THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Honorable Carolyn Matthews

Docket No.: 13-ALJ-08-0159-AP

Peter Brown,
Appellant,

v.

South Carolina Department of Health and Human Services,
Respondent.

MEMORANDUM OF LAW REQUIRED BY SCRCP RULE 240(c)(2)[1]

I. Background.

This litigation was initiated in 2005, when Respondent's agent notified Peter's guardian of their intent to terminate 12 hours a week of companion services which had been in his plan of care for many years and has been determined by his physicians to be medically necessary. The notice of termination did not contain the information required by 42 C.F.R. 431.210. Three days of hearings were held on Respondent's motion to dismiss, but a hearing on the merits has never been held. The hearing officer dismissed

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[1] Note: Due to the shortness of time to file this Motion, Exhibits are listed, but will be provided within one week.

Peter's appeal, for reasons not contained in the notice of termination, finding that he did not have jurisdiction, after three days of hearings on Respondents' motion to dismiss. The Administrative Law Court agreed with the hearing officer that jurisdiction was lacking and that court dismissed his appeal also. This Court issued an order on April 20, 2011 determining that the Administrative Law Court applied an incorrect legal standard in dismissing Peter's 2005 Medicaid "fair hearing" appeal. Exhibit 1. That order remanded his case to DHHS, with directions to provide a hearing on the merits in accordance with that opinion and pursuant to 42 C.F.R. § 431.220(a)(1)-(2). DHHS is obligated to provide a evidentiary hearing meeting all of the due process requirements of *Goldberg v. Kelly*, 397 U.S. 254, 261(1970) and to issue a final administrative decision with "reasonable promptness," which courts have interpreted as meaning within 90 days.[2] 42 U.S.C. 1396a(a)(3) and *Doe v. Kidd I*, 501 F.3d 348, 354 (4th Cir. 2007). *See also* 42 U.S.C. 1396a(a)(3) and 42 C.F.R. 431.200 et. seq.

On remand from this Court, instead of providing a simple fair hearing, as ordered by this Court in 2011, and in violation of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the hearing officer reviewed the pretrial briefs submitted by the parties and decided to dismiss Peter's appeal, without providing him an opportunity to cross examine the agency's witnesses or to present his case orally. This is exactly what the Court in *Goldberg* found to be unconstitutional - terminating benefits based on written responses, without providing an oral argument meeting basic due process requirements - a hearing specifically required by federal statute in this case. The hearing officer was not satisfied

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[2] Or, in some cases, a shorter time.

with Peter's counsel's written response, which simply requested that she comply with the Medicaid Act by providing the required evidentiary hearing. Exhibit 3. Then, a few days before the scheduled hearing in March of 2013, the hearing officer granted Respondent's motion to dismiss his appeal, over the objections of Brown's guardian, without providing the mandatory evidentiary hearing. Exhibit 4. By order dated February 4, 2014, the Administrative Law Court again erred as a matter of law in dismissing Peter's appeal of DHHS' wrongful denial of his clearly and unambiguously established constitutional and statutory due process rights to an evidentiary hearing. Exhibit 5.

According to reports from Peter's guardian and his psychological services provider, the services ordered by Judge Childs have not been provided.[3] Exhibits 8 and 9. When the hearing officer arbitrarily dismissed his case, based on the agency's promise to provide services, Peter was denied the right to present this evidence at the required hearing. 42 C.F.R. 431.242. He was not given the opportunity to cross-examine Respondent's witnesses or to present witnesses who would testify that the services have not been restored and that his condition has deteriorated since that time. He was prevented from presenting his plans of care into the record at the hearing, which included

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Respondent claims that Peter's services have been restored, but his guardian disagrees and asserts that those services have not been provided in the amount, quality and kind as were provided in 2009, as recommended by Magistrate Judge Bruce Howe Hendricks and ordered by Judge Michelle Childs. Exhibits 6 and 7. *Peter B. v. Sanford*, Civil Action No. 6:10-767, Entry 71, Report and Recommendation of Magistrate Judge (S.C.D.C. November 24, 2011) and Order of Judge Childs, Entry 93, dated February 1, 2011. But this is an issue of enforcement of the order, not an indication that Peter is not the prevailing party. Respondent should not be allowed to avoid fees by shirking its responsibility and violating this Court's order.

services ordered by Judge Childs. This evidence is important to show not only that Peter is the prevailing party, but that he is entitled to fees under the state fee statute, because the agency was not substantially justified in refusing to provide the services that were ordered by his physicians.[4] Exhibits 10 and 11.

