THE STATE OF SOUTH CAROLINA
In Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

App. Case No. 2012-21078
Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

SECOND
SUPPLEMENTAL RECORD ON APPEAL

Chalmers C. Johnson
923 N. 13th St. Apt. # 1
Tacoma, WA 98403
Attorney for the Appellant

Lindsay Smith-Yancey
Daniel S. McQueeney
E.D. Pratt-Thomas
POD 22247
Charleston, SC 29413
Attorneys for the Respondent

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012CP-10-2410

Dr. Cynthia Holmes, M.D.

PLAINTIFF(S)

East Cooper Community Hospital, Inc.; Trident Heathsystem Medical, Inc.

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
2012 MAR -7 PM 2:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Plaintiff's Motion to Reconsider, Alter or Amend the Court's Order of February 1, 2012 is denied.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge — Judge Code: 251 — Date: 3/1/12

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

CLERK OF COURT

Court Reporter:

5-24-12

The Supreme Court of South Carolina

Cynthia Holmes, M.D., Appellant,

v.

East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc., Respondents.

Appellate Case No. 2012-210786

ORDER

There are two appeals in this matter currently pending before the Court of Appeals. Respondents move to certify the appeals to this Court pursuant to Rule 204(b), SCACR, and for the appeals to be consolidated. Appellant takes no position on whether the appeals should be transferred to this Court, but opposes the request for consolidation.

The motion to certify is granted. We also grant respondents' motion to consolidate the appeals for purposes of the record on appeal and oral argument. Appellant may file a supplemental record if needed.

C.J.

FOR THE COURT

Columbia, South Carolina

May 24, 2012

cc:
Lindsay Kathryn Smith-Yancey
Daniel Simmons McQueeney, Jr.
Erskine Douglas Pratt-Thomas
Chalmers Carey Johnson
The Honorable Jenny Kitchings

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OR COMMON PLEAS
2010-CP-10-03410

DR. CYNTHIA HOLMES, M.D.,

Plaintiff,

V.

EAST COOPER COMMUNITY HOSPITAL, INC., TENET HEALTHSYSTEMS MEDICAL INC.,

Defendants.

TRANSCRIPT OF RECORD

November 22, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE KRISTI L. HARRINGTON, JUDGE

A P P E A R A N C E S:

Mr. Chalmers Carey Johnson, Esquire
Representing the Plaintiff

Mr. Daniel E. McQueeney, Esquire
Mr. E. Douglas Pratt-Thomas, Esquire
Representing the Defendants

Anne Bouley Meyer, RPR
Circuit Court Reporter

THE COURT: All right, counsel, if you'll state your name for the record and the party you represent.

MR. JOHNSON: My name is Chalmers Johnson, Your Honor, I represent the plaintiff, Dr. Cynthia Holmes.

THE COURT: All right, thank you.

MR. McQUEENEY: Your Honor, my name is Chip McQueeney I'm here with Douglas Pratt-Thomas. We represent the defendants, East Cooper Community Hospital, Inc, and Tenet HealthySystems Medical, Inc.

THE COURT: Counsel, I'm having a hard time writing this down, Mr. McQueeney, so I assume you are speaking too fast for my court reporter.

MR. McQUEENEY: I'm sorry, Your Honor.

THE COURT: Tell me your name again.

MR. PRATT-THOMAS: Douglas Pratt-Thomas, Your Honor.

THE COURT: Thank you. Counsel, we are here on your motion for sanctions?

MR. McQUEENEY: Correct, Your Honor.

THE COURT: You are prepared to go forward on that, Mr. Johnson?

MR. JOHNSON: Your Honor, it's defense's motion.

THE COURT: I understand, but you are prepared to go forward?

MR. JOHNSON: Yes, I am, Your Honor. Thank you

very much.

THE COURT: If you are not prepared to go forward you need to tell me now.

MR. JOHNSON: I'm prepared to go forward.

THE COURT: All right, Mr. McQueeney, I have your -- let me hear from you.

MR. McQUEENEY: Again I represent East Cooper Community Hospital, Inc., and Tenet HealthSystems Medical, Inc. And, Your Honor, this is litigation that really has been going on since roughly 1997.

I'm going to try to be as concise as possible. There are a lot of things that have happened.

