THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2011-198092 and 2011-209666
Case No. 2010-CP-10-3410

RECEIVED
APR 10 2014
S.C. SUPREME COURT

Dr. Cynthia Holmes, M.D.

Appellant/

Petitioner,

v.

East Cooper Community Hospital, Inc.;
Tenet HealthSystem Medical, Inc.,

Respondents.

APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

On March 26, 2014, the Supreme Court filed an opinion in this case, affirming the Circuit Court's dismissal of this case and affirming the Circuit Court's imposition of sanctions against Dr. Holmes, the Plaintiff and Appellant in this matter, personally, in the form of attorney's fees and costs, under the S.C. Frivolous Civil Proceedings Sanctions Act S.C. Code 15-36-10, et seq. (hereinafter FCPSA) The Appellant has reviewed the Court's opinion, and respectfully wishes to identify and be heard, pursuant to Rule 221, SCACR on issues which she feels the Court has overlooked or misapprehended in coming to its conclusions.

ARGUMENT

I. The record does show that Respondents engaged in successive identical "motions to dismiss" pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

In section I of the Court's Opinion, entitled "Successive 'Motions to Dismiss,'" the Court states that "Appellant mischaracterizes the nature of Respondents' motions. The characterization of Respondent's motions as 'motions to dismiss' contradicts the record." This is a mistake of fact and, potentially, one of law. Although it may be true that the motions' captions stylized them as a motion for judgment on the pleadings, a motion to reconsideration, and a motion for summary judgment, respectively, the stylization only addressed, in each document, part of the motion being brought before the Court. This case was dismissed before trial and for lack of subject matter jurisdiction. To address this issue, one of subject matter jurisdiction, the proper vehicle is not a motion for summary judgment, or a motion for judgment on the pleadings, or even a Rule 12(b)(6) motion. It is well founded that "The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP..."

Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004) "The question of subject matter jurisdiction is a question of law for the Court, not a jury question. *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993). If the facts which give rise to a jurisdictional issue are in dispute, the court, not a jury, must find the facts." *Id.*

The records shows that the Respondents began this case with an Answer, which included a Rule 12(b)(1) motion to dismiss, followed that with a motion to dismiss which incorporated the motion to dismiss from the answer, submitted a memorandum in support of a motion to dismiss under Rule 12(b)(1), then moved for reconsideration, specifically, as to the motion to dismiss under Rule 12(b)(1), and, finally, moved for a dismissal for lack of jurisdiction under Rule 12(b)(1) before Judge Harrington. The case was ultimately dismissed for lack of jurisdiction under Rule 12(b)(1), not on Summary Judgment. In support of this request for a rehearing on this matter, the Appellant cites to the following portions of the record:

ROA P.15 - Defendant's Answer, Motion to Dismiss, and Counterclaims – This is the first page of the respondents' Answer. It specifically is stylized as a motion to dismiss. "ANSWER, MOTION TO DISMISS, AND COUNTERCLAIMS OF DEFENDANTS..."

ROA P. 28 – Paragraph 49 of the Defendant's Answer, Motion to Dismiss and Counterclaims – Paragraph 49 of the Answer reads: "FOR A FOURTH DEFENSE AND BY WAY OF A MOTION TO DISMISS PURSUANT TO RULE 12(B)(1), SCRCP (Lack of Subject Matter Jurisdiction) "49. Defendants, further answering the Plaintiff's Complaint and as an affirmative defense thereto, hereby move, pursuant to Rule 12(b)(1), SCRCP, to dismiss Plaintiff's Complaint on the grounds that this Court lacks subject matter jurisdiction to address

and private hospital's staffing or privileging decisions."

ROA Pp. 635-636 Notice of Motion and Motion for Judgment on and Dismissal of Plaintiff's Pleadings – In this motion, although it is stylized as a motion for judgment on the pleadings, which is Rule 12(c), the Respondents bring a separate motion to dismiss under Rule 12(B)(1). Section I. reads: "This Court respectfully lacks jurisdiction over the subject matter of the present dispute." On the following page, the motion incorporates the motions to dismiss set forth in the Answer: "This motion is made in association with the Motions to Dismiss plead and set for the in the Answer of the defendants, the grounds of which are included and incorporated herein by reference."

