

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

CONSOLIDATED APPEALS

(Tracking number 2011185767)(1st Appeal)
(Tracking Number 2011197671)(2nd Appeal)
(Tracking Number 2011203391) (3rd Appeal)

Pee Dee Health Care, P.A.Appellant,
v.
Estate of Hugh S. ThompsonRespondent.

REPLY IN SUPPORT OF APPELLATE COURT SANCTIONS

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SEP 23 2013

SC Court of Appeals

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I. The Motion For Sanctions Differs From Previous Motions To Dismiss.

a. The Pending Motion Is Extraordinary.

In the Response to the pending motion for sanctions under SCACR 269 (hereinafter “Response”), Appellant Pee Dee Health Care, P.A. (hereinafter “PDHC”) seeks to characterize the pending motion as simply the third of a trilogy of motions that should be denied as a matter of routine – like the previous two motions. As discussed below, there were actually three previous motions to dismiss appeals filed by Respondent. All were denied in lieu of full briefing and oral arguments which would understandably be the Court’s preference in most matters.¹

The pending motion, however, is anything but routine. Counsel for Respondent does not recall ever having sought sanctions with the possible exception of costs affiliated with trial court discovery motions. Respondent’s counsel does not relish seeking such sanctions but determined it would be a disservice to the Respondent Estate not to recommend and pursue such a course. The detailed review undertaken by Respondent in the Motion for Sanctions reveals that the conduct in these appeals, with hindsight now available to the Court, is anything but routine.

b. Court’s Opinion Confirmed Third Appeal Was Procedurally Without Merit.

Not only is the pending motion extraordinary, the basis for the previously denied motion to dismiss has now been ratified by this Court’s opinion which concluded “Accordingly, we dismiss PDHC’s appeal of the circuit court’s order entering summary judgment in favor of the Estate as untimely.” Opinion page 3. Of course, the Court’s reasoning rested upon its finding that “PDHC did not file a proper Rule 59(e), SCRCPC, motion.” Opinion page 2. This was

¹ Respondent obviously does not presume to know the Court’s thoughts and preferences. Respondent has noted the brevity of prior orders and suspects that the Court was simply allocating its time to the fully ripe appeal. Respondent intends no offense in expressing such suspicion.

precisely the basis for the Respondent's "Motion To Dismiss Appeal On Merits As Untimely And Dismiss All Interlocutory Appeals As Moot" submitted to this Court on November 14, 2011.

This Court did deny the motion on January 9, 2012, leaving the timeliness issue to be resolved following briefing and oral argument; but that denial did not address the specific merits of Respondent's argument. The pending motion for sanctions is also based upon more than the mere untimeliness of this appeal; it is based upon a combination of facts and events. Moreover, even if this appeal had been timely, it lacked substantive merit (as discussed again below).

The survival of these appeals beyond that early motion to dismiss provided the opportunity and time for other misconduct that contributed to the composite basis of the pending motion for sanctions. This is why Respondent's counsel repeatedly sought an early disposition to these matters. To be clear, no criticism is directed toward the Court. Of course, Respondent understands that caseloads and other factors may prevent the Court from acting as promptly as a party desires. Unavoidable court delays, however, do not render a party's abusive conduct acceptable even though they may provide the time and opportunity for such conduct to continue.

c. Although Denied, Other Motions Still Illustrate Problematic Conduct.

Following the initial motion to dismiss the summary judgment appeal as untimely, the Respondent filed two other motions in this Court to dismiss one of these appeals. The first was a general motion to dismiss the second appeal for failure to prosecute (submitted July 24, 2012); this motion was filed because of the delay (approximately 60 days beyond due date), initially unauthorized by this Court², in preparing any record so that Respondent could finalize its Brief. The second was a more specific motion to dismiss the second appeal for failure to comply with SCACR 210 (submitted October 24, 2012) because the first attempt at a record for that appeal,

² A subsequent Order of this Court did allow the Appellant additional time.

already delayed, did not include matters designated by the Respondent. This series of tardy and unprofessional events bears striking resemblance to events from other appeals involving Appellant and/or Appellant's counsel (referenced herein or in the Motion for Appellate Court Sanctions).

Even these motions were not routine because Respondent's counsel has never previously encountered difficulties or disagreements in the mere preparation of an appellate record – but even these unusual motions did not attempt to address the complete scope of conduct encompassed by the Motion for Appellate Court Sanctions. The previous motions eventually worked themselves out through the delayed preparation of a supplemented useable record on appeal – but the delay and expense imposed upon the Respondents unnecessarily could not have been addressed by those previous motions.