2. Violations of the Medicaid Act.

42 C.F.R. 431.210 identifies specific information that must be contained in a notice of adverse action involving Medicaid services. Notices must include the reason for the action as well as citation of the statute or regulation upon which the adverse action is based. Procedural rights of Medicaid participants include the right to bring witnesses, to establish all pertinent facts and circumstances, to present an argument without undue interference and to refute any testimony or evidence, including the right to cross-examine witnesses. 42 C.F.R. 431.242. Matters which must be considered at the hearing include agency action or failure to act with reasonable promptness on a claim for services, including both initial and subsequent decisions regarding eligibility. 42 C.F.R. 431.241. Hearings must be conducted at a reasonable time, date and place only after written notice meeting the requirements of 42 C.F.R. 431.210 by an impartial hearing official. 42 C.F.R. 431.240(a). Where the hearing involves medical issues, the hearing officer is authorized to order a medical assessment at agency expense which is made part of the record. 42 C.F.R. 431.240(b). 42 C.F.R. 431.244(a) provides that:

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When a case is remanded to DHHS, the hearing officer purges the record and does not include testimony, physicians' reports or evidence contained in the record prior to the remand in the Record on Appeal when the hearing officer dismisses an appeal on remand without providing a fair hearing.

> Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing. (Emphasis added.)

When the agency fails to provide an evidentiary hearing, it is impossible to base a decision to dismiss the appeal on evidence introduced at the hearing. Federal regulations specifically prohibit an agency from dismissing a Medicaid appeal except where the participant requests dismissal in writing, or where the participant fails to show up at a scheduled hearing without good cause. 42 C.F.R. 431.22. Neither of these grounds existed in this case when DHHS committed legal error by dismissing Peter's administrative appeal in 2013 and the Administrative Law Court committed legal error by upholding that decision in 2014. Not only was Peter prevented from introducing evidence into the record at a hearing, showing that those services have not been restored, he was hindered in his ability to build support for his claim that the agency lacked substantial justification and that it would be unjust not to order the payment of his legal fees.

42 U.S.C. 1396a(a)(3) requires that DHHS provide a fair hearing, and 42 U.S.C. 1396a(a)(8) requires that medical assistance be provided with "reasonable promptness." Those statutes are unambiguous, as interpreted by Medicaid Act regulations and court cases, and they are mandatory. Because DHHS has been a defendant for more than ten years in *Doe v. Kidd*, that agency should be intimately familiar with the requirements of those statutes. The Fourth Circuit has held that:

> Federal regulations direct state agencies to determine an applicant's eligibility for Medicaid within ninety days of the date of application and to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures." 42 C.F.R. §§ 435.911, 435.930 (2002).

Doe v. Kidd I, 501 F.3d 348, 354 (4th Cir. 2007). As even the dissent in *Doe v. Kidd I* recognized:

> Of course, if a state failed to provide a Medicaid recipient with adequate pre-deprivation due process in the form of a fair hearing, then a 42 U.S.C. § 1983 action could be brought against the state, because the Fourteenth Amendment would supply the right in these circumstances. Cf. *Goldberg v. Kelly,397* U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