ROA P. 642 – Defendant's Memorandum in support of motion to dismiss for lack of subject matter jurisdiction and motion for judgment on the pleadings – This is the memorandum in support of the motions to dismiss raised in the Answer and the motion from ROA page 635. This memorandum clearly shows that there are two motions being pursued, a motion to dismiss for lack of subject matter jurisdiction, and another separate and distinct motion for judgment on the pleadings. On the following page, the two motions are clearly separated and pursued separately. On Page 643, defendant specifically cites to South Carolina law, explaining that the only vehicle for addressing lack of subject matter jurisdiction before a trial is through a Rule 12(B)(1) motion.

ROA P. 658 – Notice of Motion and Motion for Reconsideration – In this motion, the Respondents not only admit that they had previously filed a motion to dismiss for lack of subject

matter jurisdiction, but they also admit that Judge Dennis denied it. Respondents specifically "move this Court for an Order reconsidering its oral ruling denying defendant's motion to dismiss on the basis of subject matter jurisdiction." The Respondents then go on to tell Judge Dennis that "while this Court ruled that Defendant's motion would be more appropriately addressed as a motion for summary judgment, subject matter jurisdiction is properly raised only through a Rule 12(B)(1) , SCRP, motion to dismiss." Respondents then specifically request that the motion for reconsideration be limited to the issue of subject matter jurisdiction, under Rule 12(B)(1).

ROA Pp. 596-597 – Transcript of hearing before Judge Dennis – At the hearing on the respondents' motion for reconsideration, the respondents' attorney clearly characterized his prior motion and the motion for reconsideration as motions to dismiss for lack of jurisdiction under Rule 12(B)(1):

> MR. MCQUEENEY: The defendants filed and Answer and moved to dismiss both under 12(b)(6) and under 12(b)(1) for lack of subject matter jurisdiction. Your honor denied the motion and we move to reconsider with respect to the 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The grounds for that really are that – as far as subject matter jurisdiction is concerned, that's a Rule 12(b)(1) motion. The case law says that it cannot be converted into a motion for summary judgment, so it's more appropriately raised as a 12(b)(1) motion.

Mr. McQueeney was right. South Carolina law will not allow a motion to dismiss for subject matter jurisdiction to be treated as a summary judgment matter. "If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the court should treat

the motion as if it were a Rule 12(B)(1) motion." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993). After having been apprised that South Carolina law would not allow him to convert a motion to dismiss for lack of subject matter jurisdiction to a summary judgment motion, Judge Dennis responded by denying the Respondent's 12(b)(1) motion to dismiss:

> THE COURT: I can help you. You've got a ground for appeal. Mr. Johnson, I assume you want me to deny the Motion to reconsider?
>
> MR. JOHNSON: That's correct, Your Honor.
>
> THE COURT: It's denied. Thank you. Thank you very much. Have a great day.
>
> (ROA 597)

This quote, of course, was from Judge Dennis, the same judge who authored the 2005 dismissal of Appellant's claims and awarded sanctions in the previous case. Despite Judge Dennis' telling the Respondents that they had a ground for appeal from his decision, they never did appeal it.

ROA P. 663 – Defendant's Notice of Motion and Motion for Summary Judgment –Although Respondents entitled their motion as one for summary judgment in the caption, it included a separate motion to dismiss, pursuant to Rule 12(b)(1), SCRCP. Respondents requested an Order granting summary judgment under Rule 12(b)(1). As was just mentioned above, the Courts are instructed, under South Carolina law, to treat a motion to dismiss for lack of subject matter jurisdiction, when brought as a rule 56 motion for summary judgment, as a rule 12(b)(1) motion to dismiss *Id.* Thus, this motion would have, technically, had to be converted to a motion to dismiss under Rule 12(b)(1) rather than remaining a Rule 56 motion, especially in light of the fact that the Judge actually granted a dismissal solely on the grounds of a lack of subject matter

jurisdiction.

ROA P. 1213 – Page 14 of Defendant's Memorandum in support of its motion for summary judgment – Respondents close their argument for dismissal of the Appellant's claims (it should be noted that this case has never been dismissed, fully, as Respondent's counterclaims were never dismissed, and Appellant's motions to dismiss and motion to strike were never ruled on by Judge Harrington) by stating "Accordingly, this action should be dismissed pursuant to Rule 12(b)(1), SCRCP."