Just as Appellant's counsel “essentially tried to shift the responsibility of preparing a Record in compliance with the Rule to the Respondent” (Respondent's Motion to Dismiss for Failure to Comply with Rule 210, page 3), counsel now seeks to suggest that the delays and failings were the fault of Respondent's counsel because “Appellant provided counsel for Respondent a full and complete copy of the proposed record on appeal.” Response at 3 (also page 4). This is not true; no proposed record was provided.

A dialogue did occur and an e-mail invitation was extended October 1, 2012 for Respondent to identify “additional information that you would like to have included [in] the Record on Appeal....” Respondent's counsel replied then as they have stated consistently since that time – “We require only those matters listed in our Designation of record previously submitted to the Court....” But as noted in the October 24, 2012 Motion to Dismiss by

Respondent, the Appellant still got it wrong. As stated in that motion, “Following the Rules would have been easy.” Motion at page 2 (first sentence).

II. Appellant’s Response Erroneously Suggests That Appeals Had Merit.

Several sections of the Appellant’s Response seem to be addressed to the alleged merit of the appeals – specifically Sections III, IV, V, and VII. Respondent again urges this Court to now declare that these appeals were both without merit and unnecessary.

a. Actual Basis For Disqualification Not Now Disputed And Matthews Participation Never In Doubt.

In section III of its Response, the Appellant understandably focuses on the Supreme Court case of Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). As Respondent candidly admitted in its Return to the Petition for Rehearing, “the *dicta* offered by the Court in Hagood v. Sommerville, supports the proposition that a trial court should not conduct the final trial until the appellate court resolves the alleged disqualification of trial counsel....” (citation and footnote omitted from quote).³ Thus, Appellant argues that the disqualification appeal was a necessity.

The instant sanctions motion, however, is based upon the lack of underlying merit to any appeal of the disqualification (now the law of the case) and the continued availability of the same lawyer chosen to execute the actual complaint in this case, Benjamin R. Matthews. The lack of underlying merit to any disqualification appeal is no longer challenged – as found in footnote 1

³ The Supreme Court case of Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) was previously cited by the Appellant in its Brief on the issue of disqualification (page 23) for the position that choice of counsel is a substantial right which can and must be appealed immediately to avoid waiver. Hagood in fact involved the proffer of an attorney’s full time investigator as an expert accident reconstruction witness. In response to the proffer, the trial court had ruled that the party needed to either get a new expert or get a new attorney. The Supreme Court ultimately determined that disqualification of counsel would not be required because Rule 3.7 of the Rules of Professional Conduct did not reach such a firm employee.

of the Response, “Appellant has not further appealed the issues surrounding appeals 1 and 2.”⁴ Moreover, the record in the case makes it clear that the appeal of this issue never had any merit and Appellant and its counsel knew it – although they refused to acknowledge the same. As the Motion for Sanctions observes, “both the trial court (twice)⁵ and this court (Opinion at 4) have itemized the areas in which Mr. Megna’s undenied role as CEO of the Appellant renders him a necessary witness for relevant and needed factual inquiry.” Motion at page 6.

Appellant’s Response (footnote 11) suggests that the availability of their counsel Mr. Matthews was not guaranteed as he might suffer from imputed disqualification. This suggestion is disingenuous. Neither the Respondent nor the courts have suggested that Mr. Matthews is disqualified; to the contrary, Respondent’s Brief in the disqualification appeal noted that “Rule 3.7(b) allows for Mr. Megna’s non-witness partner Ben R. Matthews to continue in his existing and already extensive representation of Appellant.” Indeed, even before the original trial court hearing on the Motion for Disqualification, Respondent’s counsel acknowledged that Mr. Matthews would not be subject to the same disqualification. R.p. 722, text accompanying footnote 2 (Trial Court Motion to Disqualify, January 28, 2011); see also R.p. 410 line 23 to p. 411 line 9 (transcript of trial court disqualification hearing).

b. Undisputed Oversight of Decedent Does Not Change Outcome.

In Section IV of the recent Response, Appellant states that “Decedent never informed Appellant....that he had been disbarred...” With Dr. Thompson’s death occurring before the present claims were asserted, the Respondent and its counsel don’t know what the decedent did

⁴ Respondent asks that this Court proceed to issue its Remittur to the trial court with regard to these two appeals.

