

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

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

Respondents

---

**RECORD ON APPEAL**

**Vol 5 of 5**

---

Chalmers Johnson  
523 So G St Apt #402  
Tacoma, WA 98405  
(425) 999-0900  
Attorney for the Appellant

Richard S Dukes  
Turner Padget Graham & Laney, P A  
P O Box 22129  
Charleston, SC 29413  
(843) 576-2810  
Attorney for Respondents

## TABLE OF CONTENTS

### Orders, Judgments, Decrees

|    |                                                                                           |    |
|----|-------------------------------------------------------------------------------------------|----|
| 1  | Order - U S District Court - Judge Duffy - 11-22-99                                       | 1  |
| 2  | Order - U S District Court - Judge Duffy - 6-2-00                                         | 18 |
| 3  | Judgment - Charleston CP - Judge Dennis - 7-24-02                                         | 20 |
| 4  | Order Denying Plaintiff's Motion for Clarification - Charleston CP - 3-11-2003            | 21 |
| 5  | Order - SC Ct App - 4-29-03                                                               | 23 |
| 6  | Remittitur - SC Ct App - 7-10-03                                                          | 24 |
| 7  | Order - SC Sup Ct - 4-8-04                                                                | 25 |
| 8  | Remittitur - S C Ct App - 4-22-04                                                         | 27 |
| 9  | Order - Richland CP - Judge Barber - 8-10-04                                              | 28 |
| 10 | Order - SC Ct App - 1-11-05                                                               | 30 |
| 11 | Order - SC Ct App - 5-25-05                                                               | 32 |
| 12 | Order - SC Ct App - 3-27-06                                                               | 33 |
| 13 | Order - SC Sup Ct - 10-19-06                                                              | 35 |
| 14 | Remittitur - SC Ct App - 10-27-06                                                         | 37 |
| 15 | Order - Richland CP - Judge Childs - 3-28-07                                              | 38 |
| 16 | Judgment - Charleston CP - Judge Dennis - 2-5-08                                          | 42 |
| 17 | Protective Order - Charleston CP - Judge Dennis - 2-22-08                                 | 43 |
| 18 | Order - Charleston CP - Judge Dennis - 3-5-08                                             | 45 |
| 19 | Judgment - Charleston CP - Judge Dennis - 5-20-08                                         | 51 |
| 20 | Order - Charleston CP - 6-30-08                                                           | 52 |
| 21 | Scheduling Order - Charleston CP - 7-16-08                                                | 53 |
| 22 | Order - SC Ct App - 8-8-08                                                                | 54 |
| 23 | Order - Charleston CP - 1-9-09                                                            | 56 |
| 24 | Order - SC Sup Ct - 4-23-09                                                               | 58 |
| 25 | Remittitur - SC Ct App - 4-29-09                                                          | 60 |
| 26 | Order - SC Sup Ct - 5-13-09                                                               | 61 |
| 27 | Judgment - Charleston CP - Judge Dennis - 5-21-09                                         | 63 |
| 28 | Judgment - Charleston CP - Judge Dennis - 6-5-09                                          | 64 |
| 29 | Judgment - Charleston CP - Judge Jefferson - 6-5-09                                       | 65 |
| 30 | Order - Charleston CP - Judge Jefferson - 6-5-09                                          | 66 |
| 31 | Order - Charleston CP - Judge Jefferson - 6-5-09                                          | 68 |
| 32 | Judgment - Charleston CP - Judge Jefferson - 6-10-09                                      | 69 |
| 33 | Order denying Plaintiff's Motion to Reconsider – Charleston CP - Judge Jefferson - 7-6-09 | 70 |
| 34 | Order - Charleston CP - Judge Hughston - 7-14-09                                          | 72 |

|                                                                                                       |     |
|-------------------------------------------------------------------------------------------------------|-----|
| 35 Order on post trial motions - Charleston CP –<br>Judge Hughston - 11-18-09                         | 98  |
| 36 Order denying Plaintiff's motion to alter/amend or<br>reconsider judgment - Charleston CP - 2-4-10 | 111 |

### **Pleadings**

|                                |     |
|--------------------------------|-----|
| 37 Complaint - 4-1-02          | 112 |
| 38 Amended Complaint - 12-1-06 | 126 |
| 39 Amended Complaint - 2-3-07  | 149 |

### **Transcripts**

|                                                                                |      |
|--------------------------------------------------------------------------------|------|
| 40 Transcript - Charleston CP - Judge Rawl - 10-29-02                          | 170  |
| 41 Transcript - Charleston CP - Judge Rawl - 1-7-03                            | 180  |
| 42 Transcript - Richland CP - Judge Barber - 7-22-04                           | 201  |
| 43 Transcript - Charleston CP - Judge Dennis - 10-28-04                        | 238  |
| 44 Transcript - Richland CP - Judge Childs - 5-25-07                           | 250  |
| 45 Transcript - Charleston CP - Judge Dennis - 2-5-08                          | 319  |
| 46 Transcript of motion - Charleston CP - Judge Dennis 5-20-08                 | 382  |
| 47 Transcript - Charleston CP - Judge Jefferson - 5-18-09                      | 461  |
| 48 Transcript (in chambers telephonic conference) –<br>Charleston CP - 5-18-09 | 499  |
| 49 Transcript - Charleston CP - Judge Hughston - 6-8-09                        | 529  |
| 50 Transcript - Charleston CP - Judge Hughston – trial 6-9-09<br>to 6-12-09    | 743  |
| 51 Transcript - Charleston CP - 9-29-09                                        | 1444 |

### **Trial Exhibits**

|                                                                 |      |
|-----------------------------------------------------------------|------|
| 52 Plaintiff Exhibit # 3 - Letter from East Cooper of 1-26-00   | 1464 |
| 53 Plaintiff Exhibit #8 - US Dist Ct Docket                     | 1465 |
| 54 Plaintiff exhibit # 10 - Order of Judge Duffy 4-17-00        | 1472 |
| 55 Defendant Exhibit # 34 - Letter from Sinkler & Boyd 5-29-98  | 1495 |
| 56 Defendant Exhibit # 49 - Letter from Sinkler & Boyd 7-15-99  | 1506 |
| 57 Defendant Exhibit # 86 – Letter from Sinkler & Boyd 5-5-98   | 1509 |
| 57 Defendant Exhibit # 90 - Letter from Sinkler & Boyd 12-15-99 | 1512 |
| 58 Defendant Exhibit # 92 - Letter from Sinkler & Boyd 12-27-99 | 1514 |
| 59 Defendant Exhibit # 95 - Letter from Sinkler & Boyd 1-10-00  | 1523 |
| 60 Defendant Exhibit # 96 - Letter from Sinkler & Boyd 1-18-00  | 1528 |

|                                                                                                                                                                      |      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 61 Defendant Exhibit # 97 - Addendum                                                                                                                                 | 1532 |
| 62 Defendant Exhibit # 98 - Letter from Sinkler & Boyd 1-21-00                                                                                                       | 1533 |
| 63 Defendant Exhibit # 110 - Pro Se motion to reconsider<br>dissolution of the temporary injunction, motion to<br>allow additional time to obtain substitute counsel | 1536 |
| 64 Defendant Exhibit # 116 - Transcript of Motion Hearing                                                                                                            | 1546 |
| 65 Defendant Exhibit # 117 - Judgment                                                                                                                                | 1561 |
| 66 Defendant Exhibit # 118 - Settlement Agreement                                                                                                                    | 1594 |
| 67 Defendant Exhibit # 121 - Affidavit of Holmes                                                                                                                     | 1599 |
| 68 Defendant Exhibit # 129 - Informal Brief                                                                                                                          | 1638 |
| 69 Defendant Exhibit # 132 - Petition for Writ of Cert                                                                                                               | 1657 |

### **Other Documents**

|                                                                                                                                                               |      |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 70 Plaintiff's Response to Defendant's Motion to Dissolve<br>Preliminary Injunction 1-24-00                                                                   | 1695 |
| 71 Notice of Appeal 3-12-03                                                                                                                                   | 1698 |
| 72 Notice of Appeal 3-20-03                                                                                                                                   | 1700 |
| 73 Petition for Rehearing in Original Jurisdiction 6-22-04                                                                                                    | 1701 |
| 74 Amended Notice of Appeal 11-29-04                                                                                                                          | 1706 |
| 75 Petition for Writ of Cert 6-20-05                                                                                                                          | 1707 |
| 76 Petitioner's motion pursuant to rule 240, SCACR 7-29-05                                                                                                    | 1721 |
| 77 Notice of Appeal 4-6-07                                                                                                                                    | 1727 |
| 78 Motion for Reconsideration 4-7-08                                                                                                                          | 1728 |
| 79 Supplemental motion to alter or amend judgment denying<br>motion for summary judgment regarding all claims<br>against Manton Grier and James Becker 4-9-08 | 1729 |
| 80 Notice of Appeal 7-1-08                                                                                                                                    | 1731 |
| 81 Supplemental Notice of Appeal 8-9-08                                                                                                                       | 1732 |
| 82 Notice of motion and motion for reconsideration 1-27-09                                                                                                    | 1733 |
| 83 Notice of transfer to jury roster 4-8-08                                                                                                                   | 1735 |
| 84 Notice of motion and motion for priority matter regarding<br>rule 59(e) SCACR pursuant to rule 40 SCACR 5-20-09                                            | 1736 |
| 85 Notice of motion and motion for reconsideration of<br>priority matter pursuant to rule 40, SCRCR 5-28-09                                                   | 1739 |
| 86 Expedited motion for continuance and priority matter pursuant<br>to rule 87, SCRCR 6-5-09                                                                  | 1742 |
| 88 Notice of motion and motion for reconsideration of priority matter<br>pursuant to rule 40, SCRCR                                                           | 1744 |
| 89 Motion to Dismiss 7-7-09                                                                                                                                   | 1747 |

|                                                                                                                                    |      |
|------------------------------------------------------------------------------------------------------------------------------------|------|
| 90 Letter from Judge Hughston 7-15-09                                                                                              | 1751 |
| 91 Notice of motion and motion for new trial 7-20-09                                                                               | 1754 |
| 92 Motion for reconsideration 7-21-09                                                                                              | 1760 |
| 93 Defendant's memorandum in support of their motion<br>for sanctions pursuant to SC Code Ann 15-36-10 and<br>Rule 11 SCRPC 8-3-09 | 1762 |
| 94 Motion for reconsideration 8-3-09                                                                                               | 1795 |
| 95 Letter from Dr Holmes to Judge Hughston 8-4-09                                                                                  | 1832 |
| 96 Letter from Dr Holmes to Judge Hughston 8-6-09                                                                                  | 1868 |
| 97 Memorandum in support of motion for new trial 8-11-09                                                                           | 1899 |
| 98 Return to defendant's motion for sanctions 9-21-09                                                                              | 1931 |
| 99 Motion 9-21-09                                                                                                                  | 1949 |
| 100 Motion to seal 10-29-09                                                                                                        | 1975 |
| 101 Motion 11-10-09                                                                                                                | 1977 |
| 102 Motion to reconsider pursuant to rule 59(e) SCRPC 11-25-09                                                                     | 1979 |
| 103 Notice of Appeal 11-28-09                                                                                                      | 1981 |
| 104 Plaintiff's memorandum in support of motion to alter or amend<br>judgment and for reconsideration 1-4-10                       | 1983 |
| 105 Notice of Appeal 3-15-10                                                                                                       | 1989 |

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr Circuit Court Judge

---

Case No 2002-CP-00 1448

---

J Doe

Petitioner

v

Manton Guier James Y Becker and  
Sinkler & Boyd P A ,

Respondents

---

Petition for Rehearing in  
Original Jurisdiction

---

C Holmes, M D , Esq  
PO Box 187  
Sull Isd SC 29482  
843 883 3010  
Petitioner

Counsel of Record for Respondents  
John Wilkerson III, Esq  
40 Calhoun St  
Charleston, SC 29401  
843 576 2800

RECEIVED

JUN 22 2001

SC SUPREME COURT

The Petitioner respectfully requests a rehearing on Petition for Writ of Certiorari in Original Jurisdiction with a suggestion for rehearing en banc. As per Rule 221, SCACR, a petition for rehearing shall state the points supposed to have been overlooked or misapprehended by the court. In compliance with Rule 221, SCACR, the pertinent points are set forth below.

This appeal is based upon objection to a pattern of actions by the Respondents designed to and which in fact did, prevent appellate review by thwarting a Record for Appeal and Brief. Respondents' ex parte/out-of-court communications with the lower appellate court led to a misinformed and misdirected *sui sponte* Motion to Dismiss. Similarly, via prohibited out-of-court communications, the Respondents contacted the presiding judge at the lower court level. These prohibited out-of-court communications were ex parte in fact because the Petitioner was not allowed to respond in violation of Rule 3(B)(7)(a)(11), Rule 501, SCACR. Further, the Respondents' prohibited out-of-court communications included what was characterized by Respondents as "relevant documents." These documents were not reviewed by the other party prior to presentation to the presiding judge. The Respondents' unethical actions constitute a pattern of obstruction of appellate review, an attempt to deliberately thwart a Record for Appeal and Brief, denial of the Petitioner's right to be heard, and effective elimination of any chance of meaningful review.

This cause of action grew out of an oral contract for professional services with Respondents and Respondent law firm. This appeal is based upon a pattern by Respondents of ex parte/out-of-court communications prohibited by Rule 1.8, RPC, Rule 407, SCACR. The Respondents' pattern of prohibited ex parte/out-of-court communications has led to the intended result of loss of an opportunity to respond and loss of the right to be heard. Respondents' actions violate traditional notions of fundamental fairness, due process, and equal protection under both the South Carolina and Federal constitutions.

Further, as mandated by the Constitution of the State of South Carolina, Article I, Section 22, no person shall be subject to the same entity as the moving party and the adjudicator and "he shall have in all such instances the right to judicial review." After the Respondents' prohibited out-of-court/ex parte communications with the lower appellate court, the Motion to Dismiss was raised *sui sponte* and adjudicated by the same entity. The Petitioner seeks review under this Honorable Court's inherent constitutional powers and under Article I, Section 22, of the South Carolina Constitution.

The issue of ex parte/out-of-court communications is material, timely, and substantial and it affects the very foundation of the judicial system. The fact that there has been only one law school in this state with attendance by most of the state's practicing attorneys is reason enough

for review of this critical issue. Given that only one law school exists, the statistical probability that the current incidence of disqualification is valid is exceedingly small. It is hardly surprising that the crucible for this issue is based in malfeasance. Other professions answer for malfeasance. At least one or more of the Respondents has chosen to file suit based upon professional malfeasance. Public interest compels the judicial system to be solidly grounded in traditional notions of fundamental fairness and due process, not mired in prohibited unethical ex parte communications and unrecanted conflicts.

The Petitioner respectfully requests that this Honorable Court hear and address the substantial issue of prohibited out-of-court/ex parte communications. This problem appears to be growing. It threatens to undermine the foundation of the judicial system. It is a significant, even urgent, issue which is capable of evading review and certain to evade review if ignored. Out-of-state attorneys with multi-state practices who have practiced in South Carolina have been surprised and appalled at the number of prohibited out-of-court/ex parte communications as well as the routine and cavalier attitude toward them. Some have stated it is rampant and unique to South Carolina in its depth and breadth. References available upon request. Offhand dismissal condones this conduct.

Those in the "trenches" with ethics, both bench and bar, pray that the light of day will illuminate.

consideration of this most basic tenet of fairness The  
Petitioner seeks a full and fair hearing on the merits

For the foregoing reasons, the Petitioner respectfully  
requests a rehearing on Petition for Writ of Certiorari in  
Original Jurisdiction with a suggestion for *en banc*  
rehearing For substantial justice affecting substantial  
rights, the Petitioner requests worthwhile and worthy  
deliberation of the foregoing significant issues affecting  
public interest

Respectfully submitted,

June 18, 2004

  
C. Holmes  
PO Box 187  
Sullivans Isd , SC  
29482-0187  
(843) 883-3010

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No ~~2002-CP-10-1448~~

2007-CP-10-1444

J Doe

Appellant,

v

Manton Grier James Y Becker, and  
Sinkler & Boyd, P A ,

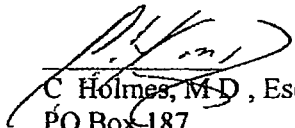
APR - 6 2007

Respondents, Appellants  
CLERK CP & SS

AMENDED NOTICE OF APPEAL

J Doe appeals the verbal order of the Honorable R Markley Dennis, Jr , on  
October 28, 2004

Dated 10/29/07

  
C Holmes, M.D , Esq  
PO Box 187  
Sull Isd , SC 29482-0187  
843 883 3010  
Appellant

Counsel of Record for Respondents  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800

FILED  
2004 NOV 29 AM 11 39  
JULIUS STRONG  
CLERK OF COURT  
BY \_\_\_\_\_

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable James R Barber, III, Circuit Court Judge

S C Ct App filed January 12, 2005

J Doe,

Petitioner,

v

Manton Grier, James Y Becker, and

Sinkler & Boyd, P A ,

Respondents

PETITION FOR A WRIT OF CERTIORARI

C Holmes, Esq  
PO Box 187  
Sullivans Isd , SC 29482-0187  
843 883 3010  
Petitioner

Other Counsel of Record  
John Wilkerson, III  
PO Box 22129  
Charleston SC 29413  
843 576 2800  
Attorney for Respondents

## INDEX

|                                                                                                                                                  |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Certificate of Counsel                                                                                                                           | 1  |
| Issues Presented                                                                                                                                 | 2  |
| Statement of the Case                                                                                                                            | 3  |
| Arguments                                                                                                                                        |    |
| 1 The Court of Appeals erred in dismissing the appeal and in failing to uphold the previous lower court order establishing the law of the case   | 5  |
| 2 The Court of Appeals erred in its interpretation of Rule 203(b)(1), SCACR                                                                      | 6  |
| 3 The Court of Appeals erred in ruling the notice of appeal premature                                                                            | 7  |
| 4 The Court of Appeals erred in dismissing the appeal of denial of permission to proceed anonymously which MUST be immediately appealed          | 8  |
| 5 The Court of Appeals erred in dismissing the appeal and mooted the Motion for Remand to correct the transcript and record for appeal           | 9  |
| 6 The Court of Appeals erred in dismissing the appeal based upon appealability of orders striking pleadings                                      | 9  |
| 7 The Court of Appeals erred in dismissing the appeal based upon appealability under subsection (3) of S C Code Ann Section 14-3-330 (1976)      | 11 |
| 8 The Court of Appeals erred in dismissing the appeal based upon the substantial right of fundamental fairness, adequate notice, and due process | 11 |
| Conclusion                                                                                                                                       | 12 |

CERTIFICATE OF COUNSEL

Counsel and Petitioner certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 25, 2005

## ISSUES PRESENTED

- 1 The Court of Appeals erred in dismissing the appeal and in failing to uphold the previous lower court order establishing the law of the case
- 2 The Court of Appeals erred in its interpretation of Rule 203(b)(1), SCACR
- 3 The Court of Appeals erred in ruling the notice of appeal premature
- 4 The Court of Appeals erred in dismissing the appeal of denial of permission to proceed anonymously which MUST be immediately appealed
- 5 The Court of Appeals erred in dismissing the appeal and mooting the Motion for Remand to correct the transcript and record for appeal
- 6 The Court of Appeals erred in dismissing the appeal based upon appealability of orders striking pleadings
- 7 The Court of Appeals erred in dismissing the appeal based upon appealability under subsection (3) of S C Code Ann Section 14-3-330 (1976)
- 8 The Court of Appeals erred in dismissing the appeal based upon the substantial right of fundamental fairness, adequate notice and due process

## STATEMENT OF THE CASE

Respondents and petitioner entered into a contract for legal services. Respondents billed petitioner well over \$100,000.00 including \$43,000.00 in money "for trial" which was not returned. See copy of cashier's check for \$43,000.00 (Appendix, p. 20). Partial summary judgment was granted on a Federal cause of action and respondents failed and refused to continue representation in the litigation. After respondents spurned all efforts to resolve the matter, this action for professional malfeasance was commenced.

The facts pertinent to this petition are the following. The petitioner appeals from the lower court order dated August 10, 2004, which was heard on July 22, 2004. Before the court at that hearing were petitioner's and respondents' motions. Petitioner timely served and filed a motion pleading prior court order dated April 23, 2003, establishing the law of the case, and, if denied, a motion to dismiss respondents' motions with a request for an opportunity to prepare, obtain counsel, and respond. In addition, petitioner timely served and filed a motion for change of venue based upon convenience of physician witnesses more than 100 miles away. Further, petitioner timely served, submitted, and filed an affidavit in opposition to respondents' motions. Respondents made a motion to strike, a Rule 12(b)(6), SCRCF, motion, and a motion under Rule 10 and 17, SCRCF. The order failed to uphold the prior lower court order establishing the law of the case and included denial of petitioner's request to proceed anonymously. The petitioner timely served and filed a Rule 52, SCRCF, motion. Thereafter, petitioner timely served and filed a notice of appeal. The appeal is based upon lack of jurisdiction and the law of the case as well as other grounds.

Upon review of the transcript, certain omissions material to the appeal were evident. The Court reporter was immediately notified. Respondents failed and refused to consent to correction of certain obvious omissions. Thereafter, the petitioner moved for a remand to correct omissions in the transcript.

Doe v Howe, Op No 3896 (S C Ct App dated November 22, 2004) (Shearouse Adv Sh No 46), was decided on November 22, 2004, and clarified immediate appealability of denial of permission to proceed anonymously in a legal malpractice action *independent* of the merits (emphasis added)

The Court of Appeals dismissed the appeal and declared the motion for remand to correct the transcript moot by order dated January 11, 2005 J Doe v Manton Grier, James Y Becker, and Sinkler and Boyd, P A (S C Ct App filed January 12, 2005 )  
The petitioner seeks a writ of certiorari

## ARGUMENT

1 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AND IN  
FAILING TO UPHOLD THE PREVIOUS LOWER COURT ORDER  
ESTABLISHING THE LAW OF THE CASE

The petitioner pleads judgment dated April 23, 2003, striking case number 2002-CP-40-3705 which the Respondents chose not to appeal. It has been entered and is now the law of the case. Based upon the previous lower court order in the case dated April 23, 2003, the Court of Appeals erred in dismissing the appeal. *Harmon and Bore, Inc v Jenkins*, 282 S C 189, 318 S E 2d 371 (S C App 1984), *In Re Thames*, 344 S C 564, 544 S E 2d 854 (S C App 2001), *McCall v State Farm*, 359 S C 372, 597 S E 2d 181 (S C App 2004)

There was no jurisdiction to proceed in the case which had been stricken and dismissed. Respondents chose not to appeal the prior lower court order striking and dismissing the case in Richland County, therefore, the conflicting August 10, 2004, order should be vacated. Respondents chose not to file appropriate post-judgment motions in compliance with the SCRCF. Proceeding in a case that has been stricken jeopardizes subsequent judgment and subjects it to collateral attack. The lower court order dated August 10, 2004, was entered without jurisdiction. This objection was raised immediately to the lower court although lack of jurisdiction may be raised at any time. *Carter v State*, 329 S C 355, 495 S E 2d 773 (1998), *Bardoon Properties, NV v Eidolon Corp*, 326 S C 166, 485 S E 2d 371 (1997)

The final judgment entered April 25, 2003, ended case number 2002-CP-40-3705. Pursuant to S C Code Ann. Section 14-3-330(1) (1976), the lower court order dated August 10, 2004, is appealable based upon final judgment dated April 23, 2003. *Murphy v Owens Corning Fiberglass Corp*, 346 S C 37, 550 S W E 2d 589 (Ct App 2001), *Link*

v. School District of Pickens County, 302 S C 1, 393 S E 2d 176 (1990), Good v. Hartford Accident and Indemnity Co., 201 S C 32, 21 S E 2d 209, (1942)

The petitioner respectfully requests that this Honorable Court uphold the prior lower court order dated April 23, 2003, by vacating the conflicting August 10, 2004, lower court order on appeal herein. In the alternative, the petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

2 THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF RULE 203(b)(1), SCACR

Rule 203(b)(1), SCACR enlarges the time for appeal and relates to timeliness. In the instant case, there is no question of timeliness and all parties agree that the notice of appeal was timely. Therefore, Rule 203(b)(1), SCACR, is not dispositive and is not a valid basis for dismissal of a timely appeal. In Diamond Jewelers of Spartanburg Inc. v. Naegle Outdoor Advertising Co., 290 S C 260, 349 S E 2d 98 (1985), the appellant moved for remand to consider post-trial motions. In this case, petitioner has not moved for remand to consider post-trial motions. Post-trial motions were filed to correct the record for appeal. When notice of appeal was filed, under Rule 205, SCACR, the appellate court had exclusive jurisdiction, therefore, petitioner moved for remand to correct the transcript and record for appeal. Clements v. Young, 310 S C 73, 425 S E 2d 63 (Ct App 1992). See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina Second Edition, 265 (S C Bar 2002).

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

3 THE COURT OF APPEALS ERRED IN RULING THE NOTICE OF APPEAL  
PREMATURE

Rule 203(b)(1), SCACR, merely sets the deadline for a timely notice of appeal, it does not prohibit or deem premature a notice of appeal filed before the deadline. Petitioner may elect to file the notice of appeal before the deadline, especially here, where an order denying anonymity must be immediately appealed or be waived and where the appeal of an order denying anonymity is independent of the merits. See Doe v Howe, Op No 3896 (S C Ct App dated November 22, 2004) (Shearouse Adv Sh No 46). In Diamond Jewelers of Spartanburg Inc v Naegle Outdoor Advertising Co, 290 S C 260, 349 S E 2d 98 (1985), the appellant moved for remand to consider post-trial motions. In Clements v Young, 310 S C 73, 425 S E 2d 63 (Ct App 1992), the appellant moved for remand to correct the record. When notice of appeal was filed, under Rule 205, SCACR, the appellate court had exclusive jurisdiction. The petitioner elected to move for remand to correct the transcript and record for review on appeal. The notice of appeal herein complies with Rule 203(b)(1), SCACR, and is not premature. The Court of Appeals erred in ruling the notice of appeal premature without considering or even knowing the grounds for appeal.

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

4 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL OF  
DENIAL OF PERMISSION TO PROCEED ANONYMOUSLY WHICH MUST  
BE IMMEDIATELY APPEALED

Application of the recent Doe v. Howe, *supra*, decision clarifies immediate appealability of the order on appeal herein denying petitioner's request to proceed under the Doe caption. In fact, application of that decision means that petitioner MUST appeal immediately. Further, where there is an appealable issue, other issues may be considered on appeal. Pruitt v. Bowers, 330 S C 483, 499 S E 2d 250 (Ct App 1998). See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina Second Edition, 87, 88 (S C Bar 2002).

The lower court order dated August 10, 2004, which is the subject of this appeal denied Appellant's request to proceed anonymously. Based upon the November 22, 2004, decision of Doe v. Howe, Op No 3896 (S C Ct App dated November 22, 2004) (Shearouse Adv Sh No 46), and S C Code Ann Section 14-3-330 (1976), an order denying permission to proceed anonymously in a legal malpractice action is an appealable interlocutory order and the issue is *independent* of the merits and *independent* of the Rule 52 motion filed to correct the record (emphasis added). The petitioner seeks review of an order denying Appellant's request to proceed anonymously.

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

5 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AND  
MOOTING THE MOTION FOR REMAND TO CORRECT THE TRANSCRIPT  
AND RECORD FOR APPEAL

After reviewing the transcript, certain omissions material to the appeal were evident. The Court reporter was immediately notified. Petitioner moved for a remand to correct omissions in the transcript. See Clements v. Young, 310 S.C. 73, 425 S.E.2d 63 (Ct. App. 1992). The Court of Appeals erred in mooting the petitioner's Motion for Remand to correct the transcript for appeal. In contrast to Diamond Jeweleis of Spartanburg, Inc. v. Naegle Outdoor Advertising Co., 290 S.C. 260, 349 S.E.2d 98 (1985), the petitioner in this case did not move to remand for the lower court to consider post-trial motions although the petitioner could have elected to do so. The petitioner herein moved for remand to correct the transcript and record for appeal. Fundamental fairness mandates an accurate transcript for review. Absence of an accurate transcript and record effectively thwarts any meaningful opportunity for review.

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

6 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL BASED  
UPON APPEALABILITY OF ORDERS STRIKING PLEADINGS

The order dated August 10, 2004, is immediately appealable because it falls within one of the several categories of appealable orders listed in S.C. Code Ann. Section 14-3-330 (1976). Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995), Baldwin Construction Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004).

Pursuant to Subsection (2c) of S C Code Ann Section 14-3-330 (1976), the August 10, 2004, order is appealable as an order striking a portion of pleadings. In Hagood v Sommerville, Op No 25918 (S C Sup Ct dated January 4, 2005), the Supreme Court affirmed appealability of such orders because if the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial because the evidence and the issues are submitted to the jury according to the pleadings, and on appeal from the final judgment the Supreme Court could not say there was error of law in confining the evidence and charge to the pleadings. See Harbert v Atlanta & Charlotte A L Ry, 74 SC 13, 53 SE 1001 (1903). Other recent cases also support appellate review of orders striking pleadings. Baldwin Construction Co, Inc v Graham 357 S C 227, 593 S E2d 146 (2004), Wilson v Builders Transport, Inc, 330 S C 287, 498 SE2d 674 (Ct App 1998), Jefferson v Gene's Used Cars, Inc, 295 SC 317, 368 SE2d 456 (1988).

Because the order grants a Motion to Strike, it is immediately appealable as an order affecting a substantial right under S C Code Ann Section 14-3-330(2) (1976). Hagood v Sommerville, Op No 25918 (S C Sup Ct dated January 4, 2005), Brown v Investment Management and Research, Inc, 323 S C 395, 475 S E 2d 754 (1996), Mid-State Distrib, Inc v Century Importers, Inc, 310 S C 330, 426 S E 2d 777, (1993). Also, where another appealable issue is before the Court, consideration of the motion to strike is justified and supported by Pelfrey v Bank of Greer, 270 S C 691, 244 S E 2d 315 (1978).

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari.

7 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL BASED  
UPON APPEALABILITY UNDER SUBSECTION (3) OF S C CODE ANN  
SECTION 14-3-330 (1976)

As per S C Code Ann Section 14-3-330 (1976), this matter is appealable pursuant to Subsection (3) This subdivision was intended to provide for matters of an independent nature arising after judgment and where matters arise upon a summary proceeding in an action after judgment and "a summary application in any action after judgment " Cureton v Hutchinson, 3 S C 606 (1871), Kennedy v Greenville, 78 SC 124, 58 S E 989 (1906) The August 10, 2004, order on appeal is appealable as a matter arising after judgment dated April 23, 2003

The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari

8 THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL BASED  
UPON THE SUBSTANTIAL RIGHT OF FUNDAMENTAL FAIRNESS,  
ADEQUATE NOTICE, AND DUE PROCESS

S C Code Ann Section 14-3-330(2) (1976) is the statutory basis for appealability of orders affecting a substantial right such as fundamental fairness, adequate notice, and due process Appellant seeks a full and fair hearing on the merits in this highly contentious professional malfeasance litigation Respondents failed to file appropriate post-judgment motions in compliance with the SCRCP Respondents seek to proceed in a case that has been stricken and dismissed effectively denying due process, adequate notice, and any meaningful opportunity to be heard Hagood v. Sommerville, Op No 25918 (S C Sup Ct dated January 4, 2005), McLaughlin v Strickland, 279 S C 513,

309 S E 2d 787 (Ct App 1983) Because it affects a substantial right, the order is immediately appealable

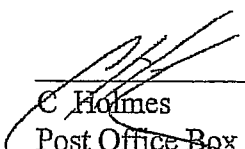
The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari

### CONCLUSION

For the reasons stated, the petitioner respectfully submits that the prior lower court order dated April 23, 2003, should be upheld and that the conflicting August 10, 2004, lower court order should be vacated. In the alternative, the petitioner respectfully seeks a writ of certiorari

Respectfully submitted,

Date 6/20/05

  
C. Holmes

Post Office Box 187

Sullivan's Isd., SC 29482-0187

843 883 3010

Petitioner

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
2005 JUL 29 AM 11 11  
SC SUPREME COURT

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

---

South Carolina Court of Appeals filed January 12, 2005

---

J. Doe,

Petitioner,

v

Manton Grier, James Y. Becker, and

Sinkler & Boyd, P.A.,

Respondents

---

PETITIONER'S MOTION PURSUANT TO RULE 240, SCACR

---

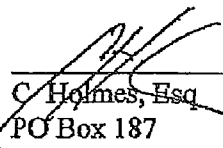
Pursuant to Rule 240, SCACR, the Petitioner hereby moves for sanctions upon the Respondents for noncompliance with the South Carolina Rules of Court and the South Carolina Appellate Court Rules. Rule 226 (f), SCACR, states that the Respondents' Return "shall include an argument on each question." Respondents have failed to address questions numbered 1 (one) through 8 (eight) of the Petition. Further, the Petitioner hereby moves for sanctions against the Respondents pursuant to Rule 240, SCACR, because the Return is frivolous and/or taken solely for the purpose of delay and/or fails to provide a good faith response to the questions raised. Finally, Respondents have failed to

uphold the law of the case which they chose not to appeal and which they have failed to even acknowledge The Respondents' return is frivolous in failing to even address the law of the case

This motion is based upon Rule 240, SCACR, and further based upon equity, substantial justice, due process, and full faith and recognition for the law of the case It is also based upon the specific grounds set forth in the Memorandum in Support of Petitioner's Motion filed herewith

Based upon this motion the Petitioner respectfully requests any and all appropriate sanctions against the offending Respondents including striking the Return and granting the Petition for a Writ of Certiorari as well as further sanctions which may be required and/or just

Respectfully submitted on 7/25/05

  
C. Holmes, Esq  
PO Box 187  
Sullivan's Island, SC 29482-0187  
843 883 3010  
Petitioner

Other Counsel of Record  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800  
Attorney for Respondents

RECEIVED

2005 JUL 29 AM 11 11

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

---

South Carolina Court of Appeals filed January 12, 2005

---

J Doe,

Petitioner,

v

Manton Grier, James Y. Becker, and

Sinkler & Boyd, P A ,

Respondents

---

MEMORANDUM IN SUPPORT OF PETITIONER'S  
MOTION PURSUANT TO RULE 240, SCACR

---

The Petitioner submits this memorandum in support of the Motion Pursuant to  
Rule 240, SCACR, filed herewith

## ARGUMENT

### THIS HONORABLE COURT SHOULD IMPOSE RULE 240, SCACR, SANCTIONS UPON THE RESPONDENTS

Rule 240, SCACR, states that where a return is frivolous, or taken solely for the purpose of delay, or is not in compliance with the Rules, the appellate court may impose sanctions against the offending Respondents. Respondents have failed to comply with Rule 226, SCACR, which states that the 'return shall include an argument on each question.' Respondents' Return failed to address questions 1 (one) through eight (8). Therefore, the Return is not in compliance with the Rules. Accordingly, the Return should be stricken and the Petition for a Writ of Certiorari should be granted.

The Petitioner has respectfully requested that the law of the case be upheld. The Respondents chose not to appeal the law of the case dated April 23, 2003 (see attached). The Respondents' Return is frivolous in failing to even address the law of the case. Harmon and Bore, Inc. v. Jenkins, 282 S. C. 189, 318 S. E. 2d 371 (S. C. App. 1984), In Re Thames, 344 S. C. 564, 544 S. E. 2d 854 (S. C. App. 2001), McCall v. State Farm, 359 S. C. 372, 597 S. E. 2d 181 (S. C. App. 2004). Respondents apparently believe that they do not have to acknowledge or even address the law of the case, arguably because it issued from an able and accomplished jurist who happens to be African American.

The Return is just one in a succession of frivolous pleadings by Respondents demonstrating cavalier disregard and disrespect for the South Carolina Appellate Court Rules and Appellate Courts. Recently, Respondents and Respondent law firm filed a frivolous motion for costs in an appeal dismissed without prejudice. Case law makes clear that where dismissal is without prejudice, costs have not been allowed. Either Respondents and Respondent law firm did not adequately research the case law or in

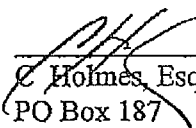
shameless disrespect for the Court, they frivolously, even fraudulently, filed pleadings claiming entitlement to costs Johnson v Paraplane Corp , 321 S C 316, 468 S E 2d 620 (1996), Peterkin v Brigman, 319 S C 367, 461 S E 2d 809 (1995), Duncan v Govt Employees Ins Co , 331 S C 484 449 S E 2d 580 (1994), McLendon v South Carolina Department of Highways and Public Transportation, 313 S C 525, 443 S E 2d 539 (1994), Ballenger v Bowen, 313 S C 476, 443 S E 2d 379 (1994) See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina Second Edition, 295 (S C Bar 2002) Further, under Rule 222, SCACR, recovery of costs is clearly limited to costs incurred in pursuing the appeal Martin v. Paradise Cove Marina, 348 S C 379, 555 S E 2d 348 (Ct App 2001) However, Respondents chose to submit a frivolous, even fraudulent, sworn, itemized South Carolina Appellate Court Rule Form 16 statement of costs for \$1000 00 in attorney's fees for a *sua sponte* motion to dismiss Apparently, Respondents and Respondent law firm contend they are entitled to recover attorney's fees for work done *sua sponte* by the Court of Appeals The Respondents' frivolous motion was summarily denied See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina Second Edition, 297 (S C Bar 2002) Earlier in trial court pleadings, Respondents and Respondent law firm took the position that Rule 11, SCRCP, which applies to all attorneys, did not apply to them The record in this matter reflects an abundance of frivolous pleadings by Respondents and Respondent law firm demonstrating cavalier disregard and disrespect for the South Carolina Appellate Court Rules and Appellate Courts

This motion is based upon Rule 240, SCACR, the South Carolina Rules of Court, and case law and is further based upon equity, substantial justice, due process, and full faith and recognition for the law of the case

CONCLUSION

The Petitioner seeks a full and fair hearing on the merits. For the foregoing reasons, the Petitioner respectfully requests this Honorable Court impose Rule 240, SCACR, sanctions upon the offending Respondents, including striking the Return, granting the Petition for a Writ of Certiorari, and such further sanctions and relief as may be just and proper.

Respectfully submitted on 7/25/05

  
C. Holmes, Esq.  
PO Box 187  
Sullivan's Island, SC 29482-0187  
843 883 3010  
Petitioner

Other Counsel of Record  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800  
Attorney for Respondents

2007-CP-10-1444

all 04-3492 R

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable James R Barber, III, Circuit Court Judge

Case No 2002-CP-40-3705

04-3492-R

J Doe

Appellant,

v

Manton Grier, James Y Becker, and

Sinkler & Boyd, P A

Respondents

NOTICE OF APPEAL

J Doe appeals the order of the Honorable James R Barber, III, dated August 10 2004 The pending post-judgment motion to alter or amend was served on August 21, 2004, and filed on August 25, 2004

Dated 9/24/04

C. Holmes, M D, Esq  
PO Box 187  
Sull Isd, SC 29482-0187  
843 883 3010  
Appellant

Counsel of Record for Respondents  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413

FILED  
2007 APR -6 PM 4 36  
JULIE J ARMSTRONG  
CLERK OF COURT  
BY  
FILED  
2007 SEP 28 AM 8 25  
BARBARA A SCOTT  
C C C & G S

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO 07 CP-10-1444

1

3

2

1

2

84

JULIE J. ALLEN FRUNG  
CLERK OF COURT

2008 APR -7 PM 4 06

BOB JOES

Respectfully submitted,

Dated 3/27/08

C. Collie, Esq  
 P O Box 187  
 Sullivans Island, SC  
 29482-0187  
 For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CYNTHIA HOLMES,

Plaintiff,

vs

HAYNSWORTH, SINKLER & BOYD, P A ,  
successor to SINKLER & BOYD, P A ,  
MANTON GRIER, and JAMES Y BECKER,

Defendant

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
DOCKET NO 07-CP-10-1444

SUPPLEMENTAL MOTION TO  
ALTER OR AMEND JUDGMENT  
DENYING MOTION FOR SUMMARY  
JUDGMENT REGARDING ALL  
CLAIMS AGAINST MANTON GRIER  
AND JAMES BECKER

2008 APR -9 PM 2 23  
JULIE J. STRONG  
CLERK OF COURT

FILED

08-5138  
The Defendants Manton Grier and James Becker, through undersigned counsel of record, move pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to alter or amend Court's Order denying these Defendants' Motion for Summary Judgment. The Court heard oral arguments regarding these Defendants' Motion for Summary Judgment on February 5, 2008 and a Form 4 Order was filed with the Clerk of Court on February 11, 2008. These Defendants filed a motion pursuant to Rule 59(e) regarding the Court's oral order on February 14, 2008. Defendants' initial Rule 59(e) motion regarding the Court's order from the bench has not been heard or ruled upon. The Defendants received written notice of the entry of the Court's order denying them summary judgment on April 1, 2008. This Motion is being served within ten (10) days' of such order.

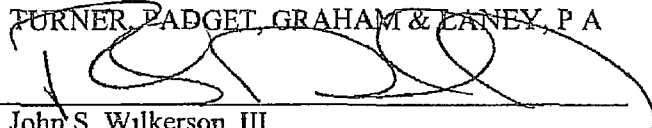
Defendants Manton Grier and James Becker respectfully submit that, as set forth more fully in their Motion addressed to the Court's ruling from the bench, and incorporating and reaffirming those arguments as if restated fully herein, the Court erred in denying these Defendants' Motion for Summary Judgment. Because no genuine issue of material fact remains

CHAS 511250V1

regarding Plaintiff's failing to commence her action against Manton Grier and James Becker before the statute of limitations ran on her claims, and because they are entitled to judgment as a matter of law, the Court should reconsider its Order and should grant Defendants Grier and Becker judgment and dismiss Plaintiff's claims against them with prejudice

Respectfully submitted,

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



---

John S. Wilkerson III  
Richard S. Dukes, Jr  
40 Calhoun Street, Suite 410  
Post Office Box 22129  
Charleston, SC 29213-2129  
Phone 843 576-2810  
Fax 843-577-1646  
Email jwilkerson@turnerpadget.com  
rdukes@turnerpadget.com  
Attorneys for Defendants

April 7, 2008

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2007-CP-10-1444

J Doe(CHolmes),

Appellant,

v

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

Respondents

NOTICE OF APPEAL

The Appellant appeals the orders of the Honorable R Markley Dennis, Jr , entered March 5, 2008, and March 26, 2008 Post-judgment motions were denied by order mailed on May 28, 2008

Dated June 27, 2008

  
C. Collie, Esq  
PO Box 187  
Sull Isd , SC 29482-0187  
843 883 3010  
For Appellant

Counsel of Record for Respondents  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800

FILED  
2008 JUL -1 PM 4:15  
JULIE J ARMSTRONG  
CLERK OF COURT  
BY 

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R Markley Dennis, Jr , Circuit Court Judge

Case No 2007-CP-10-1444

J Doe(CHolmes),

Appellant,

v

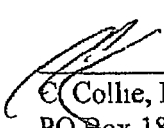
Manton Grier, James Y Becker, and  
Haynsworth Sinkler Boyd, P A ,  
as successor to Sinkler & Boyd, P A ,

Respondents

SUPPLEMENTAL NOTICE OF APPEAL

The Appellant appeals the ruling of the Honorable R Markley Dennis, Jr , at the hearing on February 5, 2008, and entered March 5, 2008, March 26, 2008, and July 22, 2008 Post-judgment motions were denied

Dated August 9, 2008

  
C Collie, Esq  
PO Box 187  
Sull Isd , SC 29482-0187  
843)883 3010  
For Appellant

Counsel of Record for Respondents  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800

FILED  
2008 AUG 12 PM 2 24  
JULIE J ARMSTRONG  
CLERK OF COURT  
RY DS

1444

IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT  
) CASE NO 07-CP-10-1444

)

i

)

;

)

)

)

)

)

)

)

)

)

)

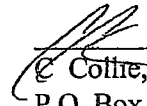
)

The Plaintiff respectfully makes a motion for reconsideration of the Order of the Honorable R Markley Dennis, Jr , filed January 12, 2009, addressing multiple motions. This motion is based upon the Order of the Honorable Roger Young granting continuance pending return of remittitur. Remittitur has not been returned. Further sustaining grounds are lack of jurisdiction, pendant appeal, violation of Rule 225, SCACR, substantial justice affecting substantial rights, and such other and further grounds as may be presented at the hearing on reconsideration pursuant to Rule 59, SCRCp. This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing.

For the foregoing reasons, it is respectfully requested that this Court grant this Motion and alter and/or amend its order

Respectfully submitted,

Dated January 24, 2009

  
C. Collier, Esq.  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

JULIE J ARMSTRONG  
CLERK OF COURT C P & G S  
100 BROAD STREET SUITE 106  
CHARLESTON S C 29401 2258

RETURN SERVICE REQUESTED



www3 charlestoncounty.org

9



DUKES, RICHARD S JR  
PO BOX 22129  
CHARLESTON SC 29413 2129

#### NOTICE

THE BELOW CAPTIONED CASE HAS BEEN TRANSFERRED TO THE JURY TRIAL ROSTER IT IS YOUR RESPONSIBILITY TO TRACK THE PROGRESSION OF YOUR CASE ON THE JURY TRIAL ROSTER YOU MAY VIEW AND DOWNLOAD THE CURRENT JURY TRIAL ROSTER AT THE FOLLOWING WEBSITE WWW3 CHARLESTONCOUNTY.ORG THIS REPORT WILL CHANGE DAILY AS CASES ARE TRIED OR ENDED

ATTORNEYS AND PRO SE LITIGANTS ARE HEREBY ON NOTICE THAT UPON FAILURE TO ATTEND ROSTER MEETINGS WITHOUT PRIOR COURT APPROVAL, THE PRESIDING OR CHIEF JUDGE WILL EITHER DISMISS THE COMPLAINT FOR FAILURE TO PROSECUTE OR STRIKE THE ANSWER AND PLACE THE DEFENDANT IN DEFAULT

PLEASE CONTACT DON MICHEL AT (843) 958-5013 IF YOU HAVE ANY QUESTIONS REGARDING THIS NOTICE  
THIS IS THE ONLY NOTICE YOU WILL RECEIVE FROM THE COURT REGARDING THE SCHEDULING OF THIS CASE FOR TRIAL

CASE HOLMES, C VS- HAYNESWORTH SINKLER & BOYD P A

DUKES, RICHARD S JR  
P O BOX 22129  
CHARLESTON SC 29413

CASE NUMBER 2007 CP10-001444  
DATE OF TRANSFER 04/08/2008  
THE HON JULIE J ARMSTRONG, CLERK OF COUR  
100 BROAD ST , CHARLESTON, SC 29401

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff

vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07 CP-10-1444

) NOTICE OF MOTION AND  
) MOTION FOR PRIORITY MATTER  
) REGARDING RULE 59(e), SCRC  
) PURSUANT TO RULE 40, SCRC

CLERK OF COURT  
JUDGE J ARMSTRONG

2009 MAY 20 PM 4 40

FILED

09-8458

The plaintiff respectfully requests a motion hearing on the pending Rule 59(e), SCRC, Motion filed September 3, 2008, regarding scheduling order. The plaintiff is prejudiced because defendants have caused unjustifiable delay by failing to make the client file available for copying though defendants agreed in response to discovery requests to provide the file years ago. Defendants also stated that they would provide the scanned discs of the client file and to date the defendants have failed to provide them. Defendants caused further unjustifiable delay when defendants, officers of the court, ignored this Honorable Court's properly served subpoena without just cause, without notice, and willfully failed to appear for defendants' own depositions.

Pursuant to Rule 40, SCRC, "A party may move to strike a case from the jury trial roster if upon timely motion that party establishes that there was a pending motion for (*scheduling*) order." Rule 40(g), SCRC (emphasis added). The plaintiff respectfully submits that there is "a pending motion for (*scheduling*) order." Rule 40(g), SCRC (emphasis added). See Docket for the instant case and Rule 59(e), SCRC, motion filed September 3, 2008, regarding scheduling order dated August 20, 2008.

The plaintiff respectfully submits that the Rule 40, SCRCP, motion herein was timely made as soon as possible after learning of the erroneous placement on the JTR. The plaintiff respectfully requests that the case herein be stricken from the JTR due to "pending motion for (*scheduling*) order" as well as other pending motions and discovery matters pursuant to Rule 40(g). Rule 40(g), SCRCP (emphasis added). S C Const art I, sec 3, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV.

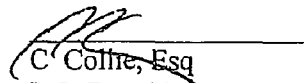
The plaintiff is prejudiced by deprivation of the right to a full and fair hearing on the merits, equal protection, due process, and trial by jury as mandated by the state and federal constitutions. Further, there are pending discovery motions, outstanding discovery, and incomplete discovery. Creed v Stokes, 285 S C 542, 331 S E 2d 351 (1985), S C Const art I, sec 3, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV.

For substantial justice affecting substantial rights and for such other and further grounds as may be presented at the hearing, the plaintiff requests a hearing on the September 3, 2008, Motion and relief pursuant to Rule 40, SCRPC. This Motion is based upon the attached affidavit, the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing. The plaintiff respectfully requests

- 1) a hearing on the pending September 3, 2008, Motion and relief pursuant to Rule 40, SCRPC,
- 2) that the case herein be stricken from the jury trial roster due to "pending motion for (*scheduling*) order" as well as other pending motions and discovery matters. Rule 40(g), SCRPC (emphasis added),
- 3) in the alternative, the plaintiff requests a continuance in order to obtain trial counsel

Respectfully submitted,

Dated 5/19/07

  
C. Collier, Esq.  
P O Box 187  
Sullivan's Island, SC  
29482-0187  
For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff,

-vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

NOTICE OF MOTION

AND

MOTION FOR RECONSIDERATION

OF PRIORITY MATTER

PURSUANT TO RULE 40, SCRCP

BY

JULIE J. ARNOLD  
CLERK OF COURT

2009 JUN - 1 AM 10 30

FILED

10

The Plaintiff respectfully makes a motion for reconsideration of the Honorable Deadra Jefferson's verbal order of May 18, 2009, failing to strike this case from the jury trial roster (JTR) due to pending motion for scheduling order pursuant to Rule 40, SCRCP, and/or failing to comply with Rule 40(b), SCRCP. Specifically, Rule 40(b), SCRCP, states, "Cases shall be called for trial in the order in which they are placed on the JTR." Rule 40(b), SCRCP. This case was on the JTR in error while on appeal and should have been stricken from the JTR while on appeal. See attached South Carolina Court Administration Form Order **Order to Strike - Case on appeal to the Supreme Court**. Pursuant to the South Carolina Court Administration and Rule 40(b), SCRCP, ORDER OF CALL, this matter should be placed at the bottom of the JTR after appeal and "called for trial in the order in which they are placed on the jury trial roster."

