economically (R p 1208, lines 12-18, p 1209, lines 7-25, p 1221, line 8 - p 1223, line 9, p 1226 21 - p 1227, line 2) Haynsworth, after preliminary injunction was dissolved, failed to timely appeal or even advise Dr Holmes of the right to appeal the loss of injunctive relief (R p 1214, line 14 - 1215, line 3) When there was an attempt to address the dissolution of the preliminary injunction, Judge Duffy, of the U S District Court, wrote an Order, chronicling Haynsworth's pattern of failures to engage in the prosecution of the case as his basis for having granted the motion to dissolve the preliminary injunction (R p 18, p 1212, lines 9-25) East Cooper moved for Summary Judgment in Federal Court, and, on April 17, 2000, summary judgment was granted as to the federal claims The Federal Court declined to exercise jurisdiction over the remaining state claims (R p 1228, lines 2-6, p 1472) Haynsworth pressured Holmes to abandon the case Haynsworth never did represent Dr Holmes in a trial, but failed to return the $43,000 00 in fees that Dr Holmes had paid in advance for trial (R p 1211, lines 15-16) Instead, Haynsworth drafted a State complaint, and advised Dr Holmes to proceed pro se (R p 1009, lines 6-10, 21-24) Holmes did proceed pro se, and eventually prevailed by settling the case with East Cooper (R p 1213, lines 18-25, p 1230, lines 7-19, p 1594)

After Haynsworth refused to return the $43,000 00 in fees that Dr Holmes had advanced to cover attorney fees at trial, she filed suit, alleging professional negligence,

breach of contract, conversion, and several other causes of action (R p 112, 126, 149) Haynsworth moved for Summary Judgment (R p 596, line 20-p 572, line 5) The Motion was denied by Judge Hughston, who was, ultimately the trial judge (R p 569, line 20 - p 572, line 5) As the case had recently been remanded to the state court trial docket by remittitur on May 18th, Dr Holmes moved for a continuance of the trial date, which was set for June 8, 2009 (R p 556, lines 19-23) The motion was denied (R p 556, lines 19-23) Dr Holmes, during the trial, attempted to testify as an expert in support of her legal malpractice claims (R p 1140, line 4 - p 1186, line 6) Judge Hughston excluded her testimony finding that she was not qualified as an expert (R p 1192, lines 14-19) At the close of the Defendant's case, Haynsworth moved for a directed verdict Judge Hughston granted the directed verdict, finding that Dr Holmes had failed to produce an expert to support her claims for legal malpractice (R p 1406, line 18 - p 1407 3) He dismissed all other claims collectively, finding that they were "subsumed" in the professional negligence claim (R p 909, lines 13-15,R p 1173, lines 5-8, p 1407, lines 12-19) Thereafter, Haynsworth moved for sanctions against Dr Holmes Despite the fact that Dr Holmes had prevailed at summary judgment and presented her case to the jury, Judge Hughston awarded sanctions pursuant to Rule 11, SCRCP, the South Carolina Frivolous proceedings sanctions act, and, according to the Order, a common law given inherent right of the Court to impose sanctions (R p 98) Dr Holmes filed a motion for reconsideration as to the sanctions order, which was denied by Judge Hughston (R p 1979-1980, 1983-1987) Motion for reconsideration, (R p 111) Dr Holmes thereafter appealed (R p 1989)

ARGUMENT

I The Trial Court erred in granting a directed verdict to the Respondents at the trial of this case

A Standard of review for Directed Verdict

An appellate court will reverse the trial court's grant of a directed verdict when any evidence supports the party opposing the directed verdict *Milhouse v Food Lion, Inc*, 289 S C 203, 203, 345 S E 2d 739, 739 (Ct App 1986) The appellate court must determine " whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor " *Erickson v Jones St Publishers, L L C*, 368 S C 444, 463, 629 S E 2d 653, 663 (2006) " When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence " *Id* When ruling on a directed verdict motion, the trial court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party *Swinton Creek Nursery v Edisto Farm Credit ACA*, 334 S C 469, 476, 514 S E 2d 126, 130 (1999)

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party *Koester v Carolina Rental Ctr*, 313 S C 490, 493, 443 S E 2d 392, 394 (1994) "Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence " *Hancock v Mid-South Management Co*, 381 S C 326, 673 S E 2d 801 (S C 2009)

B Dr Holmes' claims for professional malpractice should not have been dismissed for a lack of presentation of expert testimony as to whether Haynsworth deviated from the standard of care

1) The testimony of an expert was not necessary to establish deviation from a standard of care in this case

In *Cianbro Corp v Jeffcoat and Martin*, the Federal Court applied South Carolina state law and recognized the "common knowledge" exception to expert testimony *Cianbro Corp v Jeffcoat and Martin*, 804 F Supp 784, 791 (D S C 1992), affirmed 10 F 3d 806 (4th Cir 1993) As argued below, on the claim for legal malpractice, Dr Holmes presented evidence that Haynsworth failed to file timely response to East Cooper's motion for dissolution of a standing preliminary injunction which was protecting Dr Holmes' right to conduct surgeries in East Cooper Hospital While causation is affirmed from the June 2, 2000 Order itself, Haynsworth's failure to timely respond to a motion to dissolve an injunction which it had already successfully shown was protecting Dr Holmes from imminent harm is a sufficiently obvious breach of duty not to need expert testimony to establish a the breach (R p 18) Where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury *Stallings v Ratliff*, 292 S C 349, 356 S E 2d 414 (Ct App 1987) Judge Hughston took judicial notice of the S C Rules of Professional conduct (R p 904, line 3 - P 905, line 14, p 950, lines 7-13, p 1012, lines 5-7, p 1210, lines 8-10) which can be used to establish deviation from the standard of care without expert testimony A jury could certainly conclude, by common sense, that failure to return fees paid in advance for trial when there was no trial and failure to comply with the Rules of Professional Conduct is a deviation from the standard of care When expert testimony is not relied upon, it is sufficient for the plaintiff to put

forth evidence of proximate cause which "rises above mere speculation or conjecture " *Armstrong v Weiland*, 267 S C 12, 225 S E 2d 851 (1976) The Plaintiff's case which was presented to the jury as to the issue of legal malpractice was sufficiently clear to comply with these standards The Court erred in granting a directed verdict upon the finding that Dr Holmes had failed to present expert testimony