THE COURT: I have heard at least one matter, motion in this case, so I do not need a whole litany of background information. Tell me what you are requesting here today.

MR. McQUEENEY: Yes, Your Honor. We are requesting that this Court sanction the plaintiff for bringing a 2010 lawsuit against the defendants essentially alleging the same causes of action against the defendants, and essentially making the same arguments as they did in a 2005 lawsuit against the defendants that this Court, it was Judge Dennis, granted summary judgment to defendants on.

After Judge Dennis granted summary judgment, we

moved for sanctions. Judge Dennis ultimately granted sanctions addressing many of the arguments that the plaintiff has made in response to our motion for sanctions in this case. It's really the same case twice.

We have asked for attorney's fees, and we've submitted an affidavit of attorney's fees. We have asked for attorney's fees that we will incur in the appeals of these orders.

And one of the things we also wanted to ask for --

THE COURT: You're asking for future attorney's fees?

MR. McQUEENEY: Future -- well attorney's fees if this action, and there is I believe it's Rule 54(D) of the South Carolina Rules of Civil Procedure allowing if the Court awards attorney's fees and there is an appeal, when it comes back down the prevailing party can make a motion for costs and the attorney's fees incurred in that appeal would be added to the original judgment.

THE COURT: But I don't award those until that occurs, correct?

MR. McQUEENEY: Yes, Your Honor, that's correct. I just wanted to let you know that we are asking for

those future attorney's fees.

One of the other things that we have asked for is Dr. Holmes has been sanctioned both by the Supreme Court of South Carolina and Judge Hughston in two other cases, legal malpractice cases against her former attorneys.

The frivolous civil proceeding sanctions act was revised in 2005 to provide right to incur -- to provide an injunctive remedy to parties in certain circumstances. The Supreme Court has ruled that Dr. Holmes cannot file any petitions, filings, et cetera in court without another attorney signing the petition, filing, et cetera.

Judge Hughston in his order in the case against the Haynsworth Law Firm essentially held the same thing. She's continued to file actions hiring other attorneys since then.

One of the things we will ask for is that this Court -- really asking the Court for help to prevent future litigation -- is that this Court require Dr. Holmes to post a bond whenever she files any lawsuit, and that that bond be used to pay, only if they prevail, the defendant's attorney's fees.

I think that's the only thing that is going to prevent frivolous litigation in the future, and also

ensure the defendants are not damaged by continued frivolous litigation. This is the fourth lawsuit. Again it has been going on 13, 14 years.

We feel that's the only thing that will bring this to an end. And certainly it doesn't prevent her from litigating in the future. And it doesn't even -- if she prevails, certainly she would be -- we wouldn't be entitled to our attorney's fees.

So it's doesn't prevent her from litigating, but it does stop her, or potentially curb her from frivolous litigation in the future.

THE COURT: Counsel, is there a pending lawsuit?

MR. McQUEENEY: There is no pending lawsuit now, just this lawsuit. And there are various appeals from the other lawsuits I believe still pending.

THE COURT: So there is a pending appeal. Is there a current lawsuit pending?

MR. McQUEENEY: There is no current lawsuit pending in circuit court. I believe that Dr. Holmes has petitioned for a writ of certiorari from the United States Supreme Court in a 2005 case asking them to overturn a judgment of the Court of Appeals for roughly $1,000 and attorney's fees which were awarded as costs on appeal.

That, to my knowledge, is the only thing that is

currently pending between the defendants and the plaintiff. I'm not sure of her legal malpractice cases, what the current status is of those cases.

THE COURT: Do you have a proposed order, counsel?

MR. McQUEENEY: I do not have a proposed order. I'm happy to provide one. I can get back to the office and get it done today.

THE COURT: All right. I'm happy to hear from you, counsel.

MR. JOHNSON: Thank you, Your Honor.

May I use the podium, Your Honor?

THE COURT: Yes, you may.

MR. JOHNSON: Thank you. Your Honor, the only thing I have heard from defense counsel today at all is what they want, no argument whatsoever.

THE COURT: Because that's what I asked of counsel, what he wanted. I don't need the whole long history of what has been going on. I heard this case several months ago. I'm well familiar. I have read the motion. That's what -- I wanted to short circuit and get to what counsel wanted. That's what I asked.