Rule 40(b), SCRCP Therefore, the case was on the JTR in error while on appeal This matter should not be at the top of the JTR for trial and should be placed at the bottom of the JTR and move up for trial from that point The purpose of Rule 40, SCRCP, is to provide adequate time for trial preparation and to prevent surprise The plaintiff is prejudiced due to inadequate time to complete discovery in preparation for trial Defendants have failed to cooperate with discovery, obstructed discovery, and caused unjustifiable delay, including failing to appear for their own depositions and fraudulently obtaining change of venue Defendants seek to gain unfair advantage by rushing to trial and thwarting discovery The plaintiff is prejudiced by deprivation of the right to a full and fair hearing on the merits, equal protection, due process, and trial by jury as mandated by the state and federal constitutions Further, there are pending discovery motions, outstanding discovery, and incomplete discovery Creed v Stokes, 285 S C 542, 331 S E 2d 351 (1985), S C Const art I, sec 3, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV

The grounds for said motion are substantial justice affecting substantial rights, traditional notions of fundamental fairness, adequate notice, and meaningful opportunity to be heard and such other and further grounds as may be presented at the hearing on reconsideration pursuant to Rule 59, SCRCP This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing This motion is made in good faith and not interposed for delay

For the foregoing reasons, it is respectfully requested that this Honorable Court grant this Motion to alter and/or amend its order as follows

- 1) to strike this case from the jury trial roster (JTR) due to pending motion for scheduling order pursuant to Rule 40, SCRCP, and/or
- 2) to provide compliance with Rule 40(b), SCRCP, by placing this matter at the bottom of the jury trial roster after appeal

Respectfully submitted,

Dated 5/28/09

  
C Colhe, Esq  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I Doe(CHolmes),

Plaintiff,

-vs-

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

Defendants

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

EXPEDITED

MOTION

FOR

CONTINUANCE AND

PRIORITY MATTER

PURSUANT TO RULE 40, SCRPC

n /

2009 JUN -5 AM 10:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

FILED

The plaintiff respectfully makes this motion for continuance of the trial in this matter based upon **DEFENDANTS' CONDUCT** in failing to comply with reasonable discovery requests and Defendants' unreasonable conduct in failing to comply with this Honorable Court's orders compelling production. One of the orders commanded the defendants to produce the aforesaid documents more than a year ago.

Specifically, defendants have ignored this Honorable Court's orders to provide defendant firm's tax returns. The plaintiff is prejudiced by inadequate time to prepare for trial and inadequate time for the economic expert to prepare his opinion for trial.

Moreover, defendants have unreasonably objected to this Honorable Court's reasonable subpoena and to this Honorable Court's order for defendants to produce the defendant firm's Policy Manual. The plaintiff is prejudiced by inadequate time to prepare for trial and for deposition of defendants' legal expert Professor Freeman. Further, the plaintiff is prejudiced by inadequate time for the plaintiff's legal expert to evaluate the Policy Manual in this complex case with multiple causes of action and to form an opinion and prepare for trial.

Pursuant to Baughman v. AT&T and its progeny, each party is entitled to full and fair discovery. Baughman v. AT&T, 410 S.E.2d 537 (1991). Defendants' unreasonable conduct has

obstructed full and fair discovery all to the plaintiff's substantial and foreseeable, if not intended, detriment and prejudice

Further, physician witnesses for the plaintiff require advance notice in order to make arrangements at the office to be available for trial

Moreover, plaintiff's economic expert is requesting two additional years of tax returns in order to prepare and form an opinion on ability to pay as well as additional time to form that opinion for trial

In addition, plaintiff's trial counsel is out-of-state and also needs additional time to make arrangements to leave the office

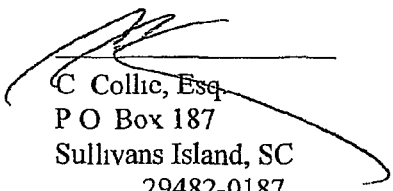
Also, plaintiff's legal expert requires additional time to evaluate the Policy Manual and to prepare and form an opinion for trial

For substantial justice affecting substantial rights, the defendants should be ordered to produce the defendant firm's tax returns and defendant firm's Policy Manual. The motion for continuance should be granted pending adequate time for the economic expert to evaluate the documents and to form his opinion for trial and pending adequate time for the legal expert to evaluate the Policy Manual in order to form his opinion for trial and for adequate time to depose Defendants' legal expert regarding the Policy Manual before trial.

For the foregoing reasons, it is respectfully requested that this Court grant this Motion

Respectfully submitted,

Dated June 4, 2009



C. Collic, Esq.  
P O Box 187  
Sullivan's Island, SC  
29482-0187  
For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff,

vs

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

FILED  
2009 JUN -8 AM 9 31  
JULIE J. PEYTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

NOTICE OF MOTION  
AND  
MOTION FOR RECONSIDERATION  
OF PRIORITY MATTER  
PURSUANT TO RULE 40, SCRCP

The Plaintiff respectfully makes a motion for reconsideration of the Honorable Debra Jefferson's verbal order of May 18, 2009, failing to strike this case from the jury trial roster (JTR) due to pending motion for scheduling order pursuant to Rule 40, SCRCP, and/or failing to comply with Rule 40(b), SCRCP. Specifically, Rule 40(b), SCRCP, states, 'Cases shall be called for trial in the order in which they are placed on the JTR.' Rule 40(b), SCRCP. This case was on the JTR in error while on appeal and should have been stricken from the JTR while on appeal. See attached South Carolina Court Administration Form Order **Order to Strike - Case on appeal to the Supreme Court**. Pursuant to the South Carolina Court Administration and Rule 40(b), SCRCP, ORDER OF CALL, this matter should be placed at the bottom of the JTR after appeal and 'called for trial in the order in which they are placed on the jury trial roster.'

Rule 40(b), SCRCP Therefore, the case was on the JTR in error while on appeal This matter should not be at the top of the JTR for trial and should be placed at the bottom of the JTR and move up for trial from that point The purpose of Rule 40, SCRCP, is to provide adequate time for trial preparation and to prevent surprise The plaintiff is prejudiced due to inadequate time to complete discovery in preparation for trial Defendants have failed to cooperate with discovery, obstructed discovery, and caused unjustifiable delay, including failing to appear for their own depositions and fraudulently obtaining change of venue Defendants seek to gain unfair advantage by rushing to trial and thwarting discovery The plaintiff is prejudiced by deprivation of the right to a full and fair hearing on the merits, equal protection, due process, and trial by jury as mandated by the state and federal constitutions Further, there are pending discovery motions, outstanding discovery, and incomplete discovery Creed v Stokes, 285 S C 542, 331 S E 2d 351 (1985), S C Const art I sec 3, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV

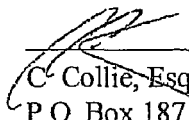
--- The grounds for said motion are substantial justice affecting substantial rights, traditional notions of fundamental fairness, adequate notice, and meaningful opportunity to be heard and such other and further grounds as may be presented at the hearing on reconsideration pursuant to Rule 59, SCRCP This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing This motion is made in good faith and not interposed for delay

For the foregoing reasons it is respectfully requested that this Honorable Court grant this Motion to alter and/or amend its order as follows

- 1) to strike this case from the jury trial roster (JTR) due to pending motion for scheduling order pursuant to Rule 40, SCRCP, and/or
- 2) to provide compliance with Rule 40(b), SCRCP, by placing this matter at the bottom of the jury trial roster after appeal

Respectfully submitted,

Dated 5/28/09

  
C. Collie, Esq  
P O Box 187  
Sullivan's Island, SC  
29482-0187  
For Plaintiff



Because this cause of action arose before 2005 the applicable statutes are S C Code Ann Sections 15-36-10 through 15-36-50 (1988) Act No 432, Section 6 Ex Parte Gregory 663 S E 2d 46 fn 1 (S C 2008), Clegg v Lambrecht 2009-SC-0206 304 fn 1 (Ct App 2009) Moreover criteria for Rule 11 sanctions are essentially the same as those for the FCPSA In re Beard, 359 S C 351 597 S E 2d 835 (S C App 2004)

Pursuant to S C Code Ann Section 15-36-10 through 15-36-50 (1988), defendants have the burden of proving that the proceedings are final and have terminated in favor of the moving party Because a final judgment has not been entered there is no jurisdiction and the defendants motion should be dismissed

Moreover, defendants have filed their motion pursuant to Rule 59, SCRCP " Rule 59 New Trials Amendment of Judgments, SCRCP Defendants have filed inconsistent motions By filing their motion pursuant to Rule 59, SCRCP, the proceedings are not final and "the time for appeal for all parties shall be stayed " Rule 59(f), SCRCP Where the moving party before determination of the motion, proceeds in a manner inconsistent with the object of the motion, the motion is waived, as by making an inconsistent motion Bridgers v S C Hwy Dept , 197 S C 125, 14 S E 2d 632, 633 (1941) citing 42 C J "Motions and Orders Section 173 page 516 Defendants motion should be dismissed as internally inconsistent

Pursuant to S C Code Ann Section 15-36-40 (1988), defendants have the burden of proof Defendants' motion is unsupported by affidavit as required by S C Code Ann Section 15-36-30 (1988), therefore defendants' motion is unsupported deficient, and legally insufficient Pursuant to Rule 9(i) SCRCP verification of account is required and Rule 11(c), SCRCP specifies that the verification or affidavit shall be sworn to or affirmed before an officer authorized to administer oaths BB&T v Fleming, 360 S C 341, 601 S E 2d 540 (2004) Further when a motion is to be supported by affidavit or sworn itemized statement as required by S C Code Ann Sections 15-36-10 through 15-36-50 (1988), it "SHALL be served with the motion " Rule 6(d) SCRCP Defendants

failed to comply with Rule 6(d), SCRPC, and failed to serve affidavit or sworn itemized statement with the motion. The plaintiff respectfully submits that the defendants' motion should be dismissed because it is unsupported, technically deficient, and legally insufficient.

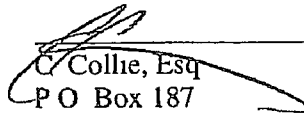
When a motion is to be supported by affidavit or sworn, itemized statement as required by S C Code Ann Sections 15-36-10 through 15-36-50 (1988) it "SHALL be served with the motion. Rule 6(d), SCRPC, S C Code Ann Sections 15-36-10 through 15-36-50 (1988) Act No. 432, Section 6. Fundamental rights of equal protection and due process require compliance with Rule 6(d) SCRPC, and S C Code Ann Sections 15-36-10 through 15-36-50 (1988). S C Dept of Soc Ser v Beeks, 325 S C 243, 246, 481 S E 2d 703, 705 (1997), Stono River Env Prot Assn v SCDHEC, 305 S C 90, 94, 406 S E 2d 340, 342 (1991), Kurschner v City of Camden Planning Commission, 376 S C 165, 171, 656 S E 2d 346, 350 (2008), S C Const art I sec 22, S C Const art I sec 3, S C Const art V sec 4, S C Const art V, sec 5, U S Const amend V and XIV. Defendants' motion fails on due process grounds and should be dismissed.

Moreover, where a party survives summary judgment motion, it is not subject to sanctions under the FCPSA. Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997), rehearing denied. Survival of motion for summary judgment precludes sanctions under FCPSA. Whitfield Const Co v Bank of Tokyo Trust Co, 383 S C 207, 525 S E 2d 888, (S C App 1999) rehearing denied, certiorari denied. The circuit court denied both parties' motions for summary judgment. Therefore, the defendants' motion should be dismissed.

For the foregoing reasons it is respectfully requested that this Court hold all time limits in abeyance including time to file written response to defendants' motion filed June 22 2009, and it is respectfully requested that this Court grant this Motion and dismiss defendants' motion filed June 22, 2009

Respectfully submitted

Dated 7/1/09

  
C Collie, Esq  
P O Box 187  
Sullivans Island SC  
29482-0187  
For Plaintiff

State of South Carolina



THOMAS L. HUGHSTON JR  
CIRCUIT JUDGE RETIRED

100 BROAD STREET SUITE 368  
CHARLESTON SC 29401 2285  
TELEPHONE (843) 958 5100  
FAX (843) 958 5108  
E MAIL: thughston@sccourts.org

July 15, 2009

Ms C Collie  
Attorney at Law  
Box 187  
Sullivan's Island, SC 29482-0187

Mr Richard S Dukes, Jr  
Attorney at Law  
P O Box 22129  
Charleston, SC 29413

Re Holmes vs Haynsworth, etc  
Case No 07 CP-10-1444

Dear Attorneys

I am scheduling any post-trial matters for Monday, August 3, 2009 at 10 00 a m in whatever courtroom I am working Unless I hear otherwise, I look forward to seeing and hearing you then

Very truly yours,

A handwritten signature in black ink, appearing to read "T L. Hughston, Jr", written over a horizontal line.

Thomas L Hughston, Jr

# State of South Carolina



THOMAS L. HUGHSTON JR.  
CIRCUIT JUDGE RETIRED

100 BROAD STREET, SUITE 368  
CHARLESTON, SC 29401-2285  
TELEPHONE (843) 958-5100  
FAX (843) 958-5108  
E-MAIL: [thughston@sccourts.org](mailto:thughston@sccourts.org)

August 11, 2009

Ms. C. Collie  
Attorney at Law  
Box 187  
Sullivan's Island, SC 29482-0187

Mr. Richard S. Dukes, Jr.  
Attorney at Law  
P.O. Box 22129  
Charleston, SC 29413

Re: Holmes vs. Haynsworth, etc.  
Case No. 07-CP-10-1444

Dear Attorneys:

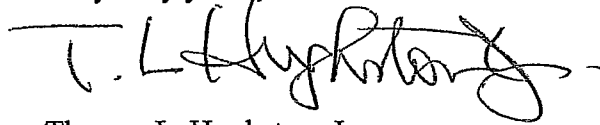
I am again scheduling a hearing on all post-trial matters for Tuesday, September 8, 2009 at 9:30 a.m. in whatever courtroom I am working that week. I still do not fully understand the mix-up on 8/3/09. For one thing, I schedule my post-trial matters not the Clerk of Court. So, do not look at Clerk's records on-line to see what I am doing. In reviewing Clerk's records now it appears--actually, I will not even try to explain it--it will just add to the confusion. The following is what I have received since the trial:

- 1 Received Plaintiff's letter of 6/19/09 to Clerk of Court with Motion for New Trial
- 2 Received e-mail from Attorney Dukes on 6/22/09 with proposed Order Granting Directed Verdict. Copied Plaintiff by USPS
- 3 Received Attorney Dukes letter of 6/22/09 to Clerk of Court with Motion for Sanctions
- 4 Received Plaintiff's letter of 6/29/09 objecting to proposed Order
- 5 Received Plaintiff's letter of 7/1/09 with your proposed Order re sanctions
- 6 Filed my formal Order Granting Directed Verdict on 7/14/09

- 7 Sent my letter of 7/15 to Attorney C Collie and Attorney L es scheduling all post trial matters for 8/3/09
- 8 Received Plaintiff's letter of 7/19/09 with Motion for Reconsideration
- 9 Received Plaintiff's Memo on 8/3/09 for New Trial
- 10 Received Defendants' Memo on 8/3/09 in support of Motion
- 11 On 8/6/09 by fax, received Plaintiff's letter of 8/4/09--3 pages with attachments
- 12 Received Plaintiff's letter of 8/6/09 on 8/10/09--9 pages with attachments
- 13 Received from Clerk's Office per my request a copy of Plaintiff's Motion for Reconsideration on 8/10/09--filed 8/3/09
- 14 On 8/11/09, received copy of Attorney C Collie's letter of 7/27/09 to Clerk with copy of Motion for Reconsideration
- 15 On 8/11/09, received letter of 8/4/09 from Attorney C Collie with attachments
- 16 On 8/11/09, received another letter of 8/4/09 from Attorney C Collie with proposed Order and attachments

In summary, I now have Plaintiff's Motion for New Trial and Reconsideration, and Defendant's Motion for Sanctions. If there is anything else pending, please let me know. Unless I hear from you otherwise, I look forward to seeing and hearing from you September 8, 2009.

Very truly yours,



Thomas L. Hughston, Jr



Court complaint, and instructing the Plaintiff to file the Complaint *pro se* is conduct not requiring expert testimony to show a deviation of the standard of care for an attorney in South Carolina and to establish a claim for professional negligence

3 In failing to rule that the Plaintiff's causes of action for 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 did not require expert testimony to show a deviation of the standard of care for an attorney in South Carolina

4 Error as a matter of law in improperly excluding the Plaintiff's testimony as a licensed attorney. The grounds for exclusion were lack of trial experience when there was no underlying trial and the allegations of negligence did not involve trial matters. Therefore, there was no rational, relevant basis for exclusion. Moreover, any such objection would go to weight of the testimony, not admissibility. The plaintiff was prejudiced by exclusion of the plaintiff's expert testimony and by failure to allow an opportunity to submit additional expert testimony in support

5 Error as a matter of law in failing to apply the applicable standard for a directed verdict set forth in Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801(2009), and by failing to take all evidence in the light most favorable to the Plaintiff instead making essentially all findings of fact in favor of untrustworthy defendants

6 In failing to deny the Defendants' motion for a directed verdict when the Defendants' expert testified that **but for** Defendants' failure to timely respond to discovery and scheduling orders, the preliminary injunction (PI) would not have been dissolved on January 25, 2000, and the PI would have remained in effect until at least April, 2000, allowing plaintiff to complete the

already scheduled procedures for February and March, 2000, and proving damages in the form of lost income and damage to the plaintiff's practice at a critical growth phase in the development of plaintiff's practice

7 In failing to continue the case for trial under the totality of the circumstances including the unavailability of Plaintiff's out-of-state retained counsel, unavailability of physician witnesses who require advance notice in order to make arrangements to be available, failure to remove the case from the trial roster during the pendency of an appeal, failure to remove the case from the trial roster during the pendency of a motion for a scheduling order, failure to comply with Rule 40(b), SCRCP, providing that the case should have been placed at the bottom of the jury trial roster following the appeal and that "(t)rial shall be had no earlier than 30 days " after placement on the jury trial roster (JTR), the placement of the case as number one (1) on the JTR on May 18, 2009, immediately following the Appellate Court's final disposition of an appeal on May 13, 2009, and in failing to rule that there had been a pattern and practice by the Defendants of not complying with discovery and Court Orders affecting discovery The plaintiff was prejudiced thereby and deprived of the right to full and fair discovery pursuant to Baughman v. AT&T, 410 S E 2d 537 (1991) and the right to a meaningful opportunity to be heard

8 In failing to rule that there had been a pattern and practice by the Defendants of not complying with discovery and Court Orders affecting discovery and depriving the Plaintiff of full and fair discovery pursuant to Baughman v. AT&T, 410 S E 2d 537 (1991) including Defendants' naming of 150-200 legal experts, failure to produce the Defendant Firm's tax returns for more than a year after ordered to do so, failure of the Defendants to honor subpoenas and attend Defendants' own scheduled depositions, failure to reconvene the deposition of defendants' named witness, an officer of the court, who refused to answer questions in violation of Rule 30,

SCRCF, and failure of Defendants to comply with an order to produce its Policy Manual until the Friday before trial prejudicing the plaintiff by requiring the cancellation of the deposition of the defendants' expert and depriving the plaintiff of full and fair discovery Baughman v AT&T, 410 S E 2d 537 (1991)

9 In improperly granting the Hospital representative's request for protection from disclosure based upon S C Code Ann 40-71-20 (1979) when the same information sought to be excluded was admitted without objection in the underlying case and when the Hospital's own expert testified the information was not peer review and, therefore, was not subject to confidentiality Moreover, S C Ann 40-71-10 (1978) (1989) was proven to be inapplicable in the underlying case because defendants therein were NOT operating "pursuant to written bylaws that have been approved by the governing board" S C Ann 40-71-10 (1978) (1989)

10 In failing to allow the Plaintiff to use the discovery from the underlying case to develop the case and to fairly meet the case-within-a-case requirement because the evidence is now unavailable due to the passage of time, witness relocation out-of-state, and death of the witness Allen Powers The plaintiff was prejudiced by failure to allow use of otherwise unavailable evidence resulting in directed verdict

11 In improperly excluding the testimony of the Plaintiff's economic expert on the grounds that the Defendants did not have an opportunity to depose him before trial due to Defendants' failure to produce the Defendant firm's income tax returns more than one year after being ordered to do so Defendants failed to timely provide the documents even after a second Motion to Compel was required

12 In failing to exclude the Defendants' expert witness for the same reasons Professor Freeman's expert testimony was excluded in the case of Dawkins v Fields, 354 S C 58, 580

S E 2d 433 (2003) Specifically, Professor Freeman's testimony is inadmissible as expert testimony on issues of law The overwhelming majority of Professor Freeman's testimony is simply legal argument and inadmissible as conclusions of law Moreover, his testimony is inadmissible as based upon improper hearsay not relied upon within the field, based upon anti-trust outside his expertise, based upon his ' consultations ' with untrustworthy defendants, and based upon his indication that his testimony was based in whole or in part on subjective opinion formed before his evaluation

13 In failing to acknowledge the law of the case set forth in the Federal Court Order entered June 2, 2000, ruling that the Defendants' failure to timely respond to discovery and scheduling orders caused the untimely dissolution of the preliminary injunction (PI) resulting in foreseeable, direct, and proximate damages to the Plaintiff

14 In failing to acknowledge the Defendants' failure to appeal or even advise the Plaintiff of the right to appeal the loss of the preliminary injunction (PI) causing the Plaintiff to lose the right to seek relief in the Federal Court and causing the foreseeable, irreparable harm to the Plaintiff and the Plaintiff's practice which Defendants themselves warned of in their Motion for Preliminary Injunction (PI)

15 In denying the Plaintiff the right to trial by jury, the right to retained counsel, and fundamental fairness as guaranteed by the State and Federal Constitutions S C Const art I, sec 3, S C Const art I, sec 22, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV

This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing For the foregoing reasons for substantial justice affecting substantial rights, and for such other and further grounds as may be presented at the hearing, it is respectfully requested that this Honorable Court grant this Motion for New Trial

Respectfully submitted,

Dated 6/17/07

  
C. Collier Esq  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff,

-vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

MOTION FOR RECONSIDERATION

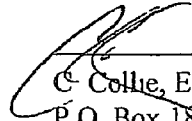
FILED  
2009 JUN 21 AM 11 25  
JULIE J ARMSTRONG  
CLERK OF COURT

The Plaintiff respectfully makes a motion for reconsideration of the order entered on July 7, 2009, denying plaintiff's motion filed June 5, 2009. The grounds for said motion are substantial justice affecting substantial rights, and such other and further grounds as may be presented at the hearing on reconsideration pursuant to Rule 59, SCRCP. This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing.

For the foregoing reasons, it is respectfully requested that this Court grant this Motion and alter and/or amend its order entered July 7, 2009, and grant plaintiff's motion filed June 5, 2009

Respectfully submitted,

Dated 7/19/09

  
\_\_\_\_\_  
C. Collier, Esq  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CYNTHIA HOLMES,

Plaintiff,

vs

HAYNSWORTH, SINKLER & BOYD, P A ,  
successor to SINKLER & BOYD, P A ,  
MANTON GRIER, and JAMES Y BECKER,

Defendants

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
DOCKET NO 07-CP-10-1744

2009 SEP 3 PM 10 53  
JULIE A. ARISTON  
CLERK OF COURT

FILED

DEFENDANTS' MEMORANDUM IN  
SUPPORT OF THEIR MOTION FOR  
SANCTIONS PURSUANT TO S C  
CODE ANN §15-36-10 and RULE 11,  
SCRCP

Defendants submit this Memorandum of Law in support of their Motion for Sanctions Pursuant to the South Carolina Frivolous Civil Proceedings Act and, in the alternative, pursuant to Rule 11, SCRCP, or the Court's inherent authority to award attorneys' fees where the losing party has "acted in bad faith vexatiously, or for oppressive reasons" *See e g Alyeska Pipeline Serv Co v Wilderness Soc y*, 421 U S 240 (1975) Plaintiff's allegations and causes of action have terminated in favor of Defendants by way of an Order granting Defendants judgment as a matter of law in open court on June 12, 2008, and pursuant to the Court's written Order dated July 14, 2009 As further grounds for this motion, it is clear from the total lack of evidence in support of her claims that Plaintiff's initiation and continuation of this lawsuit was done in bad faith and with no reasonable cause, and that any reasonable attorney would have believed that the proceedings to date have been completely frivolous

As became evident throughout trial, Plaintiff filed a non-meritorious and baseless lawsuit Plaintiff quite obviously conducted no investigation prior to filing her action of the facts she would be required to provide to substantiate her wide-ranging claim Plaintiff likewise completely failed to develop any evidence that could satisfy her burden of proof at trial Any

reasonable attorney would conclude that Plaintiff's entire case was completely frivolous and was brought, and continued for seven years, without any reasonable basis and in bad faith

Furthermore, Plaintiff engaged in dilatory litigation tactics and appealed numerous interlocutory matters, including orders regarding venue and several orders on discovery matters. These appeals were likewise frivolous and dilatory. Plaintiff also has submitted numerous affidavits and memoranda accusing Defendants and defense counsel of engaging in all manner of inappropriate and abusive conduct, each of which has been dismissed and discounted by the Court, and all of which were submitted without reasonable basis.

Defendants filed and served the instant motion within ten (10) days of the Court's order in open court granting Defendants' Motion for Directed Verdict. In that Motion, Defendants notified Plaintiff and the Court of the conduct that constituted a violation of the Act and of Rule

Plaintiff has presented no reasonable response to the assertions regarding her pattern and practice of misconduct within thirty (30) days as is required by §15-38-10(d).

### FACTS

A detailed recitation of the history of this litigation is largely unnecessary and Defendants incorporate the Court's statement of facts as set forth in its Order granting Directed Verdict. As the Court noted, Plaintiff is herself a lawyer admitted to practice in the State of South Carolina. This litigation arises out of Defendants' representation of Plaintiff regarding her medical staff privileges at the hospital then known as East Cooper Community Hospital. The credentialing decisions by the Hospital that Plaintiff challenged took place in 1997 and 1998 and the federal court litigation took place in 1999 and early 2000. Plaintiff lost that federal antitrust case at the summary judgment stage because, essentially, Plaintiff had failed to come forward with any evidence to substantiate her claims under the Sherman Antitrust Act. Without a basis for federal jurisdiction, Plaintiff's state law claims were dismissed without prejudice. Dr. Holmes then

prosecuted those state law claims *pro se*, for a time, and she retained counsel from Tennessee to represent her at trial. The case settled after jury selection.

Dr. Holmes appealed Judge Duffy's dismissal of her federal claims to the Court of Appeals for the Fourth Circuit. After the Court of Appeals for the Fourth Circuit affirmed Judge Duffy's Order and denied both her petition for rehearing and petition for rehearing *en banc*, Dr. Holmes filed a petition for writ of *certiorari* from the United States Supreme Court. The Supreme Court denied Dr. Holmes' petition. Thus, Judge Duffy's ruling was, and remains, the settled law in the Fourth Circuit.

Dr. Holmes sued her former lawyers alleging myriad misdeeds, about which she offered no proof and only baseless conclusions and self-serving and unsupported allegations. She asserted claims for (1) legal malpractice, (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, (4) breach of fiduciary duty, (5) unfair trade practices, (6) abandonment, (7) civil conspiracy, (8) promissory estoppel, (9) defamation, (10) constructive fraud, (11) conversion, (12) negligent misrepresentation, (13) negligent supervision, (14) fraud and misrepresentation, and (15) *quantum meruit*. None of these claims had any merit, and, though she had more than seven years to develop her case through discovery, Plaintiff adduced no evidence to support her claims.

Moreover, Plaintiff needlessly engaged in dilatory and vexatious conduct throughout the pendency of the case. Dr. Holmes refused to contact defense counsel to coordinate scheduling matters, she refused to allow defense counsel to fax or hand deliver any document or letter to her, she refused to permit defense counsel to contact her at her office by telephone during regular business hours, she denied having access to e-mail, she demanded lengthy advance notice for any proceeding, including Court hearings, she launched appeal, after appeal, after appeal regarding every conceivable issue and of every ruling by the Court on any matter. All in all, Dr.

Holmes' demands and conduct rendered the litigation process overly difficult and unreasonably time consuming and expensive. No reasonable attorney would have comported herself in this fashion.

Furthermore, and regardless of Plaintiff's vexatious conduct throughout this action, at no point has Dr. Holmes ever presented any admissible, or even credible, evidence that Judge Duffy's ruling in the underlying case was incorrect. Over the course of this litigation, Plaintiff has never presented a shred of credible evidence that the Defendant lawyers did anything that was wrong, or that anything her lawyers did or did not do made any difference whatsoever in Judge Duffy's determination that her federal claims failed as a matter of law. During seven years of litigation, Dr. Holmes never came forward with any evidence of any sort that gave credence to her claims of conspiracy, fraud, misrepresentation of any sort, or breach of any contract. Quite simply, Dr. Holmes' claims were at the time she filed her Complaint and after, nothing more than baseless and meritless rants. No reasonable attorney would have filed Plaintiff's case in the complete absence of any facts supporting these allegations. No reasonable attorney would have prosecuted these claims in the manner Dr. Holmes did, appealing every conceivable issue and delaying the ultimate conclusion of the case.

#### ARGUMENT

The Frivolous Civil Proceedings Sanctions Act (hereinafter "the Act"), S.C. CODE ANN. §15-36-10 allows the Court to impose sanctions for the initiation and prosecution of meritless civil actions.<sup>1</sup> Section 15-36-10(C)(1) of the Act, provides, in pertinent part that after a case has

---

<sup>1</sup> In 2005 the former Frivolous Civil Proceedings Act S.C. CODE ANN. §§15-36-10 through 15-36-50 was repealed effective March 21, 2005, by Act No. 27, 2005 S.C. Acts 121 §12. Act 27 §4 reenacted the Frivolous Civil Proceedings Act effective July 1, 2005. See *Rutland v. Holler, Dennis, Corbett, Ormond & Garner*, 637 S.E.2d 316 (S.C. 2006). The new statute is applicable to all causes of action arising on or after that date. Because the right of action based upon the Act could not ripen until after a judgment has been rendered against the plaintiff, the current version of the statute should apply. However, even were the former version of the Act to apply, Defendants submit

been dismissed by a directed verdict, upon motion of the prevailing party, the court *shall* proceed to determine if the claim was frivolous S C CODE ANN §15-36-10(C)(1) An attorney, party, or *pro se* litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or *pro se* litigant failed to comply with one of the following conditions

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law,
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party, or
- (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonable founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based

Section 15-36-10(E) of the Act sets forth the elements a court should consider when determining whether an attorney, party, or a *pro se* litigant has violated the provisions of [the Act], stating the court shall take into account the following

- (1) the number of parties,
- (2) the complexity of the claims and defenses,
- (3) the length of time available to the attorney, party, or *pro se* litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4),
- (4) information disclosed or undisclosed to the attorney, party, or *pro se* litigant through discovery and adequate investigation,
- (5) previous violations of the provisions of this section,

---

that they would still be entitled to have sanctions imposed under the Act or under the Court's authority under Rule 11 and the Court's inherent authority to sanction bad faith, vexatious, or oppressive litigants

(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section, and

(7) other factors the court considers just, equitable, or appropriate under the circumstances

In particular, Dr Holmes violated the Act by virtue of her baseless attempt to couch what was, in all events, a meritless legal malpractice case, as a far reaching conspiracy and fraud claim Dr Holmes never produced any tangible evidence to support any of her fifteen separate causes of action, much less to support her legal malpractice case Over the course of seven years of litigation, Dr Holmes failed to adduce an iota of evidence to support *any* of her claims—she failed to come forward with evidence to support any of the essential elements of her claims and causes of action and relied solely on her own conclusory narrative as the “proof” of the validity of her claims Furthermore, she never provided any evidence whatsoever of her alleged damages In short, though this case was pending and active for seven years, Dr Holmes could not prove her case and she failed to present any substantive evidence in support of her claims She had no evidence of her damages, nor did she ever produce any substantive evidence causation No reasonable attorney would have brought such claims without a shred of evidence to support the allegations Dr Holmes made in her lengthy Amended Complaint and no reasonable attorney would have pressed such claims without any evidence of damages

Additionally, Dr Holmes appealed nearly every ruling on pretrial motions throughout the case All told, Dr Holmes filed at least six separate appeals of interlocutory orders, failing on each and every one Dr Holmes appealed an order transferring venue, she appealed the dismissal of her motions filed in one county after venue had been transferred to another county, she appealed an order ruling that she could not proceed anonymously, and she appealed orders on discovery matters, including orders quashing her improperly issued subpoenas In each appeal, Dr Holmes petitioned for writ of *certiorari* from the Supreme Court and, when that was

denied, she requested *en banc* hearings and filed petitions for review of the decision in the original jurisdiction of the Supreme Court Dr Holmes has, quite simply, invoked every conceivable appellate procedure with respect to matters that were almost uniformly interlocutory

Throughout the tortuous history of this case, Dr Holmes has proven herself to be profoundly litigious Since being reassigned to Courtesy Staff at East Cooper Hospital in 1997, Dr Holmes engaged in a lengthy, albeit fruitless, administrative appeal of the Hospital's decision She then sued the Hospital in federal court, and failing there, in state court She sued Mr Becker and Mr Grier and their law firm over the handling of the federal case She sued two Tennessee lawyers in both South Carolina and Tennessee state courts over their role in achieving a settlement of her state court case against the Hospital<sup>2</sup> In 2005, Dr Holmes sued the Hospital in a second action, alleging a wide array of complaints against the Hospital and several physicians, the gist of which was that the Hospital continued to refuse to increase her level of privileges<sup>3</sup> In Dr Holmes' 2005 case against East Cooper Hospital, which the Court deemed to be barred by her settlement of the 2000 case, the Court imposed a \$90,000 sanction for violation of the Act In each of the cases Plaintiff has filed *pro se* since settling her 2000 state court case against East Cooper Hospital, Plaintiff has asserted baseless and frivolous claims for which she lacked any evidentiary support She has launched numerous pointless appeals, every one of which has been resolved in favor of the respondents Throughout, Plaintiff has made baseless,

---

<sup>2</sup> In very similar fashion to the claims against these Defendants Dr Holmes alleged a wide array of claims against the Tennessee lawyers including attorney malpractice unfair trade practices civil conspiracy, promissory estoppel, conversion, and inadequate supervision breach of fiduciary duty and unspecified fraudulent conduct See *Doe v Duncan* 2008 WL 4367314 (Tenn Ct App 2008) (attached hereto as *Exhibit B*) Dr Holmes' cases against the Tennessee attorneys have been dismissed in both states Dr Holmes appealed the Tennessee court's order granting summary judgment against her, but both the Court of Appeals of Tennessee and the Tennessee Supreme Court affirmed that decision Dr Holmes has appealed the dismissal of her South Carolina case as well

<sup>3</sup> In the 2005 case she sued East Cooper Hospital Tenet HealthSystem Medical Inc Dr John Grady and Dr Paul Yantis for (1) breach of contract (2) breach of a covenant of good faith and fair dealing, (3) breach of contract accompanied by a fraudulent act (4) civil conspiracy and (5) violation of the South Carolina Unfair Trade Practices Act

even scandalous, allegations against numerous physicians and lawyers without care, and in the absence of evidentiary support. Her tactics have been dilatory, vexatious, oppressive and unreasonable. Her conduct clearly warrants a severe punishment from the Court.

Section 15-36-10(G) of the Act sets forth the sanctions allowable under the Act including (1) reasonable costs and attorney's fees, (2) a reasonable fine to the court, or (3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith. "The determination of whether attorney's fees should be awarded under the Frivolous Proceedings Act is treated as one in equity." *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). An appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions. *Ex parte Beard*, 359 S.C. at 357, 597 S.E.2d at 838.

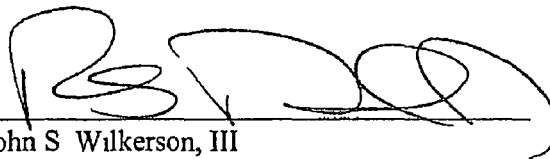
Dr. Holmes' frivolous case against James Becker, Manton Grier, and Haynsworth Sinkler Boyd, and her manner of litigating, and appealing, every issue in the case, has caused the Defendants to incur very substantial legal fees and costs over the seven year span of the case. Additionally, the Defendants were forced to devote time to defending the case—time that was taken away from other clients and other matters, resulting in considerable lost opportunity costs to the Defendants. *Affidavit of Manton M. Grier* (Attached hereto as *Exhibit C*). The Defendants' time devoted to defending Plaintiff's baseless claims resulted in the Defendant lawyers and their staff devoting nearly 600 hours of their own time to the case. Dr. Holmes' frivolous complaint and dilatory and vexatious actions resulted in lost opportunity costs to the Defendant lawyers more than \$200,000.00 in lost revenue. See, *Exhibit C*. Under Rule 11 and pursuant to the Court's inherent powers, the Court is authorized to award an appropriate sanction that may include a monetary award to defendants to compensate them for the revenue lost by these defendants. Also, the court has the inherent power to sanction litigants for misconduct. The Defendants' actual attorneys' fees and costs incurred in the defense of this action are set

forth in the attached Affidavit and amounted to well over \$400,000 00 These fees and costs are set forth more fully in *Exhibit A*

Clearly, Plaintiff has abused the judicial system generally, and these Defendants in particular, with her unreasonable and ill-considered frivolous lawsuit Throughout this matter, and in her other cases, Dr Holmes has repeatedly shown that she is unwilling and unable to evaluate the merits of her own cases, and that she is unable to present any evidence to support her claims Dr Holmes has shown a laser-like focus on a litany of minor issues, which, in the end, amount to nothing She has evidenced a pattern of abusing the legal process in bringing frivolous actions and the potential remains for her to continue that practice unless severe sanctions are levied against her

As shown fully above and in the Record before this Court, Defendants are entitled to an award of sanctions in this case Based on the above, the Defendants request that the Court order the Plaintiff to pay the Defendants' costs and attorney's fees of \$448,914 48 for defense of this action, and, in addition, to award the Defendants' a monetary sanction equal to their lost opportunity costs of \$224,073 64

TURNER, PADGET, GRAHAM & LANEY, P A

By 

John S. Wilkerson, III  
Richard S. Dukes, Jr  
40 Calhoun Street, Suite 410  
P O Box 22129  
Charleston, SC 29413-2129  
Telephone (843) 576-2800  
Facsimile (843) 577-3369  
Email [jwilkerson@turnerpadget.com](mailto:jwilkerson@turnerpadget.com)  
[rdukes@turnerpadget.com](mailto:rdukes@turnerpadget.com)  
ATTORNEYS FOR THE DEFENDANTS

Charleston, SC  
August 3, 2009

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CYNTHIA HOLMES,

Plaintiff,

vs

HAYNSWORTH, SINKLER & BOYD, P A ,  
successor to SINKLER & BOYD, P A ,  
MANTON GRIER, JAMES Y BECKER,

Defendant

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
DOCKET NO 07-CP-10-1444

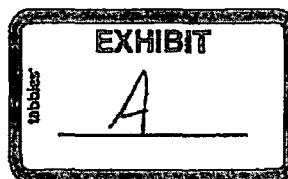
AFFIDAVIT OF ATTORNEY'S FEES IN  
SUPPORT OF DEFENDANT'S MOTION FOR  
SANCTIONS

Richard S Dukes, Jr, Esq , first being duly sworn deposes and says

1 The undersigned is a duly licensed attorney admitted to the South Carolina Bar in good standing and actively engaged in the practice of law since 1999 The undersigned is a shareholder in the law firm of Turner Padget Graham & Laney, P A , attorney of record for Defendants Haynsworth, Sinkler & Boyd, P A , James Y Becker, and Manton Grier (hereinafter "Defendants") in the above-captioned matter This Affidavit is based upon personal knowledge of involvement in this case

2 The customary normal hourly litigation rates for Turner Padget Graham & Laney P A in attorney malpractice litigation are \$225 00 per hour for shareholders, \$175 00 to \$200 00 per hour for associates, and \$110 00 for paralegals In this matter, these rates became effective on June 1, 2007 Prior to that time, the rates were as follows \$200 00 per hour for shareholders, \$150 00 to \$175 00 per hour for associates, and \$100 00 for paralegals

3 An accounting of the time and applicable charges devoted to this matter by Turner Padget Graham & Laney P A is attached to and incorporated in this Affidavit as *Exhibit 1* All time and charges are comparable to the compensation charged by and paid to other attorneys and



TPGL 2830182V1

1  
paralegals with comparable legal ability, experience, success, and standing within the South Carolina Bar in connection with complex litigation throughout the state of South Carolina

4        *Exhibit 1* also includes the total value of the services rendered and the additional expenses chargeable to Defendants in defense of this action, including amounts disbursed by Turner Padgett Graham & Laney to pay for expenses chargeable to the client. In addition, *Exhibit 2* provides an accounting of the total expert witness fees attributable to this case

5        Incorporated herein by reference is the holding of *Glasscock v. Glasscock* 403 S E 2d 313 (S C 1991), concerning the factors and criteria it should be considered by the Court in setting award of attorney's fees. In addition to this Affidavit, the discretion of the Court is requested in the determination of the amount of fees, based upon, among other things, the Court's knowledge of the litigation between the parties, the Court's file that reflects the difficulty of the services rendered, the time necessarily expended, the result accomplished, the fact that there is no contingency of compensation in this case, the Court's understanding of Turner Padgett Graham & Laney, P A , and the fees customarily charged in the area of complex litigation and attorney malpractice litigation for similar legal services

6        The services rendered by Turner Padgett Graham & Laney, P A in this matter were reasonable under the circumstances. The pre-trial defense of this action required, without limitation (a) filing of numerous motions regarding discovery matters, (b) defense of numerous motions filed by Plaintiff, (c) advocacy of such motions at a number of hearings, (d) preparation of memoranda, affidavits and exhibits in support of, and in opposition to, such motions, (e) preparation and review of discovery, (f) consultation and interviews with fact and expert witnesses, (g) conducting and defending depositions, (h) defending six separate interlocutory appeals by Plaintiff of decisions of the Circuit Court to the South Carolina Court of Appeals,

including the filing of various briefs and several motions and memoranda in support thereof, and, (1) defense of Plaintiff's numerous petitions for extraordinary writs from the South Carolina Supreme Court and for additional review of the various appellate rulings by the South Carolina Supreme Court. Also included in the services rendered by Turner Padgett Graham & Laney, P A was preparation for trial on two separate occasions, including meetings with and consultation with witnesses and the preparation by the attorneys for trial, filing pre-trial briefs and motions, and preparing motions for directed verdict and post-trial motions.

7 As set forth in Defendants' Motion for Sanctions, the Plaintiff failed to make a reasonable investigation into the facts or law applicable to this matter prior to filing her case or during the prosecution of this action. A reasonable investigation into the facts and applicable law would have precluded the filing of this action.

8 The time listed in *Exhibit 1* was necessarily devoted to the defense of this case as a result of Plaintiff's filing and continuation of this frivolous action and the prosecution of numerous frivolous and meritless appeals of interlocutory orders.

9 In addition to the fees and costs listed on *Exhibit 1*, Defendants were required to pay expert witness fees of \$33,240.22. See *Exhibit 2*.

10 Defendants' requirement to pay for defense of the case was not contingent on the outcome.

11 Turner Padgett Graham & Laney, P A obtained a beneficial result for Defendants, including an Order dismissing Plaintiff's claims on directed verdict, in obtaining numerous orders from the South Carolina Court of Appeals dismissing Plaintiff's myriad appeals, and, in obtaining denials of all petitions for extraordinary writs from the South Carolina Supreme Court.

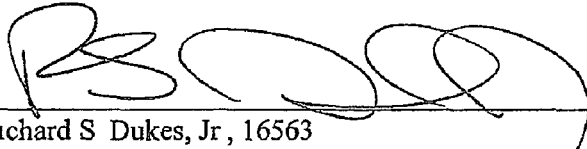
12 At all times relevant to this action, Turner Padgett Graham & Laney, P A had

other matters on which it could have expended its time and been paid at the full hourly rates indicated herein

13 In considering the result achieved in this action, a reasonable award would be full reimbursement of the attorney's fees and costs incurred by the Defendants to date in defense of this matter, or \$404,462 00 in attorney's fees, \$11 212 26, in costs, and \$33,240 22 in expert witness fees, for a total of \$448,914 48 Additional fees may be incurred in finalizing this motion and for opposing Plaintiff's post trial motions, as required, and in responding to any appeals Plaintiff might file

TURNER PADGET GRAHAM & LANEY P A

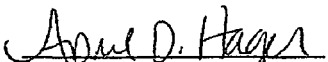
By

  
Richard S Dukes, Jr, 16563  
P O Box 22129  
Charleston, South Carolina 29413  
Phone (843) 576-2810  
Fax (843) 577-1646  
JWilkerson@TurnerPadget.com  
RDukes@TurnerPadget.com

ATTORNEYS FOR DEFENDANTS

August 3, 2009

SWORN TO and Subscribed before me  
on this 3 day of August, 2009

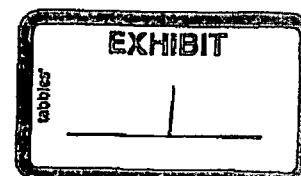
  
Notary Public for South Carolina

My Commission expires 5/24/2016

TPGL 2830182V1

## Exhibit 1: Schedule of Attorney's Fees and Costs

| Timekeeper                        | Total Hours Expended | Rate     | Total Billed Amount |
|-----------------------------------|----------------------|----------|---------------------|
| Allen, Julian                     | 0 4                  | \$175 00 | \$70 00             |
| Barrett R Hawthorne               | 45 8                 | \$225 00 | \$10,305 00         |
| Bolton, Diane                     | 3 4                  | \$90 00  | \$306 00            |
| Chambers R Gerald                 | 101 9                | \$140 00 | \$14 266 00         |
| Chambers R Gerald                 | 37 1                 | \$185 00 | \$6 863 50          |
| Clayton Michelle P                | 18 4                 | \$175 00 | \$3 220 00          |
| Dorsel, Christopher T             | 0 6                  | \$80 00  | \$48 00             |
| Dorsel Christopher T              | 6 8                  | \$200 00 | \$1 360 00          |
| Dukes Richard S Jr                | 190 5                | \$175 00 | \$33,337 50         |
| Dukes, Richard, S , Jr            | 22 8                 | \$185 00 | \$4 218 00          |
| Dukes Richard, S , Jr             | 101 7                | \$200 00 | \$20 340 00         |
| Dukes Richard, S , Jr             | 729 3                | \$225 00 | \$164 092 50        |
| Harper Kathryn L                  | 1                    | \$85 00  | \$85 00             |
| Hill Charles E                    | 1                    | \$160 00 | \$160 00            |
| Hutto Renee L                     | 25 7                 | \$110 00 | \$2 827 00          |
| Leaphart Jr B Gibbs               | 9 1                  | \$80 00  | \$728 00            |
| Madden Teresa D                   | 92 6                 | \$80 00  | \$7 408 00          |
| Marbach David D                   | 4 6                  | \$110 00 | \$506 00            |
| Mason, Meredith Britton           | 2 1                  | \$110 00 | \$231 00            |
| Mason Meredith Britton            | 6 6                  | \$150 00 | \$990 00            |
| Mason Meredith Britton            | 13 9                 | \$175 00 | \$2,432 50          |
| McDonald Kristen M                | 44 1                 | \$80 00  | \$3,528 00          |
| McDonald Kristen M                | 66                   | \$90 00  | \$5 940 00          |
| McDonald Kristen M                | 227 3                | \$110 00 | \$25 003 00         |
| Powers Steve T                    | 1 1                  | \$90 00  | \$99 00             |
| Preston, Karen C                  | 0 1                  | \$110 00 | \$11 00             |
| Ralephata Nosizi X                | 5 4                  | \$80 00  | \$432 00            |
| Rushton, Douglas E                | 20 4                 | \$110 00 | \$2,244 00          |
| Smith Jennie M                    | 0 4                  | \$110 00 | \$44 00             |
| Stover, Jeffrey T                 | 2 5                  | \$110 00 | \$275 00            |
| Thames G Troy                     | 1                    | \$175 00 | \$175 00            |
| Wall, Jennifer M                  | 15 9                 | \$110 00 | \$1,749 00          |
| Wilkerson, III John S             | 108 5                | \$160 00 | \$17 360 00         |
| Wilkerson III John S              | 84 4                 | \$185 00 | 15614 00            |
| Wilkerson III John S              | 247 8                | \$225 00 | 55755 00            |
| <b>Total Disbursements Billed</b> |                      |          | <b>\$402,023 00</b> |



**Turner, Padgett, Graham & Laney, P A.**

**File 4472 103**

**St. Paul Travelers**

**Doe v Gner Becker Sinkler & Boyd**

| TKPR Name                                 | Client | Matter | WIP               | WIP          | Rate  |
|-------------------------------------------|--------|--------|-------------------|--------------|-------|
|                                           |        |        | Base Amt          | Es Hrs       |       |
| Barrett R Hawthorne                       | 4472   | 103    | 810 00            | 3 60         | \$225 |
| Dukes Richard S Jr                        | 4472   | 103    | 1530 00           | 6 80         | \$225 |
| McDonald Kristen M                        | 4472   | 103    | 99 00             | 0 90         | \$110 |
| <b>Total of Unbilled Fees &amp; Hours</b> |        |        | <b>\$2 439 00</b> | <b>11 30</b> |       |

**Grand Total of Fees & Hours =      \$404 462 00      2310 70**

|                                                      |                    |
|------------------------------------------------------|--------------------|
| <b>Total amount of Billed Disbursements =</b>        | <b>\$10,988 10</b> |
| <b>Total amount of Unbilled Disbursements(WIP) =</b> | <b>\$224 16</b>    |
| <b>Grand Total of Disbursements =</b>                | <b>\$11 212 26</b> |

JOHN P FREEMAN, LLC  
2329 Wilmot Avenue  
Columbia, South Carolina 29205-3164

803 254-4667 f  
753 9870 f  
jfreemanusc@hotmail.com

June 16, 2009

Richard S Dukes, Jr, Esquire  
Turner Padgett Law Firm  
40 Calhoun St, Suite 200  
Charleston SC 29401

Re Expert Work in Holmes v Haynsworth Sinkler Boyd

Dear Richard

I'm glad you tried it and happier you won it

My bill of March 2, 2009, copy attached, remains unpaid Additional work performed by me since sending that bill is as follows

Review of voluminous file, review Tenn opinion re dismissal of Holmes' lawsuit, preparation outline of testimony for use by trial counsel, meeting at HSB with trial counsel, individual defendants and Bill Boyd in advance of trial, review of Supreme Court certiorari filing on behalf of Holmes, review of authorities cited in my Summary Judgment affidavit, review of parties' voluminous Summary Judgment motions and related filings, review and revision of my affidavit, review Dr Holmes supp affidavit, pretrial conf with counsel, review HSB policy manual, prep for deposition (deposition set for June 6th called off by Dr Holmes on evening of June 5th) Prep to testify in Charleston, travel to trial, testimony at trial, and return to Columbia on June 11

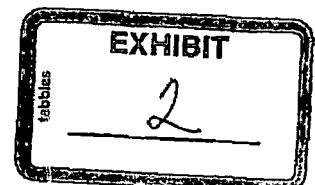
|                                                          |       |                  |
|----------------------------------------------------------|-------|------------------|
| Total time since March 2, 2009 24 6 hrs @ \$500 per hour | Total | \$12,300 00      |
| Prior balance due per attached bill                      |       | <u>20,940 22</u> |
| Total due                                                |       | \$33,240 22      |

My tax ID is 20-0594450

Sincerely yours,

*John*

John P Freeman



Copy

JOHN P FREEMAN, LLC  
2329 Wilmot Avenue  
Columbia, South Carolina 29205-3164

803 254-4667 l  
753 9870 f  
jfreemanusc@hotmail.com

March 2, 2009

Richard S Dukes, Jr , Esquire  
Turner Padgett Law Firm  
40 Calhoun St , Suite 200  
Charleston, SC 29401

Re Expert Work in Holmes

Dear Richard

Thanks for associating me to help you in connection with the case Dr Holmes has brought against the Haynsworth firm, et al My bill for services rendered to date is

Meetings and phone conferences with defendants and their counsel, review of the complaint, the amended complaint and defendants' answer to the amended complaint, plaintiff's deposition, plaintiff's 27-page errata sheet to her deposition, review of a numbered set of the exhibits to plaintiff's deposition, the motion for summary judgment in the federal case, the memo opposing summary judgment in the federal case, the transcript of proceedings before Judge Duffy on January 25, 2000, the district court's order in the federal case granting summary judgment as to the federal causes of action and dismissing the state causes of action Review of separate copies of the following items Letter of May 5, 1998 from James Becker to Cynthia Holmes, Fax cover sheet with conflict data dated Feb 19, 1999, Docket sheet detailing filings in federal case, Motion for preliminary injunction in federal case filed Aug 26, 1999, Amended Complaint in the federal action dated Dec 6, 1999, Letter of Dec 6, 1999 and draft of letter, from James Becker to Cynthia Holmes, Draft letter dated Dec 8, 1999, to Cynthia Holmes from James Becker, Letter dated Dec 10, 1999, to Cynthia Holmes from James Becker, Letter dated Dec 12, 1999, from Cynthia Holmes to James Becker, Fax cover sheet with letter of Dec 15, 1999 Cynthia Holmes from James Becker with deposition notice, Draft letters dated Dec 27, 1999, from James Becker to Cynthia Holmes, Letter dated Dec 27, 1999, from James Becker to Cynthia Holmes, Fax letter dated Dec 30, 1999 from Cynthia Holmes to James Becker, Motion to Withdraw filed in federal action dated January 5, 2000, Copy of foregoing document with notes from Frank Mood, Letter of Jan 10, 2000 from James Becker to Cynthia Holmes with fax cover sheet, Letter of Jan 18, 2000, from James Becker to Cynthia Holmes (2 copies), Letter of Jan 21, 2000 from James Becker to Cynthia Holmes, Addendum dated Jan 25, 2000, signed by Mr Becker and Dr

Homes, plus an extra copy of the cover page of the Addendum, Letter of Feb 28, 2000, from James Becker to Cynthia Holmes transmitting billing data, letter dated Feb 27, 2000, marked received Mar 14, 2000, from Cynthia Holmes to James Becker, Letter of March 21, 2000, with attachments, State court action filed May 16, 2000, after federal dismissal, August 16, 2000 letter to William Boyd from Cynthia Holmes re file pick-up, Letter dated Aug 23, 2000, from William Boyd to Cynthia Holmes responding to August 16 letter, Letter of Sept 5, 2000, from James Becker to Cynthia Holmes re file copying, Receipt from Document Systems dated Sept 11, 2000, for pick-up of 3 boxes to be scanned, Statement of Account for HSB dated Sept 15, 2000, Sept 29, 2000, receipt from Document Systems for 7 boxes returned to HSB, Statement of Account for HSB dated Feb 23, 2001, with letter back from Dr Holmes dated Feb 24, 2001, Letter dated Feb 28, 2001 from William Boyd to Dr Holmes re billing and returning check, Letter dated April 9, 2001, to Cynthia Holmes from James Becker re billing error, September 13, 2001 State Court Summary Judgment Order, Statement of Account for HSB dated Sept 14, 2001, Prebill dated October 1, 2001, Memo re billing dated Oct 1, 2001, Client Ledger dated Oct 3, 2001, Memo to Lisa Hoffman re billing Oct 3, 2001, Letter dated Oct 14, 2001, re billing statement, Letter dated Oct 22, 2001, to William Boyd from Cynthia Holmes re billing, Letter to Cynthia Holmes from Steve Matthews dated Oct 29, 2001, re billing with a copy of same, Letter dated Nov 5, 2001, from Cynthia Holmes to William Boyd re billing, same with notes from William Boyd to Steve Matthews, Letter dated Dec 27, 2001 from Steve Matthews to Cynthia Holmes re billing, Letters dated March 21, 2002, from Steve Matthews to Cynthia Holmes re billing Legal research, prep detailed expert affidavit, discussion of affidavit with counsel, prep response to subpoena served by Dr Holmes

|                                                           |                    |               |
|-----------------------------------------------------------|--------------------|---------------|
| Total time to date 41 3 @ \$500                           | Total due for time | \$20,650 00   |
| Copying costs for portion of subpoenaed file delivered to |                    |               |
| defense counsel (receipt attached)                        |                    | <u>290 22</u> |
| Total due                                                 |                    | \$20,940 22   |

My tax ID is 20-0594450.