⁵ R.pp. 4-12 (original disqualification order) and R.pp.13-14 (denying reconsideration of disqualification). References to the Record on Appeal are to the most inclusive Record created for the second appeal (Tracking Number 2011197671).

or did not inform Appellant⁶; hence, the Respondent has consistently focused its defense on what was certain – that Appellant had a non-delegable, federally-codified, and court-recognized duty to verify the credentials of its employees before it accepted the assignment of their Medicare earnings. The undisputed, apparent oversight of the decedent with regard to reinstatement with the Medicare Inspector General did not change the dispositive duty first relied upon by the federal Administrative Law Judge and subsequently relied upon by the Circuit Judge here. This dispositive duty rendered Appellant’s claim and this appeal without substantive merit; the brash disregard of the trial court’s disqualification by Mr. Megna rendered the appeal untimely and procedurally without merit.

c. Probate Appeal Procedurally Without Merit And Clearly Unnecessary.

In Section V of its Response, the Appellant argues that its appeal of the probate court ruling was not unreasonable. Notably, the Response does not address the codified procedural failures recognized by this Court’s July opinion that rendered the probate appeal fatally flawed in the Circuit Court and therefore without merit in this Court. Opinion pages 1-2, item 1.

The Appellant correctly notes that the Probate Court required further authorization for the distribution of estate assets.⁷ Response, page 9. The Appellant does not, however, explain how this “did not adequately protect the interests of Appellant...” Because the Probate Court’s order did protect the interests of the Appellant within the value of the Estate, the appeal from that order was unreasonable.

⁶ Section IV of the Response proclaims “Allegations to the contrary by Respondent are unsupported and untrue.” Respondent does not know, and it isn’t clear, what allegations are referenced but Respondent knows that its comments relating to unknown decedent communications have been accordingly transparent. The Appellant frequently attributes artificial positions to Respondent only to knock them down like a straw man.

⁷ Specifically, further order of the Probate Court would be required for such distributions.

Appellant points to its consent to certain probate matters in an apparent effort to appear reasonable. This is really beside the point. While it is true that Appellant has consented to the sale of a few Estate assets, the proceeds of those sales were either deposited in the Probate Court protected account or spent on Court approved real estate carrying costs. While it is also true that Respondent has not petitioned the Probate Court for any disbursements – such as for counsel’s fees, this was an informed decision to wait. The highly litigious nature of Appellant and its counsel made it clear early that disputes that could be avoided -- should be avoided -- to circumvent adding to the already exorbitant legal costs of this litigation.

As stated in the Motion for Sanctions, the Respondent did suggest the possibility of court oversight as an alternative to a costly and unnecessary commercial bond sought in an amount greater than the Estate’s value (Motion for Sanctions, footnote 3 and accompanying text). As footnote 3 observed, this offer was made to accommodate the Probate Court and in anticipation of a prompt resolution; it also was an effort to limit Appellant’s avenues of litigation and the great costs associated therewith. Contrary to its representation in the Response (page 10), Appellant did not consent to this proposed method of protection which would have been reasonable; Appellant needlessly appealed it.

d. Application of Collateral Estoppel Clear Despite Denials.

In Section VII of the Response, the Appellant asserts its position that the federal Administrative Law Judge’s decision did not have preclusive effect because it did not consider any “cross-claim” for indemnification against Dr. Thompson. The federal administrative court did not have Dr. Thompson as a party before it – despite Mr. Matthew’s misrepresentations to the contrary in the early stages of this litigation. (See footnote 14 of the Motion for Sanctions

and accompanying text together with referenced Exhibit B – June 24, 2010 letter of Matthews). Likewise the federal administrative court was not considering any state claim of indemnification.

As extensively analyzed by Judge Baxley in his summary judgment order, however, the federal administrative court was expressly dealing with PDHC’s fault and its right to rely upon Dr. Thompson when it came to Medicare compliance. And in that regard, the federal judge held that PDHC “is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship.” R.p.110. Accordingly, Judge Baxley found the issue of justifiable reliance – central to PDHC’s claims *including indemnification* – had been adjudicated and any contrary finding would be precluded. R.pp. 26-28. This prior adjudication did render any effort to achieve contrary findings without merit. As stated in the motion for sanctions, “*Appellant knew the issue of fault had been litigated to finality in the federal forum before it sought to shift that fault to the unsuspecting Estate of the muted decedent.*” Motion page 8 (footnote omitted).