MR. JOHNSON: Your Honor, what I'd like to talk about is the standard for the frivolous proceedings sanctions act finding, which is first that the Court

has to find that the action was frivolous. It could also only be filed by the prevailing party. And at this point there is an appeal ongoing of Your Honor's order dismissing the case

THE COURT: Well is it, counsel, that it has to be finally decided in order? Or isn't it that they're the prevailing party at this point?

MR. JOHNSON: It looks like -- and honestly, Your Honor, as I look at the sanctions act, you can bring the sanctions act against any party for any kind of action at all.

So for instance, an action by the defense to remove a case which is thrown back down could be subject to the sanctions act. So I think that you have the right to find an action frivolous that is before you. In other words, if it's --

THE COURT: So I don't need to wait on the appeals?

MR. JOHNSON: Well that's the question, Your Honor. Because if, for instance, I brought a motion to continue and that motion to continue was frivolous, I think regardless of what happens in the case you can consider whether that motion was frivolous or not and award sanctions.

The question here is whether they have prevailed

on the issues of the full case. What they are asking you to do is to sanction, I suppose, me and Dr. Holmes because we brought this lawsuit at all.

And if the appellate court were to determine that I'm right about Lee versus Chesterfield, and this case comes back down to be retried and we haven't prevailed, we certainly haven't lost, I don't think they have prevailed yet on the issue they are bringing before the Court. Does that make sense, Your Honor?

THE COURT: But you would agree that they have prevailed as of now?

MR. JOHNSON: They have prevailed on a motion to dismiss for lack of subject matter jurisdiction.

THE COURT: All right.

MR. JOHNSON: And I don't think they have prevailed for now since it's under appeal. It seems like that issue is still open.

THE COURT: It's an issue of semantics in your mind. But clearly the reflection in the -- my decision was that the defendants prevailed on the motion to dismiss, correct?

MR. JOHNSON: That's correct, Your Honor.

THE COURT: Thank you.

MR. JOHNSON: They did. But I'm focusing actually on the language of the statute. And the

statute says, upon motion of the prevailing party. I would interpret that, and ask the Court to interpret that, as the party who has prevailed. At this point, I don't think they have.

But I would like to address some other issues as well. On a technical matter, I believe that the motion itself was improperly filed.

THE COURT: The motion for sanctions?

MR. JOHNSON: Correct. Under Rule 59, the motion is to be filed through post-trial motion, and a copy is supposed to be sent directly to the Judge who ruled on the initial order, which was not done. In fact, it got up in front of Judge Dennis and we had to move it to your court. So technically I think the motion was improperly filed.

THE COURT: Hold on. Mr. McQueeney, what is your response to that?

MR. McQUEENEY: Your Honor, I thought that we had mailed it to you or emailed it to you, I vaguely recollect that. But I'm not positive, please don't hold me to that.

I know the rule does say it's supposed to be served on the judge at the same time. There is plenty of case law that says that doesn't deprive the court of jurisdiction. And then there is also the civil

procedure rules --

THE COURT: So you should have done it within ten days after my -- I issued my order on it?

MR. McQUEENEY: Correct, Your Honor. The only jurisdictional requirement is that it be served within ten days. And I actually just got another appeal dismissed from the Court of Appeals arguing this very issue.

But all for jurisdictional purposes that has to happen is it has to be served on the other party within ten days. It doesn't even have --

THE COURT: And you did that?

MR. McQUEENEY: Yes, Your Honor, that's correct.

THE COURT: All right, thank you.

You may continue.

MR. JOHNSON: Your Honor, I would like the Court to consider the Hanahan and Southeastern cite prep cases and the fact that Judge Dennis did rule on the same issue the case was dismissed on finally by your order.

And I know Your Honor has already ruled on whether that was a final ruling or not. But under Hanahan versus Southeastern Site Prep, it doesn't matter if it was a final ruling or not, that's not an issue. And I know the defense argued that in its

brief.

But if you look at Southeastern Site prep, Hanahan and the cases that flow from that, the point is whether any reasonable attorney would have felt encouraged by the Court to continue, or discouraged by the Court from continuing upon a cause of action.

When I filed this cause of action I took it, I filed it, I researched it, I knew it had been thrown out on subject matter jurisdiction before. And I did carefully research Lee versus Chesterfield.