With best wishes,

Sincerely yours,

John P Freeman

JOHN P FREEMAN  
2329 Wilmot Avenue  
Columbia, South Carolina 29205 3164

803-254-4667 t  
753 9870 f  
jfreemanusc@hotmail.com

June 16, 2009

Richard S Dukes, Jr , Esquire  
Turner Padgett Law Firm  
40 Calhoun St , Suite 200  
Charleston, SC 29401

Re Expert Work in Holmes v Haynsworth Sinkler Boyd

Dear Richard

I'm glad you tried it and happier you won it

My bill of March 2, 2009, copy attached, remains unpaid Additional work performed by me since sending that bill is as follows

Review of voluminous file, review Tenn opinion re dismissal of Holmes' lawsuit, preparation outline of testimony for use by trial counsel, meeting at HSB with trial counsel, individual defendants and Bill Boyd in advance of trial, review of Supreme Court certiorari filing on behalf of Holmes, review of authorities cited in my Summary Judgment affidavit, review of parties' voluminous Summary Judgment motions and related filings, review and revision of my affidavit, review Dr Holmes supp affidavit, pretrial conf with counsel, review HSB policy manual, prep for deposition (deposition set for June 6th called off by Dr Holmes on evening of June 5th) Prep to testify in Charleston, travel to trial, testimony at trial, and return to Columbia on June 11

|                                     |                           |       |                  |
|-------------------------------------|---------------------------|-------|------------------|
| Total time since March 2, 2009      | 24 6 hrs @ \$500 per hour | Total | \$12,300 00      |
| Prior balance due per attached bill |                           |       | <u>20,940 22</u> |
| Total due                           |                           |       | \$33,240 22      |

My tax ID is 20-0594450

Sincerely yours,

John P Freeman

Westlaw.

Not Reported in S W 3d  
 Not Reported in S W 3d 2008 WL 4367314 (Tenn Ct App)  
 (Cite as 2008 WL 4367314 (Tenn Ct App))

Page 1

Only the Westlaw citation is currently available

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee

J DOE

v

Richard L DUNCAN, et al  
 No E2006-02506-COA-R3-CV

April 10, 2008 Session

Sept 18, 2008

Appeal from the Circuit Court for Knox County  
 No 3 586-05 Wheeler A Rosenbalm, Judge  
 Dr Cynthia Holmes, Sullrivans Isd , South Carolina,  
 Pro Se

Stephen C Daves, for the appellees, Richard L  
 Duncan, Meridith Bond Sidney Gilreath and  
 Gilreath & Associates

PATRICIA J COTTRELL PJ MS delivered  
 the opinion of the court in which ANDY D BEN  
 NETT and RICHARD H DINKINS, JJ , joined

### OPINION

PATRICIA J COTTRELL PJ

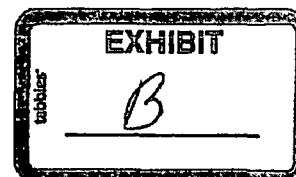
\*1 Since plaintiff in this legal malpractice case failed to refute defendants' affidavits that they were familiar with and complied with the applicable standard of care and that plaintiff was not injured by any violation of the standard, the trial court correctly granted defendants' motion for summary judgment. The trial court did not abuse its discretion in failing to revise its order based on affidavits filed after the final order since plaintiff gave no explanation why the affidavits should be considered

and since the affidavits did not create a genuine issue of material fact as to whether the defendants committed legal malpractice or injured plaintiff

The plaintiff, Dr Cynthia Holmes,<sup>FN1</sup> filed suit against Richard Duncan Meridith Boyd Sidney Gilreath and their firm Gilreath & Associates, for legal malpractice in October of 2005 Mr Duncan and Mr Boyd had previously represented Dr Holmes in an action in South Carolina against a hospital

FN1 Dr Holmes filed the suit as "J Doe" but the trial court noted in its November 3 2006 order that plaintiff has failed to provide an appropriate reason why she should proceed anonymously expressly disapproved the process, and stated that the suit should have been filed as *C Holmes v Duncan et al* We agree and will use plaintiff's name throughout this opinion

Dr Holmes' complaint includes numerous causes of action yet the essence of all Dr Holmes claims is that defendants committed legal malpractice since they were not prepared to proceed to trial which forced her on the eve of trial to agree to a settlement that was not appropriately advantageous to her Dr Holmes' alleged injury is the inadequate settlement she asserts was caused by defendants' failure to adequately prepare her case According to Dr Holmes, the defendants wrongfully solicited her business when they represented themselves as trial attorneys' with a collective experience of more than 50 years in trying cases and on par with the 'Ness, Motley law firm' " Defendants were also alleged to have breached the oral contract between the parties to provide Dr Holmes legal representation at the trial of her action against the hospital According to Dr Holmes, the settlement and defendants' failure to try the case breached their oral agreement Dr Holmes alleges the de-



Not Reported in S W 3d  
 Not Reported in S W 3d, 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 2

defendants breached the fiduciary duty owed her and engaged in unspecified fraudulent conduct <sup>FN2</sup>

FN2 Plaintiff includes a laundry list of other claims which like the claims discussed above, are basically encompassed in the malpractice claim, such as unfair trade practices, civil conspiracy promissory estoppel conversion and inadequate supervision of Mr Duncan and Mr Bond by Mr Gilreath

The defendants filed a motion for summary judgment Mr Gilreath sought summary judgment on the basis that he did not represent Dr Holmes in the South Carolina case or elsewhere The defendants who represented Dr Holmes in the South Carolina case, Mr Duncan and Mr Bond also sought summary judgment on the basis that they complied with the applicable standard of care and that no deviation from the applicable standard injured Dr Holmes

In support of their motion defendants filed the affidavits of Sidney Gilreath, Richard Duncan, and Meridith Bond The affidavit of Mr Gilreath stated two determinative facts namely that he never represented Dr Holmes in any matter and that defendants Bond and Duncan had 50 years cumulative trial experience and needed no supervision from him

According to the affidavits of Mr Duncan and Mr Bond, in November of 2001 they met with Dr Holmes regarding her case that was already pending against Tenet Health Systems Medical Inc in South Carolina and later that month they filed a notice of appearance in that matter Between November 2001 and October 2002 defendants Duncan and Bond took several depositions and conducted other discovery After negotiations the parties reached a settlement which provided Dr Holmes a confidential monetary recovery, reappointment to courtesy staff at the hospital and the

right to apply for a change of status The settlement was negotiated and effectuated with Dr Holmes' participation

\*2 With regard to the standard of care both the affidavits of Mr Duncan and Mr Bond state that they are familiar with the standard of care for cases such as Dr Holmes' and contain the following

It is my opinion to a reasonable degree of legal certainty that both Meridith Bond and Richard Duncan exercised the appropriate standard of care in representing Cynthia Holmes in connection with the litigation entitled *J Doe v Tenet Health System Medical Inc et al* CA 00 CP-10-1888 Charleston County Court of Common Pleas The appropriate standard of care was exercised by us both in connection with preparation of the case for trial and in settlement negotiations leading to settlement of the case

Within a reasonable degree of legal certainty, it is [our] opinion that [neither parties] representation caused or contributed to any harm or injury to Cynthia Holmes

In response to defendants motion Dr Holmes filed three of her affidavits The first two affidavits, in effect, were motions to strike and dismiss the defendants' motion <sup>FN3</sup>In her third affidavit Dr Holmes states that she was licensed to practice law in South Carolina during the period in question and that defendants deviated from the standard of care and such deviation caused her injuries Other than holding a license in that state, however, Dr Holmes made no reference to familiarity with the applicable standard of care that she has ever practiced law or that she has any experience that would lead one to conclude that she has familiarity with the applicable standard Dr Holmes failed to refute any of the substantive proof presented in defendants' affidavits The only objections raised by Dr Holmes to defendants' affidavits were that some referenced attach

Not Reported in S W 3d  
 Not Reported in S W 3d, 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 3

ments were not attached While it was not necessary to file the referenced materials, defendants then did so

FN3 Dr Holmes also filed a Memorandum In Opposition To The Motion For Summary Judgment that was sworn to by her Given that this Memorandum was not an affidavit but contained argument and legal citations, the trial court correctly treated it as pleadings In any event, the memorandum likewise creates no genuine issue of material fact to rebut defendants' affidavits

Also accompanying defendants' motion was a Statement of Undisputed Material Facts pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure The defendants' Statement made specific citations to the record as required by Rule 56.03 The citations were to the defendants affidavits Dr Holmes filed a sworn Response Establishing Disputed Material Facts which failed to either agree that the facts were undisputed or demonstrated that the material facts were disputed as required by Rule 56.03 The Response was sworn to by Dr Holmes and, in effect either stated she had no personal knowledge of the facts or provided additional information that was not germane to creating issues of fact which she says defendants failed to disclose

The trial court held a hearing on the motion on September 15 2006 wherein the trial court questioned Dr Holmes closely and explained the significance of her lack of proof on the issue whether Mr Gilreath was involved at all and whether Mr Bond and Mr Duncan violated the applicable standard of care which in any way that caused her any injury

\*3 The trial court granted defendants' motion for summary judgment on November 3 2006 and in

corporated into the order a transcript of its ruling from the bench <sup>FN4</sup>With regard to Mr Gilreath since his affidavit unequivocally states he had no role in Dr Holmes representation and that Mr Bonds and Mr Duncan needed no supervision which remained unchallenged by Dr Holmes, the trial court granted Mr Gilreath summary judgment The trial court likewise granted Mr Bond and Mr Duncan summary judgment based on their affidavits that they were familiar with the applicable standard of care and that they complied with the applicable standard of care in preparing her case for trial and in its settlement and that Dr Holmes suffered no loss from any deviation of that standard Although the trial court found that the affidavits by Mr Bond and Mr Duncan may be meager in terms the trial court found that they were sufficient to negate essential elements of plaintiff's claims such that it was incumbent upon Dr Holmes to come forward with competent evidence showing a violation of the standard of care and a resultant injury Since Dr Holmes came forward with no such proof, the defendants motion was granted As to her other claims the trial court found they were subsumed by the legal malpractice claim and, consequently, Dr Holmes' lawsuit was dismissed in its entirety against all defendants

FN4 The trial court denied Dr Holmes' motion to strike and to dismiss defendants' motion for summary judgment

Thereafter on November 14, 2006, Dr Holmes filed what was styled a "Rule 52 Motion" asking the court to revise its final order of November 3 2006 In support of her motion, Dr Holmes subsequently filed three additional affidavits in an effort to alter or amend the order granting summary judgment The trial court denied Dr Holmes request to amend the order granting summary judgment based upon several grounds First the trial court found that Dr Holmes' reliance on Tenn R Civ P 52.02 was

Not Reported in S W 3d  
 Not Reported in S W 3d 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 4

misplaced since that rule does not apply to motions for summary judgment. Second, Dr. Holmes' motions did not comply with Tenn. R. Civ. P. 7. Third, the trial court found the affidavits were not timely since they were filed after the order granting summary judgment was entered. Finally, the trial court found that after reviewing the three affidavits, even if they were considered, the affidavits were insufficient to create genuine issues of material fact.

Dr. Holmes appeals the order granting summary judgment.

### I. STANDARD OF REVIEW

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr. Inc.*, 49 S.W.3d 281, 285 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Fimsler v. Humboldt Gen. Hosp. Inc.*, 970 S.W.2d 435, 437 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co. Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

\*4 The requirements for the grant of summary judgment are that the filings supporting the motion show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04. *Blair*, 130 S.W.3d at 764; *Pero v. Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Consequently, summary judgment should be granted only when

the undisputed facts and the inferences reasonably drawn from the undisputed facts support one conclusion that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001); *Brown v. Birman Managed Care Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Staples*, 15 S.W.3d at 88.

In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party and we must afford that party all reasonable inferences. *Doc v. HCA Health Servs. Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). We must determine first whether factual disputes exist and, if so, whether the disputed fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). "[I]f there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 211.

To meet the requirements for summary judgment, a defendant moving for summary judgment must, in its filings supporting the motion, either affirmatively negate an essential element of the nonmoving party's claim or conclusively establish an affirmative defense. *Blair*, 130 S.W.3d at 767; *Staples*, 15 S.W.3d at 88. If the moving party fails to meet this burden, the burden to come forward with probative evidence establishing the existence of a genuine issue for trial does not shift to the non-moving party and the motion must be denied. *Staples*, 15 S.W.3d at 88, 89.

If, however, the moving party successfully negates a claimed basis for the action or establishes an affirmative defense, the non-moving party may not simply rest upon the pleadings. *Staples*, 15 S.W.3d

Not Reported in S W 3d  
 Not Reported in S W 3d, 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 5

at 89 In that situation, the non moving party has the burden of pointing out rehabilitating or providing new evidence to create a factual dispute as to the material element in dispute *Staples* 15 S W 3d at 89 *Rains v Bend of the River* 124 S W 3d 580 587 88 (Tenn Ct App 2003)

## II CLAIM AGAINST MR GILREATH

Mr Gilreath submitted proof by affidavit that at no time did he represent Dr Holmes and that given the years of trial experience by Mr Duncan and Mr Bond there was no requirement or duty that he supervise them Dr Holmes at no time offered any proof to refute this either before or after the trial court granted summary judgment Consequently summary judgment as to Mr Gilreath is affirmed

## III CLAIMS AGAINST MR DUNCAN AND MR BOND

\*5 The affidavits of Mr Duncan and Mr Bond provide proof that they were familiar with and met the applicable standard of care in preparing Dr Holmes' case for trial and during settlement negotiations Dr Holmes submitted no proof whatsoever to refute defendants familiarity with the applicable standard Dr Holmes' third affidavit did state that defendants violated the standard of care however the affidavit failed to state that she had any familiarity with the applicable standard Consequently, the trial court did not err in granting summary judgment to the defendants While plaintiff alleged numerous causes of action we agree with the trial court that plaintiff's claim is essentially one for legal malpractice so judgment as to all claims was appropriate

After the trial court granted summary judgment Dr Holmes then asked the court to consider her fourth affidavit and the affidavit of two other South Carolina attorneys on whether the representation by defendants Mr Duncan and Mr Bond violated the ap-

plicable standard of care While Dr Holmes' request was not made appropriately in effect Dr Holmes' request was one under Rule 59 04, asking the court to alter or amend the final order based on additional evidence

Our Supreme Court has held that when additional evidence is submitted in support of a motion to revise a grant of summary judgment the court should consider the following factors

- 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment
- 2) the importance of the newly submitted evidence to the movant's case
- 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment
- 4) the likelihood that the nonmoving party will suffer unfair prejudice and
- 5) any other relevant factor

*Stovall v Clarke* 113 S W 3d 715 721 (Tenn 2003) (standard applied to Rule 59 motion), *Harris v Chern* 33 S W 3d 741, 745 (Tenn 2000) (standard applied to Rule 54 02 motion) *Pullum v Robinette* 174 S W 3d 124, 141 (Tenn Ct App 2004) The trial court's ruling on a motion to alter or amend will be reversed only for an abuse of discretion *Stovall* 113 S W 3d at 721

While the trial court failed to cite *Stovall* or *Harris* or make express reference to the standard enunciated therein, we find no reversible error since the trial court is correct that even if one considers the three affidavits there is no competent proof introduced to refute either the affidavits of Mr Duncan and Mr Bond that they complied with the applicable standard of care or Mr Gilreath's affidavit that he was not involved

Not Reported in S W 3d  
 Not Reported in S W 3d, 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct.App ))

Page 6

The untimely affidavits provided by Dr Holmes were from two South Carolina attorneys and Dr Holmes herself. The affidavit of Desa Ballard, a South Carolina attorney, does not provide an opinion regarding whether defendants violated the standard of care but only points out what she believes are factual disputes between the parties. Ms Ballard's affidavit expressly states that she does not have sufficient evidence to opine whether the standard of care was breached and whether Dr Holmes was injured thereby. The affidavit of another attorney, Kevin Holmes, Dr Holmes' former husband, likewise expresses no opinion on whether the standard of care was violated but instead relates a sequence of events leading up to the trial. Finally, the plaintiff filed a fourth affidavit stating that, in addition to being a physician, she is also an attorney licensed to practice in South Carolina. However, nowhere in Dr Holmes' affidavit does she state that she ever practiced law or was familiar with the standard of care required of attorneys in her case in South Carolina or in any jurisdiction.

\*6 Even though the affidavits were offered by Dr Holmes after the final order and without explanation why the trial court should consider them, nevertheless, the trial court did so. Clearly, the trial court gave this *pro se* litigant, who is also an attorney, every opportunity to present genuine issues of material fact about the defendants' alleged legal malpractice which she was unable to do.

Dr Holmes raises several issues on appeal that she did not appear to bring to the attention of the trial court either before or after the trial court granted defendants' motion. These issues include inadequate opportunity to conduct discovery, applicability of South Carolina law, and the assertion that summary judgment was not providently granted because she did not timely receive defendants' reply to her response to their motion.<sup>FN</sup> Additionally, for the first time on appeal, Dr Holmes appears to challenge the affidavits of Mr Bond and Mr Duncan on the ground that they are not licensed to

practice law in South Carolina.<sup>FN6</sup> The Supreme Court in South Carolina has decided this issue and held licensure is not required to give an expert legal opinion since professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert. *Smith Haynsworth McKay & Genard*, 472 S W 2d 612, 614 (S C 1996). On appeal, Dr Holmes also faintly appears to take issue with the fact that defendants' affidavits do not expressly state that they are familiar with the standard of care in South Carolina.

FN5 Even if raised before the trial court, we do not find that these alleged errors affected the summary judgment.

FN6 There is no dispute that whether the defendants violated the standard of care in representing Dr Holmes in the South Carolina lawsuit is governed by South Carolina law.

Failure to raise an issue in the trial court precludes our consideration of it on appeal. Our courts have consistently taken the view that 'issues not raised in the trial court cannot be raised for the first time on appeal.' *Correll v E I DuPont de Nemours & Co*, 207 S W 3d 751, 757 (Tenn 2006) (citing *Simpson v Frontier Community Credit Union*, 810 S W 2d 147, 153 (Tenn 1991)), *Barnes v Barnes*, 193 S W 3d 495, 501 (Tenn 2006), *Norton v McCaskill*, 12 S W 3d 789, 795 (Tenn 2000), *Bell v Todd*, 206 S W 3d 86, 93 (Tenn Ct App 2005). Consequently, the trial court's decision may not be reversed since these alleged errors were not raised to the trial court.

We will, however, discuss briefly the issue Dr Holmes appears to raise about the defendants' familiarity with the applicable standard. It is generally recognized that, in most, if not all, jurisdictions in the United States, an attorney 'may be liable to his client for damages resulting from his failure to exercise [the] ordinary care, skill and dili-

Not Reported in S W 3d  
 Not Reported in S W 3d, 2008 WL 4367314 (Tenn Ct App )  
 (Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 7

gence which is commonly possessed and exercised by attorneys in practice in the jurisdiction " *Chapman v Bearfield* 207 S W 3d 736 739 (Tenn 2006) (quoting *Spalding v Davis* 674 S W 2d 710 714 (Tenn 1984)) (in which Tennessee joined South Carolina in recognizing a statewide standard of professional care) *Smith* 472 S W 2d at 614. Consequently, in order to give an opinion on the standard of care, one must exhibit a familiarity with it. See *Chapman* 207 S W 3d at 739 40 *Smith* 472 S E 2d at 613 15.

\*7 The affidavits at issue do not expressly state that affiants Bond and Duncan are familiar with South Carolina law. Regarding familiarity with the applicable standard of care, the affidavits state that Mr Bond and Mr Duncan both have years of complex trial experience and are familiar with the standard of care for attorneys in cases such as *J Doe v Tenet Health Systems Medical Inc et al* CA 00 CP-10-1888 Charleston County Court of Common Pleas.<sup>FN7</sup> The trial court without objection from plaintiff found this to be sufficient. The reference to the court where the case was filed is sufficient to assert familiarity with the type of case and with the jurisdiction. Consequently they were competent to present evidence to negate an essential element of the plaintiffs claim.

FN7 While not necessarily dispositive it should also be noted that in this case defendants Mr Bond and Mr Duncan have actually practiced law in South Carolina in association with local counsel.

Questions about the qualifications, admissibility, relevance, and competency of expert testimony are generally left to the sound discretion of the trial court—*McDaniel v CSX Transportation* 955 S W 2d 257 263 (Tenn 1997) *State v Ballard* 855 S W 2d 557 562 (Tenn 1993).

As this court found in *Pullum v Robinette* 174 S W 3d at 134.

The trial court has broad discretion regarding the admission of expert testimony. *Robinson* 83 S W 3d at 725, *State v Stevens* 78 S W 3d 817 832 (Tenn 2002) *McDaniel* 955 S W 2d at 263. Consequently, a trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or is abused. *Stevens* 78 S W 3d at 832. *Scfflick v St Thomas Hospital* 969 S W 2d 391 393 (Tenn 1998) *State v Shuck* 953 S W 2d 662, 669 (Tenn 1997). A finding of abuse of discretion is proper when the trial court applied an incorrect legal standard or reached a decision against logic or reasoning that caused an injustice to the party complaining. *Stevens* 78 S W 3d at 832. *Eldridge v Eldridge* 42 S W 3d 82, 85 (Tenn 2001), *Shuck*, 953 S W 2d at 669.

Accordingly, appellate courts will set aside a discretionary decision only where the trial court has misidentified, misconstrued, or misapplied the controlling legal principles, or the decision is contrary to the substantial weight of the evidence. *White v Vanderbilt Univ* 21 S W 3d 215 223 (Tenn Ct App 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court, and an appellate court should allow the trial court's exercise of discretion to stand if reasonable judicial minds could differ as to its soundness. *Eldridge* 42 S W 3d at 85, *White* 21 S W 3d at 223.

Given the applicable abuse of discretion standard, together with the plaintiffs' failure at the trial court level to take issue with defendants' familiarity about the standard or any perceived deficiencies with their affidavits, we will not reverse the trial court.

For the reasons stated herein, the grant of summary judgment is affirmed. The costs of this appeal are assessed to Dr Cynthia Holmes for which execution may issue if necessary.

Not Reported in S W 3d  
Not Reported in S W 3d 2008 WL 4367314 (Tenn Ct App )  
(Cite as 2008 WL 4367314 (Tenn Ct App ))

Page 8

Tenn Ct App 2008  
Doe v Duncan  
Not Reported in S W 3d 2008 WL 4367314  
(Tenn Ct App )

END OF DOCUMENT

© 2009 Thomson Reuters/West No Claim to Orig US Gov Works

STATE OF SOUTH CAROLINA   )  
                                          )  
COUNTY OF RICHLAND        )

AFFIDAVIT

PERSONALLY appeared before me Manton M Grier who first being duly sworn,  
deposes and says

1       I am a shareholder in the law firm of Haynsworth Sinkler Boyd, P A in the firm's  
Columbia office

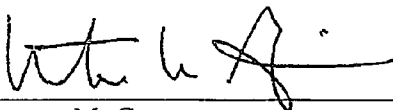
2       The attached billing information memos, marked Exhibits A and B, are a true and  
correct copy of a printout of the firm's billing and expense records for our file number 9976 3

3       The time and expense entries shown on Exhibits A and B were made by a person  
with knowledge at or near the time of the acts or events recorded in Exhibits A and B

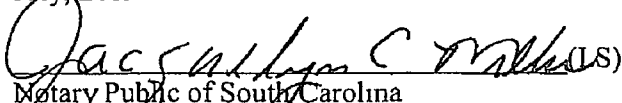
4       Exhibits A and B constitute business records of Haynsworth Sinkler Boyd, P A ,  
which have been prepared and maintained in the ordinary course of business

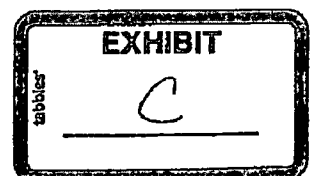
5       File number 9976 3 was set up by my partner James Becker so that he and I and  
other members or employees of the firm could track their time and expenses associated with  
defending the claims of Cynthia Holmes in the case of *Cynthia Holmes M D v Haynsworth  
Sinkler Boyd P A successor to Sinkler & Boyd P A Manton Grier and James Y Becker*

Further Affiant sayeth not

  
\_\_\_\_\_  
Manton M Grier

SWORN to before me this 30 day of  
July, 2009

  
\_\_\_\_\_  
Notary Public of South Carolina  
My Commission expires 10 01 2011



09976 HOLMES CYNTHIA M D

0003 Holmes Cynthia

\*1766923\*

Prebill Number 1766923

Bill Date Jul/22/2009

Haynsworth Sinkler Boyd, P A  
Prebill

Please Indicate Final \_\_\_\_\_  
Interim \_\_\_\_\_

PREBILL INFORMATION

Session No 82157 Prebill Print Date 07/22/09 Prebill No 1766923 Time Allowed Date 04/10/02 Fees selected through 07/22/09  
Matter Status OPEN Bill Freq X Open Date 04/10/02 Matter Type 227 Hospital & Health Disbursements selected through 07/22/09

Claim Number Description

Client ID 09976 - HOLMES, CYNTHIA M D

Matter ID 0003 - Holmes, Cynthia

Billing Attorney 0012 Becker, James Y

Resp Attorney 0012 Becker James Y

Supervising Atty

Billing Contact

Overide Name

Billing Address

-1790-

Prebill Summary

|                                 | <u>Prebill Total</u> | <u>Edit</u> |
|---------------------------------|----------------------|-------------|
| Fees                            | \$126 169 00         | _____       |
| Disbursements                   | 2,913 82             | _____       |
| Total Premium/Discount          | 0 00                 | _____       |
| <b>Prebill Total</b>            | <b>\$129 082 82</b>  | _____       |
| Outstanding Accounts Receivable | 0 00                 | _____       |
| <b>Total Amount Due</b>         | <b>\$129,082 82</b>  | _____       |

Unapplied Cash & Trust Balances

| <u>Type</u>      | <u>Balance</u> |
|------------------|----------------|
| Unapplied Cash   | \$0 00         |
| Trust Balance(s) | \$0 00         |

Client Comments

Matter Comments

EXHIBIT

tabbies

A

09976 - HOLMES CYNTHIA M D  
0003 Holmes Cynthia

Prebill Number 1766923  
Bill Date Jul/22/2009

| Bill Format (Accounting Use Only) |    |
|-----------------------------------|----|
| Matter Options Intro              | 10 |
| A/R                               | 10 |
| History                           | 99 |
| Fee Detail                        | 52 |
| Fee Sum                           | 20 |
| Disbursement Detail               | 10 |
| Disbursement Sum                  | 10 |
| Attach                            | 99 |

| Matter Timekeeper Summary |        |        |           |       |
|---------------------------|--------|--------|-----------|-------|
| Timekeeper                | Rate   | Hrs    | Fees      | Edit  |
| Manton M Grier            | 425 00 | 153 50 | 65 237 50 | _____ |
| William C Boyd            | 375 00 | 3 00   | 1 125 00  | _____ |
| Manton M Grier            | 375 00 | 2 00   | 750 00    | _____ |
| James Y Becker            | 350 00 | 111 20 | 38 920 00 | _____ |
| James Y Becker            | 300 00 | 38 10  | 11 430 00 | _____ |
| James Y Becker            | 275 00 | 0 80   | 220 00    | _____ |
| James Y Becker            | 240 00 | 2 50   | 600 00    | _____ |

09976 HOLMES CYNTHIA M D

0003 Holmes Cynthia

James Y Becker

Prebill Number 1766923

Bill Date Jul/22/2009

215 00 11 80 2 537 00

Barry B Wheeler

180 00 4 20 756 00

Heather W Bailey

175 00 2 50 437 50

Samuel Gray Wallington

175 00 4 30 752 50

Heather W Bailey

170 00 2 60 442 00

Samuel Gray Wallington

170 00 13 30 2,261 00

Michael J Cerkez

145 00 0 90 130 50

Christine L Sellers

80 00 6 90 552 00

Michael J Cerkez

60 00 0 30 18 00

Totals 357 90 126 169 00

09976 HOLMES CYNTHIA, M D  
0003 Holmes Cynthia  
\*1766832\*

Prebill Number 1766832  
Bill Date Jul/20/2009

Haynsworth Sinkler Boyd, P A  
Prebill

Please Indicate Final \_\_\_\_\_  
Interim \_\_\_\_\_

PREBILL INFORMATION

Session No 82133 Prebill Print Date 07/20/09 Prebill No 1766832 Time Allowed Date 04/10/02 Fees selected through 07/20/09  
Matter Status OPEN Bill Freq X Open Date 04/10/02 Matter Type 227-Hospital & Health Disbursements selected through 07/20/09  
Claim Number Description  
Client ID 09976 - HOLMES, CYNTHIA M D  
Matter ID 0003 - Holmes, Cynthia

Billing Attorney 0012 Becker, James Y  
Resp Attorney 0012 - Becker, James Y  
Supervising Atty  
Billing Contact

Override Name  
Billing Address

Prebill Summary

|                                 | Prebill Total | Edit  |
|---------------------------------|---------------|-------|
| Fees                            | \$92,077 00   | _____ |
| Disbursements                   | 2 913 82      | _____ |
| Total Premium/Discount          | 0 00          | _____ |
| Prebill Total                   | \$94 990 82   | _____ |
| Outstanding Accounts Receivable | 0 00          | _____ |
| Total Amount Due                | \$94,990 82   | _____ |

Unapplied Cash & Trust Balances

| Type             | Balance |
|------------------|---------|
| Unapplied Cash   | \$0 00  |
| Trust Balance(s) | \$0 00  |

Client Comments

Matter Comments

EXHIBIT

B

09976 HOLMES CYNTHIA M D  
0003 Holmes Cynthia

Prebill Number 1766832  
Bill Date Jul/20/2009

| Bill Format (Accounting Use Only) |    |
|-----------------------------------|----|
| Matter Options Intro.             | 10 |
| A/R                               | 10 |
| History                           | 99 |
| Fee Detail                        | 52 |
| Fee Sum                           | 20 |
| Disbursement Detail               | 10 |
| Disbursement Sum                  | 10 |
| Attach                            | 99 |

Matter Timekeeper Summary

| <u>Timekeeper</u>   | <u>Rate</u> | <u>Hrs</u> | <u>Fees</u> | <u>Edit</u> |
|---------------------|-------------|------------|-------------|-------------|
| Grier Manton M      | 425 00      | 138 50     | 58 862 50   | _____       |
| Becker James Y      | 350 00      | 93 40      | 32 690 00   | _____       |
| Wallington Samuel G | 175 00      | 2 50       | 437 50      | _____       |
| Cerkez Michael J    | 145 00      | 0 60       | 87 00       | _____       |
| Totals              |             | 235 00     | 92 077 00   |             |

-1794-

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff,

vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07 CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

MOTION FOR RECONSIDERATION

FILED  
2009 AUG -3 AM 11:04  
JULIE J ARMSTRONG  
CLERK OF COURT

09-121012  
The Plaintiff respectfully makes a motion to alter and/or amend pursuant to Rule 59, SCRCF and for reconsideration of the order entered on July 14 2009 The grounds for said motion are substantial justice affecting substantial rights and such other and further grounds as appear below and as may be presented at the hearing This Motion is based upon the S C Rules of Court, statutory and case law, the record herein, memoranda which may be submitted, and evidence to be presented at the hearing

Exhibit # 1 is a Federal Court document filed in the underlying case The underlying case forms the basis for the causes of action in this matter In the underlying case, defendants breached their fiduciary duty to the physician and took actions adverse to the interests of their client, the physician Defendants (hereinafter S&B for Sinkler & Boyd, P A , Defendant Grier, and Defendant Becker) failed to even oppose the motion to dissolve the injunction even though

S&B knew that the loss of the injunction would cause irreparable harm to the physician and the physician's practice. See S&B's motion for preliminary injunction - Exhibit # 2. S&B's negligent loss of the physician's injunction resulted in foreseeable damages, irreparable harm, and loss of income from already-scheduled procedures. Exhibit # 3. After losing the injunction, S&B fraudulently altered the date-stamp to back date and to misrepresent that a response in opposition was filed days before the hearing. See Exhibit # 1. S&B usurped the authority of the Federal Court and fraudulently altered the Federal Court date-stamp. A jury does not need an expert to assist a finding of wrong-doing based upon this evidence. In addition, S&B's own legal expert admitted that fraudulently altering the Federal Court date-stamp was wrong and that important legal rights are determined by the Federal Court date-stamp. Mali v. Odom, 295 S. C. 78, 367 S. E. 2d 166 (Ct. App. 1988) (expert testimony supporting plaintiff's claims may come from defendants' expert testimony). Moreover, the Court took judicial notice of the South Carolina Rules of Professional Conduct (RPC). A jury does not need an expert to assist a finding that defendants violated the RPC when they fraudulently altered the Federal Court date-stamp. Furthermore, violations of the RPC are evidence of breach of the standard of care. Defendants' lack of trustworthiness is established in this very matter. In addition, the fraudulent alteration of the Federal Court date stamp is evidence which goes to credibility. A reasonable jury could find that the defendants' testimony and evidence is not trustworthy. The fraudulently-altered document is evidence in support of a finding by the jury that S&B fraudulently altered court documents, that defendants' behavior is consistent with wrongdoing and culpability, and that defendants attempted to cover-up their wrongdoing. S&B's own expert has testified that defendants' negligence in failing to timely respond to discovery requests proximately caused the loss of the injunction in January, 2000. The loss of the injunction proximately caused damages to the plaintiff in the form of loss of income for procedures already scheduled and for the irreparable harm which defendants themselves warned of in their motion for injunction. Exhibit # 2. Moreover, defendants' own Policy Manual places responsibility for keeping deadlines squarely on the defendants, a jury does not need an expert to assist a finding that the defendants

violated their own Policy Manual as well as the RPC Defendants' actions are dishonorable and bring disrepute on the whole profession while revealing defendants' egregious contempt for the judicial system itself as well as the Federal Courts The motion for directed verdict should be denied

Moreover, the order does not reflect the proceedings as it was drafted by untrustworthy defendants, and the order contains errors, inconsistencies, and prejudicial matter as well as issues not raised or ruled upon Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S C 56, 427 S E 2d 673 (1993) Grant v. SC Coastal Council 319 S C 348 461 S E 2d 388 (1995)

In addition, the order does not reflect the proceedings and errs in relying on current law which was not in effect at the pertinent time Specifically, with respect to service of the Summons and Complaint, the prior Rule 3, SCRCF, is applicable and operates to toll the statute of limitations upon filing in April, 2002 As the law of the case, Judge Dennis ruled that the defendants waived objection to service as well as the statute of limitations The Order of this Honorable Court filed February 11, 2008, states, "Defendants' Motion for Partial Summary Judgment based on non-service is **DENIED** " The transcript of the hearing at pages 60-61 states this Honorable Court's findings of fact on the motion for partial summary judgment (MPSJ), the Court found that the issue of non-service was **waived** by the defendants and the Court stated

'Defendants' counsel Your Honor, the issue in our summary judgment motion is service under the old Rule 3

The Court Who are you representing here today?

Defendants' counsel Haynsworth, Sinkler, Boyd, Manton Grier, and Jamie Becker

The Court You've **waived** that Thank you, Sir Motion on that basis is denied Is there another basis?

Defendants counsel No Sir

The Court They have submitted themselves to the jurisdiction I

understand your objection I saw the affidavits in the file  
I read it the bottom line is, you are standing here  
telling me as a lawyer that you are incurring expenses  
for these people and you don't think there was a basis  
from the start? No way Not going to have it No,  
thank you "

(February 5, 2008, Transcript, pp 60 - 61, emphasis added )

See order - exhibit # 4 Defendants' attempts at **evasion of service** at the eleventh hour were rejected To date, S&B has elected not to disclose to this Honorable Court what specific defect in service, if any, they claim There is no defect to claim Untrustworthy defendants drafted the order entered July 14, 2009, which materially misstates and overlooks the affidavit of service which the physician submitted on point See exhibit # 5 Further, the order entered July 14, 2009, does not reflect the proceedings as there was no ruling by this Honorable Court on service or the statute of limitations The claims are not barred by the statute of limitations

Further, defendants have misrepresented the date when the statute of limitations began to run The U S District Court recorded June 19, 2000, as the date of defendants' termination as counsel of record See exhibit # 6 Therefore, assuming, though not admitting, that the defendants' admitted date of service in May, 2003, is correct, it is well before the date of defendants' termination as counsel of record and well within the statute of limitations The physician had motioned the Federal Court for an order removing the defendants as counsel, however, the motion was denied Defendants continued uninterrupted as counsel of record until June 19, 2000 The RPC require defendants to continue their representation and to comply with the Federal Court order Defendants Grier and Becker were negligent in failing to advise of appeal for dissolution of the injunction, however, the physician had no knowledge of it until the order entered June 2, 2000, was received in the mail Exhibit # 7 Defendants Grier and Becker have admitted service in May, 2003 Therefore, assuming, though not admitting, Defendant

Grier and Defendant Becker were served in May, 2003, the statute of limitations had not run. Defendants Grier and Becker, untrustworthy officers of the court, significantly omit and materially fail to disclose that they received actual notice and were served in April, 2002. Defendants Grier and Becker's attempts at evasion of service are as unseemly and unprofessional as Counsel of Record Wilkerson's material omissions, misstatements, and misrepresentations. Counsel of Record Wilkerson's first document filed with this Honorable Court is dated May 1, 2002, since Counsel of Record Wilkerson has admitted representing all defendants, he is ethically bound to make all of his clients aware of the Summons and Complaint. Counsel of Record Wilkerson has actual knowledge that all defendants received the Summons and Complaint in 2002 yet he repeatedly makes material misrepresentations and violates Rule 3.3, RPC, Rule 407, SCACR, CANDOR TOWARD THE TRIBUNAL. Under Rule 3, SCRCPP, in effect at the time of service, the statute was tolled upon filing in April, 2002. The claims are not barred by the statute of limitations.

Moreover, all defendants were served in April, 2002. All defendants were served through mailing sufficient copies of the Summons and Complaint to the Sheriff of Richland County on April 1, 2002, for service. All defendants were served by the Sheriff's Department in April, 2002. After receiving the Summons and Complaint, defendants' filed a "laundry-list" Rule 12(b), SCRCPP, motion dated May 1, 2002. Defendants, however, failed to plead with specificity and failed to provide sufficient detail to properly raise this defense, therefore, any issues or defenses regarding service are waived including a statute of limitations defense. See *Garner v. Houck*, 435 S.E.2d 847 (1993). In order to properly raise the defense, the objection must be specific and must point out in what manner the rules were not satisfied. See *Unisun Ins. v. Hawkins*, 537 S.E.2d 559, 542 (Ct. App. 2000). The defendants herein failed to properly raise the defense, and, therefore, under Rule 12, SCRCPP, have waived any issues or defenses regarding service including a statute of limitations defense. See James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996). Significantly, defendants failed to disclose that they filed an Amended Rule 12(b), SCRCPP, Motion which did not raise the issue of service. Exhibit # 8. By

filing an Amended Rule 12(b), SCRCF, Motion which did not raise the issue of service, Defendants Grier and Becker waived the issue of service as well as the statute of limitations. See *Unisun Ins v Hawkins*, 537 S E 2d 559, fn 4 (Ct App 2000), James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed 1996). In addition, Defendants' counsel represented to the plaintiff that the issue of service was resolved and not contested. The claims are not barred by the statute of limitations.

Pursuant to the former Rule 3(b), SCRCF, 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 fees to the Richland County Sheriff's Department for service in April, 2002. At the first hearing on July 22, 2002, opposing counsel represented to the Court that he was appearing on behalf of all defendants and moved forward on the Motion to Change Venue based upon the individual defendants' affidavits asserting residences in Richland County. See attached transcript - exhibit # 9. At that hearing, Counsel of Record Wilkerson significantly omitted and materially failed to disclose that Haynsworth Sinkler Boyd P A, was the successor to Sinkler & Boyd in order to fraudulently obtain change of venue. Thus, Counsel of Record Wilkerson had no qualms about making material misrepresentations to the court. In addition, the significance of the transcript is that the individual defendants entered affidavits, made requests of the Court, and thereby made voluntary appearances. Further, opposing counsel's representation that he was appearing on behalf of all defendants is evidence that all defendants were served, it is also evidence that defendants had actual notice of the Summons and Complaint. The claims are not barred by the statute of limitations.

Moreover, Defendant Grier and Defendant Becker previously filed a Rule 56, SCRCF, Motion for Partial Summary Judgment (MPSJ) attempting to challenge service. See exhibit # 9. The MPSJ, however, was procedurally insufficient because by filing a Rule 56, SCRCF Motion for Partial Summary Judgment, defendants made a voluntary appearance waiving service. The individual defendants have made voluntary appearances, including but not limited to, challenge via Motion for Partial Summary Judgment **instead of** Motion pursuant to Rule 12, SCRCF, as

required by the SCRCF and case law See *Unisun Ins v Hawkins*, 537 S E 2d 559, fn 4 (Ct App 2000) Therefore, defendants have made voluntary appearances and have waived objection to service and the statute of limitations See James F Flanagan, *South Carolina Civil Procedure* 100 (2d ed 1996) The claims are not barred

Further, in defendant law firm's responses to discovery, S&B has admitted that it was served more than once, just as the individual defendants were served more than once Exhibit # 10 Also, S&B has admitted that it communicated with Defendant Grier and Defendant Becker regarding the lawsuit shortly after it was filed in 2002 Moreover, defendants' insurance carrier communicated with Defendant Grier and Defendant Becker regarding the lawsuit shortly after it was filed in April, 2002 Thus, defendant firm has admitted actual notice and constructive notice of this matter by the named individual defendants shortly after suit was filed in 2002 Further, defendants cannot show legal prejudice By analogy, the individual defendants are "in active concert" with defendant law firm and charged with actual notice as set forth in State Record Co., Inc v State, 504 S E 2d 592 (1998) The claims are not barred

Defendants Grier and Becker submitted affidavits, Exhibits # 11 and # 12, in bad faith containing material omissions and misrepresentations Defendants failed to disclose that they were served through the Sheriff's Department shortly after the Summons and Complaint was filed in April, 2002, and before Defendants filed their first pleading dated May 1, 2002 Defendants failed to disclose that they filed an Amended Rule 12(b), SCRCF Motion which did not raise the issue of service By filing an Amended Rule 12(b), SCRCF, Motion which did not raise the issue of service, Defendants Grier and Becker waived the issue of service as well as the statute of limitations See *Unisun Ins v Hawkins*, 537 S E 2d 559, fn 4 (Ct App 2000), James F Flanagan, *South Carolina Civil Procedure* 100 (2d ed 1996) In addition, defendants' counsel represented to the plaintiff that the issue of service was resolved and not contested Further, the defendants' affidavits coyly recount coaxing the Deputy Sheriff to provide a copy of the cover letter The defendants attached the cover letter to their affidavits but failed to disclose that they had already been served But for defendants' express and written representations that the issue of

service was resolved, the Sheriff's Department records would have been available at that time. The plaintiff is now prejudiced as the records with the Sheriff's Department have been shredded. The affidavit of service, Exhibit # 5, is the best evidence. The individual defendants were served more than once just as the defendant firm has admitted it was served more than once. Defendants' affidavits are insufficient to prove the truth of the matter asserted because the defendants were served more than once, defendants have not denied receiving the Summons and Complaint in 2002, defendants have made voluntary appearances, and defendants have waived service and the statute of limitations. The claims are not barred.

In his response to Request to Admit (see Exhibit # 13) Defendant Grier admitted making a voluntary appearance in this matter. Though his answer to the request to admit receipt of the Summons and Complaint in 2002 was evasive, his non-responsive answer is significant for the fact that he does not deny receiving the Summons and Complaint in 2002. The individual defendants have made discovery requests, submitted affidavits, participated in discovery, and have appeared voluntarily in court with opposing counsel at a motion hearing to request the Court's reconsideration of Order transferring venue to Charleston County. Voluntary appearance is equivalent to personal service. Rule 4(d), SCRPC. The claims are not barred by the statute of limitations.

Defendant Becker's response to Request to Admit (see Exhibit # 14) receipt of the Summons and Complaint in 2002 was just as evasive and non-responsive as that of his supervisor, Defendant Grier. The response is significant in that Defendant Becker does not deny receipt of the Summons and Complaint in 2002. Defendant firm has admitted that Defendant Becker's insurance carrier communicated with Defendant Becker regarding the Summons and Complaint shortly after April, 2002. The evidence establishes service through the pertinent Sheriff's Department, actual notice, and constructive notice shortly after filing the Summons and Complaint in April, 2002, and well within the statute of limitations. Defendant Becker can show no legal prejudice. Further, Defendant Becker has verified defendant firm's discovery responses (see attached # 15). Defendant law firm has admitted it was served in 2002. Actual notice is

therefore imputed to Defendant Becker because defendant firm has represented that Defendant Becker is its agent by virtue of his verification of discovery responses for defendant firm. In addition, the copy of the Sheriff's Affidavit dated May 9, 2003 (see attached # 16) establishes service upon Defendant Becker and his agent Brenda Black which Defendant Becker failed to disclose to this Honorable Court. On October 8, 2007, the same agent Brenda Black notarized Defendant Becker's and Defendant Grier's affidavits attached to the MPSJ. Defendant Becker submitted his Rule 56, SCRCF MPSJ affidavit in bad faith. Defendant Becker made substantial omissions and material misrepresentations when he failed to disclose that he had actual notice and was previously served. Untrustworthy defendants, officers of the court, attempt to hoodwink this Honorable Court. The claims are not barred by the statute of limitations.

Defendants' counsel expressly represented that the issue of service was resolved to the plaintiff's substantial prejudice. The plaintiff is prejudiced because the sheriff's department now has shredded the documents from that date. In their affidavits, defendants coyly recount coaxing the Deputy Sheriff to allow them to copy the cover letter. If defendant attorneys, officers of the court, had not represented that the issue of service was resolved, the prior records with the Sheriff's Department would have been available at that time and would not have been shredded. Counsel of Record Wilkerson expressly represented that the issue of service was resolved and not contested. Counsel of Record Wilkerson then confirmed it in writing by filing his Amended Rule 12(b), SCRCF, Motion waiving the issue of service as well as the statute of limitations. The physician relied on Counsel of Record's express representations and his written confirmation. Counsel of Record Wilkerson intended for the physician to rely on his representations. The physician justifiably relied on Counsel of Record Wilkerson's express representations to the physician's detriment. Equitable estoppel bars defendants' claims regarding non-service as well as the statute of limitations.

Moreover, the fact that the anti-trust claims were colorable and viable is res judicata as adjudicated in the November 22, 1999, Federal Court Order. Exhibit # 17. Even assuming, though not admitting, defendants' position that the plaintiff would have lost the anti-trust claims,

the plaintiff would have prevailed on pendant state court claims at trial in Federal Court in April, 2000, but for defendants' negligence. Defendants failed to adequately pursue discovery for the claims they pled and the claims defendants recommended NOT be dismissed. Defendants' own correspondence from that time stated that the anti-trust claims should not be dismissed. But for defendants' negligence in failing to name necessary parties and failing to depose culpable competitors, the plaintiff would have prevailed at trial scheduled for April, 2000, on at least the pendant state court claims and the plaintiff would have been able to resume the plaintiff's practice and continue to build it. Even assuming summary judgment was granted, the physician would not have lost income for the already-scheduled surgeries. Even assuming summary judgment was granted, the loss of the injunction would have been appealed. Significantly, the physician would have been able to continue to grow the practice and explore options during the pendency of the appeal. Though Tenet and East Cooper expressly requested that the Federal Court dismiss the pendant state claims with prejudice, the Federal Court Judge refused to do so and thereby transferred the case to state court. Further, on June 2, 2000, by Federal Court Order denying the physician's motion for injunction pending appeal (see exhibit # 7), the Federal Judge stated that S&B did not timely appeal the previous order dissolving the injunction. Based upon the Federal Court Order entered June 2, 2000, it is res judicata that defendants' negligence changed the status quo, defendants' negligence forever deprived the physician of injunctive relief. Defendants' negligence proximately caused the foreseeable, irreparable harm which defendants themselves warned of in their motion for injunction. Exhibit # 2. Defendants never counseled the plaintiff regarding appeal of the Order dissolving the injunction and the plaintiff had no knowledge until the aforesaid Order, entered on June 2, 2000, was received in the mail. The statute of limitations did not run until after the defendants have admitted they were served. The claims are not barred by the statute of limitations.