The agency's absolute refusal to comply with these statutes and regulations is an issue of great public interest. DHHS has committed legal error by dismissing appeals in other cases based on Medicaid participant's responses to "interlocutory orders" - or sometimes by hearing officer's dissatisfaction with responses to their emails threatening to dismiss cases - without providing evidentiary hearings that are unambiguously required by 42 U.S.C. 1396a(a)(3) and in violation of federal regulations contained at 42 C.F.R. 200 et. seq. See *Hickey v. DHHS*, Docket No. 10-ALJ-08-0650AP (SCALC July 19, 2011) (Exhibit 12); *Edge v. DHHS*, Docket No. 10-ALJ-08-0501-AP (SCALC October 29, 2010); *Eubanks v. DHHS*, Docket No. 10-ALJ-08-0502-AP (SCALC October 29, 2010); *Morgan v. DHHS*; Docket No. 10-ALJ-08-0503-AP (SCALC October 29, 2010). See also order of Administrative Law Court and initial brief in *Waddle v. DHHS*, pending in the South Carolina Court of Appeals. Orders dated November 19, 2013, December 23, 2013 and Initial Brief filed in the Court of Appeals. Exhibits 13, 14 and 15. Yet, this same practice of dismissing Medicaid appeals without providing a fair hearing continues unabated, without corrective action in this and other cases because no court has held DHHS accountable for these continuing violations.

The Annual Accountability Reports of the Administrative Law Court demonstrate that the court has flagrantly ignored the reasonable promptness standards of the Medicaid Act. According to the Administrative Law Court's Report for FY 2011-2012, its "suggested time frame" for disposing of Medicaid appeals was 180 days, double the time CMS allows for a State to issue a final administrative appeal decision. *See* http://dc.statelibrary.sc.gov/bitstream/handle/10827/9423/ALC_Annual_Accountability_Report_2011-2012.pdf?sequence=1 at 14. 42 C.F.R. 431.244(f) and *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012). That year, the Administrative Law Court only ruled upon 40% of its Medicaid appeals within this 180 day period, taking an average of 284 days to decide Medicaid appeals, not counting the time spent in proceedings at DHHS or earlier proceedings in the Administrative Law Court on the same issue. 2011-2012 Id. at 15. By the next year, the average length of time to decide a Medicaid appeal had increased to 422 days and only 23 percent of the Medicaid appeals were decided within 180 days. See Accountability Report for FY 2012-2013 at http://www.scalc.net/pub/FY2012-2013%20ALC%20Accountability%20Report.pdf. These numbers do not even include the number of days spent in DHHS "fair hearing" Never Never Land, where the State Medicaid Agency totally ignores the federal standard of promptness, despite being found by the Fourth Circuit to be in violation of those mandates in another case involving the same Medicaid waiver program operated by DDSN.

CMS has addressed the State's illegal use of remands to drag out administrative proceedings in the State Medicaid Manual (SMM). This Manual contains CMS' official

interpretations of the law and regulations. It is binding on Medicaid State agencies and the Administrative Law Court. *Shakhnes v. Berlin*, 689 F.3d 244, fn 11 (2d Cir. 2012). The SMM states that "a conclusive decision in the name of the State Agency shall be made by the hearing authority" and that a remand "is not a substitute for a definitive and final administrative action." SMM § 2903.2(A). Yet, these agencies, all within the Executive Branch, have a long history of dragging out administrative appeals for years, flat out ignoring the reasonable promptness mandate, refusing to grant hearings on the merits and dismissing fair hearing appeals based on agency policy without complying with 42 U.S.C. 1396a(a)(3) or the unambiguous requirements set forth in 42 C.F.R. 431.424 and 244.

Then, once a DDSN Medicaid waiver participant prevails, the agencies involved have refused to enforce court orders. As in *Doe v. Kidd I and II*, Respondent promised to provide services to Peter, allegedly in order to dismiss state administrative proceedings, but Peter's guardian alleges that DHHS then refused to provide the service with reasonable promptness.[5] *Doe v. Kidd I*, 501 F.3d 348, 354 (4th Cir. 2007) and *Doe v. Kidd II*, Case No. 10-1191 (4th Cir. March 24, 2011). In *Doe I*, the Fourth Circuit held that Medicaid participants have a private right to bring an action in federal court for violation of the reasonable promptness requirements of the Medicaid Act. Id. In *Doe v. Kidd II,* the Fourth Circuit held that Doe was the prevailing party entitled to legal fees and to receive residential habilitation services that had been wrongfully denied for many years. In *Doe v. Kidd* I, as in Peter's case, Respondent caused Doe's appeal to be dismissed by promising