2) Haynsworth's expert established the basis for a finding that Haynsworth deviated from the standard of care

Even if the "common knowledge" exception from *Cianbro Corp v Jeffcoat and Martin* was not applicable to this case, Dr Holmes claims for legal malpractice should not have been dismissed for a want of expert testimony Haynsworth's own legal expert, reviewing the Federal Court Order of June 2, 2000, acknowledged that, according to the Order, but for defendants' failure to timely respond to discovery and scheduling orders, the preliminary Injunction would not have been dissolved on January 25, 2000, and would have remained in effect until at least April, 2000, allowing plaintiff to complete the already scheduled procedures for February and March, 2000 (R p 1295, line 13 - 1297, line 11, p 1298, lines 6-14, p 1299, line 12- p 1300, line 2)

During the trial of this case, Haynsworth had introduced an addendum to its retainer agreement with Dr Holmes, which required her to pay Haynes worth $43,000 00 The addendum was presented to Dr Holmes on the day of the hearing on East Cooper's motion to dissolve the preliminary injunction protecting Dr Holmes' ability to perform surgeries at East Cooper At the time that Haynsworth presented the addendum, it had filed a notice of intent to withdraw from the case The record shows that Haynsworth was requiring Dr Holmes to agree to pay $43,000 00 to be used to fund

the trial of the case, if it went to trial, in lieu of the original agreement, which called for a contingency arrangement, in order for Haynsworth to agree to remain on the case and appear to represent Dr Holmes at the hearing, that very day, on East Cooper's motion to dissolve the preliminary injunction (R p 941, line 15 - p 943, line 2, p 1204, lines 1-4, p 1205, lines 9-17, p 1206, lines 12-17, p 1224, lines 1-4) When presented with this scenario, respondents' own legal expert, Dr Freeman, testified that what respondents did when they threatened to prejudice the case in order to extract fees was consistent with "extortion, a form of blackmail, and criminal in South Carolina to do that And that's my answer " (R p 1342, lines 3-23) A party is allowed to use testimony from an opposing party's expert to establish a deviation from the standard of care *Mali v Odom*, 295 S C 78, 367 S E 2d 166 (S C App 1988) From the trial testimony of defendants' legal expert, Professor John Freeman "(T)he jury could infer the deviation from the standard of care and a 'ritual incantation of certain words' from the expert that it constituted a deviation was not necessary " *Stallings v Ratliff*, 292 S C 349, 353, 356 S E 2d 414, 417 (Ct App 1987)

C Even if the Court had properly dismissed Dr Holmes' claims for professional negligence for a lack of expert testimony establishing a deviation from the standard of care, the remaining causes of action, which did not require the establishment of a professional standard of care should not have been dismissed for want of expert testimony

The Trial Court granted directed verdict to Haynsworth as to the cause of action for legal malpractice and then collectively dismissed all of the other causes of action in Dr Holmes' complaint Instead of reviewing each claim to determine whether the record contained any evidence supportive of the essential elements particular to the claim, Judge Hughston simply made a broad decision to dismiss them all stating that they were

subsumed by Dr Holmes' claim for legal malpractice (R p 909, lines 13-15, p 1173, lines 5-8, p 1407, lines 12-19)

Under Rule 8(e)(2), SCRCP, a party may state as many causes of action as he has *Cobb v Benjamin*, 325 S C 573, 482 S E 2d 589 (Ct App 1997) The dismissal of the legal malpractice claim, even if the dismissal had been legitimate, would not have called for an automatic dismissal of all other plead causes of action Instead, it should, at the very least, have triggered a review of each remaining claim individually at directed verdict The other claims plead in the complaint, and which had not been dismissed on any other grounds as of the Court's consideration of Haynsworth's motion for directed verdict included breach of contract, quantum meruit, breach of contract accompanied by a fraudulent act, defamation, breach of fiduciary duty, violation of Unfair Trade Practices Act, abandonment, civil conspiracy, promissory estoppel, constructive fraud, conversion, negligent misrepresentation, negligent supervision, and fraud and misrepresentation, none of which require, as an element, the presentation of expert testimony (R pp 112, 126, 149) As is argued in this section, that decision was improper and should be grounds for reversal Because the Trial Court failed to address each cause of action and whether the record presented any evidence sufficient to support it, this brief will not address each cause of action separately Should the Court agree with the arguments in this section, that the causes of action were properly plead under Rule 8(3), SCRCP, and did not require expert testimony as an element, the case should be remanded to the Circuit Court for consideration of each individual claim under a directed verdict standard, or the case should be remanded for trial as to those causes of action

D The Trial Record contained genuine issues of material fact supporting Dr Holmes's claims for Professional negligence/ Legal Malpractice