Significantly, the court's opinion errs in applying an incorrect legal standard. The Supreme Court ruled that in cases applying the preponderance of the evidence burden of proof as in the case at bar, the non-moving party is only required to submit a mere scintilla of evidence in

order to withstand the motion Hancock v Mid-South Management Co., Inc., No. 26857 (S C Sup Ct, January 26, 2009) (Shearouse Adv Sh 5) The record reflects an incorrect legal standard was applied The Motion for Directed Verdict should be denied

In addition, the circuit court erred in finding that all claims were “subsumed into legal malpractice”

Also, the circuit court erred in finding that all claims were “subsumed into legal malpractice” since the legal malpractice claim was dismissed because the plaintiff’s expert testimony was excluded while the other claims do not require expert testimony The Motion for Directed Verdict should be denied

Furthermore, the plaintiff has a right to present evidence based upon professional education, training and expertise which a lay-person does not have The plaintiff’s testimony is admissible because the plaintiff has relevant evidence and pertinent professional training The weight of the testimony is for the jury The Motion for Directed Verdict should be denied

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, S&B failed to respond to discovery requests and the Supreme Court has ruled that failure to reply to discovery requests is a violation of Rule 1.1, RPC, Rule 407, SCACR, which requires an attorney to provide competent representation to a client In re Moore, 329 S C 294, 494 S E 2d 804, 807 (1997) Exhibit 18 The jury does not need an expert to assist a finding that failure to provide competent representation is a breach of the standard of care The jury does not need an expert to assist a finding that S&B’s failure to reply to discovery requests is a violation of Rule 1.1, RPC, Rule 407, SCACR, and is evidence of breach of the standard of care The Motion for Directed Verdict should be denied

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, since the Court took judicial notice of the RPC, there are genuine issues of

material fact whether S&B violated multiple canons of the RPC and, therefore, deviated from the standard of care. The jury does not need an expert to assist a finding that defendants violated multiple canons of the RPC as well as their own policy manual. The Motion for Directed Verdict should be denied.

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, the jury does not need an expert to assist a finding that defendants failed to return \$43,000.00 fees paid in advance for trial. Exhibit 19. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, the jury does not need an expert to read the Federal Court order stating that defendants failed to timely appeal the loss of the injunction. The jury does not need an expert to assist a finding that defendants' lack of diligence and failure to timely appeal the loss of the injunction is a breach of the standard of care. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, the defendants' own legal expert testified that the loss of the injunction in January, 2000, was proximately caused by defendants' failure to timely respond to discovery requests. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Professional Negligence, taking the evidence in the light most favorable to the physician, the plaintiff's expert testimony should not have been excluded. The plaintiff has a right to present all relevant evidence. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Breach of Contract, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Breach of Contract and Breach of Contract Accompanied by a Fraudulent

Act taking the evidence in the light most favorable to the physician, the jury does not need an expert to assist a finding that defendants failed to return \$43,000.00 fees paid in advance for trial Exhibit 18. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Breach of Contract Accompanied by a Fraudulent Act, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact; therefore, the Motion for Directed Verdict should be denied.

With regard to Breach of Fiduciary Duty, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Unfair Trade Practices, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact. S&B's unfair and irregular billing practices as well as other irregular practices have adversely affected other clients as well as adversely affecting the public interest. The Motion for Directed Verdict should be denied.

With regard to Abandonment, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact. A jury does not need an expert to assist a finding that defendants took all the client's money and then abandoned the client, handing a complaint to the client and stating, "Go file it yourself." The Motion for Directed Verdict should be denied.

With regard to Civil Conspiracy, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Promissory Estoppel, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to Defamation, taking the evidence in the light most favorable to the

physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Constructive Fraud, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Conversion, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Negligent Misrepresentation, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Negligent Supervision taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Fraud and Misrepresentation, taking the evidence in the light most favorable to the physician there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to Quantum Meruit, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to damages, taking the evidence in the light most favorable to the physician, there are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied Exhibits # 3, 7, 19, 20

With regard to damages, taking the evidence in the light most favorable to the physician, the physician introduced evidence kept in the ordinary course of business establishing loss of income There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied

With regard to damages, taking the evidence in the light most favorable to the physician, the physician offered deposition testimony from the economic expert in the underlying case to document damages. The circuit court improperly excluded economic expert evidence from the underlying case. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

With regard to damages, taking the evidence in the light most favorable to the physician, the physician submitted evidence in the form of correspondence documenting damages in the form of loss of income for procedures already scheduled at the time that defendants negligently lost the injunction. There are genuine issues of material fact, therefore, the Motion for Directed Verdict should be denied.

The court's opinion errs in essentially striking the physician's complaint and in essentially making all findings of fact in favor of untrustworthy defendants officers of the court.

The court's opinion errs in failing to grant the plaintiff's motion for directed verdict on the issue of liability based upon res judicata and the Federal Court order entered June 2, 2000, finding that S&B failed to timely appeal the loss of the injunction. Exhibit # 7. Plaintiff's motion for directed verdict on the issue of liability based upon res judicata should be granted.

The court's opinion errs in failing to grant the plaintiff's motion for directed verdict on the issue of liability based upon S&B's own expert testimony that the injunction would not have been lost in January, 2000, but for S&B's negligent failure to timely respond to discovery requests. S&B's negligence caused damages and loss of income for already scheduled procedures. Exhibit # 3. Therefore, the physician established through S&B's own expert that S&B's negligence caused foreseeable damages to the physician. Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988). Plaintiff's motion for directed verdict on the issue of liability should be granted.

The court's opinion errs in failing to acknowledge the Federal Court Order dated

November 22, 1999, as res judicata on the anti-trust claims. The court's opinion errs regarding anti-trust law in effect at that time. Untrustworthy S&B drafted the order entered July 14, 2009, and misrepresented the evidence, the court's findings, the anti-trust claims, and anti-trust law at that time. See Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 513 S.E.2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit). Plaintiff's motion for directed verdict on the issue of liability should be granted and defendants' motion for directed verdict should be denied.

The court's opinion errs in not excluding Freeman's testimony as subjective opinion and/or as improper conclusions of law. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). Defendants' motion for directed verdict should be denied.

The court's opinion errs in excluding the plaintiff's expert testimony since the plaintiff has expertise and has a right to present evidence. The plaintiff's testimony is relevant and the plaintiff has pertinent expertise. The plaintiff's testimony is admissible and the weight of the evidence is for the jury. Plaintiff's motion for directed verdict on the issue of liability should be granted and defendants' motion for directed verdict should be denied.

The court's opinion errs regarding the case-within-a-case. Defendants' motion for directed verdict should be denied.

The court's opinion errs in excluding evidence from the underlying case not otherwise available at this time and denying the plaintiff the right to full and fair discovery. Baughman v. ATT, 410 S.E.2d 537 (1991). Defendants' motion for directed verdict should be denied.

The court's opinion errs in that the logical conclusion to S&B's argument on anti-trust is that defendants were negligent in bringing an anti-trust claim that they now claim did not exist and that they now assert they never believed had merit, therefore, defendants admit violating the standard of care and the RPC Rule 3.1, RPC, Rule 407, SCACR. Therefore, defendants admit malpractice and the damages are the unreasonable and/or excessive fees which untrustworthy defendants, officers of the court, extorted. Defendants' motion for directed verdict should be denied.

The court's opinion errs in failing to address the motion for continuance. Defendants' motion for directed verdict should be denied.

The court's opinion errs in tenor and tone. Defendants' motion for directed verdict should be denied.

Untrustworthy defendants failed to return \$43,000.00 paid in advance for trial when there was no trial. Untrustworthy defendants violated Rule 16, RPC, Rule 407, SCACR. Expert testimony is not needed for the jury to determine that untrustworthy defendants failed to perform as agreed and failed to return fees paid in advance for trial. See exhibit # 18. Expert testimony is not needed for the jury to determine that untrustworthy S&B failed to provide a written contingency fee agreement in violation of Rule 15, RPC, Rule 407, SCACR. Violation of multiple RPC's are evidence of deviation from the standard of care. Defendants' motion for directed verdict should be denied.

The court's opinion errs in misrepresenting the antitrust claims and the anti-trust law at the time. The November, 1999, Federal Court Order is res judicata that the antitrust claims were valid under existing law at that time. Exhibit # 17. Defendants' motion for directed verdict should be denied.

Furthermore, S&B's negligent loss of the injunction and resulting damages occurred while the antitrust claims were pending and are separate and distinct from the antitrust claims. Defendants' motion for directed verdict should be denied.

Even assuming, though not admitting, S&B's position that the antitrust claims would have failed, S&B's own expert testified that the injunction would not have been lost at that time but for S&B's failure to timely respond to discovery. Therefore, S&B's negligence and violation of Federal Court orders to timely comply with discovery caused damages through loss of income for already-scheduled procedures and damage to the practice at a critical time in the development of the practice. Further, but for S&B's negligence and failure to comply with Federal Court orders for mandatory mediation, the physician would not have lost the opportunity for mediation toward settlement at a critical time. S&B's negligence caused the foreseeable, irreparable harm.

to the practice which defendants themselves warned of in their motion for injunction Exhibit # 2

S&B's defense is a circular argument there can be no malpractice if the attorney loses the case because losing the case proves there was no case at all S&B's argument is flawed where, as in this case, the attorney loses the case due to failure to pursue adequate discovery to develop the evidence necessary to prove the claims the attorney has pled In the underlying state case, the deposition of the culpable competitors established antitrust injury to the geographically-isolated market by restricting patient access to modern, safe, small-incision cataract surgery, by restricting patient access to the superior procedure with well-established, universally accepted superior results, and by restricting patient access to the physician of their choice The defendants should have deposed the culpable competitors The culpable competitors' depositions in the underlying state case established anti-trust injury The culpable competitors' depositions from the underlying case were improperly excluded to the physician's substantial prejudice The improper exclusion deprived the physician of the ability to fairly meet the case-within a-case Moreover, the improper exclusion of the culpable competitors' depositions from the underlying case deprived the plaintiff of the right to trial by jury The Motion for Directed Verdict should be denied

Moreover, the court's opinion errs regarding the case-within-a-case due to improper exclusion of deposition testimony from a deceased witness establishing slander The former office manager's testimony is otherwise unavailable and establishes the slander cause of action Defendants in the underlying case published slander stating that the physician "bought her medical degree " After four years of college, four years of medical school, one year of rigorous internship, and three years of intensive residency training, the physician worked just as hard as any other physician for her medical degree and office practice The Motion for Directed Verdict should be denied

The court's opinion errs in denying the physician the right to trial by jury, in denying the mode of trial to which any similarly-situated plaintiff is entitled, and in denying fundamental fairness, equal protection, and due process S C Const art I, sec 3, S C Const art I, sec 22,

S C Const art V, sec 4 S C Const art V, sec 5, U S Const amend V and XIV

The court's opinion errs in denying the physician s right to employ counsel and right to already-retained, out-of-state counsel The unconstitutional denial resulted in deprivation of property - legal services already paid - by an arm of the State, i e , the court, without compensation and in favor of defendants This deprivation without just compensation by the State is unconstitutional The State through the court thereby anointed untrustworthy defendants, officers of the court, with unfair advantage S&B certainly had counsel and testified that they would not want to proceed without counsel The Motion for Directed Verdict should be denied

The court's opinion errs in failing to address the physician's motion for continuance and multiple factors supporting continuance

The court's opinion errs in failing to apply strict scrutiny to breach of fiduciary duty The Motion for Directed Verdict should be denied

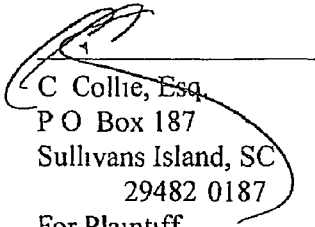
Sanctions should be granted where, as in this case, defendants have made significant omissions, material misrepresentations, discovery abuse, and bad faith affidavits See Creighton v Coligny Plaza Limited Partnership, 512 S E 2d 510 (Ct App 1998)

## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant this Motion and alter and/or amend its order entered July 14, 2009. Specifically, it is respectfully requested that this Honorable Court issue an order as follows: (1) that the previous ruling rejecting defendants' attempts at evasion of service, the law of the case, is adopted, (2) that defendants waived the issue of service and the statute of limitations, (3) that the claims are not barred by the statute of limitations, (4) that defendants' motion for directed verdict on all counts is denied, (5) that plaintiff's motion for directed verdict on liability is granted, and (6) that defendants' significant omissions, material misrepresentations, discovery abuse, and bad faith affidavits warrant sanctions against defendants to discourage similar actions in this and future cases and to discourage actions which are prejudicial to and which jeopardize the administration of justice.

Respectfully submitted,

Dated 7/27/09



C. Collie, Esq.  
P O Box 187  
Sullivan's Island, SC  
29482 0187  
For Plaintiff

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

NOV 22 1999 *cm*

LAHRY W. PHIPPS, CLERK  
CHARLESTON, SC

J Doe, M D

Plaintiff

v

C A # 2 99-833-23

Tenet HealthSystem Medical Inc  
and East Cooper Community  
Hospital, Inc

Defendants

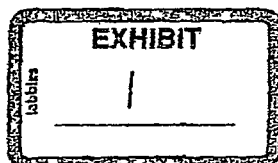
ORDER

This matter is before the court upon motion of plaintiff, J Doe, M D , for a preliminary injunction. The court has reviewed the pleadings, affidavits and the legal memoranda filed by the parties. The court also heard arguments from counsel on October 21, 1999. After due consideration, the court is of the belief that the balance of hardships analysis, as required by Blackwelder Furniture Co v Seilig Mfg Co, 550 F 2d 189, 195 (4th Cir 1977), and its progeny favors the plaintiff. The plaintiff also appears to have alleged colorable claims that present serious issues for deliberate consideration by this court. Thus for these reasons, and as set forth fully in more detail below, the court grants the plaintiff's motion for a preliminary injunction.

I. FACTUAL BACKGROUND

Plaintiff, an ophthalmologist practicing in Mt Pleasant, South Carolina, was on the Medical Staff of the Defendant East Cooper Community Hospital d/b/a/ East Cooper Regional Medical Center ( 'Hospital ' ) until her medical staff privileges were revoked on September 10, 1997. Plaintiff's home and office are located near the Hospital where Plaintiff had maintained

*1*  
*cm*



SB 20469

*(22)*

medical staff and patient admitting privileges since 1994

Defendant Hospital owns and operates a local hospital in Mt Pleasant, and Defendant Tenet HealthSystem Medical, Inc is its parent company Physicians practicing in the hospital are organized into a medical staff which operates pursuant to Bylaws rules and regulations The medical staff is accountable to the Board of Directors for the quality and appropriateness of patient care rendered by all physicians practicing at the hospital, and to that end the Bylaws set forth procedures for the processing of credentials, medical staff appointments, and ongoing peer review evaluations The recommendations concerning the granting of privileges are made by physicians practicing at the Hospital and serving on medical staff committees

A physician desiring medical staff privileges at the Hospital must apply for and be granted same To keep medical staff members apprized of their ongoing responsibilities and any changes in the Bylaws rules, and/or regulations medical staff meetings are regularly scheduled along with departmental staff meetings for each of the medical staff departments All medical staff physicians are encouraged to attend these meetings The medical staff also maintains an office within the hospital managed by a full-time medical staff coordinator Any physician needing information regarding the Bylaws, rules, and/or regulations can go to that office for guidance and updated information.

At the pertinent times in question the medical staff was divided into categories designated as Active, Associate, Courtesy, Consulting, and Honorary The active staff consists of physicians who consult in connection with or attend or admit to the hospital a minimum of twenty-four patients per year and who are located closely enough to the hospital to provide continuous care to their patients Members of the active staff are granted privileges to admit or

attend to patients in the hospital and to exercise such clinical privileges as have been granted to the particular physician. As members of the active staff, physicians may vote on medical staff issues, hold office in the medical staff organization, and are required to attend a requisite number of medical staff and departmental meetings. The twenty-four patient contact requirement has existed since at least 1989 at East Cooper Hospital.

Associate staff members consist of physicians who are eligible for advancement to the active staff and who will in the ordinary course of events be advanced to the active staff after serving not more than two years on the associate staff. Members of the associate staff may admit and attend to patients in the hospital within the clinical privileges granted. Associate members may also serve on committees and are required to attend a requisite number of staff meetings. They are not, however, eligible to hold office or vote.

Courtesy staff members consist of physicians who are eligible for active staff membership but who admit or attend to not more than twenty-five patients in any twelve month period or act only as consultants. Courtesy staff members may admit and/or attend to patients in the hospital within the clinical privileges granted to them. They may attend staff and departmental meetings but are not eligible to hold office or vote. At the time plaintiff was first granted privileges at East Cooper Hospital in July of 1994, there was no specific requirement that courtesy staff members be required to have active privileges at another local hospital before courtesy privileges would be granted at East Cooper Hospital, but the Bylaws were amended in July 1995 to include said requirement. This amendment was first proposed by the medical staff itself, approved by the medical staff, and ultimately approved by the Board on July 20, 1995.

Consulting staff members consist of physicians who do not admit patients to the hospital,

but who desire privileges to provide consultative services to patients at the request of staff physicians. Consulting staff members are not eligible to admit patients and are not eligible to vote or hold office within the medical staff. They are also not allowed to perform surgery in the capacity of primary surgeon. They may attend departmental and staff meetings.

Pursuant to the Bylaws, all initial appointees to any category of the medical staff must serve a provisional term for twelve months. This provisional status may be renewed for not more than a total of two six-month periods. An initial appointee shall remain provisional until certain requirements are met as set forth in the Bylaws. If the provisional appointee fails within that period to furnish the certification required in the Bylaws, his staff membership or particular clinical privileges, as applicable, shall automatically terminate.

Physicians are considered for reappointment to the medical staff every two years. Plaintiff first applied for staff privileges in January 1994; her application for active staff privileges was processed, and in July 1994 she was appointed to the associate staff. This was customarily referred to as "associate active staff." In the ordinary course of events she would have remained in this status for a period of one year, at the conclusion of which her status would be reviewed. In order to progress to active staff status she would have been required to attend a requisite number of medical staff meetings and would have been required to consult, attend, or admit to the hospital at least twenty-four patients in the twelve month period. If the plaintiff did not have the requisite patient contacts within that first year, there are provisions in the Bylaws which allow the provisional status to be extended in six month increments, but in no event is this provisional status to exceed two years from the initial appointment.

On November 30, 1994, plaintiff requested that her status be changed from associate

active status to the courtesy staff. This request was granted and as such, she was then in provisional courtesy status. As indicated above at the time this request was made by plaintiff and granted, there were no requirements in the Bylaws that physicians with courtesy status have active privileges at any other local hospital. As a member of the courtesy (provisional) staff plaintiff was not required to attend meetings nor were there any minimum patient contact requirements.

Although the plaintiff's status was changed from associate active to provisional courtesy at her request in November of 1994, the period of her initial appointment in a provisional status still began in July of 1994 and would automatically come up for review in July of 1995. In July 1995 the plaintiff's status was reviewed. The Hospital determined that she did not have the requisite number of patient contacts to be granted active status, as there were only records of one patient contact between July 1994 and July 1995. Plaintiff came off of the provisional year and remained a member of the courtesy staff.

Reappointment to the medical staff, pursuant to the Bylaws, occurs every two years and, as such, plaintiff came up for reappointment in July of 1996, two years after her initial appointment to the staff. In the spring of 1996, plaintiff was sent correspondence reminding her of the necessity to complete a reappointment application and plaintiff did so on April 18, 1996. She requested reappointment to the courtesy staff. She was then reminded that in order to be granted courtesy status she would need to have active privileges at another local hospital pursuant to the Bylaws in effect at the time of her application for reappointment.

At this point plaintiff first complained that she was never notified nor was she aware of the Bylaw change to this effect which had been approved the previous year in July 1995.

Plaintiff then attempted to assert that the amended Bylaws did not apply to her specifically and that only the prior requirements should apply to her

As the time approached for the plaintiff's reappointment to the staff to be considered in July 1996, plaintiff did not have active privileges at any other local hospital and, therefore, did not qualify for courtesy privileges pursuant to the terms of the Bylaws. She also did not have the requisite patient contacts to qualify for active staff status. Indeed, she only had two patient contacts from January 1, 1995, to December 31, 1995, and at most one or two patient contacts in 1996 by the time her application for reappointment was being considered in July 1996. In an effort to work with plaintiff and to enable her to continue to have admitting privileges at East Cooper Hospital, the credentials committee offered to allow plaintiff to apply again for associate active privileges for another year but reminded her of the requirement that she would have to meet the twenty-four patient contact provision to progress to active status if she accepted this offer. Plaintiff agreed to same, but attempted to modify the twenty-four patient contact requirement by marking through the twenty-four requirement number and replacing it with twelve. This unilateral modification was rejected, and plaintiff was informed that twenty-four patient contacts would be required and the only way to change the requirement would be through an amendment to the Bylaws. As such, plaintiff was appointed to the associate active staff for a period of one year beginning in August 1996 and ending in August 1997. Despite her acceptance of this appointment, plaintiff unsuccessfully appealed the reappointment requirements, and then requested a Bylaw amendment which would permit general ophthalmologists to maintain privileges with twelve patient contacts per year. The amendment was unanimously rejected by the medical staff.

In August 1997 plaintiff came up for review at the end of the additional provisional year, at which time the Hospital determined that she did not have the requisite number of patient contacts. According to the Hospital's records, it appears that plaintiff only had five patient contacts during the period of time from August 1996 to August 1997. Moreover, plaintiff chose not to obtain active staff status at any other local hospital and, as such, did not qualify for courtesy staff privileges at East Cooper Regional Medical Center. Under these circumstances, she was granted consulting staff privileges and was notified of her right to appeal.

As one of the bases for bringing this action against Tenet HealthSystem, plaintiff alleges that Tenet interfered with her medical practice and patient relationships by improper acts. For example, at the same time the Hospital was imposing the twenty-four patient contact requirement on plaintiff, plaintiff claims that Tenet failed to renew her yellow page listing and advertisement. Plaintiff cites this as interference with established patients who noticed the deletions and could have assumed that the plaintiff had moved or stopped practicing, and as interference with potential patients who would have used the yellow pages in locating a doctor.

It is undisputed that the proceedings concerning plaintiff's staff privileges did not implicate in any way professional competence or patient care. There is no allegation that the plaintiff is not a fully qualified and competent physician, nor any allegation of a single incident or problem with her medical care to any patient. Plaintiff has had at least eight patients who needed ophthalmic surgery, but who were forced to go elsewhere for those services. In addition, plaintiff submits that there will be future patients who will be required to seek a different physician due to plaintiff's lack of admitting privileges. She also asserts that she is being deprived of income, that she is placed at a competitive disadvantage as to other

7  
CJM

ophthalmologists, and that she is suffering harm to her professional reputation, all as a result of the defendants' actions

Plaintiff pursued her appeal through the appropriate committees and governing mechanisms in place at East Cooper Regional Medical Center, her appeal was denied, and her status on the consulting staff affirmed. This lawsuit was thereafter initiated, along with Plaintiff's Motion for a Temporary Injunction. In addition to other causes of action stated in the complaint, plaintiff claims that the Hospital violated the Bylaws when it retroactively applied the 1995 amendments to her staffing determination that the twenty-four patient contact should not have been applied to her or in the alternative, that she complied with the contact requirement by consulting in connection with or attending to at least twenty-four patients of a Hospital-owned medical practice. Plaintiff has also recently added claims for violations of the 42 U.S.C. § 1320a-7b, 42 U.S.C. § 1395nn, and S.C. Code Ann. § 44-113-10.

## II ANALYSIS

The Fourth Circuit outlined the analytical framework which courts must employ in determining whether to grant preliminary relief in Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991) (citing Blackwelder, 550 F.2d at 195). First, the party requesting preliminary relief must make a "clear showing" that he will suffer irreparable harm if the court denies his request. Id. at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." Id. at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised

questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation' Id. at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." Id. Fourth, the court must evaluate whether the public interest favors granting preliminary relief Id.

The two most important factors are the probable irreparable harm to the plaintiff if an injunction is not issued and the probable harm to the defendant if an injunction is issued. Blackwelder, 550 F.2d at 120. If the balance of these two factors is in the plaintiff's favor, the plaintiff does not have to show a likelihood of success on the merits, and the presentation of a grave or serious question is sufficient to warrant a preliminary injunction. Id.

#### A. Irreparable Harm

Plaintiff submits that due to the Hospital's actions against her, she is neither able to admit any patients to any Hospital, nor perform surgery on her patients who require it. Those patients now must either delay surgery or be forced to select another ophthalmologist to perform the necessary surgical procedures. Plaintiff also claims that she suffers economic damage to her medical practice because she is deprived of the revenue that would result from performing these surgical procedures. Furthermore, she claims that the termination of her privileges threatens to destroy her professional reputation, as she is left without the ability to properly provide a full range of medical services for which she is trained and qualified. While the fact that plaintiff had over one year to make alternative arrangements or changes to her practice in order to best serve her patients in anticipation of this problem discounts any argument of surprise, the harm she suffers and that harm upon her patients continues.

Defendants argue that the plaintiff's harm is solely of an economic nature, and as such courts have generally refused to find that kind of harm irreparable for it can be compensated by a money judgment. See Hughes Network Systems Inc v Interdigital Communications Corp., 17 F 3d 691, 694 (4th Cir 1994) (loss of contractual security interest). However, while the revenue lost is purely economic the remainder of plaintiff's "injuries"— injury to patient relationship and professional reputation — are incalculable. "[I]rreparability of harm includes the impossibility of ascertaining with any accuracy the extent of the loss." Blackwelder, 550 F 2d at 197. see also Federal Leasing v Underwriters at Lloyd's 650 F 2d 495, 500 (4th Cir 1981).

Defendants also rely upon the unpublished opinion of Strauss v Peninsula Reg'l Med Ctr, 1996 LEXIS 11486 (4th Cir May 20, 1996) for the proposition that the type of harm the plaintiff alleges she will suffer is not irreparable. In Strauss, physicians sought a preliminary injunction to restore their staff privileges based upon irreparable harm to their business and reputations. That case, however, involved two competing radiology groups "who routinely feuded over such matters as patient referrals and the scheduling of time on hospital equipment," exclusive contracts to provide radiation oncology services at the defendant hospital, plans by the plaintiffs to build a competing "independent radiation therapy facility," and failed negotiations by the defendant hospital to purchase the facility. Id. \* 2-3. The Strauss court held

Monetary loss, however, does not constitute irreparable harm unless the loss cannot be "ascertain[ed] with any accuracy." As the district court explained, this was not the case here. The history of plaintiffs' patient volume would certainly enable a jury to compensate any business loss suffered by plaintiffs with a monetary judgment. So too do we agree with the district court that any reputational injury to [plaintiffs] is too speculative to merit injunctive relief.

10  
mm

Id The defendants' reliance on this case fails to account for the extreme factual dissimilarities and support, in this matter, for the proposition that without such an injunction that there is a risk of injury to plaintiff's professional reputation and a loss of future patients due to any such reputational injury. Hence, at this stage the nature of the plaintiff's harm is incalculable.

#### B. Balance of Hardships

As evidence of harm, defendants argue that an injunction restoring the plaintiff's staff privileges will be disruptive, in part because all other doctors at the Hospital have met the Bylaw requirements. However, nothing in the record indicates any real probability that such disruption would come to fruition. Reliance upon Strauss, where the court found a similar injunction would "place a great burden on the hospital because of the strife that would be created by [reinstatement of plaintiff's] privileges during a combative lawsuit," id. \* 5, fails to account for the lack of any such disruption in this case. Plaintiff correctly points out that the Hospital offers no proof of this proposition, and cites that the Hospital already restored plaintiff's privileges from a revoked status in August of 1997 with no discernible effect on the Hospital. Moreover, the Hospital offered evidence of the polite and business like manner in which the decision was made as support for their action, discounting reliance upon the likelihood of 'strife' in the staff. In addition, plaintiff argues that the Hospital's interests will not be adversely affected if an injunction is granted because it will benefit from any income generated by admission of plaintiff's patients to the Hospital. While an injunction of the kind sought will bring into question the Hospital's credentialing processes, this effect of a legal challenge, in and of itself, does not represent the kind of substantial and irreparable harm required in the face of a plaintiff's request for a preliminary injunction.

I therefore based upon the weightiness of plaintiff's hardships in comparison to the Hospital's cited burdens, the balance of hardships tips in favor of the plaintiff. If the balance of the hardships is in the plaintiff's favor, the plaintiff does not have to show a likelihood of success on the merits, and the presentation of a grave or serious question which is fair ground for litigation is sufficient to warrant a preliminary injunction. Blackwelder, 550 F.2d at 196. Only where the balance of hardships does not tip decidedly in favor of the plaintiff must the plaintiff show a probability of success on the merits. Direx Israel, Ltd. 952 F.2d at 813.

#### C. The Merits

Due to the balance of the burdens weighing more heavily upon the plaintiff, she only has to present grave or serious questions which are fair ground for litigation. Notwithstanding that the plaintiff will not be required to establish a likelihood of success on the merits, the following discussion sets forth the stage on which those questions lie. First, plaintiff maintains that the Hospital's revocation of her admitting privileges violates the nondiscrimination clause in the Hospital Bylaws, which states that "no person shall be denied medical staff membership or particular clinical privileges on the basis of any other criterion lacking professional justification" (Bylaws at 5, art. III, § 2 D). The Hospital attempts to place its actions with respect to the plaintiff in this category by describing the patient contact requirement as the only method by which "to adequately judge and review an active staff physician's professional competence and clinical judgment in the treatment of patients." Plaintiff contends that there is no evidence that this rationale was ever considered in the Bylaws, or in minutes of any meeting where this provision was approved. In contrast, plaintiff claims that the Hospital's 1997 Bylaws indicate that the patient contact requirement is actually evidence of physician "support" of the

Hospital (1997 Bylaws, p 22 § 3 A 2)

The Bylaws provide the procedures that govern the relationship between the Hospital and its member physicians. Plaintiff relies upon cases which hold that medical staff bylaws are to be treated by the courts as creating enforceable contract rights and that hospitals are 'held to a standard of strict compliance.' Miller v Indiana Hosp., 419 A 2d 1191, 1193 (Pa Super Ct 1980) see also Virmani v Presbyterian Health Servs Corp., 488 S E 2d 284, 287-88 (N C Ct App 1997). However, application of this level of review to such decisions in South Carolina is doubtful. There are two distinct views governing review of hospital staffing decisions. See Silver v Castle Memorial Hospital The Doctor is Out! Judicial Review of Medical Staff Appointments, 20 Am J Trial Advoc 197, 200 & n 36, 203 & n 50 (1996) (discussing majority and minority views). South Carolina follows the majority view that when the trustees of a private hospital in their sound discretion, exclude a doctor from the use of the facilities of the hospital, the courts are generally without authority to nullify that discretion by injunctive process. Khoury v Community Memorial Hosp., 123 S E 2d 533, 539 (Va 1962). In Wood v Hilton Head Hosp., Inc., 356 S E 2d 841 (S C 1987), the court stated that it was well settled in South Carolina that it is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners. Id at 842. Wood involved a doctor whose staff privileges were summarily suspended pursuant to a bylaws' provision which allowed for suspension in order to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient." Id. Relying on prior precedent barring judicial review of such actions, see, e.g. Strauss v Marlboro Cty General Hosp., 194 S E 2d 65 (S C 1937) and Gowan v St. Francis Community Hosp., 268 S E 2d 580

(S C 1980) the court declined to review the Hospital's decision to revoke the staff privileges. Plaintiff attempts to distinguish these cases by noting that neither case involved an arbitrary decision to revoke staff status, but that in Wood, the subject physician had exhibited "incompetence," and in Gowan the hospital only revoked specialized privileges" (in Gowan, the court's opinion is only one paragraph and fails to indicate the specific privileges revoked). While South Carolina's aversion to review of Hospital staffing decisions will make challenge to any such decision difficult, the cases which evidence this posture involve revocation decisions related to professional competence and patient care, concerns which are not present in the case at bar.

In addition, plaintiff maintains in her complaint that the Hospital and its parent, Tenet HealthSystem, entered into a conspiracy, contract, combination, or trust to drive plaintiff out of business and achieve a monopoly in violation of the antitrust laws. While plaintiff has not established a probability of success on her antitrust claims, she has sufficiently stated her claims in such a way to allow this court to conclude that there exists a possibility of success. Defendants' contention that the unlikelihood of success on the merits should preclude any such injunction fails to recognize the difference in the bar that a plaintiff must meet when the balance of the hardships falls heavily upon her.

A violation of section one of the Sherman Act, 15 U.S.C. § 1, requires "the existence of an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade." Oksanen v. Page Mem. Hosp., 945 F.2d 696, 702 (4th Cir. 1991). In Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991), a case involving an antitrust claim by an ophthalmologist denied hospital staff privileges, the United States Supreme Court held that the

physician's allegations of restraint of trade demonstrated a "sufficient nexus with interstate commerce to support federal jurisdiction" Id. at 333. The Court also remarked "The [alleged] restraint was accomplished by an alleged misuse of a congressionally regulated peer review process, which [the plaintiff physician] characterizes as the gateway that controls access to the market for his services." Id. at 332. Liability under section one may be established by proof of either an unlawful purpose or an anticompetitive effect. Id. at 330 (citing United States v. United States Gypsum Co., 438 U.S. 422, 435 n. 13 (1978)). Plaintiff maintains that the defendants have excluded her from providing eye surgery to her patients by a misuse of the Bylaws governing privileges at the only hospital where plaintiff is on staff.

Plaintiff also alleges a violation of section two of the Sherman Act, 15 U.S.C. § 2. "While section one of the Act focuses on concerted action, monopolization under section two involves the actions of a single firm to control a market." Oksanen, 945 F.2d at 710. Defendants argue that although individual members of a medical staff are legally capable of conspiring with each other, a medical staff as an entity cannot be said to have conspired with a hospital or its board because the staff and the hospital are considered one entity. In this case, plaintiff did not sue the medical staff, but brought her action against the hospital and its parent company. Defendant maintains that there is a "unity of interest," similar to that in Oksanen, because of the common interest in patient care. While the defendants point out potential weaknesses in the plaintiff's theories, those theories are in the least, colorable claims presenting serious issues for deliberation.

Lastly, plaintiff has recently amended her complaint to add causes of action asserting alleged violations of 42 U.S.C. § 1320a-7b and 42 U.S.C. § 1395nn. 42 U.S.C. § 1320a-7b is

an anti kickback provision of the Social Security Act which prohibits offering or paying remuneration to induce referrals of program-related businesses See Hanlester Network v Shalala, 51 F 3d 1390, 1398 (9th Cir 1995) 42 U S C § 1395nn prohibits physicians who have a financial relationship with an entity from making a referral to the entity for the furnishing of designated health services for which payment otherwise may be made under a Federal health-care program Plaintiffs argue that the definition of remuneration in these statutes includes privileges and benefits such as those accorded active staff membership at the Defendant Hospital See Unemployment Compensation Bd v Miedama 365 A 2d 900, 902 (Pa Commonw Ct 1976), see also Hanlester Network, 51 F 3d at 1398 (remuneration is broader than only kickbacks, bribes and rebates) Plaintiff has also alleged numerous state law claims including claims of antitrust and anti-referral violations

#### D. Public Interest

There is no question regarding plaintiff's professional competence or ability to provide quality patient care Thus, there is no concern for protecting Hospital patients from an unqualified or incompetent physician, and the public interest will not be affected in that respect The public also has an interest in ensuring that hospitals follow their internal rules and treat their physicians fairly Though the defendants assert that the public has an interest in the Hospital's ability to review the quality of care given by their physicians, this interest can be addressed in alternative ways during the pendency of this litigation For these reasons the public interest will not be adversely affected by granting the requested injunction

### III CONCLUSION

It is therefore

**ORDERED**, for the foregoing reasons that Defendants are hereby **ENJOINED** from preventing the plaintiff from working as a member of the Active staff. Furthermore, in order to ensure that this matter is resolved in the most timely manner, this court will not allow any departures from the Scheduling Order issued on November 17, 1999.

**AND IT IS SO ORDERED**

  
**PATRICK MICHAEL DUFFY**  
**UNITED STATES DISTRICT JUDGE**

Charleston, South Carolina  
November 23 1999

17

C Collie, Esq

---

---

PO Box 187  
Sullivans Island, SC 29482-0187  
843 883 3010

---

---

August 4, 2009

The Honorable Thomas Hughston Jr  
Charleston County Judicial Center  
100 Broad Street, Ste 368  
Charleston, SC 29401

Re 2002-CP-10- 1448 and 2007-CP-10-1444 (after change of venue)  
Doe(CHolmes) v Becker et al

Dear Judge Hughston

We appreciate your generosity in granting permission to supplement the record

In addition, we are pleased to comply with your request for the more recent decision confirming that denial of summary judgment precludes sanctions under the FCPSA. The following case supports plaintiff's proposed order Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (S.C. App. 1999), rehearing denied, certiorari denied.

Also, thank you for clarifying that the case was filed in 2002. It is significant that this case was filed in 2002, not 2007. This case was filed in 2002 but was given another case number after change of venue on return to Charleston County in 2007. The filing date in 2002 is relevant because the current FCPSA is not applicable. Based upon legislative intent and the filing date in

2002, the previous FCPSA is applicable. A copy of the previous FCPSA, S C Code Ann Sections 15-36-10 through 15-36-50 (1988), is enclosed for reference. Applying the current statute rather than the previous statute is equivalent to ex post facto law. Both State and Federal constitutions contain provisions for due process, equal protection, and mandatory prohibition against ex post facto law. S C Const art I, sec 3 and 4, S C Const art V, sec 4, S C Const art V, sec 5, U S Const Art I, Sec 10, U S Const amend V and XIV. The case herein is not frivolous under either statute. The underlying antitrust claims were meritorious and were based upon the attached opinion letter of Special Antitrust Counsel.

Moreover, in Whitfield, the Court of Appeals cited Hanahan v. Simpson and stated, "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." Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S C 207, 220, 525 S E 2d 888 (S C App 1999), rehearing denied, certiorari denied, citing Hanahan v. Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997). In Whitfield, the fact that there was no formal ruling on summary judgment and no written order denying summary judgment was not dispositive. Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S C 207, 525 S E 2d 888 (S C App 1999), rehearing denied, certiorari denied. In the instant case, Judge Dennis' denial of defendants' previous Motion for Summary Judgment and Judge Barber's denial of defendants' Motion to Dismiss also preclude award of fees under the Act.

Further, we apologize for any misunderstanding with regard to the hearing on the defendants' motion for sanctions. As noted at the hearing, the attached docket sheet from the Charleston County website shows defendants' motion for sanctions was no longer pending. It is our understanding that everyone is encouraged to use this website. As a result, there was no notice that the defendants' motion for sanctions was pending and no notice that it was to be heard on that day. Similarly, the website indicated that plaintiff's previously-filed **Motion to Dismiss Defendants' Motion for Sanctions** was no longer pending (filed July 7, 2009). As a result,

there was no notice of hearing for the plaintiff's Motion to Dismiss Defendants' Motion for Sanctions. The plaintiff's Motion to Dismiss Defendants' Motion for Sanctions includes, but is not limited to, objection based upon lack of jurisdiction. The plaintiff respectfully requests an opportunity to be heard on the previously-filed plaintiff's Motion to Dismiss Defendants' Motion for Sanctions (attached).

Finally, we feel we must in fairness correct the record. If defendants wanted to bring in other parties, they could have requested it. Untrustworthy defendants make reference to other pending cases which are not before this Court, and they know that, but for defendants' negligence, we would not have to be in court today. Untrustworthy defendants have referenced the Tennessee suit, therefore in fairness plaintiff includes the three expert opinion affidavits. These affidavits establish the merits. Further, because Tennessee has an unusually short, one-year statute of limitations, it was judged prudent to file in South Carolina with motion for stay in order to toll the statute. As you can see from the three expert opinion affidavits, these matters are meritorious and they are pending.

If you have any questions, please do not hesitate to contact me. Thanking you in advance for your kind consideration, I am

Very truly yours,

C. Collie, Esq.

cc John Wilkerson

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | NINTH JUDICIAL CIRCUIT       |
| COUNTY OF CHARLESTON    | ) | CASE NO 07-CP-10-1444        |
|                         | ) |                              |
| J Doe(CHolmes),         | ) |                              |
|                         | ) |                              |
| Plaintiff,              | ) |                              |
|                         | ) |                              |
| -vs-                    | ) |                              |
|                         | ) |                              |
| Manton Grier, James Y   | ) |                              |
| Becker, and Haynsworth  | ) | ORDER                        |
| Sinkler Boyd, P A , as  | ) |                              |
| successor to Sinkler &  | ) |                              |
| Boyd, P A               | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
| Defendants              | ) |                              |
|                         | ) |                              |

This matter comes before the Court on motion of the plaintiff to strike defendants' motion for sanctions After careful consideration, the Court makes the following findings

Because this cause of action arose before 2005, the applicable statutes are S C Code Ann Sections 15-36-10 through 15-36-50 (1988) Act No 432, Section 6 Ex Parte Gregory, 663 S E 2d 46, fn 1 (S C 2008), Clegg v Lambrecht, 2009-SC-0206 304, fn 1 (Ct App 2009) Moreover, criteria for Rule 11 sanctions are essentially the same as those for the FCPSA In re Beard, 359 S C 351, 597 S E 2d 835 (S C App 2004) Where a party survives summary judgment motion, it is not subject to sanctions under the FCPSA Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997), rehearing denied Survival of motion for summary judgment precludes sanctions under FCPSA Whitfield Const Co v Bank of Tokyo Trust Co , 383 S C

207, 525 S E 2d 888, (S C App 1999) rehearing denied certiorari denied The circuit court denied both parties' motions for summary judgment

Now, therefore, for the foregoing reasons and for good cause shown, it is ordered that defendants' motion filed June 22, 2009, is hereby stricken with prejudice

IT IS SO ORDERED

Dated \_\_\_\_\_

Charleston, South Carolina

\_\_\_\_\_  
Presiding Judge

## CHAPTER 36

### South Carolina Frivolous Civil Proceedings Sanctions Act

#### SEC

- 15-36-10 Liability for attorney's fees and costs of frivolous suits
- 15-36-20 Factors supporting finding of proper purpose for action
- 15-36-30 Recovery of attorney's fees and court costs
- 15-36-40 Burden of proof
- 15-36-50 Court to determine fees and costs

#### § 15-36-10 Liability for attorney's fees and costs of frivolous suits

Any person who takes part in the procurement, initiation, continuation or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based, and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs

As used in this chapter, "person" is defined to mean any individual corporation, company, association, firm, partnership, society, joint stock company, and any other entity, including any governmental entity or unincorporated association of persons

**HISTORY** 1988 Act No 432, § 6

#### Library References

Westlaw Key Number Searches 102k1 102k194 44  
Costs C 1 194 44  
C J S Costs §§ 2 128

#### Research References

##### Encyclopedias

S C Jur Appeal and Error § 119 Costs And Sanctions For Frivolous Motions Or Appeals

S C Jur Appeal and Error XI Ref, Divisional References

S C Jur Attorney and Client § 46, Zealous Representation

S C Jur Attorney and Client V A Ref Divisional References

S C Jur Attorney Fees § 12, Generally

S C Jur Attorney Fees § 14, Scope And Procedure

S C Jur Attorney Fees § 15, Contrast With Federal Rule Of Civil Procedure 11

S C Jur Attorney Fees III D Ref, Divisional References

S C Jur Costs § 14, South Carolina Frivolous Civil Proceedings Sanctions Act

S C Jur Costs III C Ref, Divisional References

S C Jur South Carolina Rules of Civil Procedure § 11 2, Discussion  
 S C Jur South Carolina Rules of Civil Procedure IV Ref Divisional References

### Forms

South Carolina Litigation Forms and Analysis § 39 08 Attorney's Fees  
 South Carolina Litigation Forms and Analysis § 39 09 Frivolous Suit

### Law Review and Journal Commentaries

Wall & Weston, An analysis of current theories of liability 45 S C L Rev 857  
 (Summer 1994)

### Notes of Decisions

In general 1  
 Actions by state agencies 3  
 Summary judgment 2

#### 1 In general

Trial court lacked jurisdiction to consider motion for attorney fees under Frivolous Civil Proceedings Sanctions Act (FCPSA) filed after expiration of 10-day period to file post-trial motions after entry of judgment, in dispute over sale of limited liability company (LLC), trial court denied plaintiff's motion to amend complaint to add attorney who drafted amended LLC agreement as defendant, attorney filed motion for attorney fees approximately one year after motion was denied and six months after settlement and dismissal FCPSA's implied limitation period precluded application of three-year limitations period for action on statute In re Beard (S C App 2004) 359 S C 351, 597 S E 2d 835 Costs ⇨ 2

Criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) In re Beard (S C App 2004) 359 S C 351, 597 S E 2d 835 Costs ⇨ 2

Party who makes a frivolous claim or raises a frivolous defense has committed a more egregious act than one who merely acts without substantial justification, for purposes of awarding costs and/or attorney fees Father v South Carolina Dept of Social Services (S C 2003) 353 S C 254, 578 S E 2d 11 Costs ⇨ 2, Costs ⇨ 194 44

Deceased landowner's family, against whom quantum meruit action was

brought by forester, was not entitled to award of costs and attorney fees pursuant to Frivolous Civil Proceedings Sanctions Act where action survived family's motion for nonsuit based upon insufficiency of evidence and was resolved on merits, forester reasonably believed he had claim and legitimate question existed as to whether oral agreement and subsequent writing of those terms in letter would be considered express contract Swanson v Stratos (S C App 2002) 350 S C 116 564 S E 2d 117 Costs ⇨ 2

Clients of attorney were not 'aggrieved' party that could appeal sanctions imposed by trial court on attorney for filing frivolous claim, assessment of sanctions did not affect any property right of clients and did not impose any burden or obligation on them Burns v Gardner (S C App 1997) 328 S C 608, 493 S E 2d 356 Attorney And Client ⇨ 24

Determination of whether attorney fees should be awarded under Frivolous Proceedings Act is treated as one in equity Hanahan v Simpson (S C 1997) 326 S C 140 485 S E 2d 903 rehearing denied Costs ⇨ 194 44

A wife's motion to vacate a divorce decree was frivolous, and the husband was entitled to recover attorney fees under § 15-36-30 where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings, which showed that the court had asked her if she was under the influence of drugs or alcohol, and she replied that she was not (2) the wife's

claim that the husband used undisclosed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance. *Kilcawley v Kilcawley* (S C App 1994) 312 S C 425, 440 S E 2d 892.

## 2 Summary judgment

Construction lender that prevailed in action brought against it by landowner for trespass was not entitled to attorney fees and costs under the Frivolous Civil Proceedings Sanctions Act where circuit court declined to issue a ruling on lender's motion for summary judgment and parties thereafter agreed to submit case to special referee for full merits hearing that circuit court did not issue a written order denying its motion for summary judgment was not dispositive as Act only required that claims survive a motion for summary judgment in order to preclude award of fees. *Whitfield Const Co v Bank of Tokyo Trust Co* (S C App 1999) 338 S C 207, 525 S E 2d 888, rehearing denied certiorari denied. Costs ⇨ 2.

Denial of summary judgment on will contestant's causes of action for undue influence and lack of testamentary capacity precluded award of attorney fees under Frivolous Proceedings Act since there was evidence worthy of submission to jury claims could not be frivolous, within meaning of Act. *Hanahan v Simpson* (S C 1997) 326 S C

140, 485 S E 2d 903, rehearing denied. Costs ⇨ 194 44.

Where party survives summary judgment motion, it is not subject to sanctions under Frivolous Proceedings Act after trial on merits of surviving claims. *Hanahan v Simpson* (S C 1997) 326 S C 140, 485 S E 2d 903, rehearing denied. Costs ⇨ 2.

## 3 Actions by state agencies

Statute allowing recovery of attorney fees when a state agency acts without justification in pursuing its claim but specifically exempting child abuse and neglect actions, exempts Department of Social Services (DSS) from payment of attorney fees when its pursuit of a child abuse and neglect action is merely without substantial justification, however, DSS is not exempt from possibility of sanctions in form of attorney fees and/or court costs when DSS actions are frivolous, and thus, attorney fees and court costs may be assessed against DSS in a child abuse and neglect action pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA). *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254, 578 S E 2d 11. Costs ⇨ 2. States ⇨ 215.

Setting aside of sanctions of attorney fees imposed pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA) against the Department of Social Services (DSS) was warranted, in proceeding instigated by father to determine whether allegations of abuse against him were unfounded where DSS decision to investigate was not improperly motivated. *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254, 578 S E 2d 11. Costs ⇨ 2.

## § 15-36-20 Factors supporting finding of proper purpose for action

Any person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and

(1) reasonably believes that under those facts his claim may be valid under the existing or developing law, or

(2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action, or

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party

**HISTORY** 1988 Act No 432, § 6

#### Library References

Westlaw Key Number Searches 102k1, 102k194 44

Costs ⇨ 194 44

CJS Costs §§ 2 128

#### Research References

##### Encyclopedias

SC Jur Attorney and Client § 46 Zealous Representation

SC Jur Attorney Fees § 14, Scope And Procedure

#### Law Review and Journal Commentaries

Wall & Weston An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

#### Notes of Decisions

##### In general 1

##### 1 In general

Deceased landowner's family, against whom quantum meruit action was brought by forester, was not entitled to award of costs and attorney fees pursuant to Frivolous Civil Proceedings Sanctions Act, where action survived family's motion for nonsuit based upon insufficiency of evidence and was resolved on merits, forester reasonably believed he had claim and legitimate question existed as to whether oral agreement and subsequent writing of those terms in letter would be considered express contract *Swanson v Stratos* (SC App 2002) 350 SC 116 564 SE2d 117 Costs ⇨ 2

Denial of summary judgment on will contestant's causes of action for undue influence and lack of testamentary capacity precluded award of attorney fees under Frivolous Proceedings Act, since there was evidence worthy of submission to jury claims could not be 'frivolous,' within meaning of Act *Hana-*

*han v Simpson* (SC 1997) 326 SC 140, 485 SE2d 903, rehearing denied Costs ⇨ 194 44

A wife's motion to vacate a divorce decree was frivolous, and the husband was entitled to recover attorney fees under § 15-36-30, where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings which showed that the court had asked her if she was under the influence of drugs or alcohol, and she replied that she was not (2) the wife's claim that the husband used undisclosed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance *Kilcawley v Kilcawley* (SC App 1994) 312 SC 425, 440 SE2d 892

**§ 15-36-30. Recovery of attorney's fees and court costs**

When the essential elements of this chapter have been established as provided in Section 15-36-10, a person is entitled to recover his attorney's fees and court costs reasonably incurred in litigating the proceedings. The entitlement of the aggrieved person must be determined by the trial judge at the conclusion of a trial upon motion of the aggrieved party stating the manner in which the other party is alleged to have acted in violation of this statute. The court shall base its decision upon a review of the proceedings and affidavits submitted by each person affected.