I designed the complaint to focus the issues that would be before the Court on Lee versus Chesterfield on subject matter jurisdiction issue because I think that is the issue and that's what happened to Dr. Holmes in her last case is that she was unable to survive it because the complain wasn't properly drafted.

So the question under Hanahan and Southeastern Site Prep, if you've got one of these actions where the defendant tried to dismiss and was unsuccessful, is whether a reasonable attorney standing where I am would think it was okay to continue.

And Judge Dennis decided not to dismiss the case on the subject matter jurisdiction issue on a motion to dismiss saying first that he thought it was premature

and he was going to allow the case to continue on to the summary judgment phase for that determination.

First I think any reasonable attorney would have thought that a judge had given him the go-ahead to continue with the case. Because if it shouldn't have gone forward at that point, Judge Dennis could and should have stopped it.

Then the defense came back for a motion for reconsideration and insisted that Judge Dennis decide the issue of subject matter jurisdiction then and there, that's what their motion said. The Judge allowed him to argue that and denied it.

And so you've got again a reasonable attorney standing in my place. Judge Dennis has denied their insistence that you rule on the subject matter jurisdiction then and there.

And whether or not that was a final order binding you or anything like that doesn't matter. It's a question of whether a reasonable attorney in my place would have felt that the Court had encouraged him to move forward. And I can't see any other way to interpret that, Your Honor.

I think under the standards set forth in the frivolous proceedings sanctions act, holding Dr. Holmes and/or me to the standard of a reasonable attorney, and

if you add in Southeastern Site Prep and Hanahan, any reasonable attorney would have continued forward.

I would argue in fact if I had gone back to Dr. Holmes and said, even though we prevailed on this I'm going to drop your case, that she could have sued me. I think it would be unreasonable for an attorney not to proceed after that order from Judge Dennis.

Again, Your Honor, going to the reasonable attorney standard, which is the standard you need to use in this case. I think you should take a careful look at the Lee case, which I know you already have because you've heard this before and you issued an order.

Your order was issued on your interpretation and Judge Dennis's interpretation of the Lee case. And while I fully respect that the Court has the authority to interpret these cases and issue an order, the only other order in existence that supports Your Honor's order is Judge Dennis's, which is a circuit court order and not an appellate opinion. And we're in the Court of Appeals now for me to challenge that order, which is the proper way to do it.

Any attorney, even -- any attorney should be able to rely on existing appellate opinion and not be required to guess whether a judge may agree or disagree

with him at the final argument of the case, because this was a legal argument.

In fact, attorneys are allowed to even go against existing appellate opinion if they have a good-faith argument against it. In this case I wasn't going against appellate law. I was interpreting Lee. I felt that Judge Dennis was incorrect, and you felt that I was incorrect, and now we are in the Court of Appeals. That's the way the system is supposed to work. It's not a frivolous lawsuit.

In fact, you know again the new act, which the defense claims that we are under, requires you to look at this from a reasonable attorney standpoint. And if my goal was to either prevail in this lawsuit in front of a jury, or to focus the issue on subject matter jurisdiction and whether the Lee case supports our case, then I think I did that very competently.

We have managed to -- I have drafted the complaint specifically so that it only pled cause of action under breach of contract, and that it didn't stray into a request for a reasonableness -- due process hearing on the hospital.

I argued that from the very first motion. You can see in the transcript to Judge Dennis that Dr. Holmes was set apart because of the settlement

agreement, and this was a case about the settlement agreement and breach of contract, and not a request for a due process hearing.

I went on to argue that in front of Your Honor. And in fact as a result of Your Honor's order, it is focused. I framed the issue of whether or not this immunity exception applies and Lee limits it, or whether the immunity exception is a narrow exception to the general rule of lawsuits.

And in fact, Your Honor, my general argument and my theory of the case is that immunities which are granted by statute are exceptions not rules. In that it's reasonable, at least from a reasonable attorney standpoint, for me to read Lee as defining that narrow exception as not being able to exclude lawsuits that don't ask for a due process hearing.

THE COURT: But at what point, counsel, do you not have the responsibility to review the prior lawsuits and to take a look, in the eye of a reasonable attorney, as to the sanctioning of your client by two separate circuit judges?