While not particularly relevant to issue preclusion, this section of the Response also references admissions found in the Respondent’s Answer (implied duties owed to an employer and decedent’s knowledge of his disbarment status) as well as PDHC’s affidavits of ignorance as to the truth of Dr. Thompson’s Medicare OIG oversight. These submissions were also considered by the trial court; none of these admissions or affidavits creates the justifiable reliance needed by PDHC to establish its claims and precluded by the federal administrative adjudication.

III. Turner Padget Conflict Cleared But Still Used As A Tool of Abusive Conduct.

As candidly acknowledged by Respondent’s counsel in the sanctions motion, “It is regrettable that this conflict issue provided Appellant and its counsel with even a brief moment’s

fodder for their litigation tactics....” Appellant’s Response to the motion continues to use this fodder and Respondent’s counsel continues to regret its availability.

Nevertheless, every objective analysis of this conflict issue has resulted in an acceptance of the resolution reached – mandated withdrawal from the workers’ compensation matter with seamless substitution of counsel provided by the at-risk, in-control insurer approved by the Workers’ Compensation Commissioner – and continued representation of Respondent here only after full investigation, consultation with an outside ethics expert, confirmation of the absence of any disqualifying knowledge from PDHC, and Respondent’s consent and request that representation continue. Ethical complaints against Respondent’s counsel were dismissed⁸ without even a cautionary letter from the Office of Disciplinary Counsel.

Respondent’s counsel has conceded the initial concerns were legitimate. Respondent’s counsel has acknowledged regret in providing any fodder to the Appellant. But Respondent’s counsel has not misrepresented the conflict issue as the Appellant’s Response suggest – that would only fuel the litigation fires – something Respondent Estate desperately does not want to do in order to preserve the Estate. The worker’s compensation matter was settled with regard to basic liability and Appellant PDHC was a party in name only as the insurer had assumed full responsibility for the matter. The dormant matter was not fully ended as the undersigned (Attorney Josey) had been informed but the period of dual representation was harmless and no cause for disqualification in the instant matter.

Appellant’s Return implies that the matter was not fully investigated by counsel because there was no ultimate withdrawal from Respondent’s representation. Response at 6 (“When faced with the truth of the matter, counsel for Respondent could have investigated the matter,

⁸ See Exhibit F to Respondent’s Reply in Support of the Motion to Dismiss for Failure to Comply (filed November 14, 2012).

and recused themselves from further reorientation [sic] of Appellant [sic].”). Appellant *knows* the matter was investigated, *knows* that the Office of Disciplinary Counsel dismissed the complaint, and *knows* that an outside ethical expert was consulted before continued representation of Respondent.⁹ Despite this knowledge, Appellant continues to misuse a regrettable circumstance that it also *knows* was totally harmless. It is this continued misuse that counsel raises in the sanctions motion because it is simply unfair to the Estate, never mind its counsel, to continue to imply harm or continued wrongdoing.

IV. Megna Mistakes Admitted, Apology Offered, But Pattern Warrants Sanctions.

Finally, Appellant’s Response (Section VI) seeks to mitigate admitted mistakes made by counsel by tendering an apology together with the suggestion that any mistakes were accidental. Respondent is not before this Court seeking sanctions for accidental conduct – it seeks sanctions for a clear and consistent pattern of abusive and manipulative conduct. As noted in the sanctions motion itself, Appellant’s counsel has a pattern of using apologies and deprecatory appeasement mixed with manipulations and threats.

The letter of apology written to Judge Baxley and referenced in the Appellant’s response is just one of a continuous series of examples – an apology written after the fact of an order issued calling out counsel’s inappropriate conduct. While Judge Baxley did write a gracious comment in reply, he still found counsel in contempt of court as described in Exhibit H to the Motion for Appellate Court Sanctions.

Appellant’s response (Section VIII) considers the reference to other matters “legally and professionally improper.” These other orders and other matters are not included to prove the

⁹ Indeed, the affidavit of Professor Nathan Crystal detailing and analyzing the entire matter is on file with this Court (original filed August 12, 2011 in response to Motion of the Appellant). Even in its motion reply referenced in footnote 8 above (page4), Respondent observed “*This dead horse has been kicked and kicked and kicked* – in this Court, in the trial Court, and with the Office of Disciplinary Counsel.”