**HISTORY** 1988 Act No 432, § 6

**Library References**

Westlaw Key Number Searches 102k1, 102k194 44  
Costs C 1, 194 44  
C J S Costs §§ 2 128

**Research References****Encyclopedias**

S C Jur Actions § 39, Termination  
S C Jur Attorney and Client § 46, Zealous Representation  
S C Jur Attorney and Client V A Ref, Divisional References  
S C Jur Attorney Fees § 14 Scope And Procedure  
S C Jur Attorney Fees § 15, Contrast With Federal Rule Of Civil Procedure 11  
S C Jur Costs § 14, South Carolina Frivolous Civil Proceedings Sanctions Act  
S C Jur Costs III C Ref, Divisional References

**Forms**

South Carolina Litigation Forms and Analysis § 39 09, Frivolous Suit

**Law Review and Journal Commentaries**

Wall & Weston An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

**Notes of Decisions****In general 1****1 In general**

Trial court lacked subject matter jurisdiction to award attorney fees under Frivolous Proceedings Sanctions Act motion for attorney fees was untimely, where movant failed to file motion within 10 days of judgment Pitman v Republic Leasing Co., Inc (S C App 2002) 351 S C 429, 570 S E 2d 187 Costs C 2

Frivolous Civil Proceedings Sanctions Act (FCPSA) does not allow judge to 388

invoke its provisions sua sponte it clearly requires proper motion to be made by aggrieved party Pool v Pool (S C 1998) 329 S C 324, 494 S E 2d 820 Costs C 2

Frivolous Civil Proceedings Sanctions Act (FCPSA) did not authorize award of private investigator costs in divorce suit, FCPSA only allows for the granting of 'attorney's fees and court costs' as sanctions not other types of costs or fees Pool v Pool (S C 1998) 329 S C 324 494 S E 2d 820 Costs C 2

A wife's motion to vacate a divorce decree was frivolous and the husband

was entitled to recover attorney fees under § 15-36-30, where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings which showed that the court had asked her if she was under the influence of drugs or alcohol and she replied that she was not (2) the wife's claim that the husband used undis-

closed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance although the parties had never discussed health insurance *Kilcawley v Kilcawley* (S C App 1994) 312 S C 425, 440 S E 2d 892

## § 15-36-40 Burden of proof

In a motion filed pursuant to this chapter the aggrieved person has the burden of proving

(1) the other party has procured, initiated, continued, or defended the civil proceedings against him,

(2) the proceedings were terminated in his favor,

(3) the primary purpose for which the proceedings were procured initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings

(4) the aggrieved person has incurred attorney's fees and court costs, and

(5) the amount of the fees and costs set forth in item (4)

HISTORY 1988 Act No 432, § 6

### Library References

Westlaw Key Number Searches 102k1, 102k194 44

Costs C-1, 194 44

CJS Costs §§ 2, 128

### Research References

#### Encyclopedias

S C Jur Attorney Fees § 14, Scope And Procedure

S C Jur Costs § 14, South Carolina Frivolous Civil Proceedings Sanctions Act

S C Jur Costs III C Ref Divisional References

### Law Review and Journal Commentaries

Wall & Weston, An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

### Notes of Decisions

#### In general 1

#### 1 In general

To receive attorney fees and/or court costs as a sanction under the Frivolous

Civil Proceedings Sanctions Act (FCPSA) the aggrieved party must show that the party sought to be sanctioned acted frivolously *Father v South Carolina Dept of Social Services*

Note 1

(S C 2003) 353 S C 254, 578 S E 2d 11 Costs ⇨ 2 Frivolous Civil Proceedings Sanctions Act (FCPSA) *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254, 578 S E 2d 11 Costs ⇨ 2  
Standard for sanctions under Rule 11 is essentially the same as that under the

§ 15-36-50. Court to determine fees and costs

Upon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly

HISTORY 1988 Act No 432, § 6

Library References

Westlaw Key Number Searches 102k1 102k194 44  
Costs ⇨ 1, 194 44  
C J S Costs §§ 2, 128

Research References

Encyclopedias

S C Jur Appeal and Error § 119, Costs And Sanctions For Frivolous Motions Or Appeals

S C Jur Appeal and Error XI Ref, Divisional References

S C Jur Attorney Fees § 12, Generally

S C Jur Attorney Fees III D Ref, Divisional References

S C Jur Costs § 14, South Carolina Frivolous Civil Proceedings Sanctions Act

S C Jur Costs III C Ref Divisional References

S C Jur South Carolina Rules of Civil Procedure § 11 2 Discussion

S C Jur South Carolina Rules of Civil Procedure IV Ref, Divisional References

Law Review and Journal Commentaries

Wall & Weston, An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

Notes of Decisions

In general 1

Appeals 2

preponderance of evidence *Swanson v Stratos* (S C App 2002) 350 S C 116, 564 S E 2d 117 Appeal And Error ⇨ 1024 1, Costs ⇨ 2

1 In general

Since the decision whether to impose sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) is a decision for the judge, not the jury, it sounds in equity rather than at law *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254, 578 S E 2d 11 Costs ⇨ 2

Decision to award costs under Frivolous Civil Proceedings Sanctions Act is one in equity and accordingly Court of Appeals may take its own view of

2 Appeals

Pursuant to the State Constitution provision governing standard of review in matters of equity the decision whether to award sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA), as a matter in equity mandates that an appellate court take its own view of the facts *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254 578 S E 2d 11 Appeal And Error ⇨ 1024 1

In reviewing an award of attorney fees appellate court may take its own view of the preponderance of the evidence, however, appellate court must always take notice of the lack of subject matter jurisdiction. *Pitman v Republic Leasing Co., Inc* (S C App 2002) 351 S C 429 570 S E 2d 187 Appeal And Error ⇨ 23, Appeal And Error ⇨ 1024 1

In reviewing award of attorney fees under Frivolous Proceedings Act, Supreme Court may take its own view of preponderance of evidence. Code 1976, §15-36-10 et seq. *Hanahan v Simpson* (S C 1997) 326 S C 140, 485 S E 2d 903, rehearing denied Appeal And Error ⇨ 1024 1

LAW OFFICES  
MALONEY & KNOX  
5225 Wisconsin Ave , NW, Suite 316  
Washington D C 20015-2014  
(202) 293-1414 (202) 293-1702 fax

January 24, 1998

RECEIVED

JAN 27 1998

ECRMC  
Medical Staff Office

Cynthia Holmes M D  
306 Station 22 1/2  
Sullivan s Island SC 29482

Re Antitrust Issues

Dear Dr Holmes

You have requested our opinion as Special Antitrust Counsel regarding the legality of East Cooper Regional Medical Center, a Tenet Healthcare System ('Hospital') denying your affiliation privileges with Hospital

You are a licensed physician with Board eligibility in Ophthalmology Since becoming a physician in 1988 you have never had a claim made against you for medical malpractice You completed your residency in June of 1993 In July 1993 your son was born You opened your office in the Durst Building as a sole practioner in January 1994 and applied for and received physician privileges with the Hospital

You decided to practice in the Durst Building because as a working mother of three children you wanted to be close to your family and the Hospital The Hospital is located 5 mile away from your office in Mt Pleasant, South Carolina and there are no similar facilities in the Mt Pleasant area

Your practice is located in offices leased from the Dr George Durst Jr from whom you lease your office and administrative services such as telephone reception, answering service, billing and other services Part of your rent payment was paid to Dr Durst and part was paid to Durst Family Medicine including a payment for Yellow Page advertising

In 1995, the Hospital itself was acquired by the Tenet Healthcare System and they began acquisition of primary care providers including Durst Family Medicine as well as other specialist groups In 1996 the Hospital advised you that your privileges would be lost unless you maintained a certain number of patient contacts in support of the Hospital Prior to that time the minimum contact provision was waived Your request for a phase-in of the minimum contact provision as well as a request to be heard at that time was denied by the Hospital

In August 1997 your admitting privileges with the Hospital were revoked in violation of the Hospital Bylaws and in violation of your state and federal due process rights The Hospital has made no claim of misconduct or lack of professional competency Furthermore in breach of your contract, your phone number was dropped from the 96-97 and 97-98 Yellow Pages by the Hospital without notice or consultation with you Since the termination of your admitting privileges and Yellow Page listing your practice has been materially adversely affected

000617

that the defendants' motion should be dismissed because it is unsupported, technically deficient, and legally insufficient

When a motion is to be supported by affidavit or sworn itemized statement as required by S C Code Ann Sections 15-36-10 through 15-36-50 (1988), it "SHALL be served with the motion ' Rule 6(d), SCRCP, S C Code Ann Sections 15-36-10 through 15-36-50 (1988) Act No 432, Section 6 Fundamental rights of equal protection and due process require compliance with Rule 6(d) SCRCP, and S C Code Ann Sections 15-36-10 through 15-36-50 (1988) S C Dept of Soc Ser v Beeks, 325 S C 243, 246, 481 S E 2d 703,705 (1997), Stono River Env Prot Assn v SCDHEC, 305 S C 90, 94, 406 S E 2d 340, 342 (1991), Kurschner v City of Camden Planning Commission, 376 S C 165, 171, 656 S E 2d 346, 350 (2008), S C Const art I sec 22, S C Const art I, sec 3, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV Defendants' motion fails on due process grounds and should be dismissed

Moreover, where a party survives summary judgment motion, it is not subject to sanctions under the FCPSA Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997), rehearing denied Survival of motion for summary judgment precludes sanctions under FCPSA Whitfield Const Co v Bank of Tokyo Trust Co, 383 S C 207, 525 S E 2d 888, (S C App 1999), rehearing denied, certiorari denied The circuit court denied both parties' motions for summary judgment Therefore, the defendants' motion should be dismissed

STATE OF TENNESSEE  
IN THE CIRCUIT COURT OF KNOWLEDGE COUNTY, TENNESSEE  
Case No 3-58605

J Doe,

Plaintiff,

Vs

Richard L. Duncan,  
Meridith Bond,  
Sidney Gilreath, and  
Gilreath and Associates,

Defendants

AFFIDAVIT OF DESA BALLARD

Personally appeared before me, Desa Ballard, who being duly sworn, deposes and says  
that

- 1 I am over the age of eighteen (18) years and am competent to state the matters set forth herein
- 2 I am a member of the South Carolina Bar, having been admitted to the Bar in 1983. My resume is attached as Exhibit A. I have been qualified as an expert in the field of attorney misconduct and malpractice in South Carolina state courts
- 3 I have been asked by the plaintiff to review certain documents and render a preliminary opinion, based on the information available to me, as to certain acts of legal malpractice asserted against the defendants. I have not been provided with any depositions or other discovery from this action, so my opinion is necessarily limited to the information available to me, and is subject to revision after review of additional materials. In rendering this opinion, I have relied on the

10/1/83

type of information relied upon by expert witnesses in the field in which in which  
my testimony is offered

4 I have been provided by the plaintiff with and have reviewed the following  
documents which I believe to be relevant to this proceeding

- A Unfiled copy of complaint (undated) captioned as above,
- B Unfiled copy of Motion for Summary Judgment dated February 28, 2006,
- C Unfiled Statement of Undisputed Material Facts dated February 28, 2006,
- D Unfiled Affidavit of Meredith Bond dated February 10, 2006,
- E Unfiled Affidavit of Richard L. Duncan dated February 10, 2006,
- F Unfiled Affidavit of Sidney Gilreath dated February 10, 2006,
- G Unfiled Affidavit of C. Holmes dated September 7, 2006 with attachments,
- H Affidavit of C. Holmes dated June 5, 2006,
- I Affidavit of Service dated 11-17-05 reflecting service of Summons and Complaint in Case No. 2005-CP-10-4351 upon Meredith Bond,
- J Affidavit of Service dated 11-17-05 reflecting service of Summons and Complaint upon Sidney Gilreath in Case No. 2005-CP-10-4351,
- K Unfiled Motion *Pro Hac Vice* (undated) in J. Doe M.D. v. Tenet Health System Medical Inc., *et al.*, Case No. 2000-CP-10-1888 filed by Richard L. Duncan and Meredith C. Bond of Gilreath & Associates,
- L Unfiled Notice of Appearance (undated) in J. Doe M.D. v. Tenet Health System Medical Inc., *et al.*, Case No. 2000-CP-10-1888 filed by Richard L. Duncan and Meredith C. Bond of Gilreath & Associates,
- M Undated Memorandum Re Application of the South Carolina Long Arm Statute,
- N Undated, unsigned and unfiled Affidavit of the Plaintiff in the instant case, faxed to the undersigned on 3-22-2015 (*sic*), received by the undersigned on November 27, 2006,
- O Fax cover sheet from E. Douglass Pratt-Thomas to Richard L. Duncan dated October 17, 2002 with enclosure of "draft Agreement" containing four (4) pages,
- P Letter from Cynthia Holmes M.D. dated December 24, 2002 to Richard Duncan, Gilreath & Associates enclosing letter dated December 16, 2002, without enclosure,
- Q Letter from Cynthia Holmes M.D. dated October 17, 2002 to Richard Duncan, Gilreath & Associates responding to proposed settlement,

5 In providing this affidavit, I have made the following assumptions

- A The Affidavit of the Plaintiff referenced in Paragraph 4(N) above has been properly sworn and executed,
- B I have been provided with all relevant information presently available,

6 In providing this affidavit, I affirm that, to the best of my knowledge, I am not related to any party to this action. I am informed and believe that I do not know any of the parties to this action. I have no personal knowledge of the matters set forth in the referenced exhibits.

7 From my review of the referenced materials, and for purposes of the opinions expressed herein, I assume the following facts to be true:

- A Cynthia Holmes, M.D. filed an action in the Charleston County Court of Common Pleas entitled *J. Doe v. Tenet Health Systems Medical Inc et al*, in 2000 on May 16, 2000. She was initially representing herself *pro se*.
- B On or about November 5, 2001, defendants Duncan and Bond, acting within the scope of their authority as agents of Gilreath & Associates, met with plaintiff and agreed to represent her in the referenced action.
- C At all times relevant hereto, defendants Richard L. Duncan and Meredith Bond were officers and/or agents of Gilreath & Associates, a law firm based in Tennessee.
- D On or about November 15, 2001, Richard L. Duncan and Meredith C. Bond of Gilreath & Associates appeared as counsel for plaintiff in that action and apparently remained counsel for plaintiff until those proceedings were concluded and all post-settlement work was completed, which appears to be sometime in February, 2003.
- E There is no fee agreement or other writing setting forth the scope of representation of the plaintiff by Duncan, Bond and Gilreath & Associates.
- F Plaintiff did not cede to Duncan, Bond or Gilreath & Associates authority to settle the pending case without her permission. She did execute a limited power of attorney permitting those defendants to endorse a settlement check in order to expedite distribution of settlement proceeds when received by counsel.
- G Defendants Duncan and Bond attended at least one status conference and one hearing in South Carolina, conducted written discovery, and took numerous depositions during pretrial proceedings.
- H Defendants in the subject action made an offer to settle the case on or about October 17, 2002. Plaintiff communicated to defendants Duncan, Bond and Gilreath & Associates that the offer was rejected.
- I Trial of the subject matter was scheduled to begin on October 28, 2002. Defendants Duncan and Bond arrived in South Carolina to begin trial preparations with the plaintiff on Sunday, October 27, 2002.
- J After jury selection on October 28, 2002, the court was advised that the terms of a settlement had been reached and the case did not proceed to trial.

At 3

K An order reflecting the settlement was filed on or about January 20, 2003  
L Settlement documents were prepared and ultimately executed by the  
plaintiff on or about February 14, 2003  
M The records of the Clerk of Court for Charleston County, South Carolina,  
indicate that the referenced matter was concluded via "discontinued,  
settled or withdrawn" as of October 30, 2002  
N It does not appear that Sidney Gilreath, in his individual capacity,  
provided any legal representation to the plaintiff. Plaintiff was  
represented by attorneys who were acting within the course and scope of  
their agency with Gilreath & Associates

8 From the information presented to me, it appears that certain relevant facts related  
to the standard of care exercised by the defendants Duncan, Bond and Gilreath &  
Associates are disputed

9 There is a dispute as to whether or not depositions had been taken prior to Duncan  
and Bond's appearance as counsel for the plaintiff. Duncan and Bond have  
asserted that no depositions were taken when they became plaintiff's counsel, and  
plaintiff disputes this. I do not believe this is a material issue of fact which affects  
the Court's analysis on summary judgment

10 There is a dispute as to whether or not Duncan and Bond were properly prepared  
for trial when they arrived in South Carolina on or about October 25, 2002.  
Plaintiff asserts that Duncan and Bond were in trial on another matter the week  
before the referenced case was scheduled to be tried. Duncan and Bond have not  
disputed this and have not asserted that they were prepared to try the case. They  
have generally asserted that they did not deviate from the standard of care in  
connection with their representation, but I do not believe this conclusory  
allegation, which does not address the specific facts testified to by Plaintiff,  
sufficiently refutes Plaintiff's allegations. Even if they did specifically address

*[Handwritten signature]*  
C. J.  
2/2

plaintiff's allegations, the issue of the degree of their preparation remains disputed

- 11 Defendants Duncan and Bond have not disputed plaintiff's allegations that they refused to present counteroffers made by plaintiff during settlement discussions during the time leading up to trial on October 28, 2002
- 12 It appears there was, in fact, a settlement agreement entered into by plaintiff, which resolved the underlying case
- 13 South Carolina law permits the maintenance of a negligence action against attorneys arising from a settlement in a prior matter if there are factual issues as to whether the attorney's poor advice and lack of preparation for trial forced plaintiff to accept a less-than-favorable settlement. The South Carolina Supreme Court has held that the prior settlement does not preclude the maintenance of an action against the attorney under these facts. *Crowley v. Harvey & Battey*, 327 S.C. 68, 488 S.E.2d 334 (1997)
- 14 There is insufficient evidence in the record provided to me for me to make a meaningful analysis of whether or not defendants Duncan, Bond and Gilreath & Associates were prepared to try the case and provided competent legal representation to the plaintiff in the underlying action. Plaintiff asserts that they were not and did not. If the settlement was entered into by the plaintiff after receiving inadequate and uninformed advice from Duncan, Bond and Gilreath & Associates regarding the settlement, it is my opinion that the defendants Duncan, Bond and Gilreath & Associates deviated from the standard of care required of attorneys under South Carolina law

10/28/02

15 I have not been asked to, and have not, provided an evaluation of whether or not the plaintiff has sustained any damages as a result of the actions of the defendants as alleged herein. The record is insufficient for me to undertake such an analysis. Further, deponent sayeth not.

Desa Ballard  
Desa Ballard

Sworn to by me this 3rd  
day of December, 2006

Jason B. Bullkin  
Notary public for South Carolina  
My commission expires 2-25-13

*Curriculum Vitae*  
**DESA BALLARD, ESQUIRE**

**PROFESSIONAL EXPERIENCE**    Law Offices Of Desa Ballard - Attorney at Law  
West Columbia, South Carolina - 1997 - present

Adjunct Professor, University of South Carolina School of Law  
Columbia, South Carolina - 2003 to present

Barnes, Alford, Stork & Johnson, L L P ("Of Counsel")  
Columbia, South Carolina - 2000 - 2003

Ness, Motley, Loadholt, Richardson & Poole -  
Charleston, South Carolina - 1987 - 1997    Partner

Chief Justice J B Ness, South Carolina Supreme Court - 1985  
- 1987    Law Clerk to Chief Justice

South Carolina Supreme Court - 1984 - 1985    Staff Attorney

Honorable Ralph King Anderson, Jr , Florence, South Carolina  
Circuit Court Law Clerk    1983 - 1984

**BAR MEMBERSHIPS**    South Carolina Supreme Court  
District of Columbia Bar  
United States District Court, District of South Carolina  
Third, Fourth, Fifth, Eighth, Tenth Circuit Court of Appeals  
United States Supreme Court

**PROFESSIONAL ACTIVITIES**    South Carolina Trial Lawyers Association  
Chairman, Ethics & Professionalism Committee, 1996 - current  
Co-Editor, The Bulletin Magazine - 1993 - 1996  
Member, Technology Committee, 1994 - 1996  
Vice Chairman Amicus Committee, 1989 - 2000  
Board of Governors, 1990 - 1993  
Chairman CLE Committee, 1989 - 90    1991 - 92  
Vice Chairman Publications Committee, 1989 - 90  
Vice Chairman CLE Committee, 1988 - 89

South Carolina Bar  
Member - Professional Responsibility Committee, 1994 -  
present, Chairman 1997-98  
Member, Lawyers Helping Lawyers    1995 - present  
Editorial Board, South Carolina Lawyer Magazine, 1993 -  
1994  
Member - Ethics Advisory Committee, 1991 - 1999

Member - Continuing Legal Education Committee, 1991 - 1992

South Carolina Administrative Law Judges Advisory Rules Committee 1994 - present

South Carolina Criminal Practice Rules Committee 1987 - 1992

South Carolina Judicial Council, Family Court Rules Subcommittee - 1986 - 1988

Editorial Board - A Guide to South Carolina Legal Research  
South Carolina Bar CLE Division (1991)

**Other Memberships**

American Bar Association  
Center for Professional Responsibility  
Association of Professional Responsibility Lawyers  
South Carolina Association of Ethics Counsel (founding member and Chairman)

**PUBLICATIONS**    A Force To Be Reckoned With - The South Carolina Delegates to the Constitutional Convention Co-Author with J B Ness - published by the National Conference of Chief Justices - 1993

Tearing Down the Spider's Web - The Deceptive Practice of Lawyer Bashing Co-author with J B Ness - South Carolina Trial Lawyer's Bulletin - Spring, 1990

South Carolina Jurisprudence - South Carolina Bar encyclopedia  
Contributing author on the topic of appellate practice - 1990

Do The Write Thing - Quarterly column on legal writing in the South Carolina YLD Bar Tab, 1991 - 1993

Punitive Damages Today - South Carolina Lawyer - January - February, 1992

Punitive Damages Today Part II - They're Back - South Carolina Lawyer, January - February, 1994

Brother, Can You Spare a Dime? - South Carolina Trial Lawyers Bulletin - Spring, 1995

**TEACHING**

**South Carolina Bar - CLE Division**

Approx 3 - 4 seminars per year since 1986, various topics

**South Carolina Trial Lawyers Association**

Chair, moderate and speak at annual convention seminar on Ethics and Professionalism, 1996 - present

**Other various educational presentations,**

Including Mecklenburg County Bar Association, Administrative Law Judge Association, numerous Title Insurance Company seminars, Paralegal Associations, Technical College classes, York County Bar Association, Richland County Bar Association, Anderson County Bar Association

**University of South Carolina School of Law** 2-week annual seminar on the S C disciplinary process in Advanced Professional Responsibility, 1993 - present

**CIVIC ACTIVITIES** **Mental Health Association of South Carolina**  
Board Member - 1997 to 1999

**EDUCATION**

**Juris Doctor - 1983**

University of South Carolina School of Law

**Bachelor of Arts (Journalism) - 1980**

University of South Carolina

Magna *Cum Laude*, Phi Beta Kappa

**CONTACT INFORMATION**

Law Offices of Desa Ballard  
226 State Street  
West Columbia, South Carolina 29169  
Telephone 803 796 9299  
Facsimile 803 796 1066  
E-mail [desab@desaballard.com](mailto:desab@desaballard.com)  
Internet [www.desaballard.com](http://www.desaballard.com)  
Mobile telephone 803 463 6706

STATE OF TENNESSEE  
IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE

|                        |   |                             |
|------------------------|---|-----------------------------|
| J Doe ( C Holmes),     | ) | Case No 3-58605             |
|                        | ) |                             |
| Plaintiff,             | ) |                             |
|                        | ) |                             |
| -vs-                   | ) |                             |
|                        | ) | Affidavit of J Kevin Holmes |
| Richard L Duncan,      | ) |                             |
| Meredith Bond,         | ) |                             |
| Sidney Gilreath, and   | ) |                             |
| Gilreath & Associates, | ) |                             |
|                        | ) |                             |
| Defendants             | ) |                             |
|                        | ) |                             |

---

Personally appeared before me Notary Public for the State of South Carolina, J Kevin Holmes, who, first being duly sworn, deposes and says

1 I am J Kevin Holmes and I reside at 1770 Dartmoor Circle, Charleston, South Carolina 29407 I have been a member in good standing of the South Carolina Bar for thirty-one (31) years I am admitted to practice law in the courts of the State of South Carolina, the United States District Court for the District of South Carolina, the United States Fourth Circuit Court of Appeals, and the United States Supreme Court I am an active member in good standing of the Charleston County Bar Association, the South Carolina Bar Association (Resolution of Fee Disputes Committee - 2 terms), the South Carolina Trial Lawyers Association (Board of Governors - 2 terms), the American Trial Lawyers Association, and the National Association of Criminal Defense Lawyers I am a partner in the Steinberg Law Firm, L L P , which has its offices located at 61 Broad Street, Charleston, South Carolina

2 At all times mentioned herein I was married to the Plaintiff Cynthia Holmes, M D , and have personal knowledge of events leading up to the settlement of her case captioned,

Cynthia C. Holmes, M.D. v. Tenet Health System Medical Inc., et al., Civil Action Number 00-CP-10-1888, which was set for trial during the week of October 28, 2002

3 On or about October 17, 2002, the Defendant, Richard Duncan, faxed Dr. Holmes a letter containing a draft of a proposed settlement which had been discussed with opposing counsel in the litigation. A copy of the draft of a settlement agreement is attached hereto.

4 The settlement proposal was rejected by Dr. Holmes by her responding fax of that same date. A copy of Dr. Holmes' response is attached hereto.

5 To my knowledge, no further discussions were held over the following week before trial concerning settlement of the case and it was assumed the case would be tried the week of October 28, 2002.

6 I made hotel reservations for the Defendants, Richard Duncan and Meredith Bond, for the week of the anticipated trial.

7 I also made arrangements for them to use my law offices to prepare for and during the anticipated trial.

8 The Defendants, Richard Duncan and Meredith Bonds, drove to Charleston, South Carolina and arrived during the afternoon of Saturday, October 26, 2002.

9 To my knowledge, no arrangements had been made to meet with potential witnesses over that weekend before trial. I saw nothing to indicate that the Defendants were prepared to or preparing to try Dr. Holmes' case.

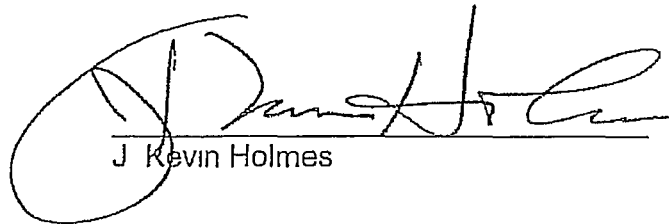
10 I was present during some of the discussions that took place at the courthouse after a jury was selected on October 28, 2002. It was apparent to me that the Defendants were recommending that Dr. Holmes settle her case as outlined in the draft of the

settlement agreement contained in the letter dated October 17, 2002 but that Dr Holmes was adamant that the proposed terms had been rejected already, were unacceptable, and that she desired to proceed to trial

11 By late afternoon it was apparent that settlement discussions had broken down without an agreement but I saw nothing to indicate that the Defendants were prepared to or preparing to try the case

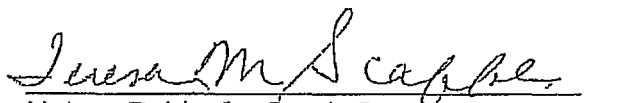
12 The Defendants refused to relay further counter settlement offers made by Dr Holmes

13 The Defendants had indicated that unless the settlement offer that had been made was accepted by Dr Holmes the Defendants would file a motion to be relieved as her lawyers the following morning



J Kevin Holmes

SWORN TO before me,  
Notary Public for the State  
of South Carolina this  
27 day of November, 2006



Luana M Scappe  
Notary Public for South Carolina  
My Commission Expires on 3/5/12

STATE OF TENNESSEE  
IN THE CIRCUIT COURT OF KNOX COUNTY, TENNESSEE

|                       |   |                 |
|-----------------------|---|-----------------|
| J Doe(CHolmes),       | ) |                 |
|                       | ) |                 |
|                       | ) |                 |
| Plaintiff             | ) |                 |
|                       | ) |                 |
| -vs-                  | ) |                 |
|                       | ) | Case No 3-58605 |
| Richard L Durcan,     | ) |                 |
| Meridith Bond,        | ) |                 |
| Sidney Gilreath, and  | ) |                 |
| Gilreath & Associates | ) |                 |
|                       | ) |                 |
| Defendants            | ) |                 |

AFFIDAVIT OF THE PLAINTIFF

Personally came and appeared before me, Notary Public,  
C Holmes, who upon being duly sworn did depose and say the  
following

1 This affidavit is submitted in support of the Complaint  
filed herein and in opposition to the Defendants' Motion for  
Summary Judgment

2 The Plaintiff is a licensed, practicing physician in  
Charleston County, S C , having earned an M D degree from  
the Medical University of S C in May, 1988, completed  
internship at the Medical College of Georgia in Augusta,  
Ga , in June of 1990, and completed ophthalmology residency  
training at the Medical University of South Carolina in  
June, 1993

3 After completing residency training, the Plaintiff was  
contacted by the office manager for a well-established  
medical practice with an offer to locate a medical practice  
in their building on Sullivans Island, S C

4 The Plaintiff accepted the offer and applied for and was  
granted privileges at East Cooper Regional Medical Center  
(hospital) in Mt Pleasant, the only hospital in the  
geographic area

5 Subsequently, the hospital and the medical practice where  
the Plaintiff's office was located were purchased/acquired  
by Tenet Healthsystems Inc , a national hospital  
corporation

6 Tener summarily withdrew the Plaintiff's hospital privileges without notice, in violation of its own Bylaws, and without any adverse patient care issues

7 The Plaintiff filed suit in State court and successfully defeated a Motion for Summary Judgment

8 The Plaintiff and the Defendant Duncan had attended the same high school

9 After many years, the Plaintiff had seen Defendant Duncan and his family at a Bar function. Thereafter, Defendant Duncan would periodically call, generally seeking clarification regarding medical terminology or similar information

10 In 1999, two years before the contract complained of herein, Defendant law firm flew the Plaintiff to Knoxville, TN, to meet with the firm's principal and consider employment there as Plaintiff is an actively licensed attorney in South Carolina. The book "The Best Lawyers in America" was prominently placed in the lobby with Defendant Gilreath's listing. Further, Defendant Gilreath had lectured as an expert trial attorney at South Carolina seminar(s) which the Plaintiff attended. The Plaintiff, however, was unaware that Defendant law firm routinely filed professional negligence suits and the Plaintiff rejected medical malpractice litigation

11 In 2001, after learning that the Plaintiff had successfully defended against a Summary Judgment Motion and was actively seeking counsel for trial, Defendant Duncan requested that the Plaintiff fax the 30-page Order to him. After reading it, Defendant Duncan tried to solicit the case for himself. When he realized that the Plaintiff would not retain him, he made false representations regarding his law firm in order to induce the Plaintiff to retain his firm. Defendant Duncan compared his firm to a well-known, local firm of successful trial attorneys (Ness, Motley), stated that his firm's namesake was well-known even in South Carolina, represented that they were trial experts who routinely tried cases in states other than Tennessee, represented that they would try the case in South Carolina, and represented that the second lawyer in the firm would be lead attorney, not Duncan. The Defendant(s) knew or should have known that the representations were false. The Plaintiff relied on the representations resulting in foreseeable injury to the Plaintiff. The Plaintiff had a right to rely and that reliance was reasonable. Defendants intended for the Plaintiff to rely. The false statements

were material. But for the false representations, Plaintiff would not have retained the Defendant firm.

12 Thereafter, the Defendants forwarded a copy of the Motion Pro Hac Vice to the Plaintiff prior to filing it with the Court. In the Motion Pro Hac Vice, Defendants expressly stated that none of them had ever been the subject of disciplinary proceedings. This representation was false. It was a material misstatement and, further, it constituted fraud upon the Court. The Defendants were admitted Pro Hac Vice based upon false representations. They failed to provide a written contingency fee agreement in violation of the Rules of Professional Conduct for South Carolina and for Tennessee. Further, they failed and refused to provide a written contingency fee agreement when requested by their client, the Plaintiff. These facts are evidence of dubious credibility and ethics. Further, these facts are evidence from which a jury could find fraud in the inducement and/or that Defendants never intended to perform under the contract.

13 If the Plaintiff had known of the ethical violation(s), there would have been no contract for legal representation. But for Defendants' false representations, the Plaintiff would have retained ethical and reasonable counsel who would have performed under the contract as agreed. Defendants(s) violated the South Carolina Rules of Professional Conduct including, but not limited to, Rule 7.1 and 7.3, RPC, Rule 407, SCACR, regarding communications concerning a lawyer's services and direct contact with prospective clients. The false representations, the solicitation, the fraud upon the Court, and failure to provide a written contingency fee agreement are deviations from the standard of care and are material. The Defendants failed to act as reasonable attorneys would have acted in the same or similar circumstances.

14 Defendant(s) used the firm's namesake as an inducement to contract for legal services. By using the title "Gilreath and Associates," the principal of the firm, Defendant Gilreath, chose to advance the intended public perception of his association on and supervision of the cases. Statements to the contrary are self-serving. But for Defendant Gilreath, there would have been no contract. Defendant Gilreath is the reason the firm was retained. Further, on information and belief and as per agency law, Defendant Gilreath is a proper party as the principal for the business entity which he named "Gilreath & Associates." All acts or omissions complained of were performed by Defendants in the course and scope of their employment, agency, or contractual

relationship with the principal, Defendant Gilreath Defendants Durcan and Bond are agents, employees, and/or contractors for the principal, Defendant Gilreath Under agency law and the doctrine of respondeat superior, Defendant Gilreath is liable for the wrongful acts or omissions of his agents, Defendants Duncan and Bond

15 At all times mentioned herein, the individual Defendants were agents, employees, or contractors for Gilreath & Associates The Defendant Gilreath & Associates at all pertinent times herein and upon information and belief, is a business entity organized and existing under and by virtue of the laws of Tennessee which conducts business by and through its agents, employees, or contractors in the practice of law with its principal office in Knoxville, Tennessee All acts or omissions alleged were performed by Defendants in the course and scope of their employment, agency, or contractual relationship with the Defendant Gilreath & Associates and for whose acts or omissions, Defendant Gilreath & Associates is responsible under the doctrine of respondeat superior

16 The Plaintiff paid the Defendants more than \$15,000 00 on an account for costs and, in addition, paid for Defendants' expenses at the Charleston Place Hotel on the Executive Level when Defendants appeared in Charleston

17 The trial was set for a date certain on October 28, 2002, with Defendants' advice and consent It was set a year after Defendants first entered the case

18 On 10/17/02, the Plaintiff rejected the opposing side's settlement offer which included untenable, unmanageable, and unsafe conditions See attached fax dated 10/17/02

19 The Plaintiff made a counter-offer See attached letter dated 10/17/02 Thereafter, approximately 10 days before trial, the Plaintiff was attending a national ophthalmology meeting with continuing medical education(CME) including "hands on" CME when Defendants paged the Plaintiff The Defendants tried to force the Plaintiff to accept essentially the same offer with unacceptable terms The Plaintiff again objected Further, Plaintiff expressly requested that if Defendants were not willing or able to try the case, then they should make that known immediately because alternate arrangements for representation needed to be made Defendants indicated they were willing and able to try the case

20 Unknown to the Plaintiff at that time, the Defendants were scheduled to be in court in Tennessee on a wrongful death case all week prior to the Plaintiff's date certain for trial. The Defendants lost the wrongful death suit on Friday before they were to appear in South Carolina two days later. On information and belief, substantial amounts for litigation costs were lost by Defendants on that trial. In setting two different jury trials in two different states back-to-back, Defendants failed to act as reasonable attorneys by failing to allow adequate time to prepare.

21 Defendants drove to Charleston all day Saturday and appeared Sunday before trial on the following day. Defendants were woefully unprepared. Defendants had failed to prepare a trial memo though they were informed it was a local custom to do so. Defendants failed to talk with witnesses.

22 On Monday morning, the jury was empanelled and the Judge released the jury until the following day.

23 The Defendants again tried to force the Plaintiff to accept untenable terms already rejected multiple times. Defendants breached the Rules of Professional Conduct, including but not limited to Rule 1.2, South Carolina Rules of Professional Responsibility, Rule 407, SCACR - which states, "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter (emphasis added)." "

24 The Defendants breached their agreement to try the case and refused to go forward to trial when requested to do so by the Plaintiff. The Defendants denied the Plaintiff the right to jury trial. Defendants refused to make reasonable counter-offers. The Plaintiff was prohibited from contacting the other side directly and the Defendants deprived the Plaintiff of the right to present counteroffers. Defendants deprived the Plaintiff of a critical opportunity. Through fraud, duress, and/or coercion, Defendants forced the Plaintiff to settle in violation of the Rules of Professional Conduct. Defendants failed to act as reasonable attorneys would have acted in the same or similar circumstances.

25 Actions taken by the Plaintiff after the breach were done in mitigation.

26 Pursuant to admission Pro Hac Vice, Defendants' actions are governed by South Carolina law. Under these facts, South Carolina case law authorizes a cause of action against

Defendants for professional negligence, and, further, settlement is not a bar to suit. See attached copy of Crowley v Parvey, 488 SE2d 335, 327 SC 68 (SC 1997). In mitigation, the Plaintiff signed the agreement containing the terms which were read into the record on October 29, 2002.

27 The Plaintiff objected to Defendants' wrongful acts on multiple occasions including, but not limited to, the letter attached dated December, 2002. When the Plaintiff objected, Defendant(s) cavalierly replied, "So sue me."

28 Defendants entered into a binding contract to represent the Plaintiff at jury trial. The Defendants owed a duty of care to the Plaintiff. Defendants, by their acts or omissions, wrongfully breached the duty of care owed to the Plaintiff. The Plaintiff had a right to and, in fact, did reasonably rely on that duty to her foreseeable detriment. The Defendants intended for the Plaintiff to rely. The Defendants were negligent, grossly negligent, willful, wanton, and/or reckless, including, but not limited to, the following particulars:

- a in prohibited solicitations,
- b in making false representations,
- c in making false representations as inducements to contract,
- d in making false representations and perpetrating fraud upon the Court,
- e in violation of Rule 1.2, Rules of Professional Conduct (RPC), Rule 407, SCACR, which states, "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter (emphasis added)."
- f in violation of Rule 1.5, RPC, Rule 407, SCACR - fees, with respect to failure to reduce the contingency fee agreement to writing,
- g in violation of Rule 1.5, RPC, Rule 407, SCACR - fees, with respect to reasonable fees. Defendants customarily charged the same amount herein for handling the entire case. Consequently, the Defendants' fee is unreasonable since they did not have to advance costs and they did not enter the case until after the complaint was filed, after

significant discovery, and after the Motion for Summary Judgment was defeated

- h in taking positions adverse to their client and their client's interest,
- i in failing to present reasonable counteroffers,
- j in depriving Plaintiff of the right to jury trial,
- k in forcing the Plaintiff to settle,
- l in breaching their fiduciary duty to the Plaintiff,
- m in negligently failing to supervise,
- n in failing to advise of tax consequences,
- o in failing to abide by the requirements of applicable provisions of the South Carolina Code of Professional Responsibility, including, but not limited to, Rule 1 4, S C Rules of Professional Conduct, Rule 407, SCACR - communication, Rule 1 5, S C Rules of Professional Conduct, Rule 407, SCACR - fees, Rule 1 6, S C Rules of Professional Conduct, Rule 407, SCACR - confidentiality, Rule 1 7, S C Rules of Professional Conduct, Rule 407, SCACR - conflict of interest, Rule 5 1, S C Rules of Professional Conduct, Rule 407, SCACR - responsibilities of a partner or supervisory lawyer, Rule 7 1, RPC, Rule 407, SCACR - communications concerning a lawyer's services, and/or Rule 7 3, RPC, Rule 407, SCACR - direct contact with prospective clients,
- p in failing to exercise that degree of care a reasonable attorney would have exercised in the same or similar circumstances

29 In addition, one or more Defendants, including the Defendant law firm, had a duty to supervise the services, actions, and omissions. The Defendant law firm and supervisory attorney and/or partner (Defendants Gilreath and/or Bond) had a duty to supervise but failed to supervise, including, but not limited to, the following failure to supervise fee agreements, to require written contingency fee agreements, to ensure adequate time between jury trials for adequate preparation, to act in the client's

interest, to present counteroffers, to abide by a client's decision whether to accept an offer of settlement, to perform under the contract as agreed, and to abide by the Rules of Professional Conduct. The supervisory attorney and/or partner failed to exercise that degree of supervision which reasonable supervisory attorneys and partners would have exercised in the same or similar circumstances. The Defendant law firm failed to exercise that degree of supervision which a reasonable law firm would have exercised in the same or similar circumstances. The Plaintiff had a right to and, in fact, did reasonably rely on the duty of supervision. The Defendants intended for the Plaintiff to rely. The Plaintiff relied to her detriment resulting in foreseeable damages to the Plaintiff.

30 Upon information and belief, one or more Defendants had knowledge of the wrongdoing, had the means and opportunity to correct the wrongdoing, and/or had knowledge of previous wrongdoing and/or impairment, yet failed to supervise and provide reasonable care and failed to disclose or act to mitigate, including, but not limited to, actions in violation of Rule 5.1 S.C. Rules of Professional Conduct, Rule 407, SCACP - responsibilities of a partner or supervisory lawyer.

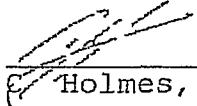
31 Further, the Defendants' multiple violations of the Rules of Professional Conduct affect the public interest and are capable of repetition. The public interest of the citizens of Tennessee is affected as well as citizens like the Plaintiff beyond the State's borders. Such misconduct and predatory acts engender disdain for the legal profession and lend credence to the popularly held negative public image of the legal profession and lawyers.

32 As a direct and proximate result of the Defendants' wrongful conduct, the Plaintiff was harmed and has not contributed thereto. The Defendants did not perform as agreed. The Defendants refused to proceed to trial and refused to present reasonable counteroffers. Further, but for Defendants' false representations and fraud in the inducement, Plaintiff would have retained ethical and reasonable counsel. As a direct and proximate result of the Defendants' misconduct, the Plaintiff has sustained damages. Under South Carolina law, the Plaintiff is entitled to recover the difference between the settlement entered and the amount of damages at trial. See attached copy of Crowley v. Harvey, 488 SE2d 335, 327 SC 68 (SC 1997). That the Plaintiff's suit was meritorious is evidenced by the settlement. The Plaintiff would have prevailed at trial and the measure of damages is based on the economic expert's

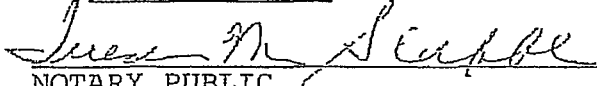
testimony for the trial Defendants already have in their possession the economic expert's deposition The settlement herein after taxes and after Defendants' unreasonable attorneys' fees did not even cover expenses much less loss of livelihood and support for minor children The amount of damages is well in excess of the jurisdictional amount in controversy

33 The Defendants' actions were willful, wanton, and/or in reckless disregard for Plaintiff's rights and interests and the Plaintiff is entitled to punitive damages As a direct and proximate result of the Defendants' wrongful conduct, the Plaintiff has sustained substantial, foreseeable, compensable losses, has not contributed thereto, and is entitled to recover actual damages, special damages, consequential damages, lost profits, costs, expenses, attorney's fees, and punitive damages in an amount to be determined by the jury, all according to applicable law

FURTHER THE AFFIANT SAITH NOT

  
E. Holmes, M D

Subscribed and sworn to before me,  
Notary Public, this 27 day  
of November 2006

  
NOTARY PUBLIC

My commission expires 3/5/12

C Collie, Esq

---

---

PO Box 187  
Sullivans Island, SC 29482-0187  
843 883 3010

---

---

August 6, 2009

The Honorable Thomas Hughston, Jr  
Charleston County Judicial Center  
100 Broad Street, Ste 368  
Charleston, SC 29401

Re           2002-CP-10- 1448 and  
             2007-CP-10-1444(after change of venue)  
             Doe(CHolmes) v Becker et al

Dear Judge Hughston

Thank you for your patience regarding this  
predictably contentious matter

New evidence previously unavailable establishes  
that defendants were served on or about April 10, 2002  
See attached affidavit by Defendant Grier dated July  
30, 2009, stating that Defendant Becker "set up" file  
number 9976 3 to track this case Defendant Grier's

In addition, at the hearing, the Court stated that the other side had provided the Court with a copy of the plaintiff's Rule 59(e), SCRCF, Motion by letter. The plaintiff has not been copied on any such correspondence. In fairness, the plaintiff requests the courtesy of a copy of the correspondence as well as a copy of any documents supplied by untrustworthy defendants and purported to be plaintiff's. Untrustworthy defendants have a sordid history of improper ex parte communication with other jurists who were enticed by untrustworthy defendants in this very matter.

Once again, untrustworthy defendants seek to deprive the plaintiff of due process, thwart a full and fair hearing on the merits, and deprive the plaintiff of any meaningful opportunity to be heard. If the shoe were on the other foot, opposing counsel would want to be noticed before any hearing. Since the motion had not even been filed, it could not have been pending for the hearing on August 3, 2009. In fairness, the plaintiff requests that the plaintiff's Rule 59(e), SCRCF, Motion be scheduled for a hearing.

There are many important reasons for a hearing. One example from the hearing on August 3, 2009, illustrates this point. Specifically, we want to thank you for clarifying that the case was filed in 2002, not 2007. If not clarified, the pertinent statutes and

case law might have been overlooked We believe the hearing made a difference, and it supports our request for hearing herein

Similarly, because this case was filed in 2002, legislative intent specifies application of the previous Rule 3(b), SCRCP - Tolling of Statute of Limitations, from S C Code Section 15-3-10 (1976) Garner v Houck, 312 S C 481, 435 S E 2d 847 (1993) The statute was later changed Under Unisun v Hawkins, failure to properly raise the issue of service with specificity constitutes a waiver of service and the statute of limitations defense Unisun v Hawkins, 342 S C 537, 541, 537 S E 2d 559 (Ct App 1994), certiorari dismissed as improvidently granted Likewise, defendants failed to properly raise the issue of service and, therefore, have waived it as well as the statute of limitations Moreover, defendants waived it by expressly representing to the plaintiff that the issues were resolved and then by confirming that verbal representation when they filed an Amended Rule 12(b), SCRCP, Motion See attached Amended Rule 12(b), SCRCP, Motion which was filed after defendants have admitted they were served in May, 2003 Under Rule 12(g), SCRCP, when defendants filed an Amended Rule 12(b), SCRCP, Motion which failed to raise the issue, the issue was waived In addition, defendants have made voluntary appearances, thereby waiving

service and the statute of limitations Further, the time when the statute of limitations begins to run is a jury question Moreover, laches, contributory negligence, reliance period or analogous doctrine, duty to mitigate, evasion of service, constructive service, and/or equitable estoppel defeat the statute of limitations defense

Further, the case of Thomas v Dootson supports the plaintiff's motions Thomas v Dootson, 659 S E 2d 253 (2008) In that case, directed verdict was granted on the grounds of lack of expert medical testimony Significantly, it was reversed and remanded based upon the common knowledge exception to expert testimony The Court of Appeals stated, "Generally expert testimony is required in medical malpractice cases to show the doctor failed to conform to the required standard of care, however, an exception exists when the 'common knowledge of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor and also to determine the presence of the required causal link between the doctor's actions and the patient's medical problems '" Thomas v Dootson, 659 S E 2d 253 (2008), citing Pederson v Gould, 288 S C 141, 142, 341 S E 2d 633, 634 (1986) "Further, this Court stated in Weaver v Lentz

[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case, tried before a jury, it is the jury that must decide what part of the witnesses' testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this Court to weigh the evidence and determine the credibility of the witnesses. " Thomas v Dootson, 659 S E 2d 253 (2008), citing Weaver v Lentz, 348 S C 672, 680-1, 561 S E 2d 360, 365 (Ct App 2002)

The Court of Appeals ruled a jury question existed rendering a directed verdict "inappropriate." Thomas v Dootson, 659 S E 2d 253 (2008)

The Thomas case above bolsters new case law since the trial, Spence v Wingate (July 9, 2009), 2009-SC-0710 470 Thomas v Dootson, 659 S E 2d 253 (2008). Both cases support the plaintiff's motions and confirm that breach of fiduciary duty based upon a violation of the Rules of Professional Conduct (RPC) does not require expert testimony. Moreover, it was reversible error for the court to make a determination of no wrongdoing as a matter of law. Spence v Wingate (July 9, 2009), 2009-SC-0710 470

In the underlying case, the Federal Court ruled that the opposing party "filed a motion to dissolve the preliminary injunction on the grounds that Dr. Holmes had failed to abide by the Scheduling Order and had

failed to comply with the rules of discovery " Federal Court Order filed June 2, 2000, page one The record reflects that the opposing party filed the motion to dissolve the injunction because defendants failed to timely respond to discovery requests It is res judicata that the motion to dissolve the injunction was filed as a direct and proximate result of defendants' negligence

On page two, the Federal Court Order further states, "due to the fact that Dr Holmes did not seek such [injunctive] relief upon the dissolution of the injunction back in January, this court declines to restore the injunction at this time " Federal Court Order filed June 2, 2000, page two It is res judicata that defendants failed to advise of and/or appeal the loss of the injunction thereby depriving the physician of injunctive relief and causing foreseeable damages See Lifschultz East Freight, Inc v Haynsworth, Marion, McKay & Guerard, 334 S C 244, 513 S E 2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit)

The attorney-client relationship is by definition a fiduciary one The defendants breached their fiduciary duty of care to the plaintiff to preserve and protect the client's rights The defendants breached their fiduciary duty of care to the plaintiff when they

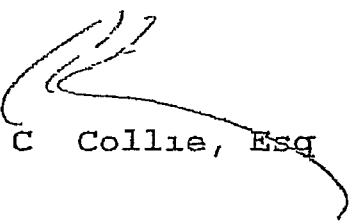
failed to appeal or advise of appeal. The Federal Court Order dated June 2, 2000, is res judicata for the ruling that defendants' negligently failed to appeal and/or advise of appeal of the loss of the injunction causing injury to their client, the physician. Untrustworthy defendants cannot now be heard to challenge Judge Duffy's ruling since they failed to appeal it. The plaintiff's motion for directed verdict on liability should be granted and defendants' motion for directed verdict should be denied.