Dr Holmes' complaint alleged that Haynsworth engaged in legal malpractice A plaintiff in a legal malpractice action must establish four elements (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate cause of the client's damages by the breach *Smith v Haynsworth, Marion, McKay & Geurard,* 322 S C 433, 435 n 2, 472 S E 2d 612, 613 n 2 (1996), *Ellis v Davidson,* 358 S C 509, 523, 595 S E 2d 817, 824 (Ct App 2004) Under controlling South Carolina law, a scintilla of evidence in support of the Plaintiff's case will preclude directed verdict *Hancock v Mid-South Management Co* , 381 S C 326, 673 S E 2d 801 (S C 2009) A review of the record in this case shows that there was more than a scintilla of evidence supporting Dr Holmes' claim for legal malpractice against Haynsworth

1) Evidence was presented which showed that Haynsworth failed to timely file opposition to East Cooper's motion for dissolution of a preliminary injunction, resulting in damages to Dr Holmes

Dr Holmes had been awarded a preliminary injunction in her case against East Cooper regarding her privileges to provide treatment for her patients at the hospital The Preliminary injunction was holding open Dr Holmes' rights to continue to admit patients, and, as a result, her ability to realize income from that treatment (R pp 1-17) " An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff " *Scratch Golf Co v Dunes W Residential Golf Props , Inc ,* 361 S C 117, 121, 603 S E 2d 905, 907 (2004) The plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action *Peek*

v Spartanburg Reg'l Healthcare Sys, 367 S C 450, 454, 626 S E 2d 34, 36 (Ct App 2005), *County of Richland v Simpkins,* 348 S C 664, 669, 560 S E 2d 902, 904 (Ct App 2002) For a preliminary injunction to be granted, the plaintiff must establish that (1) she would suffer irreparable harm if the injunction is not granted, (2) she will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law *Scratch Golf Co* 361 S C at 121, 603 S E 2d at 908, *Peek,* 367 S C at 454-55, 626 S E 2d at 36 " Before granting an injunction, the trial court should balance the equities the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief " *Peek,* 367 S C at 455, 626 S E 2d at 36-37 The purpose of an injunction is to preserve the status quo and prevent possible irreparable injury to a party pending litigation *Id*

East Cooper then filed a motion for a dissolution of the preliminary injunction The evidence shows that Haynsworth failed to timely file an opposition to East Cooper's motion for a dissolution of the preliminary injunction which was protecting Dr Holmes from continuing injury The Order of June 2, 2000 denies Dr Holmes' request to reconsider or attempt to appeal the dissolution of the preliminary injunction proves this (R p 18)

Under the applicable federal rules (as the case was in the U S District Court at the time) state that "Any memorandum or response of an opposing party must be filed with the Clerk of Court within fourteen (14) days of the date of service of the motion " Rule 7 06, FRCP, Local Civil Rules When a party files a motion and the opposing party fails to respond, the court may construe such failure to respond as non-opposition to the motion, or an admission that the motion was meritorious, may take the facts alleged in

the motion as true, and may grant the motion AMJUR MOTIONS Sec 28 South Carolina Rules of Court Keyrules - Federal, Vol IIA, p 320

The June 2, 2000, Federal Court Order is res judicata for the ruling that Haynsworth's failure to appeal the loss of the injunction reversed the status quo and, thereby caused Dr Holmes in lost income for already-scheduled procedures and forever closed the door to injunctive relief This, alone, provides sufficient evidence from which a reasonable juror could find that Haynsworth's negligence resulted in the foreseeable irreparable harm to Dr Holmes and her practice

Based solely on the fact that Haynsworth failed to timely file a response to East Cooper's motion to dissolve a preliminary injunction which was protecting Dr Holmes from harm, a reasonable juror could find that Haynsworth satisfied the elements of legal malpractice The Trial Court should not have granted a motion for a directed verdict

2) Evidence in the record shows that Haynsworth attempted to alter a court's date stamp in order to disguise its failure to timely file an opposition to East Cooper's motion for dissolution of a preliminary injunction

It is undisputed that Haynsworth failed to timely file opposition to East Cooper's motion for dissolution of preliminary injunction As argued above, this should provide sufficient grounds for a denial of a directed verdict in and of itself (R p 1321, line 25 - p 1322, line 2, p 1323, lines 8-14, p 1323 lines 8-14, 15-18) There is further evidence, however, of a breach of duty on the part of Haynsworth The record contains evidence that Haynsworth altered the Federal Court Docket Stamp to backdate the document in order to misrepresent that a response in opposition was filed before dissolution of the preliminary injunction (R p 1331, line 21 - Line 1336, line 1, pp 1695-1697) The

record shows that Haynsworth's own legal expert testified that alteration of the Federal Court Date Stamp in order to misrepresent the facts was wrong (R p 1331, line 21 - p 1336, line 1)

Evidence from which a reasonable juror could find that Haynsworth engaged in the alteration of a Federal Court's date stamp in order to attempt to disguise an act of malpractice should be regarded as sufficient evidence to allow the case to be presented to the jury on the merits of a claim for legal malpractice The South Carolina Supreme Court sets a high standard for attorney conduct

> The trust and confidence necessarily reposed in an attorney by a client requires of such attorney a high standard and appreciation of his duty to his clients, his profession, the courts, and the public Nothing should be done or left undone by an attorney which tends to bring the profession into disrepute or to lessen in any degree the confidence of the public in the profession It is a vital necessity to the well-being of society and the administration of justice that attorneys, who are officers of the court and part of our judicial system, should exhibit the most scrupulous care in conducting themselves and their business in such a manner as will secure and maintain the respect and confidence of the public in an attorney and the profession generally *Norris v Alexander*, 142 S E 2d 214 (1965)