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[5] This issue is contested by Respondent.

services that were never delivered:

> At the March 2003 hearing on DDSN's motion to dismiss, Doe conceded that DDSN had moved her to the top of the critical waiting list and had found her eligible for services under the waiver program earlier that month. Finding that all the appealed issues had already been resolved in Doe's favor, the DHHS hearing officer dismissed Doe's appeal. Doe did not appeal the dismissal to the state's Administrative Law Judge Division. At the end of March, however, Doe learned that she had been terminated from the waiver program. She requested a hearing on this decision and, several months later, learned that her Medicaid eligibility was to terminate as well (although it never did).

Doe v. Kidd I at 352. Fast forward four years later, to 2011. The Fourth Circuit substantiated that DHHS was in violation of the reasonable promptness requirements of the Medicaid Act, because residential habilitation services **that were contained in Doe's 2003 plan of care still** had not been provided by the South Carolina Department of Health and Human Services. *Doe v. Kidd II, supra.* That Court held that DHHS had "utterly failed" to provide the required services with reasonable promptness:

> Indeed, Defendants admit that they abdicated their responsibility to furnish Doe with the necessary services in the least restrictive environment...

Id. Peter's guardian claims that, as in *Doe v. Kidd II,* DHHS is attempting to substitute a lesser service for the service Peter received for more than a dozen years, which the agencies now admit he is entitled to receive again. The guardian alleges that instead of providing 12 hours a week of companion services from a single companion, who has no other duties during those hours than to work with Peter and transportation, DHHS is providing a lesser service that is not equivalent to the services he received before DHHS wrongfully terminated those services in 2009.

In this case, Respondent had caused the federal district judge in *Peter B. v. Sanford* to stay his federal case, over his objections, by informing the federal court that Peter would be provided a fair hearing before a DHHS hearing officer in March, 2014. See Joint Status Report dated February 20, 2013 and Decision of federal judge, Case No. 6:10-767-TMC (D.S.C. March 7, 2013). Exhibits 16 and 17. It is contemptuous and disingenuous to fail to provide the hearing ordered by this Court nearly three years ago, while using these proceedings to stalemate Peter's federal claims for violation of the Americans with Disabilities Act and the Medicaid Act.[6]

3. Petition for legal fees pursuant to S.C. Code 15-77-300

S.C. Code § 15-77-300 provides for the allowance of fees in "any civil action brought by the State...or by any party who is contesting state action..." *Layman v. State,* 376 S.C. 434, 658 S.E.2d 320, 325 (S.C. 2008). Fees are payable to a prevailing appellant, except where the court finds that "the agency acted with substantial justification in pressing its claim against the party and there are no "special circumstances that would make the award of attorney's fees unjust." In this case, the agency has not followed a "constitutional mandate that has not been invalidated by a court of competent jurisdiction." Instead, the Respondent in this case has blatantly and voluntarily disregarded its constitutional and statutory mandates by violating Peter's constitutional

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Because the federal court stayed Peter's federal case pending the expected fair hearing; two other severely disabled waiver participants who are plaintiffs in that case have been prevented from appealing the decision that their cases are moot based on the unfulfilled promises of DHHS.

and statutory due process rights. In *Doe v. Kidd I*, the Fourth Circuit warned DHHS that failing to provide a fair hearing would violate the Medicaid participants' right to due process and no court of competent jurisdiction has held that the fair hearing requirements in 42 U.S.C. 1396a(a)(3) and 42 C.F.R. 431.200 et. seq. have been invalidated by any court. Respondent has repeatedly been instructed by the federal courts that it must comply with all requirements of the Medicaid Act. *Doe v. Kidd I and II, Hickey v. DHHS, Peter B. v. Sanford, supra.*