But for defendants' negligence, the plaintiff would not have suffered damages, including but not limited to, lost income for already scheduled procedures, loss of \$43,000 paid in advance for trial when there was no trial, and losses established by economic expert testimony of Dr. Cunitz from the underlying case which was erroneously excluded at trial. Lifschultz Fast Freight, Inc. v. Haynsworth, Marlon, McKay & Guerard, 334 S.C. 244, 513 S.E.2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit). The plaintiff respectfully requests that the deposition testimony of Dr. Cunitz be admitted, that the plaintiff's motion for directed verdict on liability be granted, that the order reflect service within the statute of limitations so that the claims are not time-barred, and that the defendants' motion for directed

verdict be denied

If you have any questions, please do not hesitate to contact me We are pleased to comply with your permission to supplement the record With best regards, I remain

Very truly yours,



C Collie, Esq

cc John Wilkerson

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

AFFIDAVIT

PERSONALLY appeared before me Manton M Grier who first being duly sworn,  
deposes and says

1 I am a shareholder in the law firm of Haynsworth Sinkler Boyd, P A in the firm s  
Columbia office

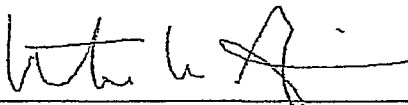
2 The attached billing information memos, marked Exhibits A and B, are a true and  
correct copy of a printout of the firm's billing and expense records for our file number 9976 3

3 The time and expense entries shown on Exhibits A and B were made by a person  
with knowledge at or near the time of the acts or events recorded in Exhibits A and B

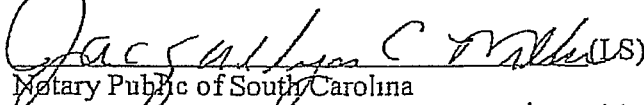
4 Exhibits A and B constitute business records of Haynsworth Sinkler Boyd, P A ,  
which have been prepared and maintained in the ordinary course of business

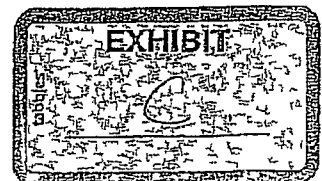
5 File number 9976 3 was set up by my partner James Becker so that he and I and  
other members or employees of the firm could track their time and expenses associated with  
defending the claims of Cynthia Holmes in the case of *Cynthia Holmes MD v Haynsworth  
Sinkler Boyd, P A successor to Sinkler & Boyd P.A Manton Grier and James Y Becker*

Further Affiant sayeth not

  
\_\_\_\_\_  
Manton M Grier

SWORN to before me this 30 day of  
July, 2009

  
\_\_\_\_\_  
Notary Public of South Carolina  
My Commission expires 10 01 2011



09976 - HOLMES CYNTHIA M D

0003 - Holmes Cynthia

\*1766923\*

Prebill Number 1766923

Bill Date Jul/22/2009

Haynsworth Sinkler Boyd, P A  
Prebill

Please Indicate Final \_\_\_\_\_  
Interim \_\_\_\_\_

PREBILL INFORMATION

Session No 82157 Prebill Print Date 07/22/09 Prebill No 1766923 Time Allowed Date 04/10/02 Fees selected through 07/22/09  
Matter Status OPEN Bill Freq X Open Date 04/10/02 Matter Type 227-Hospital & Health Disbursements selected through 07/22/09  
Claim Number Description  
Client ID 09976 - HOLMES, CYNTHIA, M D  
Matter ID 0003 Holmes, Cynthia

Billing Attorney 0012 Becker, James Y

Resp Attorney 0012 - Becker, James Y

Supervising Atty

Billing Contact

Override Name

Billing Address

-1877-

| Prebill Summary                 |                      |             |
|---------------------------------|----------------------|-------------|
|                                 | <u>Prebill Total</u> | <u>Edit</u> |
| Fees                            | \$126,169 00         | _____       |
| Disbursements                   | 2,913 82             | _____       |
| Total Premium/Discount          | 0 00                 | _____       |
| Prebill Total                   | \$129 082 82         | _____       |
| Outstanding Accounts Receivable | 0 00                 | _____       |
| Total Amount Due                | \$129,082 82         | _____       |

| Unapplied Cash & Trust Balances |                |
|---------------------------------|----------------|
| <u>Type</u>                     | <u>Balance</u> |
| Unapplied Cash                  | \$0 00         |
| Trust Balance(s)                | \$0 00         |

|                 |
|-----------------|
| Client Comments |
|                 |
| Matter Comments |
|                 |

EXHIBIT

Λ

## IL PROCEDURE

- RULE  
75 RECORD ON APPEAL TO THE CIRCUIT COURT  
TRANSMITTAL  
76 ARBITRATION AUTOMOBILE REPAIR

### V COURTS AND CLERKS

- 77 COURTS AND CLERKS  
78 CLERKS OF COURT RECORDS ABSTRACTS,  
BOOKS  
79 CALENDAR OF CIVIL ACTIONS FILE BOOK  
80 STENOGRAPHIC REPORT OF TRANSCRIPT AS  
EVIDENCE

### VI GENERAL PROVISIONS

- 81 APPLICABILITY  
82 JURISDICTION AND VENUE  
83 [RESERVED]  
84 FORMS  
85 TITLE CRIMINAL PROCEDURE RULES RE  
PEALED  
86 EFFECTIVE DATE

APPENDIX OF FORMS (Pursuant to Rule  
81 S C Rules of Civil Procedure)

- Form  
1 SECURITY FOR COSTS—FORM OF UNDERTAK  
ING  
2 UNIFORM JUROR SUMMONS FORM  
3 UNIFORM JUROR INFORMATION PAMPHLET  
4 JUDGMENT IN A CIVIL CASE  
5 APPLICATION FOR POST-CONVICTION RELIEF  
6 SUBPOENA IN A CIVIL CASE

## —ONE FORM OF ACTION

### NOTE

These Rules are the same as Federal Rules 1 and 2 except  
the name of the State. Rule 81 provides that the Rules will  
apply also to Magistrate, Probate and Family Courts where  
not inconsistent with the rules of those courts. Rule 2 is  
substantially identical to Code Sections 15-1-80 and 90. This  
Rule also abolishes the mostly cosmetic differences between  
actions and "special proceedings." A special proceeding is  
really only a civil action in which some special remedy is  
sought i.e. writ of mandamus, writ of habeas corpus, etc.

## COMMENCEMENT OF ACTION—SERVICE

### Rule

pay the fee required to file the action. If the motion is  
granted, the plaintiff may proceed without further  
application and file the complaint in the court without  
payment of filing fees.

[Amended effective July 1, 1994]

### Notes

This Rule 3(a) eliminates the seldom used practice of  
commencing an action by serving the summons without  
complaint and preserves the new requirement for prior filing  
with the clerk of court. Rule 3(b) preserves the statutory  
procedure available under Code § 15-3-10, with the added  
requirement that actual service must be accomplished in a  
reasonable time, which the cases have implied.

### Notes to 1994 Amendments

The heading of Rule 3(b) is amended to reflect the Supreme  
Court's decision in *Garner v. Howick*, 312 S.C. 181, 435 S.E.2d  
847 (1993).

Rule 3(c) provides a uniform method for presenting in  
forma pauperis petitions to the court that seek the waiver of  
filing fees. The rule does not provide a standard for ruling on  
the petitions.

## RULE 4 PROCESS

(a) **Summons Issuance.** The summons shall be  
issued by plaintiff or plaintiff's attorney. Copies of the  
original summons shall be served upon each defendant.

(b) **Same Form.** The summons shall be signed by  
the plaintiff or his attorney, contain the name of the  
State and county, the name of the court, the file  
number of the action, and the names of the parties, be  
directed to the defendant, state the name and address  
of the plaintiff's attorney, if any, otherwise the plain-  
tiff's address, and the time within which these rules  
require the defendant to appear and defend, and shall  
notify him that in case of his failure to do so judgment  
by default will be rendered against him for the relief  
demanded in the complaint.

(c) **By Whom Served.** Service of summons may be  
made by the sheriff, his deputy or by any other person  
not less than eighteen (18) years of age, not an attorney  
in or a party to the action. Service of all other process  
shall be made by the sheriff or his deputy or any other  
 duly constituted law enforcement officer or by any

person by delivering a copy of the summons and  
complaint to him personally or by leaving copies  
thereof at his dwelling house or usual place of abode  
with some person of suitable age and discretion then  
residing therein, or by delivering a copy to an agent  
authorized by appointment or by law to receive service  
of process.

(2) **Minors, Incompetents and Persons Confined.**  
Upon a minor under the age of 14 years, a person  
judicially declared incapable of conducting his own  
affairs, or an incompetent person by delivering a copy  
of the summons and complaint to such minor, or  
incompetent personally and also a copy to (a) the  
guardian or committee of such person, or if there is  
none such within the State upon (b) a parent or other  
person having the care and control of such person, or  
(c) any competent person with whom he resides or (d)  
in whose service he is employed. If the individual upon  
whom service is made is a minor between the ages of 1  
and 18, who lives with a parent or guardian, a copy of  
the summons and complaint shall likewise be served  
upon said parent or guardian, if said parent or guard-  
ian resides within the State. Service on imprisoned  
persons or persons confined in a state hospital or  
similar institution, in or out of this State, shall be made  
by delivering a copy of the summons and complaint to  
the confined person personally, and service shall be  
made by the sheriff of the county in which the person  
imprisoned or confined. In cases of persons impris-  
oned and patients in a state hospital or similar  
institution, personal service of process may be made by  
the superintendent of the institution or by the director  
of the prison system or by assistants duly designated  
by the superintendent or the director in writing for the  
purpose of making service of process instead of the  
sheriff. The superintendent or the director or their  
designated assistants shall not be entitled to any cost  
therefore. Service on confined or imprisoned person  
shall also conform to the provisions of § 15-9-510  
S.C. Code 1976.

(3) **Corporations and Partnerships.** Upon a corpo-  
ration or upon a partnership or other unincorporated  
association which is subject to suit under a common  
name, by delivering a copy of the summons and

|                            |   |                                |
|----------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA    | ) | IN THE COURT OF COMMON PLEAS   |
|                            | ) |                                |
| RICHLAND COUNTY            | ) | CIVIL ACTION NO 02-CP-40-3705  |
|                            | ) |                                |
| J DOE,                     | ) |                                |
|                            | ) |                                |
| Plaintiff,                 | ) |                                |
|                            | ) | NOTICE OF MOTION AND AMENDED   |
| vs                         | ) | MOTION PURSUANT TO SCRCP 12(B) |
|                            | ) |                                |
|                            | ) |                                |
| MANTON GRIER, JAMES Y      | ) |                                |
| BECKER and SINKLER & BOYD, | ) |                                |
| P A                        | ) |                                |
|                            | ) |                                |
| Defendants                 | ) |                                |
|                            | ) |                                |

TO C HOLMES, Pro-Se Plaintiff

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service of this notice upon you, or as soon thereafter as counsel can be heard, the Defendants will move before the presiding judge of the Court of Common Pleas for Charleston County, for an order, pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, dismissing the action on the grounds that the Complaint of the Plaintiff fails to state facts sufficient to state a cause of action against the Defendants pursuant to Rule 12(b)(6), and upon the following grounds

1 The Plaintiff has failed to identify when and under what circumstances the allegation of abandonment occurred in support of the First Cause of Action

2 The Plaintiff has failed to state any factual basis to constitute a breach of fiduciary duty in support of the Second Cause of Action

3 The Plaintiff has failed to identify any specific contract(s) between the parties to include any addendums or amendments in support of the Third and Fourth Causes of Action

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS  
DOCKET NO 2007-CP-10-1444

J DOE,

TRANSCRIPT OF MOTION

Plaintiff,

May 20, 2008  
Charleston, South Carolina

VS

MANTON GRIER, JAMES Y  
BECKER, AND HAYNSWORTH,  
SINKLER, BOYD, P A , AS SUCCESSOR  
TO SINKLER & BOYD, P A ,

Defendant

BEFORE

THE HONORABLE R MARKLEY DENNIS, JR , Judge

APPEARANCES

CYNTHIA HOLMES, M D , ESQ  
PLAINTIFF PRO SE

JOHN S WILKERSON, ESQ  
- and -  
RICHARD DUKES, ESQ  
ATTORNEYS FOR THE DEFENDANTS

HEATHER GAYLE BURNS, RDR  
OFFICIAL COURT REPORTER  
9<sup>TH</sup> JUDICIAL CIRCUIT

1                   MR   WILKERSON       I  
2           don't think there's any doubt  
3           about that

4                   THE COURT       Okay     At  
5           this point, and I'm not so  
6           sure and I know there have  
7           been some decisions that have  
8           come down subsequent to my  
9           doing something in a case that  
10          ultimately went up but I don't  
11          think it went up on that  
12          issue, but whether or not the  
13          Statute of Limitations,  
14          whether or not there's a  
15          factual issue

16                   The subsequent  
17          decision I found it, it was a  
18          factual issue, submitted it to  
19          a jury in a case where, then  
20          the jury found that it was,  
21          they checked "no", that it did  
22          not apply     But given what we  
23          have here I don't think it's a  
24          matter of law for me to  
25          determine that     I don't, I

1 understand what you're saying  
2 and I truly do, but I also,  
3 within a reasonable time I  
4 think it was served within a  
5 reasonable time I think  
6 there was an effort, an  
7 attempt to do it, provide it,  
8 everyone had it There was  
9 really no question about that  
10 You appeared so you were  
11 acknowledging that you were  
12 aware of the lawsuit

U S District Court  
District of South Carolina (Charleston)  
CIVIL DOCKET FOR CASE # 2 99-cv-00833-PMD

Doe v Tenet HealthSystem, et al  
Assigned to Judge Patrick Michael Duffy  
Demand \$0  
Case in other court 00-01660  
Cause 15 1 Antitrust Litigation

Date Filed 03/26/1999  
Date Terminated 04/17/2000  
Jury Demand Both  
Nature of Suit 410 Anti-Trust  
Jurisdiction Federal Question

Plaintiff

MD J Doe  
MD

represented by James Y Becker  
Haynsworth Sinkler Boyd  
PO Box 11889  
Columbia, SC 29211-1889  
803-779-3080  
Fax 803-765-1243  
Email jbecker@hsblawfirm.com  
TERMINATED 06/19/2000  
LEAD ATTORNEY  
ATTORNEY TO BE NOTICED

V

Defendant

Tenet HealthSystem Medical Inc

represented by E Douglas Pratt-Thomas  
Pratt-Thomas Pearce Epting and Walker  
  
PO Box 22247  
Charleston, SC 29413-2247  
843-727-2212  
Fax 843-805-6527  
Email dpt@wiselaw.com  
LEAD ATTORNEY  
ATTORNEY TO BE NOTICED

Defendant

East Cooper Community Hospital Inc

represented by E Douglas Pratt-Thomas  
(See above for address)  
LEAD ATTORNEY  
ATTORNEY TO BE NOTICED

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

JUN - 2 2000

LARRY W. PROPPS, CLERK  
CHARLESTON, SC

J Doe, M.D.,

Plaintiff,

v

CA #2 99-833-23

Genet HealthSystem Medical Inc  
and East Cooper Community  
Hospital, Inc

Defendants

ORDER

This matter is before the court upon plaintiff's motion for an injunction pending appeal under Federal Rule of Civil Procedure 62 (c). For the following reasons, the motion is denied.

Plaintiff, Cynthia Holmes, M.D., is a physician who had admitting privileges at the defendant Hospital. Upon the Hospital's termination of her admitting privileges, Dr. Holmes brought this action for both injunctive relief and monetary damages asserting violations of federal anti-trust laws and state law claims. On November 22, 1999, this court enjoined the Hospital from terminating Dr. Holmes' privileges. Thereafter, the defendants filed a motion to dissolve the preliminary injunction on the grounds that Dr. Holmes had failed to abide by the Scheduling Order and had failed to comply with the rules of discovery. Furthermore, the alleged harm suffered by her current patients had not materialized.

On January 25, 2000, the court granted the defendants' motion to dissolve the preliminary injunction after holding a hearing on the matter. Dr. Holmes did not appeal the court's order dissolving the injunction. Soon thereafter, the defendants moved for summary judgment. After considering the briefs filed, both in support of and in opposition to the motion, this court granted the defendants' motion for summary judgment as to all federal claims and dismissed without prejudice

the supplemental state law claims on April 17, 2000 Plaintiff has not appealed this court's Order. Simultaneous with the filing of her notice of appeal, plaintiff filed this motion for an injunction pending appeal pursuant to Rule 62 (c).<sup>1</sup>

Rule 62 (c) authorizes the court to suspend, modify, restore or grant an injunction during the pendency of an appeal. Fed. R. Civ. P. 62 (c). "This subdivision codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment." Charles A. Wright, Arthur R. Miller, Mary K. Kane, 11 Federal Practice and Procedure § 2904 (2d ed. 1995). However, due to the fact that Dr. Holmes did not seek such relief upon the dissolution of the injunction back in January, this court declines to restore the injunction at this time. If Dr. Holmes had appealed the order dissolving the injunction, such a motion may have been appropriate at that time. However, the status quo of this case since January is the absence of any injunction against the defendants. Therefore, the motion is denied.

It is therefore,

ORDERED, for the foregoing reasons that the Plaintiff's motion for an injunction pending appeal is DENIED,

AND IT IS SO ORDERED.

  
PATRICK MICHAEL DUFFY  
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina  
June 1<sup>st</sup> 2000

2

---

<sup>1</sup> Plaintiff also referenced the provision for injunctive relief under Clayton Act cases as a basis for her request. See 15 U.S.C. § 26. However, section 26 only provides injunctive relief as a remedy for antitrust violations. It has no applicability to the relief sought at this stage of the plaintiff's case.

2 99-cv-00833

James Y Becker, Esq  
Sinkler and Boyd PA  
Post Office Box 11889  
Columbia, SC 29211-1889

cmck

-----

PLEASE TAKE NOTICE  
PURSUANT TO LOCAL RULE 83 I 06, ONLY LOCAL COUNSEL IS BEING SERVED

-----

Phone 803-779-3080

FAX 803-765-1243

CYNTHIA HOLMES, MD  
ANALYSIS OF LOST PROFIT  
NO RECOVERY OF PRIVILEGES

| <u>Year</u> | <u>Projected<br/>Revenue</u> | <u>Actual Or<br/>Expected<br/>Revenue</u> | <u>Loss Or<br/>Revenue</u> | <u>Loss Of<br/>Profit</u> | <u>Present<br/>Value Of<br/>Lost Profit</u> |
|-------------|------------------------------|-------------------------------------------|----------------------------|---------------------------|---------------------------------------------|
| 1997        | \$66,823                     | \$66,823                                  |                            |                           |                                             |
| 1998        | 83,529                       | 59,634                                    | \$23,895                   | \$20,836                  | \$22,425                                    |
| 1999        | 102,323                      | 43,050                                    | 59 273                     | 51 686                    | 52,978                                      |
| Past Loss   |                              |                                           |                            |                           | 75 403                                      |
| 2000        | 122,787                      | 45 203                                    | 77,585                     | 65,947                    | 64 339                                      |
| 2001        | 144,275                      | 47,463                                    | 96,812                     | 77,450                    | 71,963                                      |
| 2002        | 165,916                      | 49,836                                    | 116,081                    | 87,060                    | 77,040                                      |
| 2003        | 186,656                      | 52,328                                    | 134,328                    | 94 030                    | 79,245                                      |
| 2004        | 205,321                      | 54,944                                    | 150,377                    | 100,753                   | 80,868                                      |
| 2005        | 220,721                      | 57,691                                    | 163,029                    | 105,969                   | 81 004                                      |
| 2006        | 231,757                      | 60,576                                    | 171,181                    | 111,268                   | 81,004                                      |
| 2007        | 243,344                      | 63,604                                    | 179,740                    | 116,831                   | 81,004                                      |
| 2008        | 255,512                      | 66,785                                    | 188 727                    | 122,672                   | 81 004                                      |
| 2009        | 268,287                      | 70,124                                    | 198,163                    | 128,806                   | 81,004                                      |
| Future Loss |                              |                                           |                            |                           | 778,477                                     |
| Total Loss  |                              |                                           |                            |                           | 853,880                                     |

SB 23429

SB 10096

Jonathan A Cunitz & Company  
7 Lamplight Lane  
Westport, CT 06880  
(203) 227-2287  
Fax: (203) 454-1970

Date February 4, 2000  
From Dr Jonathan A Cunitz  
To Henry White, Esq  
Firm Sinkler & Boyd, P A  
Fax # (803) 765-1243  
Pages 5 (Including covering sheet)  
Re J Doe, MD v Tenet Healthsystem Medical, Inc et al  
Comments The accompanying material is provided to assist you with my forthcoming deposition testimony Please call me if you have any questions

**J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL****TRIAL TESTIMONY OF DR. JONATHAN A CUNITZ****Qualifications As An Expert**

- Q State your name
  - Jonathan A Cunitz
- Q Dr Cunitz, what is your occupation?
  - President of Jonathan A Cunitz & Company, a management consulting firm specializing in financial management assistance to small businesses
- Q What is your educational background?
  - B.S degree in Industrial Engineering from Lehigh University
  - M B A & Doctor of Business Administration degrees from Harvard Business School
- Q Would you provide the court with a brief description of your employment after graduating from Harvard?
  - Assistant Professor of Accounting in the M B A Program at New York University
  - Corporate Financial Manager of Xerox Corporation working for the Controller at Corporate Headquarters
  - Vice President of Chase Manhattan Bank
  - Lecturer in the M B A Program at University of Connecticut
  - Adjunct Professor for Central Michigan University at U S military bases
  - Part-time consulting while teaching at N Y U & University of Connecticut
  - Full-time consulting practice since 1978
- Q Have you published any books and articles?
  - Textbook in accounting
  - Articles on finance and information systems
- Q As a business consultant, for what purposes do you prepare economic & financial analyses for your clients?
  - For budgeting, financial planning & investment decisions
  - For valuations & acquisitions of companies
  - For bank presentations

Page 2

J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL  
TRIAL TESTIMONY OF DR. JONATHAN A CUNITZ

- Q Would you describe your experience with financial analysis calculations
  - In M B A courses, taught the accounting & finance concepts used in making financial analyses
  - Taught similar courses for the American Management Association in New York, Chicago & Mexico
  - For consulting clients & in corporate positions, have prepared hundreds of financial analyses
  - Have prepared dozens of financial analyses over the past 10 years for court testimony & litigation matters as an expert witness on business damages
- Q Have you previously analyzed business damages in litigation matters?
  - Yes, in more than two dozen cases
- Q Have you testified previously as an expert witness?
  - In Federal court in Florida, Pennsylvania New York, Montana, Kansas and St Croix
  - In state courts in Florida, New York California, Wisconsin and West Virginia
  - In arbitrations in Florida Pennsylvania New York and Washington D C
- Q Submit c v as exhibit if desired.

Page 3

## J. DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL

## TRIAL TESTIMONY OF DR JONATHAN A CUNITZ

## Preparation On Case

- Q What documents have you reviewed in preparation for your testimony today?
  - Schedule C tax returns of Cynthia Holmes, M D for 1994 through 1998
  - Bank deposit receipts and information for 1999
  - Court Order dated November 22 1999
  - Monthly operating reports of Cynthia Holmes, M D
  - List of surgeries performed by Dr Cynthia Holmes M D
  - Compensation and operating study data from the American Academy of Ophthalmology
  - SEC Form 10-K Annual Report for Tenet Healthcare Corporation for the year ended May 31, 1999, and the Form 10-Q Report for the three months ended August 31 1999
- Q With whom have you spoken in preparation for your testimony today?
  - Spoke many times with Dr Cynthia Holmes about her practice and how it was affected by the loss of her hospital privileges
- Q Have you reached certain conclusions and opinions as a result of your work?
  - Yes, Dr Holmes suffered a loss of profits which will continue as a result of the disruption to her practice
- Q In your research and analysis on this case did you use methods and procedures that are normal and customary for experts in the financial accounting and economic professions?
  - Yes

## Presentation Of Analysis

- Q Would you present your analysis and findings to the court
  - Discuss exhibits

J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL  
TRIAL TESTIMONY OF DR. JONATHAN A CUNITZ

Summary Of Opinions

- e In reaching your opinions on this case did you use methods and procedures that are generally accepted and utilized in the financial, economic and accounting professions?
  - Yes
- e Were these opinions formed with a reasonable degree of financial, economic and accounting certainty?
  - Yes

TOTAL P 05

SB 10062

than Cunitz  
ry 13, 200

CYNTHIA HOLMES, MD  
ANALYSIS OF LOST PROFIT  
NO RECOVERY OF PRIVILEGES

| <u>Year</u> | <u>Projected<br/>Revenue</u> | <u>Actual Or<br/>Expected<br/>Revenue</u> | <u>Loss Of<br/>Revenue</u> | <u>Loss Of<br/>Profit</u> | <u>Present<br/>Value Of<br/>Lost Profit</u> |
|-------------|------------------------------|-------------------------------------------|----------------------------|---------------------------|---------------------------------------------|
| 1997        | \$66,823                     | \$66,823                                  |                            |                           |                                             |
| 1998        | 83,529                       | 59,634                                    | \$23,895                   | \$20,836                  | \$22,425                                    |
| 1999        | 102,323                      | 43,050                                    | 59 273                     | 51 686                    | <u>52,978</u>                               |
| Past Loss   |                              |                                           |                            |                           | 75,403                                      |
| 2000        | 122,787                      | 45 203                                    | 77,585                     | 65,947                    | 64 339                                      |
| 2001        | 144,275                      | 47,463                                    | 96,812                     | 77,450                    | 71,963                                      |
| 2002        | 165,916                      | 49,836                                    | 116,081                    | 87 060                    | 77,040                                      |
| 2003        | 186,656                      | 52,328                                    | 134,328                    | 94,030                    | 79,245                                      |
| 2004        | 205,321                      | 54,944                                    | 150,377                    | 100,753                   | 80,868                                      |
| 2005        | 220,721                      | 57,691                                    | 163,029                    | 105,969                   | 81 004                                      |
| 2006        | 231,757                      | 60,576                                    | 171,181                    | 111,268                   | 81,004                                      |
| 2007        | 243,344                      | 63,604                                    | 179,740                    | 116,831                   | 81,004                                      |
| 2008        | 255,512                      | 66 785                                    | 188 727                    | 122,672                   | 81 004                                      |
| 2009        | 268,287                      | 70,124                                    | 198,163                    | 128,806                   | <u>81,004</u>                               |
| Future Loss |                              |                                           |                            |                           | <u>778,477</u>                              |
| Total Loss  |                              |                                           |                            |                           | 853,880                                     |

SB 23429

SB 10096

Jonathan A. Cunitz & Company  
7 Lamplight Lane  
Westport, CT 06880  
(203) 227-2287  
Fax (203) 454-1970

Date February 4, 2000

From Dr Jonathan A Cunitz

To Henry White, Esq

Firm Sinkler & Boyd P A

Fax # (803) 765-1243

Pages 5 (Including covering sheet)

Re J Doe MD v Tenet Healthsystem Medical, Inc et al

Comments The accompanying material is provided to assist you with my forthcoming deposition testimony Please call me if you have any questions

**J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC, ET AL****TRIAL TESTIMONY OF DR. JONATHAN A CUNITZ****Qualifications As An Expert**

- Q State your name
  - Jonathan A Cunitz
- Q Dr Cunitz, what is your occupation?
  - President of Jonathan A Cunitz & Company, a management consulting firm specializing in financial management assistance to small businesses
- Q What is your educational background?
  - B.S degree in Industrial Engineering from Lehigh University
  - M B A & Doctor of Business Administration degrees from Harvard Business School
- Q Would you provide the court with a brief description of your employment after graduating from Harvard?
  - Assistant Professor of Accounting in the M B A Program at New York University
  - Corporate Financial Manager of Xerox Corporation working for the Controller at Corporate Headquarters
  - Vice President of Chase Manhattan Bank
  - Lecturer in the M B A Program at University of Connecticut
  - Adjunct Professor for Central Michigan University at U S military bases
  - Part-time consulting while teaching at N Y U & University of Connecticut
  - Full-time consulting practice since 1978
- Q Have you published any books and articles?
  - Textbook in accounting
  - Articles on finance and information systems
- Q As a business consultant for what purposes do you prepare economic & financial analyses for your clients?
  - For budgeting, financial planning & investment decisions
  - For valuations & acquisitions of companies
  - For bank presentations

Page 2

J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL

## TRIAL TESTIMONY OF DR. JONATHAN A CUNITZ

- Q Would you describe your experience with financial analysis calculations
  - In M B A courses, taught the accounting & finance concepts used in making financial analyses
  - Taught similar courses for the American Management Association in New York, Chicago & Mexico
  - For consulting clients & in corporate positions, have prepared hundreds of financial analyses
  - Have prepared dozens of financial analyses over the past 10 years for court testimony & litigation matters as an expert witness on business damages
- Q Have you previously analyzed business damages in litigation matters?
  - Yes, in more than two dozen cases
- Q Have you testified previously as an expert witness?
  - In Federal court in Florida, Pennsylvania New York, Montana Kansas and St Croix
  - In state courts in Florida, New York California, Wisconsin and West Virginia
  - In arbitrations in Florida Pennsylvania, New York and Washington D C
- Q Submit c v as exhibit if desired

Page 3

**J. DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL****TRIAL TESTIMONY OF DR JONATHAN A CUNITZ****Preparation On Case**

- o What documents have you reviewed in preparation for your testimony today?
  - Schedule C tax returns of Cynthia Holmes, M D for 1994 through 1998
  - Bank deposit receipts and information for 1999
  - Court Order dated November 22 1999
  - Monthly operating reports of Cynthia Holmes M D
  - List of surgeries performed by Dr Cynthia Holmes M D
  - Compensation and operating study data from the American Academy of Ophthalmology
  - SEC Form 10-K Annual Report for Tenet Healthcare Corporation for the year ended May 31, 1999, and the Form 10-Q Report for the three months ended August 31 1999
- o With whom have you spoken in preparation for your testimony today?
  - Spoke many times with Dr Cynthia Holmes about her practice and how it was affected by the loss of her hospital privileges
- o Have you reached certain conclusions and opinions as a result of your work?
  - Yes Dr Holmes suffered a loss of profits which will continue as a result of the disruption to her practice
- o In your research and analysis on this case, did you use methods and procedures that are normal and customary for experts in the financial, accounting and economic professions?
  - Yes

**Presentation Of Analysis**

- o Would you present your analysis and findings to the court
  - Discuss exhibits

J DOE, MD V TENET HEALTHSYSTEM MEDICAL, INC., ET AL  
TRIAL TESTIMONY OF DR JONATHAN A CUNITZ

Summary Of Opinions

- o In reaching your opinions on this case did you use methods and procedures that are generally accepted and utilized in the financial, economic and accounting professions?
  - Yes
- o Were these opinions formed with a reasonable degree of financial economic and accounting certainty?
  - Yes

TOTAL P 05

SB 10062

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff,

-vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

MEMORANDUM IN SUPPORT OF

MOTION FOR NEW TRIAL

FILED  
2009 AUG 11 PM 2 04  
JULIE J ARMSTRONG  
CLERK OF COURT  
BY 33

Pursuant to gracious permission by this Honorable Court, the plaintiff hereby respectfully submits this Memorandum in support of motion for new trial By analogy, new case law on fiduciary duty supports plaintiff's position Spence v Wingate, 2009-SC 0710 470 (breach of fiduciary duty based upon violation of the Rules of Professional Conduct does not require expert testimony) "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation " Spence v Wingate, 2009-SC-0710 470, citing Smith v Hastie, 367 S C 410, 417, 626 S E 2d 13,17 (Ct App 2005) It was reversible error for the circuit court to make a determination of no wrongdoing as a matter of law Spence v Wingate, 2009-SC-0710 470

In addition, this motion is based upon the following grounds

I      Defendants' pattern of lack of diligence and improper conduct is evidence of willful abandonment

---

Specifically, defendants' pattern of lack of diligence and improper conduct reaches the level of abandonment including, but not limited to, the following failure to timely file suit after exhaustion of administrative appeal, delay for a year before requesting injunctive relief at hearing after exhausting administrative appeal, failure to timely respond to discovery requests, failure to comply with Federal Court orders mandating timely response, failure to oppose out-of-time motion to compel, failure to oppose dissolution of the injunction, failure to appeal or even advise of appeal of loss of injunctive relief, breach of contingency fee agreement, taking positions adverse to their client's interests such as failing to timely comply with Federal Court orders for mandatory mediation resulting in loss of the opportunity for mediation and possible settlement at a critical time, failure to depose culpable competitors for the antitrust claims they pled. When defendants lost summary judgment, the case was transferred to State court. Defendants failed to return \$43,000.00 in fees for trial paid in advance, drafted a State complaint, and advised the client to proceed *pro se*. Compare Stearns Bank National Association v Glenwood Falls, 373 S C 331, 644 S E 2d 793 (Ct App 2007) (simple neglect is distinguished from repeated neglect which is deemed willful and constitutes abandonment).

- II In failing to rule that altering the Federal Court docket-stamp to misrepresent and back-date the defendants' response to motion for dissolution of the injunction is conduct not requiring expert testimony to establish a claim for professional negligence and to show a deviation from the standard of care for an attorney in South Carolina as well as conduct raising a question of credibility

---

In *Cianbro Corp v Jeffcoat and Martin*, the Federal Court applied 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) Further, in support of plaintiff's position herein, the opinion states

The Court has a particular distaste not only for attorney negligence, but also for an attorney's failure to exert his or her best effort for his or her client Besides the obvious harm that this causes to a client, the implications of an attorney's failure to provide fully competent service reach much farther than the particular attorney-client relationship As the South Carolina Supreme Court has stated 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 Citing *Norris v Alexander*, 142 S E 2d 214 (1965)

The Court shares these sentiments and makes no apologies for attorneys whose negligence or incompetence causes injury to their clients Attorneys, like other professionals, must be held financially accountable to their clients and ethically accountable to the public, for negligence or incompetence in rendering services *Cianbro Corp v Jeffcoat and Martin*, 804 F Supp 784, 793 (D S C 1992), affirmed 10 F 3d 806 (4th Cir 1993)

III In failing to rule that the failure to return fees paid in advance for trial, drafting a State Court complaint, and instructing the plaintiff to file it *pro se* is conduct not requiring expert testimony to establish a claim for professional negligence and to show a deviation from the standard of care for an attorney in South Carolina

---

Defendants' pattern of lack of diligence and improper conduct reaches the level of

abandonment including, but not limited to, the following failure to timely file suit after exhaustion of administrative appeal, delay for a year before requesting injunctive relief at hearing after exhausting administrative appeal, failure to timely respond to discovery requests, failure to comply with Federal Court orders mandating timely response, failure to oppose out-of time motion to compel, failure to oppose dissolution of the injunction, failure to appeal or even advise of appeal of loss of injunctive relief, breach of contingency fee agreement, taking positions adverse to their client's interests such as failing to timely comply with Federal Court orders for mandatory mediation resulting in loss of the opportunity for mediation and possible settlement at a critical time, failure to depose culpable competitors for the antitrust claims they pled When defendants lost summary judgment, the case was transferred to State court Defendants failed to return \$43,000.00 in fees for trial paid in advance, drafted a State complaint, and advised the client to proceed *pro se* Compare Stearns Bank National Association v Glenwood Falls, 373 S C 331, 644 S E 2d 793 (Ct App 2007) (simple neglect is distinguished from repeated neglect which is deemed willful and constitutes abandonment)

IV In failing to rule that the plaintiff's causes of action for 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 did not require expert testimony

---

Under Rule 8(e)(2), SCRPC, 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) Essentially, plaintiff's entire complaint was stricken Section 14-3-330 provides as follows

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal

(2) An order affecting a substantial right made in an action when such order

©) strikes out any pleading in any action

S C Ann Section 14-3-330 (1976)

Striking the entire complaint is reversible error See Breland v Love Chev Inc, 339 S C 89, 529 S E 2d 11 (2000) The plaintiff respectfully requests that the motion for new trial be granted

V Error as a matter of law in improperly excluding the plaintiff's expert testimony as a licensed attorney

Reversible error of law due to improper exclusion of plaintiff's expert testimony resulted in prejudice to the plaintiff when defendants' motion for directed verdict was granted State v Tennant, 2009-SC-0519 214 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, however, lack of trial experience goes to the weight of the evidence and not admissibility. Moreover, defendants' expert also lacks trial experience since he was full time teaching faculty when he gave his opinion a year ago. As opposed to scientific expert testimony, medical or other expertise that is unfamiliar to the court is NOT required. The Court took judicial notice of the RPC. Violations of the RPC are evidence of deviation from the standard of care.

Since there was no trial in the underlying matter, 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 has relevant testimony and specialized expertise to assist the jury. 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.

VI Error as a matter of law in failing to apply the applicable standard for a directed verdict set forth in Hancock v. Mid-South Mgmt. Co., Inc., 673 S E 2d 801 (2009).

Error as a matter of law by failing to take all evidence in the light most favorable to the plaintiff and instead making essentially all findings of fact in favor of untrustworthy defendants. In Hancock, the Supreme Court ruled that in cases applying the preponderance of the evidence burden of proof as in the case at bar, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand the motion. Hancock v. Mid-South Management Co.,

Inc, 673 S E 2d 801 (2009) The record reflects that consideration of application of judicial decision in Hancock, *supra*, is warranted including, but not limited to, the following

I ) Good faith is at issue and whether a party acted in good faith is a question of

---

fact Youmans v Youmans, 128 S C 31, 121 S E 2d 674 (1924), Small v

Spings Ind Inc , 300 S C 481, 388 S E 2d 808 (1994)

ii ) The evidence is contradictory and where the evidence is contradictory, the question is one of fact for the jury Guerin v Hunt, 118 S C 32, 110 S E 2d 71 (1921), Smalls v S C Dept of Ed , 339 S C 208, 217, 528 S E 2d 682, \_\_ (Ct App 2000)

iii ) Where a contract is capable of more than one construction, the question of what the parties intended becomes one of fact to be submitted to the jury Soil Remediation Co v Nu-Way Envtl Inc , 325 S C 231, 482 S E 2d 554 (1997), Pee Dee Stores, Inc v Doyle, 2008-SC-1216 185 (Ct App 2008)

iv ) Directed verdict should not be granted even when there is no dispute as to the evidentiary facts if there is a dispute as to the conclusions to be drawn therefrom MacFarlane v Manly, 274 S C 392, 264 S E 2d 838 (1980), Nelson v Chas Cty Parks and Rec Comm'n, 362 S C 1, 5, 605 S E 2d 744, 746 (Ct App 2004)

In this case, it is reversible error to make a determination of no wrongdoing as a matter of law  
See Spence v Wingate, 2009-SC-0710 470

VII In failing to deny the defendants' motion for directed verdict when the defendants' own legal expert testified that altering the Federal Court Docket Stamp was wrong and that the untimely loss of the injunction was due to defendants' failure to timely respond to discovery

Defendants' own expert witness testified that, but for defendants failure to timely respond to discovery requests, the injunction would not have been lost while the antitrust claims were pending The untimely loss of the injunction resulted in loss of income for scheduled procedures, injury to the plaintiff, and injury to the practice Mali v Odom, 295 S C 78, 367 S E 2d 166 (Ct App 1988) (expert testimony supporting plaintiff's claims may come from defendants' expert testimony) See Rule 1.1, RPC, Rule 407, SCACR, which requires an attorney to provide competent representation to a client In re Moore, 329 S C 294, 494 S E 2d 804, 807 (1997) (finding that failure to reply to discovery requests violated South Carolina's Rule 1.1, RPC, Rule 407, SCACR, which requires an attorney to provide competent representation to a client) See "Ethics Watch" by John Freeman, South Carolina Lawyer, January 2007, page 8 See Rule 8.4(a), RPC, Rule 407, SCACR - it is professional misconduct for a lawyer to violate the Rules of Professional Conduct (RPC)

VIII In failing to continue the case for trial under the totality of circumstances

The priority-matter motion for continuance was timely filed but was not addressed prior to trial Grounds for continuance include the unavailability of plaintiff's out-of-state counsel, unavailability of physician witnesses who require advance notice in order to make necessary arrangements to be away from the office, failure to remove the case from the trial roster during the pendency of appeal involving trial matters, failure to remove the case from the trial roster during the pendency of a motion for scheduling order pursuant to Rule 40, SCRCR, failure to comply with the letter and spirit of Rule 40, SCRCR, and its purpose to provide all parties with

adequate time to prepare for trial and to provide a meaningful opportunity to be heard, failure to acknowledge the law of the case adjudicating the case appropriate for scheduling order, failure to comply with Rule 40(b), SCRCP, providing that the case should have been placed at the bottom of the jury trial roster following the appeal which included mode of trial issues and that

---

“(t)rial shall be had no earlier than 30 days ”after placement on the jury trial roster (JTR), the unauthorized placement of the case as number one (1) on the JTR on May 18, 2009, immediately following the Appellate Court’s final disposition of appeal on May 13, 2009, and even before receipt of written notice of disposition of appeal, and in failing to rule that there had been a pattern and practice by defendants of not complying with discovery and not complying with Court Orders affecting discovery. The plaintiff was prejudiced thereby and deprived of the right to trial by jury, the right to a meaningful opportunity to be heard, and the right to full and fair discovery pursuant to Baughman v. AT&T, 410 S.E.2d 537 (1991).

IX In failing to rule that there had been a pattern and practice by the defendants of not complying with discovery and Court Orders affecting discovery

The plaintiff was deprived of full and fair discovery pursuant to Baughman v. AT&T, 410 S.E.2d 537 (1991) including, but not limited to, defendants naming 150-200 legal experts, defendants’ failure to produce the defendant firm’s tax returns for more than one year after ordered to do so, waiting until less than 24 hours before trial to produce the documents preventing the plaintiff’s expert from timely completing economic evaluation, then defendants’ bad faith objection and exclusion of plaintiff’s economic expert based upon lack of time for defendants to depose him due to defendants’ own wrongdoing (Rule 6, SCRCP), defendants’ failure to honor subpoenas and attend defendants’ own scheduled depositions, failure to reconvene the deposition of defendants’ named witness, an officer of the court, for bad faith

refusal to answer questions at deposition in violation of Rule 30, SCRCP, and failure of defendants to comply with this Honorable Court's order to produce the Policy Manual and waiting until less than 24 hours before trial to produce it, thereby prejudicing the plaintiff by defeating trial preparation and by requiring cancellation of defendant expert's deposition and depriving the plaintiff of full and fair discovery Baughman v. AT&T, 410 S.E.2d 537 (1991)

---

X In improperly granting the national hospital chain's request to prevent jury access to the plaintiff's evidence from the case-within-a-case

East Cooper Community Hospital and Defendants Grady and Yantis requested that the jury be denied access to the evidence. The culpable defendants from the underlying case attempt to deny the jury access to evidence proving their wrongdoing. Their request was improper and based upon an inapplicable statute. In addition, the hospital's own expert in that case testified the evidence was not peer review and, therefore, not subject to confidentiality. Moreover, the statute is inapplicable because the national hospital chain, East Cooper Community Hospital, and Defendants' Grady and Yantis were NOT operating "pursuant to written bylaws that have been approved by the governing board" and did not operate in accordance with the Joint Commission for the Accreditation of Healthcare Organizations (JCAHO). Therefore, the statute is inapplicable. S.C. Code Ann. Section 40-71-20 (1989). Moreover, the matters are res judicata, were not subject to confidentiality then or now, are relevant to the case-within-a-case, and are relevant to the matter herein. The improper request by the national hospital chain, East Cooper Community Hospital, and Defendants' Grady and Yantis should be denied. The plaintiff is prejudiced by failure to present relevant evidence for the case-within-a-case and to develop the case herein. The plaintiff is prejudiced by dismissal of meritorious claims. See Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 334 S.C. 244, 513 S.E.2d 96 (1999) (res

judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit)

XI In failing to allow the plaintiff to use the discovery from the underlying case

---

The evidence from the underlying case is needed to develop the case and to fairly meet the case-within-a-case because res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit and because the evidence is now unavailable due to passage of time, witness relocation, and death of a witness. One example includes, but is not limited to, the denial of the right to introduce the deposition of a witness, Mr. Powers, who has passed away. This witness testified about slander by the hospital administrator who stated that the physician bought her medical degree. The testimony was otherwise unavailable, was necessary to fairly meet the case-within-a-case requirement, and was needed to present the case herein. Furthermore, the plaintiff objects to exclusion based upon lack of one day's notice under Rule 32, SCRCP. Because the Motion to use the testimony was made well before trial and because it was included in discovery responses, the plaintiff met the required notice and the other side cannot claim surprise or lack of notice. Further, the one day's notice was given at trial as well. The plaintiff was prejudiced when the defendants' motion for directed verdict was granted.

The plaintiff was prejudiced by failure to allow use of discovery from the underlying case and the failure to allow use of otherwise unavailable evidence resulting in directed verdict. See Lifschultz Fast Freight, Inc. v. Haynsworth, Maillon, McKay & Gueiard, 334 S.C. 244, 513 S.E.2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit).

XII In improperly excluding the testimony of the plaintiff's economic expert

The plaintiff's economic expert testimony was excluded on the grounds that defendants did not have an opportunity to depose him before trial. Over a year ago, defendants were ordered to produce the discovery the expert needed. Equitable estoppel bars exclusion of plaintiff's economic expert because the delay was due to defendants' own wrongdoing and due to defendants' bad faith failure to comply with multiple court orders to timely provide the economic information. Ignoring this Honorable Court, defendants waited until less than 24 hours before trial to produce the discovery the expert required for his evaluation. Rule 6, SCRPC. The plaintiff was prejudiced by improper exclusion of relevant evidence. The claims herein are meritorious. " (W)here an attorney---an officer of the court---suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice." Chewning v Ford Motor Co, 354 S C 72, 82-84, 579 S E 2d 605 (S C 2003). Attorney fraud deprives the litigant of the right to be heard, thwarts a full and fair hearing on the merits, and obstructs justice, and, therefore, prejudice is presumed. Chewning v Ford Motor Co, 354 S C 72, 579 S E 2d 605 (S C 2003). The motion for new trial should be granted.

XIII In failing to exclude the defendants' expert witness

Freeman testified that he was full-time teaching faculty when he formed his opinion last year, therefore, he lacks trial experience. The defendants' expert testimony then is subject to exclusion on the same basis as the plaintiff's expert testimony. Moreover, the defendants' expert

witness testimony should be excluded for the same reasons as Freeman's testimony was excluded in the case of Dawkins v Fields, 354 S C 58, 580 S E 2d 433 (2003) Specifically, Freeman's testimony is inadmissible as expert testimony on conclusions of law The overwhelming majority of Freeman's testimony is simply legal argument and is inadmissible In addition, his testimony is inadmissible because it is based upon improper hearsay not relied upon within the field, based upon antitrust outside his expertise, based upon his "consultations" with untrustworthy defendants, and based upon his admission that his opinion was formed in whole or in part on subjective opinion

XIV In failing to accord full, faith, and credit to the June 2, 2000, Federal Court Order

The June 2, 2000, Federal Court Order is res judicata for the ruling that defendants' failure to timely respond to discovery caused the untimely loss of the injunction while the antitrust claims were pending, thereby resulting in foreseeable, direct, and proximate damages to the physician, their client See Lifschultz Fast Freight Inc v Haynsworth Marion, McKay & Guerard, 334 S C 244, 513 S E 2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit)

XV In failing to acknowledge res judicata set forth in the June 2, 2000, Federal Court Order

The June 2, 2000, Federal Court Order is res judicata for the ruling that defendants' failure to appeal the loss of the injunction reversed the status quo and, thereby caused the physician to suffer damages and to forever lose injunctive relief Defendants' negligence resulted in the foreseeable irreparable harm to the physician and the physician's practice which defendants' themselves warned of in their motion for injunction See Lifschultz Fast Freight,

Inc v Haynsworth, Marion, McKay & Guerard, 334 S C 244, 513 S E 2d 96 (1999) (res judicata prevents relitigation of particular issues or claims litigated and decided in a prior suit)

XVI In denying the physician the right to trial by jury, the right to retained counsel, due process, equal protection, and fundamental fairness guaranteed to all parties under the State and Federal Constitutions S C Const art I, sec 3, S C Const art I, sec 22, S C Const art V, sec 4, S C Const art V, sec 5, U S Const amend V and XIV

The fundamental right of due process is the opportunity to be heard at a meaningful time and in a meaningful manner S C Dept of Soc Ser v Beeks, 325 S C 243, 246, 481 S E 2d 703,705 (1997) Fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review S C Const art I sec 22, Stono River Env Prot Assn v SCDHEC 305 S C 90, 94, 406 S E 2d 340, 342 (1991) "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Vth or XIVth Amendment of the U S Constitution" Kurschner v City of Camden Planning Commission, 376 S C 165, 171, 656 S E 2d 346, 350 (2008) The petitioner was prejudiced by deprivation of the right to already-paid retained counsel all to defendants' substantial gain and thereby anointing untrustworthy defendants with unfair advantage The petitioner was prejudiced by deprivation of the right to employ counsel, the failure to accord professional courtesy to out of-state counsel, the deprivation of a meaningful opportunity to be heard, and the right to trial by jury

The claims herein are meritorious " (W)here an attorney---an officer of the court--- suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice" Chewning v Ford Motor Co , 354 S C 72, 82-84, 579 S E 2d 605 (S C 2003) Attorney fraud deprives the litigant of the right to be heard, thwarts a full and fair hearing on the merits, and obstructs justice, and, therefore, prejudice is presumed Chewning v Ford Motor Co , 354 S C 72, 579 S E 2d 605

(S C 2003)

XVII Regarding professional malfeasance

---

Legal malpractice is the failure of an attorney to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar circumstances and in like surroundings Jernigan v King, 312 S C 331, 440 S E 2d 379 (Ct App 1993) The action must involve charges of a deviation from that standard of care Ward v Epting, 290 S C 547, 351 S E 2d 867 (Ct App 1986) Professional malfeasance is a tort A prerequisite to a professional malfeasance claim is the establishment of an attorney-client relationship Roberts v Hunter, 310 S C 364, 426 S E 2d 797 (1993) 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) 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) Based upon In re Moore, 329 S C 294, 494 S E 2d 804, 807, South Carolina precedent establishes that defendants' failure to reply to discovery requests violates South Carolina's Rule 1.1 which requires an attorney to provide competent representation That failure is actionable where it results in harm to the client as in this case

The defendant(s) entered into an attorney-client relationship with the plaintiff The defendants owed a duty of care to the plaintiff as a result of that relationship The defendant(s) deviated from the standard of care by negligent act and/or omission The plaintiff suffered harm as a result of that breach with resulting foreseeable damages But for defendants' negligence, the injury would not have occurred and/or could have been avoided The defendant(s) conduct was willful, wanton, or in reckless disregard of the plaintiff's rights

This matter involves multiple claims arising out of the defendants' wrongdoing and

malfeasance pursuant to a binding contract for legal representation. In this case defendant(s) made false representations in order to induce the plaintiff to contract and it is sufficient if the false representation induced in whole or in part Culbreath v Investors Syndicate, 203 S C 213, 26 S E 2d 809 (1943). Certain representations were false and the speaker knew or should have known the falsity of the misrepresentation Giles v Langford and Gibson, Inc, 285 S C 285, 328 S E 2d 916 (Ct App 1985). The materiality is established because the misrepresentation was in fact an inducement to contract in whole or in part. Defendant(s) intended for the plaintiff to rely on the representation. The plaintiff relied on the truth of the representation and did not know of its falsity. Plaintiff would not have entered into the contract but for defendant(s) misrepresentation. The plaintiff had a right to rely. Defendants owed a fiduciary duty to the physician to communicate truthfully including, but not limited to, the contingency fee agreement. Defendants entered into a binding agreement to represent the plaintiff at jury trial. Defendants willfully and wantonly breached that agreement to the plaintiff's substantial detriment including actual and special damages. See Spence v Wingate, 2009-SC-0710 470.

There are material questions of fact whether the defendant(s) committed professional malfeasance.

#### XVIII Regarding breach of contract

The elements for a breach of contract cause of action are (1) a binding contract entered into by the parties, (2) breach or unjustifiable failure to perform the contract, and (3) damages suffered by the plaintiff as a direct and proximate result of the breach Fuller v Eastern Fire and Casualty Co, 240 S C 75, 124 S E 2d 602 (1962).