In this case, there is evidence from which any reasonable juror could find that, not only did Haynsworth engage in less than professional conduct, but it actually appears to have tried to cover it up by altering a court date stamp Based on this evidence, the Trial Court should not have granted a directed verdict as to the legal malpractice claim

II The Trial Court erred in dismissing claims against individual Defendants Grier and Becker for lack of personal jurisdiction in response to a motion for directed verdict

A Standard of review for dismissal for lack of personal jurisdiction

The court's exercise of personal jurisdiction over a party "will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled

by error of law " *Indus Equip Co v Frank G Hough Co*, 218 S C 169, 173, 61 S E 2d 884, 885 (1950), *see also Bargesser v Coleman Co*, 230 S C 562, 567, 96 S E 2d 825, 827 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law) Because this is a question of law, the Court should review the Trial Court's dismissal of the individual Defendants, Grier and Becker, for an error of law

B The Court had personal jurisdiction over the individual Defendants, Grier and Becker

The Trial Court, in its Order dismissing this case on directed verdict, also stated that Dr Holmes' actions against individual defendants Grier and Becker should be dismissed on the grounds that the Plaintiff had failed to properly serve those Defendants (R p 1248, lines 22-24, p 1249, lines 22-25) Although both Defendants had appeared, availed themselves of the jurisdiction of the court, and had actually engaged in the defense of the case at trial (R p 1248, lines 19-22)

Pursuant to the former Rule 3(b), SCRCP, the statute of limitations was tolled by filing the summons and complaint and by mailing copies of the summons and complaint for each defendant plus adequate fees to the Richland County Sheriff's Department for service All defendants were served by the Sheriff's Department in Richland County shortly after the Summons and Complaint was filed in April 2002 Defendants responded by Rule 12, SCRCP, motion on May 1, 2002 Defendants' counsel appeared at a hearing on the motion on July 22, 2002 and argued, successfully, for a change in venue to Richland County (R p 20)

On February 5, 2008, Judge R Markley Dennis, Jr , denied defendants' motion for

partial summary judgment based on non-service and ruling that defendants waived objection to service as well as to the statute of limitations defense (R p 42) One circuit court judge may not overrule another See *Enoree Baptist Church v Fletcher*, 287 S C 602, 604, 340 S E 2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another ")

III The Court Erred in excluding Dr Holmes as an expert witness

Dr Holmes is an attorney licensed in South Carolina (R p 1141, line 20, R p 1146, line 23 - p 1147, line 12) She offered herself as an expert witness to testify that Haynsworth deviated from its standard of care in failing to engage in her case and timely respond to a motion to dissolve a preliminary injunction, in requiring fees in excess of the original contingency arrangement on the date of a hearing to dissolve the preliminary injunction, and in retaining $43,000 00 which Dr Holmes had paid to Haynsworth to be used as fees for trial when there was no trial (R p 1140, line 24 - p 1141, line 24, p 1144, line 12 - p 1146, line 2, p 1174, line 2 - line 1175, line 23, p 1177, lines 2-20, p 1184, lines 1-10) Judge Hughston refused to certify Dr Holmes as an expert on the standard of care for South Carolina attorneys and excluded her expert testimony at trial (R p 1192, lines 14-19) In *State v White*, 2009-SC-0428 210, the Supreme Court addressed non-scientific expert testimony and stated there is no set formula, however, expert testimony is admitted based upon qualification and reliability Qualification is based upon specialized education, training, or experience beyond that of a lay-person Reliability is designed to exclude untested methods, unproven hypotheses, intuition, or revelation *State v Whaley*, 305 S C 138, 406 S E 2d 369 (1991) The plaintiff's expert testimony was excluded on the basis of lack of trial experience Since there was no trial

in the underlying matter and the issues involved wrongful retainer of money from a client and a failure to respond to motions on time, lack of trial experience is not a rational, relevant basis for exclusion It would go to the weight of the testimony, not admissibility The plaintiff was prejudiced by improper exclusion of the plaintiff's expert testimony and by failure to allow an opportunity to submit additional expert testimony in support As the Court granted directed verdict on the grounds that Dr Holmes failed to present expert testimony in her case, the exclusion of her expert testimony was fatal to her case The Trial Court's decision to exclude Dr Holmes as an expert witness should be reversed, and the order dismissing the case should also be reversed, as it was based on a finding that Dr Holmes failed to provide expert testimony in her case

IV The Trial Court erred in setting this trial to begin less than thirty days from remittitur and refusing to allow a continuance

This case was on appeal prior to being remanded for trial Remittitur was issued on May 18th, returning the case to the trial docket Rule 40(b), SCRCP provides, in pertinent part "Trial shall be had no earlier than 30 days from the date the case first appears on the Jury Trial Roster " Rule 40(b) SCRCP The trial of this case was started on June 8th, less than 30 days from the remittitur Dr Holmes filed a motion to continue the trial to allow her time to prepare and to arrange for her counsel to be present, as he was out of state (R p 556) Judge Hughston denied the motion and proceeded with the trial on June 8th (R p 556) The denial of Dr Holmes' motion for a continuance was counter to the applicable rules of civil procedure, and was prejudicial in that it denied her the ability to have counsel present or to properly prepare her case

V Judge Hughston's Order granting sanctions against Dr Holmes is not legally sound and should be overturned

A Failure of the moving party to prevail on Summary Judgment under any circumstances specifically precludes an award of sanctions