ROA P. 2 – Summary Judgment Order – Judge Harrington's order, dismissing this case is entitled "Summary Judgment Order" However, it contains only one section, and dismisses the case based on a lack of subject matter jurisdiction, not on the merits of the case. As mentioned above, the Courts are instructed, under South Carolina law, to treat a motion to dismiss for lack of subject matter jurisdiction even when brought as a rule 56 motion for summary judgment, as a rule 12(b)(1) motion to dismiss. *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993). Thus, this Order, as a matter of fact, is really an order granting Respondent's motion to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

A. Because the case was dismissed pursuant to Rule 12(b)(1) SCRCP, the FCPSA was not applicable, as it only applies to cases which were dismissed, pre-trial, by summary judgment, directed verdict, or judgment notwithstanding the verdict.

Despite its title, the plain language and substance of the defendant's proposed order, which was signed by the lower court without any changes shows that it was not granting summary judgment and therefore not an adjudication on the merits. Procedurally, the motion was converted to a motion to dismiss under Rule 12(b)(1). This is a matter of fact which has been overlooked or misapprehended by the Court, and which is crucial point to the consideration of

whether FCPSA was even applicable in this case. Where a case has not been tried, the plain language of the statute restricts its use to cases which have been dismissed by one of three methods, directed verdict, summary judgment, or judgment notwithstanding the verdict. These are all adjudications on the merits of the case. Rule 41(b) actually notes that a dismissal for lack of jurisdiction does not act as an adjudication of a case on the merits. "[A] dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction* or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Rule 41(b), SCRCP (*emphasis added*) Because this case was legally (according to *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993)) dismissed for lack of jurisdiction under a Rule 12(b)(1) motion, the plain language of the statute excludes the application of FCPSA. As the Court has stated in its opinion, "When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000).

B. Because there were successive motions to dismiss, pursuant to Rule 12(b)(1), and the Appellant survived at least one, prior to the final dismissal pursuant to Rule 12(b)(1), SCRCP, Appellant's action should not be found to be frivolous.

If the Court finds that, despite the plain language of FCPSA, it can be applied where a claim is dismissed for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP, and the entire case has not yet been adjudicated, the fact that there were successive motions to dismiss, ending with the dismissal of Appellant's claim, is still dispositive on the sanctions issue. The record shows that there were, in fact, successive motions to dismiss brought and addressed by the Court under Rule 12(b)(1) SCRCP. The Court's finding, on page 45 of the Opinion "the characterization of Respondents' motions as 'motions to dismiss' contradicts the record" is a

mistake of fact. This is a crucial mistake of fact in that the Court found that "Appellant's attempt to characterize these motions as successive 'motions to dismiss' is a veiled effort to make the facts of this case conform to those in *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), as appellant relies on Hanahan for the proposition that sanctions were inappropriate based on the posture of her case." Because the defendants made successive, unsuccessful motions to dismiss for lack of jurisdiction prior to the final, successful one, the Appellant's case does actually conform to *Hanahan*, and Appellant should have been immune from a finding by the trial Court that her case was frivolous. As argued below, the finding of frivolity is the first of two steps required to impose sanctions. Without a finding of frivolity, the sanctions cannot be awarded, even under the amended FCPSA.

II. The amended version of FCPSA still requires a judge to make an independent determination as to whether a claim or defense is frivolous in order to issue sanction without redefining the term "frivolous," and thereby leaves the developed case law as to the definition of a "frivolous action" as controlling law.

In section I. of its analysis, the Court points out that *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) was decided before the legislature amended FCPSA. Appellant believes that the Court, in its opinion has made an error of law, or at least in reading the clear language of FCPSA (as opposed to interpreting it). The 2005 Amendments do include a list of three factors for the Court to consider when deciding whether to award sanctions. The amendments, however simply add factors to consider that were not part of the prior act. They do not excuse the Court from having to make a finding of frivolity as to the claim or defense being evaluated. They do not change the basic nature and purpose of the act, which is to allow the Court to punish a party or attorney for bringing a frivolous civil claim or defense. While the Appellant recognizes that the Court cannot rewrite a statute where the language is clear and explicit, the appellant would

argue that the clear language of the statute, as amended both 1) continues to require that the Judge make a finding that the claim was frivolous, and 2) fails to explicitly define or re-define the term "frivolous." This leaves the Court with the authority and burden of applying the existing common law, such as the opinion from *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), and making the initial determination as to whether an action was frivolous or not. Section (C) of the Act reads:

> (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.