In this case, the facts establishing the elements include, but are not limited to, the following. Defendants entered into a binding agreement with plaintiff for representation. Defendants failed and refused to reduce the contingency fee agreement to writing though

ethically required to do so. Defendants unjustifiably failed to perform the contract. Based upon the evidence, a jury could find that defendants refused to provide a written agreement for representation at jury trial because they did not intend to perform as agreed. The plaintiff suffered damages including special damages as a direct and proximate result of the breach.

---

There are material questions of fact whether the defendants breached the contract. \_\_\_\_\_

XIX Regarding breach of contract accompanied by a fraudulent act

The elements of a cause of action for breach of contract accompanied by a fraudulent act are (1) a breach of contract, (2) fraudulent intent related to the breach, and (3) a fraudulent act accompanying the breach. Harper v. Etheridge, 348 S.E.2d 374 (S.C. 1986). The defendants breached the contract for representation as set forth above. The plaintiff now argues there are material questions of fact whether that breach of contract was accompanied by fraudulent acts.

Fraudulent intent is normally proved by circumstances surrounding the breach and may involve false representations. Ball v. Canadian American Express Co., Inc., 442 S.E.2d 620 (S.C. App. 1994). The fraudulent act accompanying the breach must be one of dishonesty in fact, unfair dealing, or unlawful appropriation of someone else's property. Harper v. Etheridge, supra, Ball v. Canadian American Express Co., Inc., supra. The act must accompany the breach and not be too remote in time or character. Smith v. Canal Ins. Co., 269 S.E.2d 348 (S.C. 1980). It may be prior to, contemporaneous with, or subsequent to the breach. Wilson Group, Inc. v. Quorum Health Resources, Inc., 880 F. Supp. 416 (D.C.S.C. 1995).

In this case, the facts establishing the elements include, but are not limited to, the following: Defendant(s) failed to provide a written contingency fee agreement as required by applicable law. Defendants' wrongful acts deviated from the standard of care and violate the Rules of Professional Conduct. These acts from the outset constitute evidence that defendant(s) never intended to, and in fact never did, perform as agreed. As a direct and proximate result, the

plaintiff suffered damages including special damages

There are material questions of fact whether the defendants' breach of contract was accompanied by a fraudulent act

---

XX Regarding breach of fiduciary duty

A fiduciary relationship exists between an attorney and the client Steele v Victory Savings Bank 295 S C 290, 368 S E 2d 91 (Ct App 1998) The Restatement of Torts provides that

One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation

Restatement (2d) of Torts Section 874 (1979)

Tort damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant Lowndes Products, Inc v Bower, 259 S C 322, 191 S E 2d 761 (1972), Spence v Wingate, 2009-SC-0710 470

In this case the facts establishing the elements include, but are not limited to, the following The defendants as attorneys owed the plaintiff a fiduciary duty The defendants breached that fiduciary duty by subverting the plaintiffs' substantial interests including ability to provide a livelihood and education for dependent minor children to the defendants' own self-interests Defendants failed to return fees paid for trial, fees paid in advance of trial when there was no trial Defendants breached the fiduciary duty owed to their client, the physician in other particulars as well failure to timely file suit after exhaustion of administrative appeal, delay for a year before requesting injunctive relief at hearing after exhausting administrative appeal failure to timely respond to discovery requests, failure to comply with Federal Court orders mandating timely response, failure to oppose out-of-time motion to compel, failure to oppose dissolution of

and deceptive billing practices are a violation of the SCUTPA and do not fall within the statutory exemption. On information and belief, the unfair and deceptive practices have affected other clients, are capable of repetition, and will negatively impact the public interest.

There are material questions of fact whether the defendants engaged in unfair and deceptive acts and practices which adversely affect the public interest in violation of the UTPA.

## XXII Regarding abandonment

Defendants' pattern of lack of diligence and improper conduct reaches the level of abandonment including, but not limited to, the following: failure to timely file suit after exhaustion of administrative appeal, delay for a year before requesting injunctive relief after exhausting administrative appeal, failure to timely respond to discovery requests, failure to comply with Federal Court orders mandating timely response, failure to oppose out-of-time motion to compel, failure to oppose dissolution of the injunction, failure to appeal or even advise of appeal of loss of injunctive relief, breach of contingency fee agreement, taking positions adverse to their client's interests such as failing to timely comply with Federal Court orders for mandatory mediation resulting in loss of the opportunity for mediation and possible settlement at a critical time, failure to depose culpable competitors for the antitrust claims they pled, failure to name necessary parties. When defendants lost summary judgment, the case was transferred to State court. Defendants failed to return \$43,000.00 in fees for trial paid in advance, drafted a State complaint, and advised the client to proceed *pro se*. See Stearns Bank National Association v. Glenwood Falls, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) (simple neglect is distinguished from repeated neglect which is deemed willful and constituting abandonment).

There are material questions of fact whether the defendants abandoned their client.

### XXIII Regarding civil conspiracy

The elements for a cause of action of civil conspiracy are (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes special damages

Lamotte v Punchline of Columbia Inc 370 S-E-2d-711 (S-C-1988)–Conspiracy may be inferred from the nature of the acts, the relationship of the parties, the interests of the alleged conspirators, and other circumstances Island Car Wash Inc v Norris 358 S E 2d 150 (S C App 1987) An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed Lee v Chesterfield General Hospital, Inc , 344 S E 2d 379 (S C App 1986) Lawful acts may form the basis for a civil conspiracy when the object is to ruin or damage the business of another Lamotte v Punchline of Columbia, Inc , *supra*

In this case, the facts establishing the elements include, but are not limited to, the following Two or more defendants conspired to injure the plaintiff resulting in foreseeable damages including special damages The evidence from the underlying case shows that the defendants deviated from the standard of care The evidence from the underlying case shows that the defendants took actions adverse to their client's interests all to the Plaintiff's substantial detriment Defendants failed and refused to perform under the agreement for representation and conspired to appropriate the plaintiff's property In violation of Rule 1 16, RPC, Rule 407, SCACR, defendants failed to return fees paid in advance for trial when there was no trial

There are material questions of fact whether the defendants conspired to injure the plaintiff

### XXIV Regarding promissory estoppel

The elements of a claim for promissory estoppel are (1) the presence of a promise unambiguous in its terms, (2) reasonable reliance upon the promise by the party to whom the

promise is made, (3) reliance is expected and foreseeable by the party who makes the promise, and (4) the party to whom the promise is made sustains injury in reliance on the promise Woods v. State, 431 S E 2d 260 ( 1963)

In this case, the facts establishing the elements include, but are not limited to, the following Defendants made an unambiguous promise to provide legal representation in good faith, to abide by the Rules of Professional Conduct, and to abide by their fiduciary duty The plaintiff relied on the promise But for defendants' promise, plaintiff would have retained reasonable and competent attorneys Plaintiff's reliance was expected and foreseeable by defendants The plaintiff was injured in reliance on defendants' promise The plaintiff suffered substantial injury in the form of actual and special damages in reliance upon the defendants' promises

There are material questions of fact establishing a cause of action for promissory estoppel

#### XXV Regarding defamation

Defendants made defamatory statements intended to impeach the plaintiff's reputation which in fact did cause injury to the plaintiff The elements are as follows (1) a defamatory meaning, (2) publication with actual or implied malice, (3) falsity, (4) publication by the defendant, (5) the message concerns the plaintiff and (6) legally presumed damages or special damages to the plaintiff Parker v. Evening Post Publishing Co., 317 S C 236, 452 S E 2d 640 (Ct App 1994), *cert denied*, 516 U S 1172, 116 S Ct 1263, 134 L Ed 2d 211(1996)

Defamation includes, but is not limited to, the defendants' improper motion to withdraw and bad faith affidavit containing misleading and false statements Defendants then withdrew their baseless affidavit There are genuine issues of material fact establishing defamation with actual malice

XXVI Regarding constructive fraud

Constructive fraud is breach of a legal or equitable duty that the law pronounces fraudulent because it tends to deceive, violate public or private confidence, or injure public interests Greene v Brown, 199 S C 218, 19 S E 2d 114 (1942) (fraud is a deception intended to induce someone to part with property or surrender a legal right) Constructive fraud is distinguished from fraud by the absence of the element of intent to deceive Designer Showrooms, Inc. v Kelley, 304 S C 478, 405 S E 2d 417 (Ct App 1991) It is sufficient that the defendant ought to have known the falsity of the misrepresentation Giles v Langford and Gibson, Inc., 285 S C 285, 328 S E 2d 916 (Ct App 1985) The elements of constructive fraud are (1) a representation, (2) falsity, (3) the speaker ought to have known of the falsity, (4) materiality, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, (9) the hearer's consequent and proximate injury Woods v State, 314 S C 501, 431 S E 2d 260 (Ct App 1993) Where the transaction is fiduciary as here, it calls for perfect good faith and full disclosure Jacobson v Yaschik, 249 S C 577, 155 S E 2d 601 (1967), Spence v Wingate, 2009-SC-0710 470 In another case, a misrepresentation of the law constituted constructive fraud where the plaintiff was told that "he must accept settlement or receive nothing" Koon v Pioneer-Pyramid Life Ins. Co., 175 S C 117, 178 S E 503 (1935)

In this case defendant(s) made false representations in order to induce the plaintiff to contract and it is sufficient if the false representation induced in whole or in part Culbreath v Investors Syndicate, 203 S C 213, 26 S E 2d 809 (1943) Certain representations were false and the speaker knew or should have known the falsity of the misrepresentation Giles v Langford and Gibson, Inc., 285 S C 285, 328 S E 2d 916 (Ct App 1985) The materiality is established because the misrepresentation was in fact an inducement to contract in whole or in part Defendant(s) intended for the plaintiff to rely on the representation The plaintiff relied on the

truth of the representation and did not know of its falsity Plaintiff would not have entered into the contract but for defendant(s) misrepresentation The plaintiff had a right to rely on defendant(s)' statements As a direct and proximate result of the constructive fraud, plaintiff suffered damages including special damages These actions were willful, wanton, and in reckless disregard for the plaintiff's rights Defendants represented that they would handle the legal representation diligently, competently, and in accordance with their fiduciary duty owed to the physician, their client The physician had a right to rely Defendants acted recklessly, including but not limited to, untimely loss of the physician's injunction while the antitrust claims were pending Defendants acted recklessly, including but not limited to, failure to appeal or even advise of appeal of loss of the injunction

The facts herein include but are not limited to the following elements

- (1) a representation - defendants owed a fiduciary duty to their client to communicate truthfully  
Defendants represented they would proceed in good faith on a contingency fee arrangement upon granting of the injunction in order to induce the physician to contract on the second matter
- (2) falsity - defendants owed a duty to the physician to put the contingency fee agreement in writing and owed a duty to the profession under the Rules of Professional Conduct to put the contingency fee agreement in writing The fact that defendants failed to provide a written agreement is evidence that defendants intended to induce the physician to contract but never intended to perform on the contingency fee as agreed Correspondence confirming the contingency fee agreement and the physician's check labeled "Injunction" both confirm the contingency fee agreement
- (3) the speaker ought to have known of the falsity - defendants knew or should have known that a written agreement was required
- (4) materiality - but for defendants' representations to induce the physician to contract, the physician would have had a written agreement preventing dispute over its terms But for defendants' misconduct in failing to provide a written contingency fee agreement, the

- plaintiff was injured as a direct and proximate cause resulting in foreseeable damages
- (5) intent that the representation be acted upon - defendants intended to induce the physician to contract for legal services on the second matter
  - (6) the hearer's ignorance of its falsity - the physician was unaware of the requirement that the contingency fee agreement be in writing
  - (7) the hearer's reliance on its truth - the physician relied on the defendants' fiduciary duty to communicate truthfully and act in good faith
  - (8) the hearer's right to rely thereon - the physician had a right to rely on defendants' fiduciary duty to provide ethical and truthful representation
  - (9) the hearer's consequent and proximate injury - Defendants owed a fiduciary duty to the client to represent the client diligently and competently. But for defendants' failure to comply with the RPC and consequent breach of contract, the physician was injured as a direct and proximate result. Due to defendants' negligent and untimely loss of injunction, defendants caused foreseeable loss of income for already-scheduled procedures as well as injury to the physician and the physician's practice.

Moreover, silence may also be considered a false representation where there is a duty to disclose as with a fiduciary relationship in the instant case Jacobson v Yaschik, 249 S C 577, 155 S E 2d 601 (1967). Nondisclosure of the right to appeal the loss of the injunction is fraudulent where the defendants' fiduciary duty required them to disclose it Ardis v Cox, 314 S C 512, 431 S E 2d 267 (Ct App 1993) (nondisclosure fraudulent where there is a duty to speak). Other defendant(s) knew or should have known of the falsity of the representations. Plaintiff would not have contracted if defendant(s) had disclosed pertinent information which they knew or should have known. The defendants intended for the plaintiff to rely. The plaintiff was unaware of the undisclosed but material information and was unaware of the falsity of the representation. The plaintiff relied and had a right to rely thereon especially in the context of a fiduciary relationship Woods v State, 314 S C 501, 431 S E 2d 260 (Ct App 1993). As a direct

and proximate result of the defendants' acts and/or omissions, the plaintiff sustained damages including special damages Defendant(s) acted in willful, wanton, and reckless disregard for plaintiff's rights

There are material questions of fact whether the defendants' conduct constitutes  
constructive fraud

---

#### XXVII      Regarding conversion

The elements of a cause of action for conversion are (1) an interest by the plaintiff in the thing converted, (2) the defendant converted the property to his or her own use, and (3) the use was without the plaintiff's permission Austin v Independent Life and Accident Ins Co, 296 S C 156, 370 S E 2d 918 (Ct App 1988) Demand and refusal are unnecessary where the conversion resulted from the defendant securing the property illegally, tortiously, by fraud, or other wrongful conduct SSI Medical Services, Inc v Cox, 301 S C 493, 392 S E 2d 789 (1990) Punitive damages are warranted where the conversion was accomplished recklessly and with conscious indifference to the plaintiff's rights Charleston Foundation v Murray, 286 S C 170, 333 S E 2d 60 (Ct App 1985)

In this case, the facts establishing the elements include, but are not limited to, the following After the motion for summary judgment in the underlying case was granted, unearned fees of \$43,000.00 paid in advance for trial were not returned as required by Canon 1-16, RPC, Rule 407, SCACR Defendants converted the unearned fees to the exclusion of the plaintiff's rights Moreover, defendants converted the physician's injunctive relief through reckless disregard and in violation of defendants' fiduciary duty to the physician Further, defendants converted the physician's antitrust claims by failing to prosecute and failing to depose the culpable competitors Culpable competitor Grady's deposition from the underlying State case proves his wrong-doing and proves antitrust injury through restriction of patient access to the

safer, small incision surgery with superior results and restriction of patient access to the physician of their choice in the relevant, geographically isolated area. Further, defendants converted the physician's right to mandatory mediation when they failed to timely comply with Federal Court Orders mandating mediation without notice to the physician. The physician was prejudiced through loss of the opportunity for mediation with possible settlement at a critical time.

As a direct and proximate result of the defendants' acts and/or omissions, the plaintiff sustained damages including special damages. The defendants acted in willful, wanton, and reckless disregard for plaintiff's rights.

There are material questions of fact as to conversion.

#### XXVIII      Regarding negligent misrepresentation

The elements of negligent misrepresentation are (1) a false representation made by the defendant to the plaintiff, (2) a pecuniary interest by the defendant in making the statement, (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff, (4) the defendant breached the duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation. Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997), Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (proximate cause is a direct cause of an injury but not necessarily the sole cause).

With respect to the elements herein, negligent misrepresentation includes, but is not limited to, the following:

- 1) a false representation made by the defendant to the plaintiff - defendants represented they would proceed in good faith on a contingency fee arrangement in order to induce the physician to contract.

(2) a pecuniary interest by the defendant in making the statement - defendants' business and profession are sufficient to show the element of pecuniary interest, even though one or more does not actually receive consideration for it AMA Management Corp v Strassburger, 309 S C 213, 420 S E 2d 868 (Ct App 1992)

---

(3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff - defendants owed a fiduciary duty of care to the physician to see that truthful information was communicated to the physician

(4) the defendant breached the duty by failing to exercise due care - defendants owed a duty to the physician to put the contingency fee agreement in writing and owed a duty to the profession under the Rules of Professional Conduct to put the contingency fee agreement in writing

(5) the plaintiff justifiably relied on the representation - the physician justifiably relied on defendants' fiduciary duty to communicate truthfully

(6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation - but for defendants' failure to comply with the RPC and consequent breach of contract, the physician was injured as a direct and proximate result causing foreseeable loss of income for already-scheduled procedures due to defendants' negligent and untimely loss of injunction while the antitrust claims were pending as well as injury to the physician and the physician's practice

As attorneys, defendants owed a duty of care to the plaintiff. The defendants breached the duty by failing to exercise due care. The plaintiff justifiably relied on defendants' express and implied representations. As a direct and proximate result of the defendants' acts and/or omissions, the plaintiff sustained damages including special damages. The defendants acted in willful, wanton, and reckless disregard for plaintiff's rights.

There are material questions of fact regarding negligent misrepresentation.

XXIX Regarding negligent supervision

South Carolina recognizes negligent supervision as a cause of action Degenhart v

Knights of Columbus, 309 S C 109, 420 S E 2d 495 (1992)—The owner supervisor may be liable for negligent supervision when the supervisee intentionally harms another and (1) the supervisee is on the premises and/or using the chattel of the owner-supervisor, (2) the owner supervisor knows or has reason to know of the ability to control the supervisee, and (3) the owner-supervisor knows or should know of the necessity and opportunity for exercising control Doc v Greenville Hospital System, 323 S C 33, 448 S E 2d 564 (Ct App 1994)(prior incident of misconduct known to supervisor)

In the instant case the defendant firm and/or its principal(s) and/or supervisory attorneys knew or should have known of professional misconduct, fraud, and/or misrepresentations. The defendant firm intends to give the perception to the public that it provides legal representation which complies with the standard of care. In this instance, defendant(s) invoked the good name and reputation of the firm and its namesake to induce the plaintiff to contract for legal services. Given knowledge and/or reason to know of wrongdoing, the firm owes a duty of care to the public at large and the plaintiff in particular. As a direct and proximate result of defendants' negligent supervision, the plaintiff suffered damages including special damages. Defendants' negligent supervision, including but not limited to, failure to monitor for diligent, competent representation and failure to track deadlines was willful, wanton, and in reckless disregard for plaintiff's rights.

There are material questions of fact regarding negligent supervision.

XXX Regarding fraud and misrepresentation

The elements of fraud and misrepresentation are (1) a representation, (2) its falsity, (3) its materiality, (4) either knowledge of its falsity or a reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury Kahn Construction Co v South Carolina National Bank of Charleston, 275 S C 381, 271 S E 2d 414 (1980)

Even if there is no fraud in the factum evidence may show fraud in the inducement if misrepresentation, concealment, coercion, and/or duress are found Green v Sparks, 232 S C 414, 102 S E 2d 435 (1958) As here, defendants' misrepresentations and concealment were inducements to contract The fraudulent act need not be the sole cause of the transaction, it need only play a part in inducing the plaintiff to transact Lebby v Ahrens, 26 S C 275, 2 S E 387 (1887)

The facts herein include but are not limited to the following elements

- (1) a representation - based upon the prior representation for administrative appeal, defendants agreed to proceed on a contingency fee arrangement upon granting of the injunction in order to induce the physician to contract
- (2) falsity - defendants owed a duty to the physician to put the contingency fee agreement in writing and owed a duty to the profession under the Rules of Professional Conduct to put the contingency fee agreement in writing The fact that defendants failed to provide the required written agreement is evidence of violation of Rule 1.5, RPC, Rule 407, SCACR, and evidence that defendants intended to induce the physician to contract but never intended to perform on the contingency fee as agreed
- (3) materiality - but for defendants' representations to induce the physician to contract and defendants' failure to comply with Rule 1.5, RPC, Rule 407, SCACR, the physician would have had a written contingency fee agreement But for defendants' misconduct, the plaintiff was injured as a direct and proximate cause resulting in foreseeable damages

(4) either knowledge of its falsity or a reckless disregard of its truth or falsity - defendants knew or should have known that a written contingency fee agreement was required by Rule 1.5, RPC, Rule 407, SCACR

(5) intent that the representation be acted upon - defendants intended to induce the physician to contract for legal services

---

(6) the hearer's ignorance of its falsity - the physician was unaware of the requirement that the contingency fee agreement be in writing

(7) the hearer's reliance on its truth - the physician relied on the defendants' fiduciary duty owed to the client for truthful communication

(8) the hearer's right to rely thereon - the physician had a right to rely on defendants' fiduciary duty to provide ethical and truthful representation

(9) the hearer's consequent and proximate injury - but for defendants' failure to comply with the RPC, breach of contract, and breach of fiduciary duty, the physician was injured as a direct and proximate result of defendants' negligent and untimely loss of injunction causing foreseeable loss of income for already-scheduled procedures as well as injury to the physician and the physician's practice

In the instant case, there were multiple fraudulent acts and/or omissions by defendants. As one example, the defendants threatened to prejudice the case in order to extort fees. The fraudulent act was material and materially affected the plaintiff. Defendants acted with reckless disregard. Defendants intended that the misrepresentation be acted upon. The plaintiff was ignorant of the fraud and misrepresentations. The plaintiff had a right to rely on defendants' fiduciary duty to the plaintiff and in fact did rely. As a direct and proximate result of the defendants' acts and/or omissions, the plaintiff sustained damages including special damages. The defendants acted in willful, wanton, and reckless disregard for plaintiff's rights.

There are material questions of fact as to fraud and misrepresentation.

XXX Regarding quantum meruit

*Quantum meruit* is an equitable doctrine allowing recovery for unjust enrichment

---

Columbia Wholesale Co., Inc v Scudder May N-V, 312 S C 259, 440 S E 2d 129 (Ct App

1990) In Columbia the court held that recovery is based on quasi-contract and the elements are (1) a benefit conferred upon the defendant, (2) realization of that benefit by the defendant, and (3) retention of the benefit by the defendant under conditions that make it unjust for him to retain it without paying its value

The facts herein include, but are not limited to, the following elements

- (1) a benefit conferred upon the defendant - defendants were paid \$43,000 00 in advance for trial
- (2) realization of that benefit by the defendant - defendants deposited the cashiers check for \$43,000 00 paid in advance for trial
- (3) retention of the benefit by the defendant under conditions that make it unjust for him to retain it without paying its value - in violation of the RPC, defendants failed to return fees paid in advance for trial when there was no trial

Moreover, in light of the fact that defendants failed to return fees paid in advance for trial when there was no trial, in light of the abysmal outcome at untrustworthy defendants' hands, and in light of the defendants' wrongdoing, including, but not limited to, plagiarism, defendants' unreasonable and excessive fees should be reduced accordingly under quantum meruit

There are genuine issues of material fact regarding the doctrine of *quantum meruit*

## CONCLUSION

In closing, the plaintiff worked just as hard as every other physician during medical school. Even the hospital representative in the underlying case, Defendant Yantis, testified there have never been any problems. An anterior segment and cataract specialist has described the plaintiff's surgery as "meticulous and careful" and "good." From a family of four children, the physician is one of three who are physicians and the fourth is the Director of the Department of Radiology for a private hospital. Defendants' negligence has deprived the plaintiff of the use, enjoyment, and income of her medical degree and professional practice as well as support and education for the plaintiff's minor children. The physician is fully trained, licensed and insured, takes good care of her patients, consistently receives the highest ratings from peers for quality of care, and has multiple patients requesting her services. Defendants' negligence adversely affects the physician, the physician's family, and the physician's patients on a daily basis. The physician respectfully requests that the motion for new trial be granted.

Respectfully submitted,

Dated 8/3/09

  
C. Collier, Esq.  
P O Box 187  
Sullivan's Island, SC  
29482-0187

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | NINTH JUDICIAL CIRCUIT       |
| COUNTY OF CHARLESTON    | ) | CASE NO 07-CP-10-1444        |
|                         | ) |                              |
| J Doe(CHolmes),         | ) |                              |
|                         | ) |                              |
| Plaintiff,              | ) |                              |
|                         | ) |                              |
| -vs-                    | ) |                              |
|                         | ) |                              |
| Manton Grier, James Y   | ) |                              |
| Becker, and Haynsworth  | ) | RETURN TO DEFENDANTS'        |
| Sinkler Boyd, P A , as  | ) | MOTION FOR SANCTIONS         |
| successor to Sinkler &  | ) |                              |
| Boyd, P A               | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
| Defendants              | ) |                              |
|                         | ) |                              |

FILED  
2009 SEP 21 AM 8 37  
JULIE J ARMSTRONG  
CLERK OF COURT

The plaintiff incorporates, fully reserves, and does not waive any rights, issues, and objections pursuant to the plaintiff's Motion to Dismiss defendants' motion for sanctions which is incorporated by reference herein. See attached plaintiff's Motion to Dismiss Defendants' Motion which was filed on July 7, 2009, and which requests that all time limits be held in abeyance pending resolution of the plaintiff's Motion to Dismiss defendants' motion. Though the Motion to Dismiss was timely served, defendants failed to timely correct legal insufficiencies or provide supporting documentation. The plaintiff respectfully requests that the defendants' motion be dismissed. In the alternative, the plaintiff requests a hearing

on plaintiff's motion filed July 7, 2009, to dismiss defendants' motion for sanctions

New evidence previously unavailable establishes that defendants were served on or about April 10, 2002. See attached affidavit of Defendant Grier dated July 30, 2009, stating that Defendant Becker "set up" file number 9976 3 to track this lawsuit. Defendant Grier's affidavit further certifies that the file was "set up" on April 10, 2002. This evidence along with the attached previously-filed affidavit of service establishes that defendants were actually served between the filing date of April 1, 2002, and April 10, 2002. The former Rule 3, SCRCR, tolled the statute of limitations upon delivery to the sheriff in this case. Defendants have not denied receiving the summons and complaint in 2002. Humphries v Spitz, 284 S C 521, 327 S E 2d 370 (1985) citing Dill-Ball Co v Bailey, 103 S C 233, 87 S E 2d 1010 (1916). Counsel of Record Wilkerson also has actual knowledge that defendants received the summons and complaint in April, 2002. Counsel of Record Wilkerson improperly thwarted plaintiff's questions and discovery regarding service. Defendants' motion should be denied.

"Contrary to perjury by a witness or a party's failure to disclose where an attorney---an officer of the court---suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice." Chewning v Ford Motor Co, 354 S C 72, 82-84, 579 S E 2d 605 (S C 2003). Attorney fraud deprives the litigant of the right to be heard, thwarts a full and fair hearing on the merits, and obstructs justice, and, therefore, prejudice is presumed. Chewning v Ford Motor Co, 354 S C 72, 579 S E 2d 605 (S C 2003).

Just as defendants' evasion of service and bad faith affidavits regarding service establish lack of trustworthiness, the plaintiff requests that the defendants'

untimely affidavits herein be excluded for lack of trustworthiness

Moreover, the plaintiff requests that the defendants' affidavits be excluded as untimely and improper because they were not served with the motion as required. The applicable FCPSA statute, Rule 6(d), SCRCP, Rule 7, SCRCP, Rule 9(i), SCRCP, fundamental fairness, and basic due process rights require service with the motion. Further, they were not served prior to the hearing despite notice, therefore, the plaintiff was deprived of notice and any meaningful opportunity to respond. S C Const art I, sec 3 and 4, S C Const art V, sec 4, S C Const art V, sec 5, U S Const Art I, Sec 10, U S Const amend V and XIV

Defendants' motion should be dismissed because it is based upon an inapplicable statute. Pursuant to legislative intent and the original filing date in 2002, the previous FCPSA is applicable. A copy of the previous FCPSA, S C Code Ann Sections 15-36-10 through 15-36-50 (2003), is attached. Defendants' motion should be dismissed as it is based upon S C Code Ann Section 15-36-10 (2005) which is not applicable. Ex Parte Gregory, 663 S E 2d 46, fn 1 (S C 2008), Clegg v Lambrecht, 2009-SC-0206 304, fn 1 (Ct App 2009), Pool v Pool, 329 S C 324, 494 S E 2d 820 (1998). Moreover, criteria for Rule 11 sanctions are essentially the same as those for the FCPSA. In re Beard, 359 S C 351, 597 S E 2d 835 (S C App 2004). Also, the Act's implied limitations period precludes application of a three-year limitations period for action on the statute. In re Beard, 359 S C 351, 597 S E 2d 835 (S C App 2004).

The case herein is not frivolous under either statute. Applying the current statute, however, is equivalent to ex post facto law. Both State and Federal constitutions contain provisions for due process, equal protection, and mandatory prohibition against ex post facto law. S C Const art I, sec 3 and 4, S C Const art V, sec 4, S C Const art V, sec 5, U S Const Art I, Sec 10, U S Const amend V and XIV

Moreover, denial of summary judgment precludes sanctions. In Whitfield, the Court of Appeals cited Hanahan v Simpson and stated, "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." Whitfield Const Co v Bank of Tokyo Trust Co, 338 S C 207, 220, 525 S E 2d 888 (S C App 1999), rehearing denied, certiorari denied, citing Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997). In Whitfield, the fact that there was no formal ruling on summary judgment and no written order denying summary judgment was not dispositive. Whitfield Const Co v Bank of Tokyo Trust Co, 338 S C 207, 525 S E 2d 888 (S C App 1999), rehearing denied, certiorari denied. In the instant case, Judge Dennis' denial of defendants' previous Motion for Summary Judgment, Judge Barber's denial of defendants' Motion to Dismiss, Judge Jefferson's unappealed denial of costs for trial preparation, multiple appellate court orders denying attorney's fees, and denial of both parties' motion for summary judgment at trial all preclude award of fees under the Act.

Significantly, subject matter jurisdiction is lacking because the movant failed to show timeliness. Defendants' motion should be dismissed for lack of subject matter jurisdiction. Pitman v Republic Leasing Co, Inc, 351 S C 429, 570 S E 2d 187 (S C App 2002), In re Beard, 359 S C 351, 597 S E 2d 835 (S C App 2004).

Defendants' motion is internally inconsistent and therefore, waived. Defendants have filed their motion "pursuant to Rule 59, SCRPC." Rule 59, SCRPC - New Trials, Amendment of Judgments. By filing their motion "pursuant to Rule 59, SCRPC," the proceedings are not final and "the time for appeal for all parties shall be stayed." Rule 59(f), SCRPC. Where the moving party before

determination of the motion, proceeds in a manner inconsistent with the object of the motion, the motion is waived, as by making an inconsistent motion Budgers v. S C Hwy Dept , 197 S C 125, 14 S E 2d 632, 633 (1941), citing 42 C J , “Motions and Orders,” Section 173, page 516 Defendants’ Rule 59, SCRCF, motion means that the decision is not final, therefore, defendants cannot comply with the statutory requirement to show that the proceedings are final Further, because defendants have included a request for relief under Rule 59, SCRCF, not authorized by the applicable statute, defendants have proceeded “in a manner inconsistent with the object of the motion ” Defendants’ motion should be dismissed as internally inconsistent and, therefore, waived

In violation of Rule 6(d), SCRCF, defendants’ motion is legally insufficient, unsupported, and fails for lack of evidence in the form of affidavit Rule 6(d), SCRCF, requires that when “a motion is to be supported by affidavit, the affidavit SHALL be served with the motion ” (Emphasis added ) Therefore, the motion is legally insufficient and unsupported and should be dismissed with prejudice

In violation of Rule 7, SCRCF, defendants’ motion fails to comply with even the most basic requirements of due process It fails to state with particularity the relief sought and was unsupported by affidavit It fails to state with particularity the grounds It fails to state “the manner in which the other party is alleged to have acted in violation of this statute ” S C Code Ann Section 15-36-30 (2003) Also, defendants failed to comply with the movant’s burden of proof set forth in S C Code Ann Section 15-36-40 (2003) The fundamental right of due process is the opportunity to be heard at a meaningful time and in a meaningful manner S C Dept of Soc Ser v Beeks, 325 S C 243, 246, 481 S E 2d 703,705 (1997) Fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review S C Const art I sec 22, Stono River Env Prot Assn v SCDHEC, 305 S C 90, 94, 406 S E 2d 340, 342 (1991)

“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Vth or XIVth Amendment of the U S Constitution ”

Kurschner v City of Camden Planning Commission, 376 S C 165, 171, 656 S E 2d 346, 350 (2008) The plaintiff was prejudiced by lack of notice and a meaningful opportunity to respond Defendants’ motion is legally insufficient and should be dismissed

Similarly, defendants’ motion fails to comply with Rule 9(1), SCRCP, by failing to attach a verified copy of the account to the motion, therefore, the motion is legally insufficient and fails to comply with basic due process rights S C Const art I, sec 3 and 4, S C Const art V, sec 4, S C Const art V, sec 5, U S Const Art I, Sec 10, U S Const amend V and XIV Defendants’ motion is legally insufficient and should be dismissed

Under Section 15-36-40, the movant has the burden of proof In particular, no affidavit in support was served with the Motion Therefore, the Motion fails as a matter of law and should be dismissed with prejudice Further, defendants have not met the burden of proving that “the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings ” The movant must prove that the other party acted frivolously Father v SCDSS, 353 S C 254, 578 S E 2d 11 (S C 2003) The plaintiff did not act frivolously Defendants have not proven and cannot prove the cause of action is frivolous Without adequate evidence, defendants fail to meet their burden of proof and defendants’ motion fails

Pursuant to Section 15-36-20, the plaintiff “MUST be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)” because the plaintiff reasonably believes that under these facts the claim is valid

under existing or developing law (emphasis added)

Moreover, pursuant to Section 15-36-20, the plaintiff "MUST be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)" because the plaintiff relied upon the advice of Special Antitrust Counsel, sought in good faith and given after full disclosure of all facts within the plaintiff's knowledge and information which may be relevant to the antitrust causes of action (emphasis added) Sapphire Devt., LLC v. Span USA Inc., (C A 4 (S C) 2005) 120 Fed Appx 466, 2005 WL 226032, Unreported

In addition, pursuant to Section 15-36-20, the plaintiff "MUST be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)" because the plaintiff relied upon out-of-state trial counsel sought in good faith and given full disclosure of all facts within the plaintiff's knowledge and information which may be relevant to the cause of action. The plaintiff has submitted a copy of the retainer agreement for out-of-state trial counsel.

For the final factor pursuant to Section 15-36-20, the plaintiff "MUST be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)" because the attorney of record believes in good faith that this cause of action is not intended to merely harass or injure the other party. Affidavit in opposition to defendants' motion, page four.

Opposing counsel filed in the appellate court and has just lost a similar motion for attorney's fees. Further, the appellate courts have determined that the appeals were not frivolous. Pursuant to Rule 240, SCACR, if the appeal had been frivolous, the Court of Appeals would have dismissed the appeal on that basis. In addition, untrustworthy defendants' previously filed and lost in the appellate courts another request for attorney's fees in an appeal dismissed without prejudice in which Counsel of Record Wilkerson had a subordinate swear before a notary that \$1000.00 in attorney's fees were incurred when no initial briefs were even filed.

The appeal was dismissed without prejudice on a motion as interlocutory. Needless to say, the attorney's fees were denied. Defendants' affidavits herein of unreasonable, if not excessive, fees are similarly suspect. Defendants' affidavits are not timely and should be excluded. Further, Judge Jefferson has already denied attorney's fees and costs for trial preparation, defendants did not appeal, and it is the law of the case.

Likewise, the defendants' affidavits are suspect including, but not limited to, unauthorized charges such as expert fees in violation of S.C. Code Ann. Section 15-36-30(2003). The Act does not authorize any fees other than attorney's fees and court costs. For example, private investigator costs, expert fees, non-billable clerical hours, and defendants' costs are not authorized. Pool v. Pool, 329 S.C. 324, 494 S.E.2d 820 (1998). Further, defendants improperly include appellate fees already denied multiple times and defendants improperly include costs for trial preparation already denied by Judge Jefferson whose denial was unappealed. In addition, defendants are contributorily negligent, failed their duty to mitigate, ignored subpoena, failed to show up for their own depositions, and deprived the plaintiff of the right to full and fair discovery. Defendants' motion should be denied.

Defendants misrepresent other suits and plaintiff makes a motion to exclude any reference to irrelevant matter. Defendants fail to disclose that defendants filed the first suit and, but for defendants' negligence and negligent abandonment, the dispute would have been resolved long ago and we would not have to be here today. Defendants drafted the complaint for the second suit and advised the plaintiff to file it *pro se*. The second suit was successful and should have been resolved in the first suit, but for defendants' negligence. Pursuant to South Carolina case law, the settlement agreement was signed in mitigation. Crowley v. Harvey & Battey, 327 S.C. 68, 488 S.E.2d 335 (S.C. 1997). The 2005 suit was filed by

other counsel of record in good faith, the claims are meritorious, the claims are pending, and the attached affidavit dated December 8, 2008, establishes the merits of that suit. The plaintiff objects to untrustworthy defendants' misrepresentations regarding other suits. The plaintiff requests that irrelevant matter regarding other suits be excluded.

Moreover, defendants' motion should be denied because it is precluded by denial of the motion to dismiss and denial of summary judgment twice. Also, if defendants wanted to object to service, they should not have waived it and should not have waited until trial to raise it. Defendants have failed their duty to mitigate. Defendants' motion should be denied on the basis of laches, contributory negligence, reliance period or analogous doctrine, duty to mitigate, evasion of service, constructive service, equitable estoppel or like doctrine, and/or lack of appropriateness. See Ex parte Cannon, 2009-SC-0624 1988. Defendants' motion should be stricken, dismissed with prejudice, and/or denied.

In stark contrast to defendants' statements otherwise, defendants' motion fails to show

- i that the lawsuit was done in bad faith and without reasonable cause, and
- ii that a reasonable attorney would believe that the proceedings are frivolous.

In opposition, the plaintiff has submitted Judge Duffy's order which is res judicata establishing defendants' negligence and breach of fiduciary duty in failing to appeal or even advise of appeal of the loss of the physician's injunction. The plaintiff has submitted the opinion letter of the Washington, D C , Special Antitrust Counsel establishing the merits of the antitrust claims. The plaintiff has submitted the retainer agreement with out-of-state trial counsel who believes the claims are meritorious and not frivolous. The plaintiff submits that the defendants' former partner Betsy Carpentier has stated that she no longer practices law, in whole or in

part, because of the defendants' wrongdoing in this matter. Not only do reasonable attorneys believe that the proceedings are not frivolous, the Federal Court ruled that the defendants are negligent.

Further, defendants' motion states that defendants "will serve and file in advance of hearing." Despite notice, the defendants failed to live up to that promise, too. Defendants lack credibility. The plaintiff was prejudiced by lack of notice and lack of a meaningful opportunity to respond including, but not limited to, out-of-time affidavits, unauthorized attorneys' fees, unverified account including multiple unauthorized charges, non-billable clerical hours, lack of supporting documentation, unreasonable if not excessive charges, and failure to identify custodian and/or employee charged with documentation for charges in the ordinary course of business. Defendants' motion should be denied.

In summary, defendants have not complied with the following statutory requirements. Defendants' motion is not timely. There is no subject matter jurisdiction. Further, defendants' noncompliance includes, but is not limited to, the failure to show finality. Defendants have filed a Rule 59, SCRCF, motion which precludes a showing of finality. Hanahan v. Simpson, 326 S. C. 140, 485 S. E. 2d 903 (S. C. 1997), rehearing denied. In addition, the plaintiff has filed a Rule 59, SCRCF, motion precluding a showing of finality. Moreover, defendants have failed to state with specificity "the manner in which the other party is alleged to have acted in violation of this statute." S. C. Code Ann. Section 15-36-20(2003). Also, defendants have failed to meet their burden of proving that the primary purpose for the proceedings was not that of "securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based." S. C. Code Ann. Section 15-36-10(2003). "The plaintiff's primary purpose was to secure a proper purpose and to secure the adjudication of the civil proceedings." Plaintiff's Affidavit in opposition to defendants' motion, page four. Moreover, the

plaintiff "MUST be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)" because the plaintiff reasonably believes that under these facts the claim is valid under existing or developing law (emphasis added) Plaintiff's Affidavit in opposition to defendants' motion, page four, S C Code Ann Section 15-36-20(2003) In addition, defendants have offered no evidence to rebut the presumption that the plaintiff acted to secure a proper purpose pursuant to S C Code Ann Section 15-36-10 through 15-36-50 (2003) Therefore, defendants' motion should be stricken, dismissed with prejudice, and/or denied

## CONCLUSION

For the foregoing reasons and for substantial justice affecting substantial rights, the plaintiff respectfully makes the following requests

- i that the plaintiff's motion to dismiss defendants' motion be granted, and/or
- ii that defendants' motion be stricken or dismissed with prejudice, and/or
- iii that defendants' motion be denied because it is precluded by
  - a Judge Barber's denial of defendants' motion to dismiss, and
  - a Judge Dennis' denial of defendants' motion for summary judgment, and
  - c denial of both parties' motion for summary judgment at trial

In the alternative, the plaintiff respectfully requests an opportunity to be heard on the plaintiff's Motion to Dismiss defendants' motion for sanctions filed July 7, 2009

Respectfully submitted,

Dated 8/11/09

  
C. Collie, Esq  
PO Box 187  
Sull Isd, SC 29482-0187  
843 883 3010  
For Plaintiff

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | NINTH JUDICIAL CIRCUIT       |
| COUNTY OF CHARLESTON    | ) | CASE NO 07-CP-10-1444        |
|                         | ) |                              |
| J Doe(CHolmes),         | ) |                              |
|                         | ) |                              |
| Plaintiff,              | ) |                              |
|                         | ) |                              |
| -vs-                    | ) |                              |
|                         | ) |                              |
| Manton Grier, James Y   | ) |                              |
| Becker, and Haynsworth  | ) |                              |
| Sinkler Boyd, P A , as  | ) |                              |
| successor to Sinkler &  | ) |                              |
| Boyd, P A               | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
|                         | ) |                              |
| Defendants              | ) |                              |
|                         | ) |                              |

FILED  
2009 AUG 14 PM 2 48  
JULIE J ARMS-STRONG  
CLERK OF COURT  
BY \_\_\_\_\_

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME C Holmes, who, being

duly sworn, avers and states as follows

1 I am the plaintiff in this matter

2 This affidavit is submitted in opposition to Defendants' Motion for Sanctions Pursuant to Rule 59, SCRCP, S C Code Ann Section 15-36-10 (2005), and Rule 11, SCRCP

3 New evidence previously unavailable establishes that defendants were served on or about April 10, 2002. The affidavit of Defendant Grier dated July 30, 2009, states that Defendant Becker "set up" file number 9976 3 to track this lawsuit on April 10, 2002. The affidavit establishes that Defendants Becker and Grier were actually served on or before April 10, 2002. Untrustworthy defendants officers of the court have materially omitted this fact and have made material misrepresentations regarding this fact in order to fraudulently obtain dismissal based upon the statute of limitations. Under the former Rule 3, SCRPC, in effect in 2002, the statute of limitations was tolled in this case upon mailing the summons and complaint to the sheriff's department of Richland County for service. Defendant Grier's affidavit dated July 30, 2009, evidences that the summons and complaint was actually served on or before April 10, 2009, and within a reasonable time. The plaintiff requests that the July 14, 2009, order be altered or amended to reflect that the claims are not time-barred. The plaintiff objects to untrustworthy defendants' pattern of multiple material misrepresentations and frank falsehoods throughout the proceedings generally and specifically within the Defendants' Motion for Sanctions Pursuant to Rule 59, SCRPC, S C Code Ann Section 15-36-10 (2005), and Rule 11, SCRPC.

4 Moreover, based upon legislative intent as stated in the statute, the current S C Code Ann Section 15-36-10 is applicable to causes of action arising on or after the effective date in 2005. The matter herein was filed in 2002 with Case No 2002-CP-10-1448. After return of venue to Charleston County, it was assigned a new case number. Therefore, this case was filed in 2002 before the effective date of the current statute. Defendants' motion pursuant to S C Code Ann Section 15-36-10 (2005) should be dismissed because S C Code Ann Section 15-36-10 (2005) is inapplicable. The plaintiff timely filed the Motion to Dismiss defendants' motion for sanctions and requested that all time limits be held

in abeyance pending resolution of the motion to dismiss

5 Defendants' motion should be dismissed for lack of jurisdiction and because Judge Dennis' denial of summary judgment, Judge Barber's denial of Motion to Dismiss, Judge Jefferson's denial of costs for trial preparation, the appellate courts' denial of attorney's fees multiple times, and the denial of both parties' motions for summary judgment at trial all preclude sanctions under the Act Whitfield Const Co v Bank of Tokyo Trust Co , 338 S C 207, 220, 525 S E 2d 888 (S C App 1999), rehearing denied, certiorari denied, Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997)

6 Defendants' motion should be dismissed as untimely, therefore, there is no jurisdiction Pitman v Republic Leasing Co , Inc , 351 429, 570 187 (Ct App 2002)

7 Defendants' motion should be dismissed as internally inconsistent By filing a Rule 59, SCRCF, motion, the proceeding is not terminated and is not final Therefore, there is no jurisdiction

8 Defendants' motion should be dismissed because defendants cannot show that the proceedings have terminated In fact, by filing a Rule 59, SCRCF, motion, defendants have established that the proceeding has not terminated Furthermore, the plaintiff has filed post-trial motions The proceeding is not final Therefore, the motion should be dismissed

9 Defendants' motion is legally insufficient as it is wholly unsupported and without required affidavit Defendants' motion should be dismissed

10 Defendants' motion should be dismissed as it fails to comply with even the most basic due process rights Rule 6(d), SCRCF, Rule 7, SCRCF, Rule 9(i), SCRCF, and fundamental fairness, equal protection, and due process rights Further, the plaintiff was deprived of notice and any meaningful opportunity to respond at a hearing S C Const art I, sec 3 and 4, S C Const art V, sec 4,

S C Const art V, sec 5, U S Const Art I, Sec 10, U S Const amend V and XIV The Charleston County website gave notice that the defendants' motion was closed and NOT pending

11 The plaintiff's cause of action in this matter is not frivolous Defendants' negligence injured the plaintiff causing the loss of the use, enjoyment, and income of the physician's medical degree and support and education for dependent minor children

12 The plaintiff filed this lawsuit for a proper purpose The plaintiff filed this lawsuit for adjudication of meritorious claims herein

13 Defendants have not met the burden of proving that this cause of action is frivolous

14 The plaintiff reasonably believes in the existence of the facts upon which this claim is based

15 The plaintiff reasonably believes that under these facts the claim is valid under existing or developing law

16 The plaintiff relied upon the Rules of Professional Conduct which the Court took judicial notice of and statutory and case law sought in good faith after research of the type generally relied upon in the pertinent field Rule 407, SCACR, Smith v Haynsworth, Marion, McKay & Guerard, 472 S E 2d 612 (1996)

17 The plaintiff relied upon the advice of counsel in the attached opinion letter, sought in good faith and given after full disclosure of all facts within the plaintiff's knowledge and information which may be relevant to the antitrust causes of action The plaintiff relied on the attached opinion letter by Special Antitrust Counsel establishing the antitrust claims

18 Pursuant to Section 15-36-20, the plaintiff "must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (1988)" because the attorney of record believes in good faith that this lawsuit is

not intended to harass or injure

19 Pursuant to Section 15-36-20, the plaintiff “must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (1988)” because the plaintiff reasonably believes that under these facts the claim is valid under existing or developing law

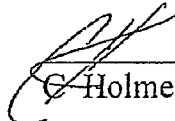
20 Pursuant to Section 15-36-20, the plaintiff “must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 (2003)” because the plaintiff relied upon the attached opinion letter of Special Antitrust Counsel, sought in good faith and given after full disclosure of all facts within the plaintiff’s knowledge and information which may be relevant to the antitrust causes of action Sapphire Devt , LLC v Span USA Inc , (C A 4 (S C ) 2005) 120 Fed Appx 466, 2005 WL 226032, Unreported

21 Pursuant to Section 15-36-40, the defendants have the burden of proving that the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings. The defendants have not met their burden of proof and the defendants’ motion should be denied

22 The plaintiff’s primary purpose was to secure a proper purpose and to secure the adjudication of the civil proceedings

23 There is not a single day that the physician, the physician's family, and the physician's patients do not feel the adverse effects of defendants' negligence The physician takes good care of patients The physician is well-trained, fully licensed, fully insured, consistently receives the highest ratings for quality of care from peers, has received no complaints, and has patients requesting services at the only facility in the geographically-isolated community where the physician and the physician's patients live The defendants' negligence has deprived patients of their physician of choice Few matters can be more substantial than pursuing legal rights to practice one's profession for the support and education of one's family after four years of medical school, one year of rigorous internship, and three years of intensive residency The claims herein are meritorious

FURTHER AFFIANT SAYETH NOT

  
G. Holmes

Sworn to before me this  
11 day of August, 2009



NOTARY PUBLIC FOR SO CAR  
My commission expires 11/29/15

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

J Doe(CHolmes),

Plaintiff,

-VS-

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

MOTION

## Defendants

To Defendants

The Plaintiff will move on the tenth day after service hereof before the presiding judge on September 25, 2009, at 9 00 a m in the Court of Common Pleas, Charleston County Circuit Court, for an order of this court pursuant to S C Code Ann Section 15-36-10 (2009) to strike and/or dismiss defendants' motion for sanctions This motion is based upon the attached affidavit, the SCRCF, statutory, common, and case law and evidence to be presented at the hearing

The Plaintiff respectfully requests that this Honorable Court issue an order pursuant to S C Code Ann Section 15-36-10 (2009) to strike and/or dismiss defendants motion for sanctions. Specifically S C Code Ann Section 15-36-10, B(1) (2009) and S C Code Ann Section 15-36-10, B(2) (2009) state the following

B(1) If a document is not signed or does not otherwise comply with this section, it must be stricken unless it is signed promptly or amended to comply with this section after the omission is called to the attention of the attorney or the party

B(2) If a document is signed in violation of this section, , the court upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances

S C Code Ann Section 15-36-10 (2009)

The above provisions were included to prevent misuse/abuse of the FCPSA  
Defendants seek to misuse/abuse the FCPSA

Pursuant to S C Code Ann Section 15-36-10, B(1) (2009), defendants motion should be stricken and/or dismissed for failure to "comply with this section". Specifically, defendants are on notice of the legislative intent and express statutory mandate that this section is "applicable to causes of action arising on or after (July 1 2005)". S C Code Ann Section 15-36-10 (2005). The causes of action herein arose before July 1 2005. Case law confirms that this section is inapplicable to the plaintiff's causes of action which arose before July 1 2005. Ex Parte Gregory, 663 S E 2d 46, fn 1 (S C 2008). Clegg v Lambrecht, 2009-SC-0206 304, fn 1 (Ct App 2009). The defendants motion, therefore fails to "comply with this section" including, but not limited to the fact that this section is expressly inapplicable. Defendants' motion should be

stricken and/or dismissed

Moreover, pursuant to S C Code Ann Section 15-36-10 B(2) (2009), defendants signed their motion 'in violation of this section S C Code Ann Section 15-36-10, B(2) (2009) Specifically, defendants are on notice that they signed their motion in violation including but not limited to, violation of the legislative intent and express statutory mandate of S C Code Ann Section 15 36-10 (2009) as well as in violation of established precedent and case law Ex Parte Gregory 663 S E 2d 46 fn 1 (S C 2008) Clegg v Lambrecht, 2009-SC-0206 304 fn 1 (Ct App 2009) Pursuant to S C Code Ann Section 15-36-10, B(2) (2009), the plaintiff makes this motion for the court to "impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances S C Code Ann Section 15-36-10, B(2) (2009)

Because the causes of action herein arose before July 1, 2005, applying the inapplicable is a violation of the State and Federal Constitutions Further, applying the inapplicable S C Code Ann Section 15-36-10 (2009) is, therefore, unconstitutional and is equivalent to an ex post facto law S C Const art I, sec 3, S C Const art I sec 22 S C Const art V sec 4, S C Const art V, sec 5 U S Const amend V and XIV

In addition defendants are on notice that under the applicable statute, denial of defendants' motion for summary judgment precludes sanctions Where a party survives summary judgment motion it is not subject to sanctions under the FCPSA Hanahan v Simpson, 326 S C 140, 485 S E 2d 903 (S C 1997), rehearing denied Survival of motion for summary judgment precludes sanctions under FCPSA Whitfield Const Co v Bank of Tokyo Trust Co , 383 S C 207, 525 S E 2d 888 (S C App 1999) rehearing denied, certiorari denied The circuit court denied both parties motions for summary judgment, defendants are

well aware that the denial of summary judgment precludes sanctions under applicable law S C Code Ann Section 15-36-10 through 15-36-50 (2004) Defendants seek to misuse and abuse inapplicable law under S C Code Ann Section 15-36-10 (2009)

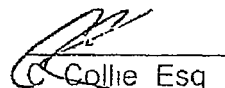
Counsel has attempted in good faith to resolve the matters to no avail

For the foregoing reasons and for substantial justice affecting substantial rights the plaintiff respectfully requests an order

- i that defendants motion pursuant to S C Ann Section 15-36-10(2009) be stricken and/or dismissed for failure to 'comply with this section S C Ann Section 15-36-10 B(1) (2009), and
- ii that imposes upon the person in violation any sanction which the court considers just, equitable and proper under the circumstances S C Code Ann Section 15-36-10, B(2) (2009)

Respectfully submitted

Dated 9/15/07

  
C. Collie Esq  
PO Box 187  
Sull Isd SC 29482-0187  
843 883 3010

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME C Collie, Esq , who, being  
duly sworn, avers and states as follows

- 1 This affidavit is submitted in support of the attached Motion
- 2 Counsel has attempted in good faith to resolve the matters to no avail
- 3 The defendants were notified of the legislative intent and express  
statutory mandate that S C Code Ann Section 15-36-10 (2005) is "applicable to  
causes of action arising on or after (July 1, 2005)' S C Code Ann Section 15-  
36-10 (2005)
- 4 The causes of action herein arose before July 1, 2005 Applying the  
inapplicable S C Code Ann Section 15-36-10 (2005) is a violation of the State  
and Federal Constitutions and is equivalent to an ex post facto law S C Const  
art I, sec 3, S C Const art I, sec 22 S C Const art V sec 4 S C Const  
art V, sec 5, U S Const amend V and XIV
- 5 Pursuant to S C Code Ann Section 15-36-10, B(1) (2009), defendants'  
motion should be stricken and/or dismissed for failure to 'comply with this  
section because this section is 'applicable to causes of action arising on or  
after (July 1 2005) S C Code Ann Section 15-36-10 (2005)
- 6 Defendants are on prior notice that they signed their motion in violation of  
the legislative intent and express statutory mandate of S C Code Ann Section  
15-36-10 (2009) as well as in violation of established precedent and case law  
Ex Parte Gregory 663 S E 2d 46, fn 1 (S C 2008), Clegg v Lambrecht, 2009-

SC-0206 304, fn 1 (Ct App 2009)

7 Pursuant to S C Code Ann Section 15-36-10, B(2) (2009), the plaintiff makes this motion for the court to impose upon the person in violation any sanction which the court considers just, equitable and proper under the circumstances S C Code Ann Section 15-36-10, B(2) (2009)

8 Moreover a reasonable attorney filed the lawsuit in good faith, believes that under the facts the claims are clearly warranted under existing law, believes that the claims are intended for a proper purpose and are not intended merely to harass or injure believes in the merits of the claims and believes that the case is NOT frivolous

9 Further the plaintiff believes that under the facts the claims are clearly warranted under existing law the plaintiff believes that the claims are intended for a proper purpose and for adjudication of the claims, the plaintiff believes that the claims are not intended merely to harass or injure the plaintiff believes in the merits of the claims and the plaintiff believes that the case is NOT frivolous

10 Defendants have not acted in good faith This case is meritorious and not frivolous See attached Federal Court Order filed June 2, 2000 According to defendants' own legal expert, defendants' threats and wrongful acts to prejudice the case to extract fees are 'unethical ' Further defendants' own legal expert testified "I consider that would be a form of blackmail or extortion and criminal in South Carolina to do that ' Defendants own legal expert testified that but for defendants failure to timely respond to discovery the injunction would not have been lost in January 2000 causing injury to the plaintiff, including but not limited to, the loss of income from already scheduled surgeries See letter dated January 26, 2000 Moreover, under applicable law, the denial of summary judgment precludes sanctions S C Code Ann Section 15-36-10 through 15-36-50 (2004) See S C Code Ann Section 15-36 10 (J) (2009) - 'The provisions of

this section SHALL NOT apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous which includes a good faith argument for an extension, modification, or reversal of the existing law (Emphasis added )

11 In addition, defendants' motion should be dismissed as untimely and because the matter is pending reconsideration. The matter is pending reconsideration, therefore, defendants cannot in good faith establish that the matter is concluded. Conclusion of the matter is a condition precedent to jurisdiction under either statute, S.C. Code Ann. Section 15-36-10 (2008) or S.C. Code Ann. Section 15-36-10 through 15-36-50 (2004) therefore, there is no jurisdiction. The defendants' motion should be stricken and/or dismissed. S.C. Code Ann. Section 15-36-10, C(1) (2008)

12 Defendants filed their Rule 59, SCRCP, Motion in the circuit court which motion is still pending. Defendants' motions are inconsistent and therefore waived. Defendants' motion should be stricken and/or dismissed.