In the Order of November 18, 2009, Judge Hughston found Dr Holmes' entire lawsuit to be frivolous from the inception, as to all causes of action He made this determination despite the fact that he, himself, had previously denied Haynsworth's motion for Summary Judgment as to all causes of action in the Complaint (R p 569-572) In the November 18th Order, Judge Hughston accepts responsibility for a lack of diligence in reviewing the Summary Judgment motion, a breach of Canon 3 of the Judicial Code of Conduct Regardless of his attempt to justify an award of sanctions, the undeniable fact still remains, that Haynsworth was unsuccessful in a motion for Summary Judgment on the Plaintiff's claims before the trial Under South Carolina law, the failure to obtain summary judgment, under any circumstances (even where no decision was ever made on the motion), precludes a finding that the underlying case was frivolous Awarding sanctions to the Defendants in this case under any theory based on finding the Plaintiff's case to be frivolous is reversible error

In *Whitfield Construction company v Bank of Tokyo Trust Company*, 338 S C 207, 525 S E 2d 888 (S C Ct App 1999), the parties filed cross motions for summary judgment The Court did not rule on the motions, but asked each party for proposed orders The parties never pursued the summary judgment issue further Instead the trial proceeded before a special referee (a different judge) The special referee found that the Plaintiff's claims were unfounded and that, in fact, they were being brought for a purpose other than to prevail in the litigation The defendant, having prevailed and having

received a finding from the court that the action was essentially frivolous, moved for sanctions under the Frivolous Proceedings Sanctions Act Sanctions were awarded On appeal, the South Carolina Court reversed and held that, where the moving party had unsuccessfully moved for summary judgment, it was necessarily precluded from making a claim that the case was frivolous Rejecting that respondent's argument that it had not actually "failed" on its summary judgment motion, the Court explained that, the failure of the party moving for sanctions to obtain summary judgment, regardless of the way in which it failed or the reason for the failure, was dispositive on the issue of sanctions based on a claim that the underlying lawsuit was frivolous Id 338 S C at 219-220

In *Hanahan v Simpson*, 326 S C 140, 485 S E 2d 903 (1997), two years earlier, the South Carolina Supreme Court had acknowledged "a split of authority [among other jurisdictions] as to whether sanctions may be awarded under Frivolous Proceedings acts notwithstanding the denial of summary judgment " Id at 157, 485 S E 2d at 912 In that case, the Supreme Court concurred with the view "that a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions under the Act after a trial on the surviving claims" even though that party did not prevail on those issues at the merits hearing Id The supreme court further reasoned "[i]t is simply untenable to suggest that, notwithstanding the trial court was convinced the issue was one for the jury, Hanahan [the nonprevailing party at trial] did not reasonably believe in the existence of her claim " Id at 158, 485 S E 2d at 912-13

Three years later, in Whitfield v BOTT, BOTT argued that its case was distinguishable from Hanahan in that Whitfield presented no independent evidence upon which he could reasonably base a belief that his claims were valid, the Court disagreed,

stating

"The supreme court unequivocally rejected the line of authority holding that "the denial of a directed verdict or summary judgment motion does not preclude a later determination that the plaintiff's claims were frivolous and groundless " Id at 157, 485 S E 2d at 912 Although the supreme court noted with approval that the nonprevailing party in Hanahan had "clearly submitted evidence supporting her claims," Id at 157-58, 485 S E 2d at 912 this was merely an additional factor showing that she had pursued her claims to secure a proper purpose Nowhere in the opinion does the supreme court suggest that, in the absence of such evidence, the theory "that if a case is submitted to the jury, it cannot be deemed frivolous" Hanahan, 326 S C at 157, 485 S E 2d at 912 would not apply " *Whitfield Construction company v Bank of Tokyo Trust Company*, 338 S C 207, 525 S E 2d 888 (S C Ct App 1999)

Most recently, in *Southeastern Site Prep LLC v Atlantic Coast Builders and Construction*, LLC, 4345 SCCA (June 22, 2011) the South Carolina Courts have affirmed this position

In the instant case, Judge Hughston has opted to fall upon his sword for the benefit of the moving party, admitting that he came to the summary judgment hearing unprepared and, due to a lack of diligence, made a decision on the motion without making any attempt to consider the parties' positions or the record As shocking as this action is, having a Judge admit to what amounts to judicial misconduct (this is addressed more specifically below) in order to secure an award for a party, it does not take this case out of the realm of the court's holdings from the *Hanahan* and *Whitfield* cases In *Whitfield*, it was overwhelmingly clear, during the trial of the case, that Whitfield's claim was not only frivolous, but was almost surely a deliberate abuse of process This finding, came after BOTT's failure to press its summary judgment claim (resulting in no ruling from the court) The fact that, in hind-sight, summary Judgment would surely have been granted, failed to distinguish the case from the *Hanahan* decision South Carolina law simply acknowledges that where a party fails to obtain relief on a Summary judgment

motion, it may not seek sanctions based on a claim that the underlying action was frivolous *Pitman v Republic Leasing Company, Inc*, 351 S C 429, 570 S E 2d 187 (2002) (Initially we note that section 15-36-30's use of the word "trial" is a misnomer because when a case survives summary judgment and proceeds to trial, an award of sanctions is precluded *Hanahan v Simpson*, 326 S C 140, 157--58, 485 S E 2d 903, 912--13 (1997), *Whitfield Constr v Bank of Tokyo Trust Co*, 338 S C 207, 221, 525 S E 2d 888, 896 (Ct App 1999))

B Sanctions are not appropriate where, but for judicial misconduct, the costs and fees awarded would not have been incurred