Appellant would point out that the statutory language clearly and explicitly requires three separate steps be taken by the trial court before a sanction may be imposed under the amended

FCPSA. The first is a dismissal of the case by summary judgment, directed verdict, or judgment notwithstanding the verdict (none of which occurred, as is stated above). Second, "the court shall proceed to determine if the claim or defense was frivolous." Only if the Court actually determines that the action was "frivolous" does it continue to the third step, to determine whether, by a preponderance of the evidence, one of the three conditions set forth in section (C)(1)(a), (b), and (c) have been met. If having one of the three conditions met was meant to replace the requirement that the Judge determine a claim or defense to have been frivolous, the amended Act would not make such a distinction, and would simply state that, "in order to determine whether a claim is frivolous," the Court should apply the following standard. If the standard actually did require nothing more than an affidavit from an attorney, stating that one of the conditions had been met, then it would seem logical that a like affidavit from another attorney, stating that the conditions were not met, would nullify the motion for sanctions. If that were actually the case, then Appellant wouldn't have been sanctioned, as her attorney has, on multiple occasions, stated that he felt the claims made in the case were not frivolous.

The only way the amended FCPSA makes sense is for it to be applied, literally, the way it is written. The Judge first has to dismiss based on the merits, then she has to make a determination as to whether the Judge finds the claim or defense to have been frivolous, and then determine, by a preponderance of the evidence, whether one of the thee conditions defined has been met. If this is the case, then the common law regarding the standards for determining whether a claim or defense is frivolous are still controlling law, solid time-tested reasoning to guide a Judge in determining whether a claim is frivolous or not. The reasoning from *Hanahan* is sound and applicable to the determination required by a judge under both pre and post amendment versions of the FCPSA. If a pretrial motion is made, and the party making it does not prevail, then it only

stands to reason that a reasonable attorney would continue with the claim. In that the Respondents brought the motion to dismiss for lack of jurisdiction on three occasions, and were unsuccessful on two prior to the final judgment, the ruling from *Hanahan* should have precluded Judge Harrington from clearing the second hurdle of under FCPA, finding the claim to have been frivolous. It should have also precluded the Judge from clearing the third hurdle, as any reasonable attorney who had survived one motion to dismiss for lack of jurisdiction would consider his legal stance to be sufficiently sound to survive an identical "second bite at the apple."

III. The Court has misinterpreted the allegations set forth in the Complaint in this case as requesting a review of or challenging the Hospital bylaws.

In the Court's Opinion, the Court cites to Plaintiff's Complaint, asserting that based on the quoted paragraph, the Plaintiff was actually trying to seek a review of the validity of the bylaws and the decisions of the credentialing committee, rather than seeking a decision from the Court not on "whether the rules are valid or reasonable or medically sound, but whether the rules were imposed in furtherance of a" breach of the duty of good faith and fair dealing in a separate settlement agreement. It is clear that the Court has not missed the assertion from Appellant's attorney, that he carefully drafted the Complaint in order to frame the claims such that they fell under *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court obviously heard, loud and clear that Appellant's counsel was trying to do that. It appears, however, that the Court may be under the impression that the Complaint actually seeks a review of the validity of the bylaws. A review of the allegations in the Complaint sheds light on the Appellant's attorney's statement "It is the denial of [Appellant's] right to apply for a change in status pursuant to the by-laws, which is the basis of her claims in this case." This portion was quoted by the Court in footnote 15 to the Opinion. Appellant would point out that it would be a

mistake of fact to find that the Complaint sought a decision as to the validity of the by-laws. In fact, she sought a decision on "whether the rules were imposed in furtherance" of a breach of her settlement agreement, which is the same language used in *Lee v. Chesterfield.* In the Complaint, the Appellant is not alleging that her injury came from a violation of the by-laws, but from the hospital's refusal to allow her to participate in the appeal process allowed under the by-laws. The one cause of actin plead in the Complaint applies only to a claim for a breach of the settlement agreement arising from a denial of access to the appeal process provided by the by-laws:

> 16. The Credentials Committee then denied the Plaintiff's application, an act which should have given Plaintiff the right to pursue an appeal, under the applicable bylaws.
> 17. When Plaintiff did timely pursue an appeal, the Defendants, in bad faith, denied her access to a complete, fair and full review.
> 18. The Defendant's actions were taken in bad faith, and in willful and knowing violation of the implied covenant of good faith and fair dealing, with the purpose of denying the Plaintiff access to the administrative process, and in an attempt to restrict Plaintiff from seeking a judicial remedy for the denial of her application for advancement in staff privileges through appropriate litigation.
>
> ROA Pp.12-13

The Court also fails to acknowledge the affidavit of Dr. Shershow, a professional hospital administrator, which was submitted by Appellant in support of her response to Respondents' motion for summary judgment. It can be found at ROA 1270. Dr. Shershow is an expert witness, who describes, in his affidavit, the fact that Appellant was denied access to the rights, protections, and procedures offered in the by-laws of the hospital, rather than asserting that the bylaws were somehow flawed, or challenging them in any way. Notably, Respondents never did depose Dr. Shershow or offer any evidence in rebuttal of his testimony. This is further factual evidence which the Court may have missed in the record, and which clarifies that the Appellant's purpose in bringing this suit was, as she has contended, to try to enforce a settlement agreement and sue for damages arising from its breach. The hospital's bylaws would have come into

consideration, as in the *Lee v. Chesterfield* case, only in that they were applied (or not applied) in such a way as to further or cause the breach of the settlement agreement.

Appellant sets this issue forth as a misapprehension of fact to the Court. If this was a factual mistake, then it would have affected the Court's decision regarding whether or not *Lee v. Chesterfield* might have applied to this case (the Court implied that it *might* have found that appellant's argument that *Lee* might not be limited to claims of civil conspiracy to be cognizable, had it reached that point), but also would have impacted, greatly, the decision on whether sanctions were justified.

IV. In finding that the Appellant lacked standing to make a constitutional challenge for lack of due process, the Court has misapprehended the fact that Appellant was not sanctioned as an attorney.

The Court has found that Appellant was sanctioned as an attorney, not as a non-attorney party (she couldn't have been sanctioned as a pro se litigant, as she was represented by counsel). Pursuant to the Court's reasoning, because she was sanctioned as an attorney, Appellant did not have standing to take the stance that FCPSA violates due process by holding non-attorneys to a reasonable attorney standard. FCPSA actually only allows non-attorneys to be sanctioned in the amount of attorney's fees and costs. Attorneys are subject to a reasonable fine to be paid to the Court. S.C. Code § 15-36-10(G) states:

> (G) Sanctions may include:
>
> (1) an order ***for the party represented by an attorney or pro se litigant*** to pay the reasonable costs and attorney's 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.
S.C. Code § 15-36-10(G) (*emphasis added*)

As a factual matter, the record shows that Judge Harrington awarded sanctions against Appellant as a party represented by an attorney and not, as an attorney. The only proper sanction against an attorney is a reasonable fine to the Court. Although she was a licensed attorney, and could have been subjected to sanctions meant for an attorney, she was not. Appellant was punished solely as a party. In the litigation, Appellant was also acting solely as a party. She was represented, and did not "enter the ring" so to speak, as an attorney in this case. As Justice Pleicones pointed out in his dissent, The Appellant chose to be represented so that she had a reasonable member of the bar, not herself, making the final call on whether to pursue this case. The Court's finding that the Appellant lacks standing to assert her constitutional challenge is based on a mistake of fact, and should be revisited. If the Court finds that Appellant does have standing to assert her constitutional arguments, they should be considered as part of the rehearing.

V. The Court's acknowledgement that Appellant's reading of *Lee v. Chesterfield* might be correct provides a new element to the evaluation of the sanctions issue in this case that should be considered on rehearing.