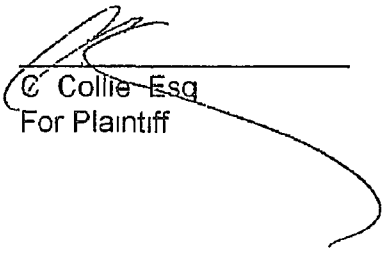
13 "The time for appeal for all parties shall be stayed by a timely motion under this Rule (59, SCRCP)." Rule 59(f) SCRCP. Conclusion of the matter is a condition precedent to jurisdiction under either statute. S.C. Code Ann. Section 15-36-10 (2008) or S.C. Code Ann. Section 15-36-10 through 15-36-50 (2004) therefore, there is no jurisdiction. The defendants' motion should be stricken and/or dismissed. S.C. Code Ann. Section 15-36-10, C(1) (2008)

14 Untrustworthy defendants have made material misstatements, have materially failed to disclose and have materially omitted pertinent information

15 Defendants seek to misuse/abuse S C Code Ann Section 15-36-10  
(2009)

16 The claims herein are meritorious The motion herein is made in good  
faith and not interposed for delay

FURTHER AFFIANT SAYETH NOT

  
C Collie Esq  
For Plaintiff

Sworn to before me this

15 day of Sept. 2009

James M. Scaphe

NOTARY PUBLIC FOR SO CAR

My commission expires 3/5/12

## CHAPTER 36

### South Carolina Frivolous Civil Proceedings Sanctions Act

#### SEC.

- 15-36-10 Frivolous lawsuits signing pleadings imposition of sanctions notice and opportunity to respond reporting violations  
15-36-20 [Repealed]  
15-36-100 Complaint in actions for damages alleging professional negligence, con  
temporaneous affidavit of expert specifying negligent act or omission

§ 15-36-10. Frivolous lawsuits, signing pleadings, imposition of sanctions, notice and opportunity to respond, reporting violations

(A)(1) A pleading filed in a civil or administrative action on behalf of a party who is represented by an attorney must be signed by at least one attorney of record who is an active member of the South Carolina Bar or who is admitted to practice in the courts of this State and must include the address and telephone number of the attorney signing the document

(2) A document filed in a civil or administrative action by a party who is not represented by an attorney must be signed by the party and must include the address and telephone number of the party

(3) The signature of an attorney or a pro se litigant constitutes a certificate to the court that

(a) the person has read the document

(b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law a good faith argument exists for the extension modification or reversal of existing law

(c) a reasonable attorney in the same circumstances would believe that his procurement initiation continuation or defense of a civil cause is not intended merely to harass or injure the other party and

(d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay or brought for any purpose other than securing proper discovery joinder of parties or adjudication of the claim or defense upon which the proceedings are based

(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for

(a) filing a frivolous pleading motion or document if

(i) the person has not read the frivolous pleading motion or document,

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension modification or reversal of existing law

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement initiation continuation, or defense of a civil cause was intended merely to harass or injure the other party, or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion or document is frivolous interposed for merely delay or merely brought for any purpose other than securing proper discovery joinder of parties or adjudication of the claim or defense upon which the proceedings are based

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension modification or reversal of existing law

(B)(1) If a document is not signed or does not otherwise comply with this section it must be stricken unless it is signed promptly or amended to comply with this section after the omission is called to the attention of the attorney or the party

(2) If a document is signed in violation of this section or an attorney or pro se litigant has violated subsection (A)(4) the court upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just equitable and proper under the circumstances

(C)(1) At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment or judgment notwithstanding the verdict upon motion of the prevailing party the court shall proceed to determine if the claim or defense was frivolous. An attorney party or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney party or pro se litigant failed to comply with one of the following conditions

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension modification or reversal of existing law

(b) a reasonable attorney in the same circumstances would believe that his procurement initiation continuation or defense of the civil suit was intended merely to harass or injure the other party or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay or was merely brought for a purpose other than securing proper discovery joinder of proposed parties or adjudication of the claim or defense upon which the proceedings are based

(2) Unless the court finds by a preponderance of the evidence that an attorney, party or pro se litigant engaged in advancing a frivolous claim or defense, the attorney party or pro se litigant shall not be sanctioned

(D) A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification the attorney party or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations as that person considers appropriate including, but not limited to by filing a motion to withdraw the pleading motion document or argument or by offering an explanation of mitigation

§ 15-36-10

(E) In determining if an attorney party or a pro se litigant has violated the provisions of this section the court shall take into account

- (1) the number of parties,
- (2) the complexity of the claims and defenses
- (3) the length of time available to the attorney party or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4)
- (4) information disclosed or undisclosed to the attorney party or pro se litigant through discovery and adequate investigation
- (5) previous violations of the provisions of this section
- (6) the response if any of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section and
- (7) other factors the court considers just equitable, or appropriate under the circumstances

(F) In determining whether sanctions are appropriate or the severity of a sanction the court shall consider previous violations of the provisions of this section

(G) Sanctions may include

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorneys fees of the prevailing party under a motion pursuant to this section. Costs shall include but not be limited to the following: the time required of the prevailing party by the frivolous proceeding and travel expenses, mileage, parking costs of reports and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding,

(2) an order for the attorney to pay a reasonable fine to the court or

(3) a directive of a nonmonetary nature including injunctive relief designed to deter a future frivolous action or an action in bad faith

(H) If the court imposes a sanction on an attorney in violation of the provisions of this section the court shall report its findings to the South Carolina Commission of Lawyer Conduct

(I) This act shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules

(J) The provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein that is not frivolous which includes a good faith argument for an extension, modification or reversal of the existing law

(K) The provisions of this section apply in addition to all other remedies available at law or in equity

(L) The amount requested for damages in a pleading may not be considered in a determination of a violation of the provisions of this section

(M) All violations of the provisions of this section must be reported to the South Carolina Supreme Court and a public record must be maintained and reported annually to the Governor, Senate and House of Representatives

**HISTORY** Amended by 2005 Act No. 27 § 5, eff. July 1, 2005 applicable to causes of action arising on or after that date.

#### Effect of Amendment

The 2005 amendment rewrote this section

#### Research References

##### Encyclopedias

SC Jur Appeal and Error § 119 Costs and Sanctions for Frivolous Motions or Appeals

SC Jur Attorney and Client § 46 Zealous Representation

SC Jur Attorney Fees § 12 Generally

SC Jur Attorney Fees § 14 Scope and Procedure

SC Jur Attorney Fees § 15 Contrast With Federal Rule of Civil Procedure 11

SC Jur Costs § 13 Frivolous or Dilatory Filings

SC Jur Costs § 14 South Carolina Frivolous Civil Proceedings Sanctions Act

SC Jur South Carolina Rules of Civil Procedure § 11.2 Discussion

##### Forms

South Carolina Litigation Forms and Analysis § 39.8 Attorney's Fees

South Carolina Litigation Forms and Analysis § 39.9 Application for and Affidavit of Attorney's Fees - Frivolous Suit

#### Notes of Decisions

##### 1 In general

In re Beard (SC App 2004) 359 SC 351 97 SE2d 835 [main volume] certiorari denied

Determination that vendor was not entitled to statutory damages from a purchaser under the South Carolina Frivolous Civil Proceedings Sanctions Act was not an abuse of discretion despite claim that the purchaser had filed suit to force the vendor to pay an environmental report preparer's bill and obtain the environ-

mental data the purchaser needed to finance its purchase of the property the vendor put forth no evidence to dispute that the purchaser reasonably believed that its claim was valid or that purchaser's reliance upon the advice of counsel was not sought in good faith and after full disclosure of all facts and information relevant to the cause of action sued upon Sapphire Development LLC v Span USA Inc (CA.4 (SC) 2005) 120 Fed Appx 466 2005 WL 226032 Unreported Costs @ 2

## CHAPTER 36

### South Carolina Frivolous Civil Proceedings Sanctions Act

#### SEC

- 15-36-10 Liability for attorney's fees and costs of frivolous suits
- 15-36-20 Factors supporting finding of proper purpose for action
- 15-36-30 Recovery of attorney's fees and court costs
- 15-36-40 Burden of proof
- 15-36-50 Court to determine fees and costs

#### § 15-36-10. Liability for attorney's fees and costs of frivolous suits

Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based, and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs

As used in this chapter, "person" is defined to mean any individual, corporation, company, association, firm, partnership, society, joint stock company, and any other entity, including any governmental entity or unincorporated association of persons

**HISTORY** 1988 Act No. 432, § 6

#### Library References

Westlaw Key Number Searches 102k1, 102k194 44  
Costs C1 194 44  
C J S Costs §§ 2, 128

#### Research References

##### Encyclopedias

S C Jur Appeal and Error § 119 Costs And Sanctions For Frivolous Motions Or Appeals

S C Jur Appeal and Error XI Ref Divisional References

S C Jur Attorney and Client § 46 Zealous Representation

S C Jur Attorney and Client V A Ref, Divisional References

S C Jur Attorney Fees § 12 Generally

S C Jur Attorney Fees § 14 Scope And Procedure

S C Jur Attorney Fees § 15, Contrast With Federal Rule Of Civil Procedure 11

S C Jur Attorney Fees III D Ref Divisional References

S C Jur Costs § 14 South Carolina Frivolous Civil Proceedings Sanctions Act

S C Jur Costs III C Ref, Divisional References

S C Jur South Carolina Rules of Civil Procedure § 11 2 Discussion

S C Jur South Carolina Rules of Civil Procedure IV Ref Divisional References

### Forms

South Carolina Litigation Forms and Analysis § 39 08 Attorney's Fees

South Carolina Litigation Forms and Analysis § 39 09 Frivolous Suit

### Law Review and Journal Commentaries

Wall & Weston An analysis of current theories of liability 45 S C L Rev 857 (Summer 1994)

### Notes of Decisions

In general 1

Actions by state agencies 3

Summary judgment 2

#### 1 In general

Trial court lacked jurisdiction to consider motion for attorney fees under Frivolous Civil Proceedings Sanctions Act (FCPSA) filed after expiration of 10 day period to file post-trial motions after entry of judgment in dispute over sale of limited liability company (LLC) trial court denied plaintiff's motion to amend complaint to add attorney who drafted amended LLC agreement as defendant, attorney filed motion for attorney fees approximately one year after motion was denied and six months after settlement and dismissal, FCPSA's implied limitation period precluded application of three-year limitations period for action on statute In re Beard (S C App 2004) 359 S C 351, 597 S E 2d 835 Costs ⇨ 2

Criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) In re Beard (S C App 2004) 359 S C 351, 597 S E 2d 835 Costs ⇨ 2

Party who makes a frivolous claim or raises a frivolous defense has committed a more egregious act than one who merely acts without substantial justification for purposes of awarding costs and/or attorney fees Father v South Carolina Dept of Social Services (S C 2003) 353 S C 254, 578 S E 2d 11 Costs ⇨ 2 Costs ⇨ 194 44

Deceased landowner's family, against whom quantum meruit action was

brought by forester was not entitled to award of costs and attorney fees pursuant to Frivolous Civil Proceedings Sanctions Act where action survived family's motion for nonsuit based upon insufficiency of evidence and was resolved on merits forester reasonably believed he had claim and legitimate question existed as to whether oral agreement and subsequent writing of those terms in letter would be considered express contract Swanson v Stratos (S C App 2002) 350 S C 116, 564 S E 2d 117 Costs ⇨ 2

Clients of attorney were not aggrieved party that could appeal sanctions imposed by trial court on attorney for filing frivolous claim, assessment of sanctions did not affect any property right of clients and did not impose any burden or obligation on them Burns v Gardner (S C App 1997) 328 S C 608, 493 S E 2d 356 Attorney And Client ⇨ 24

Determination of whether attorney fees should be awarded under Frivolous Proceedings Act is treated as one in equity Hanahan v Simpson (S C 1997) 326 S C 140, 485 S E 2d 903 rehearing denied Costs ⇨ 194 44

A wife's motion to vacate a divorce decree was frivolous and the husband was entitled to recover attorney fees under § 15-36-30 where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings which showed that the court had asked her if she was under the influence of drugs or alcohol and she replied that she was not (2) the wife's

Note 1

claim that the husband used undisclosed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance. *Kilcawley v Kilcawley* (S C App 1994) 312 S C 425 440 S E 2d 892

2 Summary judgment

Construction lender that prevailed in action brought against it by landowner for trespass was not entitled to attorney fees and costs under the Frivolous Civil Proceedings Sanctions Act, where circuit court declined to issue a ruling on lender's motion for summary judgment and parties thereafter agreed to submit case to special referee for full merits hearing, that circuit court did not issue a written order denying its motion for summary judgment was not dispositive, as Act only required that claims survive a motion for summary judgment in order to preclude award of fees. *Whitfield Const Co v Bank of Tokyo Trust Co* (S C App 1999) 338 S C 207 525 S E 2d 888, rehearing denied certiorari denied Costs ⇨ 2

Denial of summary judgment on will contestant's causes of action for undue influence and lack of testamentary capacity precluded award of attorney fees under Frivolous Proceedings Act since there was evidence worthy of submission to jury, claims could not be 'frivolous' within meaning of Act. *Hanahan v Simpson* (S C 1997) 326 S C

140 485 S E 2d 903 rehearing denied Costs ⇨ 194 44

Where party survives summary judgment motion it is not subject to sanctions under Frivolous Proceedings Act after trial on merits of surviving claims. *Hanahan v Simpson* (S C 1997) 326 S C 140, 485 S E 2d 903, rehearing denied Costs ⇨ 2

3 Actions by state agencies

Statute allowing recovery of attorney fees when a state agency acts without justification in pursuing its claim but specifically exempting child abuse and neglect actions, exempts Department of Social Services (DSS) from payment of attorney fees when its pursuit of a child abuse and neglect action is merely without substantial justification, however DSS is not exempt from possibility of sanctions in form of attorney fees and/or court costs when DSS actions are frivolous and thus attorney fees and court costs may be assessed against DSS in a child abuse and neglect action pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA). *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254 578 S E 2d 11 Costs ⇨ 2 States ⇨ 215

Setting aside of sanctions of attorney fees imposed pursuant to Frivolous Civil Proceedings Sanctions Act (FCPSA) against the Department of Social Services (DSS) was warranted in proceeding instigated by father to determine whether allegations of abuse against him were unfounded where DSS' decision to investigate was not improperly motivated. *Father v South Carolina Dept of Social Services* (S C 2003) 353 S C 254 578 S E 2d 11 Costs ⇨ 2

§ 15-36-20. Factors supporting finding of proper purpose for action

Any person who takes part in the procurement initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose as stated in item (1) of Section 15-36-10 if he reasonably believes in the existence of the facts upon which his claim is based and

(1) reasonably believes that under those facts his claim may be valid under the existing or developing law, or

(2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action, or

(3) believes, as an attorney of record, in good faith that his procurement, initiation, continuation, or defense of a civil cause is not intended to merely harass or injure the other party

**HISTORY** 1988 Act No 432, § 6

#### Library References

Westlaw Key Number Searches 102k1 102k194 44  
Costs ⇨ 194 44  
CJS Costs §§ 2 128

#### Research References

##### Encyclopedias

SC Jur Attorney and Client § 46, Zealous Representation  
SC Jur Attorney Fees § 14 Scope And Procedure

#### Law Review and Journal Commentaries

Wall & Weston, An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

#### Notes of Decisions

##### In general 1

##### 1 In general

Deceased landowner's family against whom quantum meruit action was brought by forester was not entitled to award of costs and attorney fees pursuant to Frivolous Civil Proceedings Sanctions Act where action survived family's motion for nonsuit based upon insufficiency of evidence and was resolved on merits forester reasonably believed he had claim, and legitimate question existed as to whether oral agreement and subsequent writing of those terms in letter would be considered express contract *Swanson v Stratos* (SC App 2002) 350 SC 116, 564 SE2d 117 Costs ⇨ 2

Denial of summary judgment on will contestant's causes of action for undue influence and lack of testamentary capacity precluded award of attorney fees under Frivolous Proceedings Act since there was evidence worthy of submission to jury claims could not be 'frivolous' within meaning of Act *Hana*

*han v Simpson* (SC 1997) 326 SC 140 485 SE2d 903 rehearing denied Costs ⇨ 194 44

A wife's motion to vacate a divorce decree was frivolous and the husband was entitled to recover attorney fees under § 15-36-30 where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings which showed that the court had asked her if she was under the influence of drugs or alcohol, and she replied that she was not (2) the wife's claim that the husband used undisclosed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce, which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance *Kilcawley v Kilcawley* (SC App 1994) 312 SC 425, 440 SE2d 892

## § 15-36-30. Recovery of attorney's fees and court costs

When the essential elements of this chapter have been established as provided in Section 15-36-10, a person is entitled to recover his attorney's fees and court costs reasonably incurred in litigating the proceedings. The entitlement of the aggrieved person must be determined by the trial judge at the conclusion of a trial upon motion of the aggrieved party stating the manner in which the other party is alleged to have acted in violation of this statute. The court shall base its decision upon a review of the proceedings and affidavits submitted by each person affected.

**HISTORY** 1988 Act No 432, § 6

**Library References**

Westlaw Key Number Searches 102k1, 102k194 44

Costs ⇨ 1, 194 44

CJS Costs §§ 2 128

**Research References****Encyclopedias**

SC Jur Actions § 39 Termination

SC Jur Attorney and Client § 46 Zealous Representation

SC Jur Attorney and Client V A Ref Divisional References

SC Jur Attorney Fees § 14, Scope And Procedure

SC Jur Attorney Fees § 15 Contrast With Federal Rule Of Civil Procedure 11

SC Jur Costs § 14 South Carolina Frivolous Civil Proceedings Sanctions Act

SC Jur Costs III C Ref, Divisional References

**Forms**

South Carolina Litigation Forms and Analysis § 39 09 Frivolous Suit

**Law Review and Journal Commentaries**

Wall & Weston, An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

**Notes of Decisions****In general 1****1 In general**

Trial court lacked subject matter jurisdiction to award attorney fees under Frivolous Proceedings Sanctions Act motion for attorney fees was untimely, where movant failed to file motion within 10 days of judgment. *Pitman v Republic Leasing Co Inc* (SC App 2002) 351 SC 429, 570 SE2d 187. Costs ⇨ 2.

Frivolous Civil Proceedings Sanctions Act (FCPSA) does not allow judge to

**388**

invoke its provisions sua sponte it clearly requires proper motion to be made by aggrieved party. *Pool v Pool* (SC 1998) 329 SC 324 494 SE2d 820. Costs ⇨ 2.

Frivolous Civil Proceedings Sanctions Act (FCPSA) did not authorize award of private investigator costs in divorce suit. FCPSA only allows for the granting of attorney's fees and court costs as sanctions, not other types of costs or fees. *Pool v Pool* (SC 1998) 329 SC 324 494 SE2d 820. Costs ⇨ 2.

A wife's motion to vacate a divorce decree was frivolous, and the husband

was entitled to recover attorney fees under § 15-36-30 where (1) the wife's claim that she was under the influence of prescription drugs at the time of the original settlement was belied by the divorce order and the transcript of proceedings, which showed that the court had asked her if she was under the influence of drugs or alcohol, and she replied that she was not (2) the wife's claim that the husband used undis-

closed marital property to help his new wife purchase a home was belied by her deposition taken prior to the divorce which showed that she knew of the purchase of the home at that time and took no action, and (3) the wife claimed to be entitled to 2 years of health insurance, although the parties had never discussed health insurance *Kilcawley v Kilcawley* (S C App 1994) 312 S C 425 440 S E 2d 892

### § 15-36-40 Burden of proof

In a motion filed pursuant to this chapter the aggrieved person has the burden of proving

- (1) the other party has procured, initiated continued or defended the civil proceedings against him,
- (2) the proceedings were terminated in his favor,
- (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery joinder of parties, or adjudication of the civil proceedings,
- (4) the aggrieved person has incurred attorney's fees and court costs, and
- (5) the amount of the fees and costs set forth in item (4)

**HISTORY** 1988 Act No 432, § 6

#### Library References

Westlaw Key Number Searches 102k1 102k194 44  
Costs C 1, 194 44  
C J S Costs §§ 2 128

#### Research References

##### Encyclopedias

S C Jur Attorney Fees § 14 Scope And Procedure  
S C Jur Costs § 14, South Carolina Frivolous Civil Proceedings Sanctions Act  
S C Jur Costs III C Ref Divisional References

#### Law Review and Journal Commentaries

Wall & Weston An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

#### Notes of Decisions

##### In general 1

##### 1 In general

To receive attorney fees and/or court costs as a sanction under the Frivolous

Civil Proceedings Sanctions Act (FCPSA), the aggrieved party must show that the party sought to be sanctioned acted frivolously *Father v South Carolina Dept of Social Services*

## § 15-36-40

## CIVIL REMEDIES AND PROCEDURES

### Note 1

(S C 2003) 353 S C 254 578 S E 2d 11 Costs ⇌ 2 Frivolous Civil Proceedings Sanctions Act (FCPSA) Father v South Carolina Dept of Social Services (S C 2003) 353 S C 254 578 S E 2d 11 Costs ⇌ 2

Standard for sanctions under Rule 11 is essentially the same as that under the

## § 15-36-50 Court to determine fees and costs

Upon a finding that a person has violated the provisions of this chapter, the court shall determine the appropriate fees and costs and enter judgment accordingly

**HISTORY** 1988 Act No 432, § 6

### Library References

Westlaw Key Number Searches 102k1 102k194 44  
Costs ⇌ 1, 194 44  
C J S Costs §§ 2 128

### Research References

#### Encyclopedias

S C Jur Appeal and Error § 119 Costs And Sanctions For Frivolous Motions Or Appeals

S C Jur Appeal and Error XI Ref, Divisional References

S C Jur Attorney Fees § 12 Generally

S C Jur Attorney Fees III D Ref Divisional References

S C Jur Costs § 14 South Carolina Frivolous Civil Proceedings Sanctions Act

S C Jur Costs III C Ref Divisional References

S C Jur South Carolina Rules of Civil Procedure § 11 2, Discussion

S C Jur South Carolina Rules of Civil Procedure IV Ref, Divisional References

### Law Review and Journal Commentaries

Wall & Weston An analysis of current theories of liability 45 SC L Rev 857 (Summer 1994)

### Notes of Decisions

#### In general 1

#### Appeals 2

preponderance of evidence Swanson v Stratos (S C App 2002) 350 S C 116 564 S E 2d 117 Appeal And Error ⇌ 1024 1 Costs ⇌ 2

#### 1 In general

Since the decision whether to impose sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) is a decision for the judge, not the jury it sounds in equity rather than at law Father v South Carolina Dept of Social Services (S C 2003) 353 S C 254 578 S E 2d 11 Costs ⇌ 2

Decision to award costs under Frivolous Civil Proceedings Sanctions Act is one in equity and accordingly Court of Appeals may take its own view of

#### 2 Appeals

Pursuant to the State Constitution provision governing standard of review in matters of equity the decision whether to award sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA) as a matter in equity mandates that an appellate court take its own view of the facts Father v South Carolina Dept of Social Services (S C 2003) 353 S C 254, 578 S E 2d 11 Appeal And Error ⇌ 1024 1

FRIVOLOUS CIVIL PROCEEDINGS

§ 15-36-50

Note 2

In reviewing an award of attorney fees appellate court may take its own view of the preponderance of the evidence, however appellate court must always take notice of the lack of subject matter jurisdiction. *Pitman v Republic Leasing Co Inc* (S C App 2002) 351 S C 429 570 S E 2d 187 Appeal And Error ⇨ 23 Appeal And Error ⇨ 1024 1

In reviewing award of attorney fees under Frivolous Proceedings Act Supreme Court may take its own view of preponderance of evidence. Code 1976 §15-36-10 et seq. *Hanahan v Simpson* (S C 1997) 326 S C 140, 485 S E 2d 903 rehearing denied Appeal And Error ⇨ 1024 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

J Doe, M D

Plaintiff,

v

Tenet HealthSystem Medical Inc ,  
and East Cooper Community  
Hospital, Inc ,

Defendants

CIVIL ACTION NO 2 99-0833-23

PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION TO DISSOLVE  
PRELIMINARY INJUNCTION

FILED

25  
JAN 24 2000

LARRY W PROPPES, CLERK  
COLUMBIA, S C

Plaintiff, through her undersigned counsel, hereby responds to the Defendant's Motion to Dissolve Preliminary Injunction as follows

Plaintiff has responded to the Defendant's discovery requests and Plaintiff's experts have calculated an itemization of damages which will be provided at the time of a discovery deposition of Plaintiff's experts. This deposition was previously scheduled for Monday, January 24, 2000. Plaintiff's expert, Dr Jonathan Cunitz, has reviewed adequate information to form his opinions and is prepared to give those in his deposition as soon as it takes place. Dr Cunitz has not prepared a written report.

In addition, the Plaintiff's deposition has been scheduled for January 26, 2000. The Plaintiff has made reasonable attempts to comply with her discovery obligations within the time specified in the Court's Scheduling Order. Therefore, the Court should not find that there is any evidence of unclean hands which would warrant a dissolution of the preliminary injunction.

RECEIVED  
JAN 25  
1970

The time stamp  
was incorrectly  
changed to "1/23" by  
a runner. Correct  
date is 1/25

RECEIVED

JAN 25

RECEIVED

SINKLER & BOYD, P.A.

By James Y. Becker  
James Y. Becker  
Post Office Box 11889  
Columbia, South Carolina 29211  
(803) 779 3080  
Attorneys for the Plaintiff

January 24, 2000

Columbia, South Carolina

A TRUE COPY  
Attest: Larty W. Propes, Clerk  
By Edith Hauom  
Deputy Clerk

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
CHARLESTON DIVISION

LARRY W. PROPPES, CLERK  
CHARLESTON, SC

JUN - 2 2000

J Doe MD,

Plaintiff,

v

Tenet HealthSystem Medical Inc  
and East Cooper Community  
Hospital, Inc

Defendants

C A # 2 99 833-23

ORDER

This matter is before the court upon plaintiff's motion for an injunction pending appeal under Federal Rule of Civil Procedure 62 (c). For the following reasons, the motion is denied.

Plaintiff, Cynthia Holmes, MD, is a physician who had admitting privileges at the defendant Hospital. Upon the Hospital's termination of her admitting privileges, Dr. Holmes brought this action for both injunctive relief and monetary damages, asserting violations of federal anti-trust laws and state law claims. On November 22, 1999, this court enjoined the Hospital from terminating Dr. Holmes' privileges. Thereafter, the defendants filed a motion to dissolve the preliminary injunction on the grounds that Dr. Holmes had failed to abide by the Scheduling Order and had failed to comply with the rules of discovery. Furthermore, the alleged harm suffered by her current patients had not materialized.

On January 25, 2000, the court granted the defendants' motion to dissolve the preliminary injunction after holding a hearing on the matter. Dr. Holmes did not appeal the court's order dissolving the injunction. Soon thereafter, the defendants moved for summary judgment. After considering the briefs filed, both in support of and in opposition to the motion, this court granted the defendants' motion for summary judgment as to all federal claims, and dismissed without prejudice

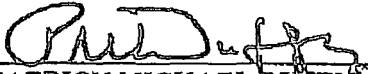
the supplemental state law claims on April 17, 2000 Plaintiff has now appealed this court's Order Simultaneous with the filing of her notice of appeal plaintiff filed this motion for an injunction pending appeal pursuant to Rule 62 (c)<sup>1</sup>

Rule 62 (c) authorizes the court to suspend, modify, restore, or grant an injunction during the pendency of an appeal Fed R Civ P 62 (c) "This subdivision codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment" Charles A Wright Arthur R Miller, Mary K Kane, 11 Federal Practice and Procedure § 2904 (2d ed 1995) However due to the fact that Dr Holmes did not seek such relief upon the dissolution of the injunction back in January this court declines to restore the injunction at this time If Dr Holmes had appealed the order dissolving the injunction such a motion may have been appropriate at that time However the status quo of this case since January is the absence of any injunction against the defendants Therefore, the motion is denied

It is therefore,

**ORDERED**, for the foregoing reasons, that the Plaintiff's motion for an injunction pending appeal is **DENIED**

**AND IT IS SO ORDERED**

  
PATRICK MICHAEL DUFFY  
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina  
June 1<sup>st</sup> 2000

A TRUE COPY  
Attest, Larry W Propp, Clerk  
By,   
Deputy Clerk

<sup>1</sup> Plaintiff also referenced the provision for injunctive relief under Clayton Act cases as a basis for her request See 15 U S C § 26 However, section 26 only provides injunctive relief as a remedy for antitrust violations It has no applicability to the relief sought at this stage of the plaintiff's case

 **East Cooper**  
**Regional Medical Center**  
Tenet HealthSystem

1200 John Dodd Blvd  
Mt Pleasant SC 29464  
T 803 881 0100

January 26 2000

*for file*  
VIA CERTIFIED MAIL

Cynthia Holmes MD  
306 Station 22 1/2  
Sullivan's Island SC 29482

Dear Dr Holmes

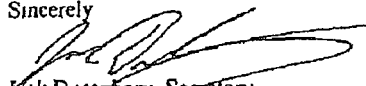
Pursuant to the Order of the Honorable Patrick Michael Duffy of the United States District Court issued on January 25 2000 dissolving the Preliminary Injunction issued on November 22 1999 the Governing Body of East Cooper Regional Medical Center is hereby notifying you that you have been removed as a member of the active medical staff effective January 25 2000. You remain a member of the consulting medical staff for the remainder of the term of your reappointment to the medical staff. Your clinical privileges have been delineated by the Credentials Committee and are on file in the Medical Staff Services Office.

Please bear in mind that while on the consulting medical staff you will be expected to comply with the terms and provisions of the Medical Staff Bylaws Rules and Regulations currently in effect and as may be amended. The Medical Staff Bylaws Rules and Regulations are on file in the Medical Staff Office and are available for your review.

It is my understanding that you previously scheduled two surgeries on February 16 2000 and two surgeries on March 15 2000. You are reminded that pursuant to Article IV Section 4 of the Medical Staff Bylaws a consulting staff member is not eligible to admit patients and may not perform surgery in any capacity as the primary surgeon. As such you will need to make appropriate arrangements with your patients concerning the above referenced surgeries previously scheduled by you.

Should you have any questions regarding the above please do not hesitate to get in touch with me.

Sincerely

  
Jack Dusenbery, Secretary  
Board of Directors

 TENET

000520

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes),

Plaintiff

-vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

) MOTION TO SEAL

BY \_\_\_\_\_

JULIE J ARMSTRONG  
CLERK OF COURT

2009 NOV 10 PM 3 56

FILED

The plaintiff hereby respectfully makes this motion to seal confidential information  
Objection is made to providing the information and the plaintiff expressly reserves and  
does not waive any rights or objections regarding the same including privacy rights The  
objection includes, but is not limited to, the fact that the defendants have failed their  
burden of proving appropriateness, reasonableness, and ability to pay under the amended  
Act S C Code Section 15-36-10 as amended in 2005 Defendants are well aware that  
defendants wrongdoing has deprived the plaintiff of the ability to earn a livelihood for  
family and dependent minor children The plaintiff is unable to pay and the defendants  
have failed to prove otherwise Under the Act, the defendants have failed to comply with  
the provisions of the Act, therefore, defendants' motion MUST be stricken and sanctions  
against defendants are authorized S C Code Section 15-36-10 as amended in 2005

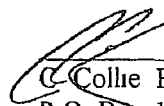
This Motion is based upon State and Federal Constitutions, the S C Rules of Court, statutory and case law the record herein, memoranda which may be submitted and evidence which may be presented S C Const art I, sec 3 S C Const art V, sec 4, S C Const art V sec 5, U S Const amend V and XIV

For substantial justice affecting substantial rights and for such other and further grounds as may be equitable and proper, the plaintiff requests that the confidential information be sealed with direction that access to the information by any third party (including defendants) is prohibited under penalty and/or fine for each and every violation

For the foregoing reasons it is respectfully requested that this Court grant this Motion to Seal

Respectfully submitted,

Dated 10/25/07

  
C. Collie Esq  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT  
) CASE NO 07-CP-10-1444

11

;

1

;

2

 $\vdots$ 

8-1

JULIE J ARMSTRONG  
CLERK OF COURT

2009 NOV 10 PM 3 57

77  
—  
F  
m  
S

07.1899

defendants are authorized S C Code Section 15-36-10 as amended in 2005

This Motion is based upon State and Federal Constitutions, the S C Rules of Court statutory and case law the record herein memoranda which may be submitted and evidence which may be presented S C Const art I, sec 3, S C Const art V, sec 4 S C Const art V sec 5, U S Const amend V and XIV

For substantial justice affecting substantial rights and for such other and further grounds as may be equitable and proper, the plaintiff requests that the confidential information be sealed with direction that access to the information by any third party (including defendants) is prohibited under penalty and/or fine for each and every violation by any third party

For the foregoing reasons, it is respectfully requested that this Court grant this Motion to direct that access to the confidential information by any third party (including defendants) is prohibited under penalty and/or fine for each and every violation

Respectfully submitted,

Dated 1/29/07

  
C. Collier, Esq  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

09-08844

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

J Doe(CHolmes)

Plaintiff,

-vs-

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

Defendants

)IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) CASE NO 07-CP-10-1444

) MOTION TO RECONSIDER  
) PURSUANT TO RULE 59(e), SCRCP

2009 NOV 25 PM 3 23  
JULIE J ARMSTRONG  
CLERK OF COURT

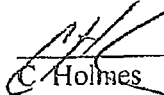
FILED

The Plaintiff respectfully makes a motion for reconsideration pursuant to Rule 59 (e) SCRCP, of the order entered on November 18 2009 The grounds for said motion are substantial justice affecting substantial rights, and such other and further grounds as may be presented at the hearing on reconsideration pursuant to Rule 59, SCRCP This Motion is based upon the S C Rules of Court statutory and case law the record herein memoranda which may be submitted and evidence to be presented at the hearing

For the foregoing reasons, it is respectfully requested that this Court alter and/or amend its order and deny defendants' motion and grant plaintiff's motions

Respectfully submitted,

Dated 11/25/09

  
C. Holmes  
P O Box 187  
Sullivans Island, SC  
29482-0187  
For Plaintiff

11-2809

RECEIVED

DEC 03 2009

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Thomas Hughston, Jr , Circuit Court Judge

Case No 2007-CP-10-1444

J Doe(CHolmes),

Appellant,

v

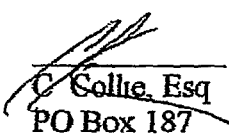
Manton Grier, James Y Becker, and  
Haynsworth Sinkler Boyd, P A.,  
as successor to Sinkler & Boyd, P A ,

Respondents

NOTICE OF APPEAL

The Appellant appeals the orders of the Honorable Thomas Hughston Jr , entered  
July 14 2009, and November 18, 2009

Dated 11/28/09

  
C. Collie, Esq  
PO Box 187  
Sull Isd , SC 29482-0187  
843 883 3010  
For Appellant

Counsel of Record for Respondents  
John Wilkerson, III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Thomas Hughston Jr Circuit Court Judge

Case No 2007-CP-10-1444

J Doe(CHolmes)

Appellant

v

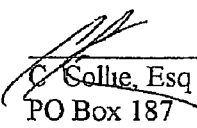
Manton Grier James Y Becker and  
Haynsworth Sinkler Boyd, P A  
as successor to Sinkler & Boyd P A

Respondents

NOTICE OF APPEAL

The Appellant appeals the orders of the Honorable Thomas Hughston, Jr entered  
July 14 2009 and November 18 2009

Dated 11/28/09

  
C. Collie, Esq  
PO Box 187  
Sull Isd , SC 29482-0187  
843 883 3010  
For Appellant

Counsel of Record for Respondents  
John Wilkerson III Esq  
PO Box 22129  
Charleston SC 29413  
843 576 2800

FILED  
2009 DEC -1 PM 1 12  
JULIE J ARMSTRONG  
CLERK OF COURT  
RY-2

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO 07-CP-10-1444

CYNTHIA HOLMES, )  
Plaintiff, )  
-vs- )  
HAYNSWORTH, SINKLER & )  
BOYD, P A , MANTON GRIER, )  
and JAMES Y BECKER, )  
Defendants )

**PLAINTIFF'S MEMORANDUM IN SUPPORT  
OF MOTION TO ALTER OR AMEND  
JUDGMENT AND FOR RECONSIDERATION**

The Plaintiff timely filed a Motion to Alter or Amend the Court's Order dated November 18, 2009 pursuant to Rule 59(e), S C R C P , on November 25, 2009 The Plaintiff submits this memorandum in support of the motion The Plaintiff preserves all issues raised and arguments made in her Return to the Motion for Sanctions and Affidavit

**I The "action" upon which sanctions were sought was filed before the Frivolous Proceeding Sanctions Act was repealed on March 21, 2005 and replaced with § 15-36-10**

The South Carolina Legislature repealed the Frivolous Proceedings Sanctions Act on March 21, 2005 On July 1, 2005 the Legislature replaced the repealed Act with § 15-36-10 The Court cites Horry v. Parbel, 378 S E 2d 253 (S C Ct App 2008) to support its application of § 15-36-10 to this case In Horry the claim for sanctions was filed after July 1, 2005 but the Court of Appeals held the pre-March 2005 act applied because the "action" upon which the sanctions were sought was filed before that date In this case the Plaintiff's original action was commenced on April 1, 2002 Although the Court allowed the Plaintiff to amend her Complaint in 2007, the amendment related back to the original action under Rule 15, S C R C P The act in effect at the time the action was commenced in 2002

should apply and the Court should not have applied the factors in § 15-36-10 to this case

The Plaintiff requests that the Court amend its Order to delete reference to § 15-36-10

**II The denial of the Defendants' Motion for Summary Judgment precludes an award of sanctions**

Prior to trial the Court denied the Defendants' Motion for Summary Judgment In the Order of November 18, 2009 the Court found the Plaintiff's action against the Defendants was frivolous Under South Carolina case law the failure to obtain summary judgment precludes an award of sanctions In the case of Hanahan v Simpson, 485 S E 2d 903 (S C 1997), the Supreme Court acknowledged there was a "split of authority as to whether sanctions may be awarded under Frivolous Proceedings acts notwithstanding the denial of summary judgment " 485 S E 2d at 912 The Supreme Court concurred with the view "that a party who survives pre-trial motions to dismiss or 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 The Supreme Court reasoned, "[i]t is simply untenable to suggest that, notwithstanding the trial court was convinced the issue was one for the jury, Hanahan did not reasonably believe in the existence of her claim " 485 S E 2d at 912-13

In a later case, Whitfield Construction Co V Bank of Tokyo Trust Co, 525 S E 2d 888 (S C App 1999), the party moving for sanction argued the Court must have actually considered and denied the motion for summary judgment in order for the rule in Hanahan to be applicable Both parties in Whitfield had filed cross motions for summary judgment but the Court never ruled on the motions Thereafter the case was heard before a special referee who found the Plaintiff's claims were unfounded and brought for an improper purpose The Defendant moved for sanctions which were awarded The Court of Appeals

reversed the award of sanction holding that the failure of the party moving for sanctions to prevail on a motion for summary judgment, for what ever reason, precluded an award of sanctions The Court of Appeals stated

The Supreme Court unequivocally concurred with the line of authority holding that "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 non-moving party in 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 pursue 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 Co V Bank of Tokyo Trust Co., supra

It is respectfully submitted the failure of the Court to have had the time to fully familiarize itself with the file before trial so that it could rule on the motion for summary judgment does not take this case out of the general rule the survival of a motion for summary judgment precludes an award of sanction under Whitfield and Hanahan In Whitfield it was clear, after the trial, that Whitfield's claim was frivolous but almost surely a deliberate abuse of process Nevertheless, the failure of the party to obtain summary judgment precluded the award of sanctions The Plaintiff respectfully requests the Court recognize South Carolina case precludes the award of sanctions when the moving party fails to obtain summary judgment

**III It is unfair to award sanctions against the Plaintiff for attorney's fees to prepare for and try the case and for expert witness fees for trial which would not have been incurred if the Court had granted summary judgment**

It is not exactly clear from the Order how the Court determined the amount of sanctions but it appears a substantial portion of the award for sanctions was for attorney

fees to prepare for and to try the case and for expert witness fees at trial. These fees and costs would not have been incurred if the Court had granted the Defendants' Motion for Summary Judgment. It is respectfully submitted, if the Court did not have the time to adequately consider the Defendants' Motion for Summary Judgment, it could have continued the case, as requested by the Plaintiff, and the Defendants would have avoided the attorney's fees and costs incurred at trial which form a substantial basis for the sanctions awarded.

**IV The Court's finding the Plaintiff was sincere in her belief that her claims were valid precludes an award of sanctions under Rule 11**

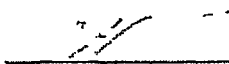
Rule 11 allows for sanctions when the party does not believe there are good grounds to support the pleading or when a pleading is interposed for an improper purpose. This is a subjective test, whereas, the test under § 15-36-10 is an objective or reasonable test. When the Court granted the Directed Verdict it acknowledged the alleged the Defendants failed to timely request a Temporary Injunction, did not timely respond to discovery, and failed to timely attend to her case. The Court went further and stated, "Thus, as of January 31, 2000, Dr. Holmes, who is herself an attorney, clearly believed she had potential claims against the Defendants." Order of July 14, 2009 at p. 5. The Court dismissed part of the Plaintiff's case under the Statute of Limitations because she "knew or should have known" she had causes of action against the Defendants. In its award of sanctions the Court again stated, "I have no doubt that [the Plaintiff] is sincere in her beliefs about this case." Order of November 18, 2009, p. 9. It is respectfully submitted the findings the Plaintiff's believed she had valid claims precludes an award of sanction under Rule 11.

**V South Carolina does not recognize a common law right to attorney's fees and**

costs

The Court also awarded the Defendants sanctions under "inherent" powers Order of November 18, 2009, pp 10 -11 The Court cited a United States Supreme Court case of Alyeska Pipeline Service Co V Wilderness Society, 421 U S 240 (1975) which was based on Federal law The federal right to award attorney's fees was first approved in Vaughan v Atkinson, 369 U S 527 (1962) which involved an award of attorney's fees as part of an equitable remedy to prevent racial discrimination by a union South Carolina has no similar case law and follows the "American Rule" acknowledged in Alyeska that the prevailing litigant is not entitled to recover attorney's fees from the loser Alyeska, at 247 In South Carolina an award for attorney's fees can only come 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 (S C Ct App 2001) citing Jackson v Speed, 486 S E 2d 750 (S C 1997), American Federal Bank v Number One Main Joint Venture, 467 S E 2d 439 (S C 1993), Blumberg v Nealco, Inc, 427 S E 2d 439 (1993), Baron v Data Systems, Inc v Loter, 377 S E 2d 296 (S C 1989), Dowaliby v Chambliss, 544 S E 2d 646 (S C Ct App 2001), Harvey v S C Dep't of Corrections, 527 S E 2d 765 (S C Ct App 2000), Global Protection Corp V Halbersberg, 503 S E 2d 483 (S C Ct App 1998), Prevatte v Asbury Arms, 396 S E 2d 642 (S C Ct App 1999) The Plaintiff respectfully requests that reference to a common law inherent right to award attorney fees and costs be deleted from the Order

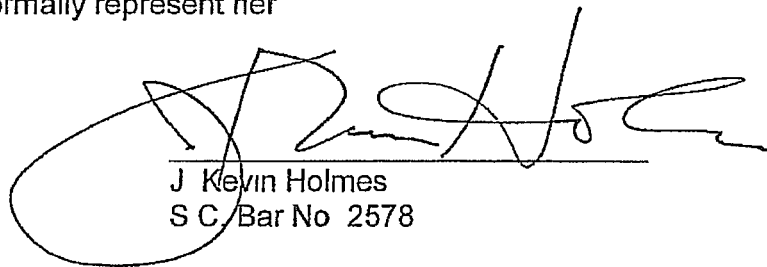
Respectfully submitted,

  
Cynthia Holmes

Charleston, South Carolina

January 4, 2010

I, J Kevin Holmes, a licensed attorney in the State of South Carolina, hereby countersign this Memorandum in Support of Motion to Alter or Amend the Order dated November 18, 2009. In accordance with the requirements of Rule 11, S C R C P, I have read the pleading and the best of my knowledge, information, and belief the grounds alleged therein and the authority cited therein support the motion and that the motion is not interposed for the purpose of delay. By countersigning this Memorandum in Support of Motion to Alter or Amend the Order dated November 18, 2009 I have not agreed to make an appearance or argue the motion on behalf of the Plaintiff but merely to enable the Plaintiff to comply with the Order of November 18, 2009 and avoid further sanctions until she can obtain counsel to formally represent her.



J Kevin Holmes  
S C Bar No 2578

Charleston, South Carolina

January 4, 2010

FILED  
JAN 14 2010  
CLERK OF COURT

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Thomas Hughston, Jr Circuit Court Judge

Case No 2002-CP-10-1448 and  
2007-CP-10-1444 after change of venue

J Doe(CHolmes)

Appellant,

v

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

Respondents

NOTICE OF APPEAL

The Appellant appeals the orders of the Honorable Thomas Hughston Jr entered February 4 2010 (written notice was mailed on February 10 2010) July 14 2009 and November 18, 2009 as well as the following orders July 24, 2002, March 11 2003, August 10, 2004, February 11 2008, March 5 2008, March 26 2008 May 21 2008 August 20 2008, January 9 2009, January 12 2009, June 8 2009(two) June 11, 2009 July 7 2009(two), and November 10, 2009, and any and all intermediate orders affecting the judgment *SCDOT v Faulkenberry* 337 S C 140 522 S E 2d 822 (Ct App 1999) Chief Justice Toal *et al Appellate Practice in South Carolina* (2002) p 88

Dated

4/15/10

For Appellant

A G Howe

POB 807

Chas, SC 29402

843 723 1661

Counsel of Record for Respondents  
John Wilkerson III, Esq  
PO Box 22129  
Charleston, SC 29413  
843 576 2800