Judge Hughston, in the Order prepared by Defendants, admits that he ruled on the Defendant's motion for summary judgment without actually reading the motion or considering the issues at all Specifically, Judge Hughston states

"I had, at the very beginning of trial, denied Defendants' Motion for Summary Judgment However, as I stated, that ruling was based on the Court's unfamiliarity with the facts of the case and was not directed to the merits of Defendant's Motion Given our system for assigning cases for trial, I had only a few days earlier gained knowledge of this case It is three clerk's files, each about four inches thick for a total of twelve inches of paper, and that does not include the depositions There was no practical way for me to deal with competing Motions for Summary Judgment on Monday of the Trial week I simply let the case go forward " (R p 100)

By making this admission, Judge Hughston is admitting judicial misconduct in the form of a lack of diligence All attorneys are held to a high standard of conduct as to preparation for appearances in court and the prosecution or defense of a client's case The duty of a Judge to be prepared and diligent is no less Canon 3 of the Code of Judicial Conduct requires diligence of the Court in carrying out its duties This includes a requirement that the Court carry out its duties in a manner designed to avoid unnecessary expenses and trouble to parties, witnesses, and the public

CANON 3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

B Adjudicative Responsibilities

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly

Commentary

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end

If one is to believe Judge Hughston's position, that, had he diligently applied himself, or applied himself at all, to the consideration of the Haynsworth's motion for Summary judgment, the trial would never have occurred, then it is Judge Hughston's admitted failure to diligently review and consider the Haynsworth's motion which actually caused the trial to proceed to its conclusion by directed verdict Although the Judge's order does not specify exactly how the specific amount of the award was calculated, a review of the Order of 11-18-09 shows that Judge Hughston is awarding sanctions for

(1) Attorney's fees for trial
(2) Expert witness fees paid by defendants for trial testimony
(3) Time spent preparing for trial
(R p 108-110)

These are exclusively costs and fees associated with the trial which, according to Judge Hughston, would not have occurred had he acted with due diligence in considering the Haynsworth's Summary Judgment motion

Succinctly put, but for Judge Hughston's specifically admitted lack of diligence, Haynsworth would not have incurred the costs for trial of this case It is the epitome of inequity for the Judge who admits misconduct in the form of a lack of diligence and preparation to impose costs, as a sanction, on Dr Holmes when it was the Court's own misconduct which brought them about If Judge Hughston is going to admit that, but for his lack of diligence, the Haynsworth would not have incurred the costs which are the basis for the sanction against Dr Holmes, he should not be allowed to force the burden of paying for his own actions upon her

C The Frivolous proceedings sanction act which was repealed on March 21, 2005 applies in this case because the Complaint, the action at issue in the motion for sanctions, was filed before March of 2005

South Carolina repealed the Frivolous Proceedings sanctions Act on March 21, 2005, replacing it on July 1, 2005 The Court cites to *Horry v Parbel*, 378 S E 2d 253, 266 n 1 (S C Ct App 2008) in support of its decision to apply the Act of July 1, 2005 to this case A review of the *Horry v Parbel* case shows that the Court was faced with claim under the frivolous proceedings sanction act which was filed after July of 2005, but which referred to an appeal which was filed between March 21, 2005 and July 1, 2005 The Court found that the Pre-March 2005 act applied, as the "action" upon which the sanctions were sought was filed on March 9, 2005

Fn 1The provisions of this Act are outlined in sections 15-36-10 to 15-36-50 We note that section 15-36-10 was completely revised and became effective

> on July 1, 2005, and sections 15-36-20 through -50 were repealed effective March 21, 2005 Because Horry County filed their motion of appeal to the circuit court on March 9, 2005, the original Act still governed the circuit court's decision For purposes of this analysis, we reference the former version of the Act
> *Horry v Parbel*, 378 S E 2d 253, 266 n 1 (S C Ct App 2008)

In this case, the Complaint was filed on April 1, 2002, (R p 112) thereby commencing this action This is the law of the case, as Judge Hughston made his finding on the issue on page 4 of his Order granting Directed Verdict to Haynsworth (R p 75) Although the Complaint was amended by leave of the Court in 2007, to add some causes of action, the amendment was a relation back amendment under Rule 15, SCRCP, and not considered an independent or new action The "action," therefore, upon which Haynsworth was seeking sanctions, was the institution of this lawsuit, which occurred in 2002 The Initial act, sections 15-36-10 through 45, which were repealed effective March 21, 2005, should have been the basis for the Court's consideration of the Haynsworth's requests for sanctions, not the amended version

D The Court's finding that Dr Holmes was sincere in her belief that her claims were valid precludes an award of sanctions under Rule 11, SCRCP

Under Rule 11, SCRCP, an attorney or party may be sanctioned for violating section (a) of Rule 11, which provides that

> RULE 11 SIGNING OF PLEADINGS, ATTORNEYS
> (a) Signature Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper, that to the best of his knowledge, information and belief there is good ground to support it, and

that it is not interposed for delay
Rule 11(a) SCRCP

The standard, therefore, for a sanction based on the filing of a frivolous claim, would be whether, to the best of the signing attorney's knowledge, information, and belief, there were reasonable grounds to support it In Judge Hughston's Order granting Directed Verdict in this case, the Court notes from the record that Dr Holmes stated reasons for her belief that her attorneys had committed malfeasance

> "The Practitioner's Attorney, however, has not been timely first, taking months to schedule the Motion for Temporary Injunction, second, not responding in a timely manner to your Honor's Scheduling Order, third, not providing adequate representation and preparation of the case, and fourth, not notifying opposing counsel until the eleventh hour on January 4, 2000 of the request to reschedule the deposition which was made by letter dated December 17, 1999 "
> (R p 76)