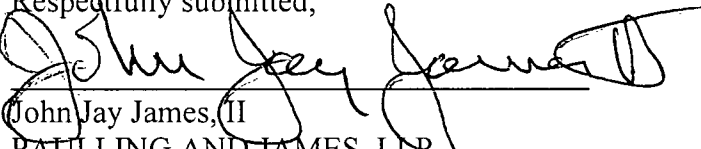
truth of Appellant's conduct here – but only to show that the pattern here is repeated in other times and places; so this is no accident, this is repetitive knowing conduct that warrants the sanctions sought. Even as recently as last week this Court issued an order dealing with PDHC, Mr. Matthews, and Mr. Megna in yet another appellate matter where procedures were not followed and deadlines not met (Tracking Number 2012-213052).

CONCLUSION

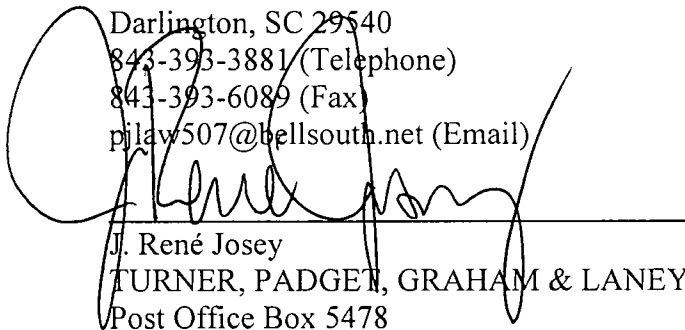
Abusive practices like those pursued by the Appellant and its lawyers in this Court need to be sanctioned to preserve respect for the judicial process and the integrity of the legal profession.

September 20, 2013

Respectfully submitted,



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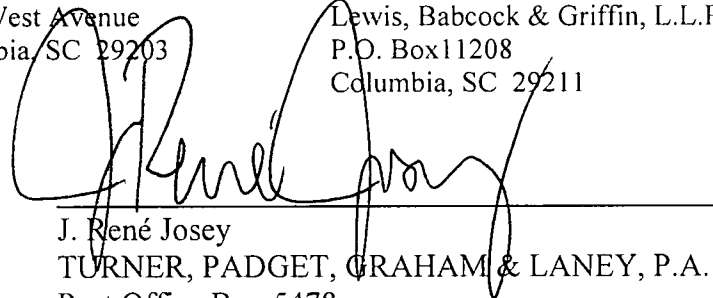
PROOF OF SERVICE

I certify that I have served a copy of the Reply in Support of Appellate Court Sanctions by depositing copies of the same in the United States mail, postage prepaid, on September 20th, 2013, to all counsel of record at the following addresses:

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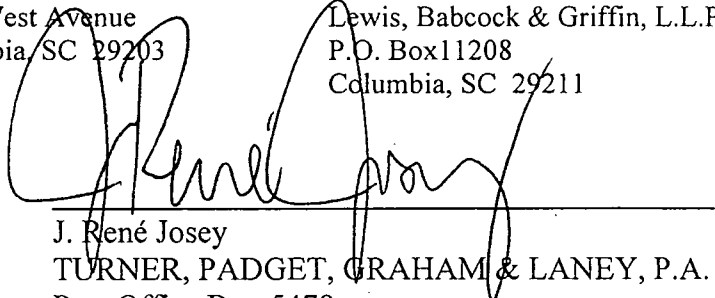
PROOF OF SERVICE

I certify that I have served a copy of the Reply in Support of Appellate Court Sanctions by depositing copies of the same in the United States mail, postage prepaid, on September 20th, 2013, to all counsel of record at the following addresses:

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September 20, 2013

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed you will find an original and six copies of the following documents for filing with your Court:

- 1) Respondent's Reply in Support of Appellate Court Sanctions in these consolidated appeals; and
- 2) Proof of Service.

I have enclosed one extra copy of these documents so that a filed copy can be returned for my records in the self-addressed envelope provided.

By copy of this letter to all counsel as indicated below, we are serving them as indicated in the corresponding proof of service. Thank you for your assistance in this matter.

Sincerely,

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

J. René Josey

JRJ:vlb
Enclosures

Cc: Jay James, II, Esq. (w/enclosures via email only)
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