MR. JOHNSON: Your Honor, one of those sanctions by Judge Houston is under appeal right now and I just filed a brief. I don't expect it to survive under Southeastern Site Prep since she's prevailed on summary

judgment before going to trial. So I don't think that sanctions order is going to hold up.

The second sanctions order I'm very well aware of. And I was aware of that when I took this case which is why I did the research, I talked to other lawyers in the community to see what they thought.

And the question was, was Judge Dennis right about Lee versus Chesterfield. The consensus I got was that he wasn't right about Lee versus Chesterfield. I don't think he was right about Lee versus Chesterfield.

And it does me no good to say that to anybody except to you and then to the Appellate Court, which is exactly where I'm going. The case was very specifically tailored for that purpose. Was either I'm going to convince a judge this time that I'm right about Lee versus Chesterfield, or I'm going to convince an appellate panel on the Supreme Court that I'm right about Lee versus Chesterfield, or I'm just dead wrong and everybody is going to tell me so all the way up.

THE COURT: Or you could have done both. You could have convinced a circuit judge and won on appeal, correct?

MR. JOHNSON: That's correct.

THE COURT: All right. Anything further,

counsel?

MR. JOHNSON: Three more things, Your Honor. I think they are ones I need to get to, and I will be very brief. One, the competency of the attorney. Apparently the defense is requesting a sanction against Dr. Holmes.

It's noted that the Court in the past has said that she couldn't file anything without an attorney signing. The whole point was for her to find competent counsel who would sign off on a pleading under Rule 11, which I did. And I have already gone through with you the thought pattern and process I went through.

I think she was being responsible by hiring an attorney. I was being responsible by researching it. And I think so far have been successful in one of the paths we have chosen to pursue.

There is a constitutional argument concerning the sanctions act. Constitutional argument being twofold. One, that there is -- since in the new act you're hold pro se litigants to a standard of a reasonable attorney, there is no notice to pro se litigants as to what that standard may be. I understand that Dr. Holmes also has a JD and is a licensed attorney, but I think it's a viable constitutional argument.

The second is that because -- and this would be, I assume, if you sanctioned me -- if you find that this act was frivolous, then you'd have to turn me into the Supreme Court for an ethics hearing. The Supreme Court would also be the Court that would hear a final appeal of this very order, which I think raises an issue of constitutionality of due process because they may not be a fair judge of their attitude to render an ethics opinion on me one way or the other.

The final argument, Your Honor. I have reviewed the affidavit of attorney's fees. They have requested attorney's fees for a lot of things that attorneys don't do. They have also requested attorney's fees beyond their success in summary judgment, and which appear to include closing down the case file. And they're asking for attorney's fees that haven't even been incurred yet on a case that I might win.

So, Your Honor, if you do chose to award attorney's fees in this case, it is their burden to present you with an affidavit of attorney's fees that is accurate and ethical. And I think that they should be held to that standard.

Do you have any other questions, Your Honor?

THE COURT: Not at this time

Counsel, I want proposed orders. I'm going to

just assume that what you are going to tell me, Mr. McQueeney, is just in response to --

MR. McQUEENEY: Yes, Your Honor.

THE COURT: If there is anything additional that I haven't heard, I will accept proposed orders. With the upcoming Thanksgiving Holiday, I'm going to give you ten days from today's date. And I don't have a calendar in front of me, but I'm assuming that you all are smart enough to know that you do not have to email it to me on a Sunday.

Ten days from today's date. Please remember to be courteous in copying each other on your proposed order. This matter is under advisement.

Counsel, I would also, if you can, and I know sometimes it's more difficult than just asking, if you can tell me procedurally on the Court of Appeals where you are. Are you scheduled for oral arguments on any of these cases?

MR. JOHNSON: Your Honor, on this particular case I'm awaiting the transcript, which I haven't received yet. And on the other cases with Haynsworth Sinkler Boyd, on that one we have just filed the appellant's brief. And I think we have got a responsive brief. I filed a reply. And now I'm creating the record on appeal.