Judge Hughston, goes on, in the order, to infer, from Dr Holmes statement

"Thus, as of January 31, 2000, Dr Holmes, who is herself a licensed attorney, clearly believed she had potential claims against the Defendants " (R p 76)

In the Order granting sanctions Judge Hughston again specifically finds that Dr Holmes held a good faith belief that her claims were valid

"Given my opportunities to observe and hear Dr Holmes, I have no doubt that she is sincere in her beliefs about this case " (R p 106)

The fact that Dr Holmes sincerely believed that her claims were valid is the law of the case In fact, the judge dismissed part of her claim on that very basis, setting the tolling of the statute of limitations via the discovery rule by the date that she reasonably should have known that she had a claim upon which she could have litigated This unappealed determination necessarily precludes any finding, under Rule 11, that the signing attorney (in this case, Dr Holmes), signed the pleading in violation of the Rule 11 requirement that her signature certify that, "to the best of his knowledge, information and belief there

is good ground to support it, and that it is not interposed for delay " Rule 11(a) , SCRCP

As Judge Hughston's November 18th Order notes, the standards for sanctions under rule 11 and under the Frivolous Proceedings sanction act are similar Thus, the arguments made above in regards to the Frivolous Proceedings Sanctions Act are also valid as applied to Rule 11 As pointed out above, under South Carolina law, where the party moving for sanctions on the basis that an action is frivolous was unsuccessful on a motion for summary judgment, an award of sanctions based on a finding that the action was frivolous is precluded *Pitman v Republic Leasing Company Inc* , 351 S C 429, 570 S E 2d 187 (2002) (Initially we note that section 15-36-30's use of the word "trial" is a misnomer because when a case survives summary judgment and proceeds to trial, an award of sanctions is precluded *Hanahan v Simpson*, 326 S C 140, 157--58, 485 S E 2d 903, 912--13 (1997), *Whitfield Constr v Bank of Tokyo Trust Co* 338 S C 207, 221, 525 S E 2d 888, 896 (Ct App 1999))

Finally, as explained above, the specific costs awarded in the order apply only to the preparation for and defense of a trial which would not have happened, according to Judge Hughston's own admission, had the Judge been diligent in his review of the Defendant's Summary Judgment motion It would therefore be inequitable and highly improper for an award of attorneys fees and costs to be awarded under Rule 11 in this case

E South Carolina does not recognize a common law right to costs and attorney's fees

The Court awards costs and attorney's fees, based on its assertion that there is a general, "inherent" common law right of the court to award sanctions (R p 107) Judge Hughston cites to a U S Supreme Court case from 1975, which discusses the history of

the authority of federal courts to award costs and attorney's fees However, the State of South Carolina law specifically rejects the federal approach on this matter In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract There is no common law right to recover attorney's fees *Harrison-Jenkins v Nissan Car Mart* 557 S E 2d 708, 711 (S C Ct App 2001) *citing*, *Jackson v Speed*, 326 S C 289, 486 S E 2d 750 (1997), *American Fed Bank, FSB v Number One Main Joint Venture*, 321 S C 169, 467 S E 2d 439 (1996), *Blumberg v Nealco Inc* , 310 S C 492, 427 S E 2d 659 (1993), *Baron Data Sys , Inc v Loter*, 297 S C 382, 377 S E 2d 296 (1989), *Dowaliby v Chambless*, 344 S C 558, 544 S E 2d 646 (Ct App 2001), *Harvey v South Carolina Dep't of Corrections*, 338 S C 500, 527 S E 2d 765 (Ct App 2000), *Global Protection Corp v Halbersberg*, 332 S C 149, 503 S E 2d 483 (Ct App 1998), *Prevatte v Asbury Arms*, 302 S C 413, 396 S E 2d 642 (CtApp 1990)

As to Judge Hughston's citation of *Alyeska Pipeline Serv Co v Wilderness Soc'y* 421 U S 240 (1975) as a case recognizing some vague inherent authority of courts, in general, to award sanctions in "bad faith" cases, the Court's reliance on this case is gravely and clearly misplaced A simple reading of the actual opinion from *Alyeska Pipeline Serv Co v Wilderness Soc'y* 421 U S 240 (1975) Shows that, in this case, the Court was considering a request for attorney's fees from a private organization based on the party's claim that it had engaged in an action to enforce a statute and had thereby performed a service for the government which should have been performed by a government prosecutor In the *Aleyska* case, the Court recognizes that, as part of the record, there had been a finding that neither party had acted in bad faith, and therefore

specifically rejects consideration of any award of fees or costs on that basis "The exception for an award against a party who had acted in bad faith was inapposite, since the position taken by the federal and state parties and Alyeska 'was manifestly reasonable and assumed in good faith ' Id , at 449, 495 F 2d, at 1029 " Id At 245 The *Alyeska* case, therefore, does not stand for the proposition that the Courts have some inherent authority to sanction litigants at will upon a finding of "bad faith "

Judge Hughston, in the order that was drafted by Haynsworth, and that he signed on November 18, 2009, claims authority to impose sanctions of attorneys fees and costs under a general, common law theory, citing a United States Supreme Court case, *Alyeska Pipeline Serv Co v Wilderness Soc'y* 421 U S 240 (1975) A review of the Alyeska case as well as of the Supreme Court cases in which it is cited, shows, unequivocally, that the "American rule" is that the parties must bear their own fees and costs absent a statutory or contractual right or duty to the contrary The court actually states, in the opinion