Counsel has recorded more than 700 hours in Peter's administrative appeal over the course of the more than nine years this appeal has been pending. Exhibit 18. Peter or his family have made partial payment of more than $60,000 in legal fees in a case where Peter was "contesting state action" of the termination of services that his physicians had determined to be medically necessary. *Layman* at 326. As in *Layman,* the agency's "maintenance of litigation" has not been substantially justified. Id. At 327. The statutes and federal regulations at issue in this case are "unambiguous" as to the federal mandate to provide a fair hearing and to allow dismissal only where either the participant requests dismissal in writing or where the appellant (or his representative) fails to appear at a hearing. Id. at 328. DHHS "did not have a reasonable basis in law or in fact" to dismiss Peter's appeal. Id. at 327. Thus, Respondent was "not substantially justified in pressing their claim." Respondent has even admitted in this case that Peter is the prevailing party, and Respondent argues that Peter has received all that he is entitled to receive. Prevailing party status for purposes of the state fee statute does not depend upon the wrongdoer's compliance with an order, it just requires that the appellant succeed in his legal claim.

Doe v. Kidd II, supra.

Petitioner respectfully requests an evidentiary hearing on the petition for legal fees, with reasonableness determined by this Court according to the requirements of S.C. Code § 15-77-300, taking into consideration the nature, extent and difficulty of the case, the time devoted, the professional standing of counsel, the results obtained and the customary legal fees for similar services. Petitioner requests, once the issue of the need for the appointment of a GAL is resolved, permission to submit evidence on the details of time spent and the reasonableness of fees.

Petitioner notes that the statute specifically exempts certain civil actions, including agency actions relating to the establishment of public utility rates, disciplinary actions of licensing boards, habeas corpus or post conviction relief actions, child support actions and child abuse and neglect actions, but no where in the statute does the General Assembly exclude from the statute those civil actions brought by disabled persons to maintain medically necessary services that the Medicaid Act requires DHHS to provide.

Petitioner respectfully requests a hearing on fees and the fair allocation of fees awarded. Given the length of time this case has lingered due to the refusal of Respondent to simply provide an evidentiary hearing and to issue a final state administrative decision within 90 days, counsel requests an award of interim legal fees and that Respondent immediately be ordered to pay the fees which have resulted from the violation of this Court's 2011 order. *Doe v. Kidd, II, supra.*

4. Power of Court to punish for contempt.

The inherent power of this Court to punish for contemptuous conduct is well established. *Miller v. Miller,* 375 S.C. 443, 453-54, 652 S.E.2d 754, 759-60 (Ct.App.2007) (internal citations omitted). In *Ex parte Jackson,* this Court recognized that:

> Courts are "vested by their very creation with the power to preserve order in judicial proceedings and to enforce judgments and orders." *Id.* Contempt results from the willful disobedience of a court's order. *Id.* A willful act is defined as one which is done voluntarily and intentionally with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done. *Id.*

As that Court held "Constructive contempt is contemptuous conduct occurring outside the presence of the court." This Court ordered DHHS to provide Peter with an evidentiary hearing in 2011 and the record demonstrates that DHHS violated that order. Petitioner requests that this Court review the underlying facts of this case and determine whether sanctions should be issued for Respondent's willful acts, which have been voluntary and intentional to do something the law forbids and, with specific intent, to fail to do something that the law requires to be done (providing notice meeting the requirements of 42 C.F.R. 431.210, providing an evidentiary hearing meeting the requirements of 42 C.F.R. 431.200 et. seq., and providing services with reasonable promptness). Counsel suggests that, separate and apart from Peter's right to claim fees under South Carolina Code § 15-77-300 et. seq., that the Court consider the award of fees incurred since remand by this Court as an appropriate sanction. The Court would, of course, consider whether such and award would reduce fees ultimately awarded under the state fee statute.

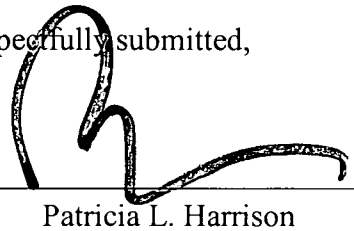
During these proceedings Respondent or its agents have retaliated against Peter's

advocates and providers of services. Exhibits 8 and 9. In considering whether contempt charges are appropriate against the Respondent, Petitioner requests that the Court hold a hearing to consider allegations of retaliation against Peter and persons providing advocacy and services to Peter, with evidence presented at an evidentiary hearing once the Court's decision regarding the appointment of a guardian ad litem is made. Petitioner respectfully requests a protective court order Respondent and its agents to cease and desist any retaliatory conduct against Peter, his family or his counsel.