Judge Harrington stated, in her Order awarding sanctions that "by its express terms, the Lee decision was limited to civil conspiracy claims." Without actually reaching a decision as to whether Appellant's interpretation of *Lee v. Chesterfield*, the Court, in its opinion, has given an acknowledgement that Appellant might be right, but certainly that Judge Harrington was wrong. On page 54 of the Opinion, the Court states "While we agree with the gravamen of Appellant's argument that Lee might not be limited to claims of civil conspiracy..." This is a crucial statement by the Court, which should impact the Court's evaluation of the sanctions Order from

Judge Harrington. If, in fact, Appellant *might* be right about her interpretation of *Lee v. Chesterfield*, then her claim should not be found to have been frivolous. While the Court clearly feels that Appellant's case would have eventually strayed into areas precluded by *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980) and its progeny, and ascribes, to Appellant, this motive, the case never was allowed to progress to a point where this could be determined one way or another. The finding that Appellant's last lawsuit was "another attempt on her part to get at the heart of the hospital's internal procedures and staffing decisions" is based on a review of her past attempts at litigation, not this one. Nobody can actually tell whether Appellant's attorney would have been sufficiently skilled to steer the case successfully through the narrow straits provided by *Lee v. Chesterfield*, and around the deadly reefs of *Gowan v. St Francis* to reach the dubious mercies of a deliberating jury because Appellant and her counsel never got the chance to try. The Court's prediction of what may have happened had Appellant survived the final motion to dismiss appears to be based on consideration of past litigation, almost like "prior bad acts" which are prohibited under the rules of evidence.

It should be noted that Appellant made a motion to strike the mention of the prior cases from the Respondents' Answer, along with motions to strike some of Respondents' counterclaims. That motion is actually still pending as it was never ruled upon by Judge Harrington, even though she had heard oral argument on them and accepted proposed orders on the issues, leaving them still pending in the Circuit Court, as are the respondent's counterclaims. The South Carolina Supreme Court has held that material such as Orders from unrelated cases is objectionable as hearsay. In *Mizell v. Glover*, the South Carolina Supreme Court stated: " We find persuasive the jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for

admission in the context of another trial. *See Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001); *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 141 F.Supp.2d 320 (E.D.N.Y.2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for public records, Rule 803(8), FRE. *Nipper*. The Fourth Circuit made clear that its holding was firmly rooted in the common law. Id. (Citing 5 John H. Wigmore, Wigmore on Evidence § 1671a (James H. Chadbourn rev.1974) (citations omitted))." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002).

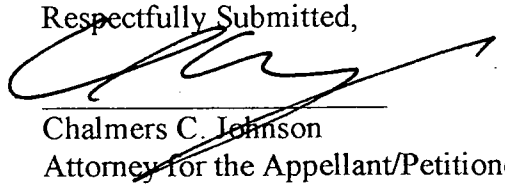
It should not be overlooked that the initial suit that Appellant filed in the Circuit Court and which was actually settled by Respondents was also based on the *Lee v. Chesterfield* argument. In accepting the settlement on the record, Judge Rawl specifically stated that the Circuit Court would retain jurisdiction to enforce that settlement. If the Supreme Court is willing to concede that appellant ***might*** have been correct in her interpretation of *Lee v. Chesterfield* (as did the Respondents, at one point, when they settled the original case), then it seems that it would follow that, had appellant been allowed to make the attempt, she ***might*** have succeeded. If she ***might*** have succeeded... how can her attempt to do so be considered frivolous?

CONCLUSION

Filing a petition for rehearing is always such a delicate matter. One must avoid the temptation to simply raise all the old arguments in the case, and concentrate, specifically, on issues which were "overlooked or misapprehended" in the review of the case. The issues raised in this petition are issues of law and fact, which do appear to have been misapprehended, or overlooked by the Court. In the case of the final section, one issue actually is raised by the Court's Opinion itself. Appellant has raised issues which she believes, if corrected, would be

sufficiently important to change the balance of the Court's opinion in this matter, and respectfully requests that the Court grant a rehearing and an opportunity for the parties to brief and properly address them. This is an opinion which will shape the future of the application of FCPSA throughout the State. It is an important issue with far reaching ramifications, and deserves a second look.

Respectfully Submitted,



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PROOF OF SERVICE FOR
APPELLANT'S PETITION FOR REHEARING

I certify that I have served a copy of the Appellant's Petition for Rehearing on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, Case No. 2010-CP-10-3410, on this date, April 9, 2014 at the following address, as well as transmitting it via email to the respondents at the email address set forth below.

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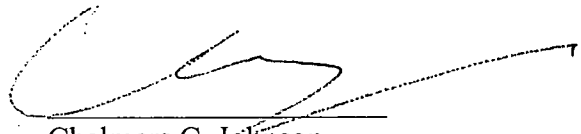

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