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser We are asked to fashion a far-reaching exception to this "American Rule", but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals Id At 247

AND

> In 1796, this Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts In *Arcambel v Wiseman,* 3 Dall 306, the inclusion of attorneys' fees as damages was overturned on the ground that "[t]he general practice of the United States is in opposition [sic] to it, and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute " This Court has consistently adhered to that early holding See *Day v Woodworth,* 13 How 363 (1852), *Oelrichs v Spain,* 15 Wall 211 (1872), *Flanders*

> *v Tweed*, 15 Wall 450 (1873), *Stewart v Sonneborn*, 98 U S 187 (1879), *Fleischmann Distilling Corp v Maier Brewing Co* , 386 U S 714, 717-718 (1967), *F D Rich Co , Inc v United States ex rel Industrial Lumber Co Inc* , 417 U S 116, 126-131 (1974)
> Id At 249-250

In the *Alyeska* case, the Appellate Court specifically notes that there had been a finding, earlier in that case, showing that the party against whom the fees were awarded had proceeded in good faith This took the Court's considerations in the *Alyeska* case out of the realm of any "inherent" power of the Court to sanction a litigant for "vexatious" litigation

> Also, a court may assess attorneys' fees for the "willful disobedience of a court order as part of the fine to be levied on the defendant, *Toledo Scale Co v Computing Scale Co* , 261 U S 399, 426-428 (1923)," *Fleischmann Distilling Corp v Maier Brewing Co* , supra, at 718, or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons " *F D Rich Co* , 417 U S , at 129 (citing *Vaughan v Atkinson,* 369 U S 527 (1962)), cf *Universal Oil Products Co v Root Refining Co* , 328 U S 575, 580 (1946) These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here
> Id At 259

The case, from which this "inherent authority" to award fees and costs actually arises is not the *Alyeska* case, but *Vaughan v Atkinson*, 369 U S 527 (1962) This case began as an admiralty and maritime case A sailor, who suffered from Tuberculosis, had sued his former employer for what amount to worker's compensation type benefits The action was one in equity, under the admiralty laws, in the Federal Courts The District Court found that the employer, in that case, should have been paying benefits to the Plaintiff all along, and that its failure to do so was in bad faith Although the statute did not specifically grant the Court the authority to award fees and costs, it was an action in equity, and the Court opted to award fees and costs, reasoning that the Federal Courts had

awarded counsel fees in equity type actions in the past Even a brief reading of the facts of the Vaughn case makes it clear that the holding could not, even under the most tortuous stretching, be read to grant State Circuit Court Judges the authority to award attorney's fees and costs at will

In *Vaughan v Atkinson*, 369 U S 527 (1962), the opinion recognizes the *Federal Court s* authority, in an *equity* case, to award fees and costs outside of statutory authority in cases where there has been obvious bad faith by a party This right, however, is clearly reserved ONLY for the federal courts, only in actions at equity, and does not purport to override State law concerning the conduct of State Courts on the subject

> Counsel fees have been awarded in equity actions, as where Negroes were required to bring suit against a labor union to prevent discrimination Rolax v Atlantic Coast Line R Co , 186 F 2d 473, 481 As we stated in Sprague v Ticonic Bank, 307 U S 161, 164 , allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is ***"part of the historic equity jurisdiction of the federal courts "***
> [Emphasis added]
> *Vaughan v Atkinson* 369 U S at 530 (1962)

The instant case is neither an action in equity, where the Court is being asked to fashion an award in equity, nor is it in Federal Court This attempt by a Circuit Court judge to award sanctions based on an "inherent" right is blatantly contrary to South Carolina law and should be reversed

CONCLUSION

There were several errors in this case, which warrant a new trial The Trial Court erred in insisting on having the trial of this case less than thirty days from the date it was restored to the trial roster, and in denying Dr Holmes' very reasonable request to be able to have time to prepare and to have her counsel present The Court's decision to disqualify Dr Holmes as an expert witness to establish the standard of care and deviation

from that standard was severely prejudicial to her ability to prosecute the case, and was not a soundly based decision The Court's granting of directed verdict was contrary to prevailing law, which does not require expert testimony to establish a standard of care in legal malpractice cases where the "common sense" rule may prevail The Court's decision to dismiss all remaining claims after dismissing the professional negligence claims, finding that they were "all subsumed" within the professional negligence claim was unsupported by any authority and counter both to the evidence and the rules of civil procedure Finally, as to the Court's award of sanctions against Dr Holmes where her case survived summary judgment, was presented to the jury, and where the Judge himself admitted that his own lack of diligence resulted in the trial moving forward, in the interest of justice and fairness, necessitates review and reversal by this Court The Appellant respectfully requests that the Appellate Court reverse the Trial Court's orders in this case, and remand the case for a new trial on the merits

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March 14, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas Hughston, Jr , Circuit Court Judge
The Honorable R Markley Dennis, Jr , Circuit Court Judge
The Honorable Deadra Jefferson, Circuit Court Judge

Case No 2007-CP-10-1444

Cynthia Holmes,

Appellant,

v

James Y Becker, Manton Grier, and
Haynsworth Sinkler Boyd, P A , as
successor to Sinkler & Boyd, P A ,

Respondents

PROOF OF SERVICE FOR APPELLANT'S BRIEF AND APPELLANT'S REPLY BRIEF

I certify that I have served a copy of the Appellant's Brief and Appellant's Reply Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, Richard Dukes and J Wilkerson, Esq , at 40 Calhoun St , Ste 200, Charleston, SC 29401, on this date, March 19, 2012

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