CERTIFICATE

I, the undersigned, ANNE BOULEY MEYER, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record, and of all the proceedings had and evidence introduced in the above captioned case, relative to appeal, in the Circuit Court for South Carolina, on the indicated date.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Anne Bouley Meyer

Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. 2010-CP-10-3410
DR. CYNTHIA HOLMES, M.D.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SANCTIONS
EAST COOPER COMMUNITY HOSPITAL, INC.; TENET HEALTHSYSTEM MEDICAL, INC.	)	
	)	
Defendant.	)	

The Defendant has filed a motion seeking sanctions against the Plaintiff in this case pursuant to Rule 59, SCRCP and SC Code Ann. 15-36-10. Defendant has yet to file any supporting memorandum, materials, or argument. The Defendant's motion was filed on August 8th, 2011 and the hearing has now been set for November 3, 2011. To date, Defendant has not filed or served any supporting memorandum or materials for it's motion. Plaintiff hereby presents her position on the motion without the benefit of knowing what the Defendant may intend to argue or what may be before the Court on the date of the hearing. Defendant has employed this tactic (filing a motion without memorandum and then submitting voluminous memoranda and attachments immediately prior to a hearing) with such regularity over its course of dealings with the undersigned that the undersigned feels compelled to pre-emotively address the prejudice that this will cause, by requesting that the Court allow ten days after service of the Defendant's memorandum for Plaintiff to supplement this response.

Regardless of what the Defendant's basis for the motion for sanctions may be, a

review of the S.C. Frivolous Proceedings Sanctions Act and applicable South Carolina law, in light of the procedural history in this case and the fact that the Court's dismissal is based on an interpretation of existing law which has never been espoused, reviewed or even entertained by the South Carolina Appellate Courts should resolve the issue of whether this case could be found to have been frivolous clearly and dispositively in the Plaintiff's favor. Plaintiff successfully rebuffed attempts by Defendant to assert to the Court that it lacked subject matter jurisdiction before Judge Dennis prior to the summary judgment hearing which resulted in dismissal. Under existing South Carolina law, interpreting the standard for finding a claim to have been frivolous, where a Court has found that the case should not be dismissed, a case (which was ultimately dismissed on the same basis) can not be considered frivolous. Furthermore, the law, the record, the fact that the Plaintiff was represented by a competent attorney, and the Plaintiff's actions in pursuing the case and preparing for trial indicate that the case was not brought or pursued frivolously. Finally, the ultimate decision as to whether the opinion from *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986), is restricted to cases which plead only civil conspiracy is a question of first impression for South Carolina, and is currently under appeal. An award of sanctions prior to a determination of the Appellate Court and potentially the Supreme Court on an issue of first impression seems presumptive, to say the least.

I. **The Court's prior decisions, denying Defendant's motion to dismiss and motion for reconsideration preclude a finding that this case was brought frivolously.**

The South Carolina Appellate Court has reviewed Circuit Court decisions concerning sanctions under Rule 11, as well as the former and current statutes authorizing

equitable awards of fees and costs for the pursuit of frivolous actions. Unanimously, in cases where the issue upon which the case was dismissed was reviewed and decided in favor of the party potentially subject to sanction earlier in the case, the Appellate Courts and the Supreme Court have ruled that this precludes a finding of frivolity.

under *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). In *Hanahan*, our supreme court reversed an award of sanctions under the previous version of the Act. *Id.* at 158, 485 S.E.2d at 913. The court stated: "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims." *Id.* The court considered that there is a split of authority as to whether sanctions may be awarded notwithstanding the denial of summary judgment. *Id.* at 157, 485 S.E.2d at 912. The court concurred with the view that "a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions after a trial on the surviving claims.

Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC, 4845 (SCCA)

...in order to receive attorney's fees and/or court costs as a sanction under the FCPSA, the aggrieved party must show that the party sought to be sanctioned acted 'frivolously.' *See, e.g., Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (denial of summary judgment precludes finding of frivolity, and thus no sanction may be imposed under the FCPSA).