5. Conclusion

Petitioner requests an order finding that Peter is the prevailing party in this action entitled to legal fees, that the state has violated the reasonable promptness requirements of the Medicaid Act and has acted without substantial justification in the wrongful actions described above. Petitioner requests an order to be relieved as counsel and for the payment of reasonable legal fees, including interim fees, with a determination of what portion of those fees are payable to Peter in reimbursement for the fees and costs he has paid. In addition, Petitioner requests that this Court consider whether the contemptuous conduct of the Respondent should be punished and a protective order protecting Peter, his family and his advocates. Finally, Petitioner requests such other relief described above and other relief as this Court shall determine to be just and right.

Respectfully submitted,



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March 6, 2014

IN THE ADMINISTRATIVE COURT OF APPEALS

Appeal of the Decision of Administrative Law Judge Carolyn Matthews

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Peter Brown,
Appellant,

v.

South Carolina Department of Health and Human Services,
Respondent

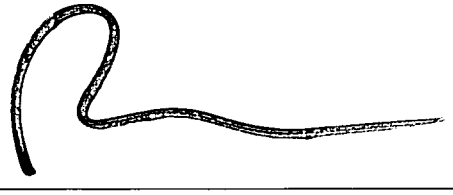
Docket No. 13-ALJ-08-0159-AP

CERTIFICATE OF SERVICE

I certify that I have served the Motion to be Relieved and other Relief, Memorandum of Law and affidavit of Patricia Logan Harrison on Kenneth Woodington, Esq. and Richard Hepfer, Esq. at the address below and with the South Carolina Administrative Law Court by hand delivery on March 6, 2014.

Kenneth Woodington, Esq.
1611 Devonshire Drive
Columbia, South Carolina 29204

Richard Hepfer, Esq.
DHHS
Main and Laurel Streets
Columbia, SC



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March 6, 2014

IN THE ADMINISTRATIVE COURT OF APPEALS

Appeal of the Decision of Administrative Law Judge Carolyn Matthews

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Peter Brown,
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South Carolina Department of Health and Human Services,
Respondent

Docket No. 13-ALJ-08-0159-AP

CORRECTED CERTIFICATE OF SERVICE

I certify that I served by hand delivery the Motion to be Relieved and other Relief, Memorandum of Law and Affidavit of Patricia Logan Harrison on Richard Hepfer, Esq. at the address below and advised Byron Roberts by email that the documents were left downstairs at DHHS on March 6. 2014.

Richard Hepfer, Esq. (notifying Byron Roberts, Esq. via email)
DHHS
Main and Laurel Streets
Columbia, SC

I served these documents on private counsel for DHHS at the address listed below, and with the South Carolina Administrative Law Court by hand delivery on March 7, 2014.

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Columbia, South Carolina
March 7, 2014

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March 6, 2014

The Honorable John C. Few
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: **Peter Brown v. SCDHHS**
Appeals' Case No. 05-MISC-015
ALC Docket No. 13-ALJ-08-0159-AP

Dear Judge Few:

Please find enclosed my motion to be relieved as counsel and for other relief in Peter Brown v. DHHS. It is my understanding of Rule 240 that the filing of this motion to be relieved automatically stays the deadline for filing an appeal. This is the decision of remand pursuant to the opinion you issued in 2011. Due to the short time for preparing the supporting documents, we plan to file the exhibits separately, hopefully by tomorrow.

A check for the filing fee an six copies are enclosed. I am respectfully requesting a hearing on this motion. Please advise if any additional information is needed.

Cordially,

Patricia L. Harrison

c: Carolyn Brown
Richard G. Hepfer, Esquire

Enclosures
PLH:jnh