Father v. South Carolina Dept. of Social Services, 353 S.C. 254, 578 S.E.2d 11,13 (S.C. 2003)

The Plaintiff filed the Complaint in this case on April 26, 2010. Defendant filed An answer, then an amended answer, counterclaims, and motion to dismiss on September 17, 2010. In the motion to dismiss, the Defendant moved to dismiss on several grounds, including the identical grounds and arguments submitted in the Defendant's motion for Summary Judgment. Judge Harrington's Order, granting Defendant's motion to dismiss, dismisses the case based on a finding of a lack of subject matter jurisdiction. The transcript of the hearing, which was requested by Plaintiff on September 6, 2011, has not yet been received and can not therefore be made part of the record at this time. However, the

transcript, as well as the Order itself, makes clear that the basis of the Judge's decision to dismiss was lack of subject matter jurisdiction, as the record contained genuine issues of material fact as to liability. The Defendant's initial motion to dismiss included a request for dismissal of the case based on lack of subject matter jurisdiction ("On the grounds that this Court lacks subject matter jurisdiction to address a private hospital's staffing or privileging decisions" Amended Answer/ Motion to Dismiss, Paragraph 49) The Defendant's position was briefed extensively and argued before Judge Dennis on December 16, 2010. The Judge, Having considered the briefs of the parties and oral argument as to the Defendant's motions to dismiss, denied the motions to dismiss. Specifically, Judge Dennis found that the issue should not be resolved on a motion on the pleadings and would be more appropriately addressed at Summary Judgment. A review of the pertinent portion of the transcript clearly shows that, at that initial hearing, the Judge did not intend to make a final ruling on the issues, but felt that there was at least sufficient grounds to allow the case to continue beyond the question of law presented by the Defendants as to jurisdiction. (Transcript of Hearing 12-16-10, pp. 15-17) On December 22, 2010, the Defendants filed a motion for reconsideration as to Judge Dennis' decision to deny the motion to dismiss based on subject matter jurisdiction. (Defendant's Motion for Reconsideration, 12-22-10) In the motion for reconsideration, the Defendants challenged Judge Dennis' decision that the issue of subject matter jurisdiction was not, in this case, ripe for a decision by the Court. Defendants argued that the Court could entertain a motion to dismiss for lack of subject matter jurisdiction at any time, and insisted that Judge Dennis make a decision as to its motion to dismiss on the Subject matter jurisdiciton issue at that point in the case (immediately after the filng of initial

pleadings). Specifically, the motion to reconsider raised the argument that "It is improper for the Courts to review decisions of governing boards of private hospitals concerning the staff privileges of practitioners" (Defendant's Motion for Reconsideration 12-22-10). Judge Dennis held a hearing on this motion on March 8, 2011. Whereas, in the December hearing, Judge Dennis had decided that the issue of subject matter jurisdiction was better considered at Summary Judgment, the Defendant, in its motion for reconsideration, insisted that Judge Dennis render decision on the subject matter jurisdiction issue. The Judge clearly acceded to the Defendant's request that he consider the motion to dismiss based on subject matter jurisdiction and give a final judgment on March 8th. Granting the Defendant's motion to reconsider, Judge Dennis did reconsider his decision to forego ruling on the motion to dismiss based on subject matter jursdiction, and gave what can only be interpreted as a final ruling on the issue of jurisdiction, stating:

> 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. (Transcript of Hearing, 3-8-22)

It seems clear that the Court intended the decision as to jurisdictional issues to be a final and binding decision. Otherwise, why would he have told the Defendant he was helping them by giving them a ground for and the right to appeal? The South Carolina Courts are clear on the fact that, except in certain statutorily qualified situations, only a final judgment is subject to an appeal.

> South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. By statute, an appeal from an interlocutory order is permitted in certain circumstances, including when the order is one involving the merits ... [or] affecting a substantial right.
> Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34, 38 (S.C.App. 2011)
> As a general rule, only final judgments are appealable. *Culbertson v. Clemens,* 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); *Bolding v. Bolding,* 283 S.C. 501, 323 S.E.2d 535 (Ct.App.1984). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson,* 367 S.C. 7, 625 S.E.2d 205 (2005).

Thereafter, the Defendant opted not to engage in discovery. Neither interrogatories, requests for Production, nor requests for admission were served. The Defendant noted no depositions, not even the Plaintiff's. Whereas the Plaintiff did seek out and provide expert opinions, affidavits, and subpoened and took the deposition of the former CEO of the hospital (See Deposition of Janie Sinacore-Jaberg) The Defendant then moved for Summary Judgment and to dismiss and prevailed ONLY on the grounds of subject matter jurisdiction.

A determination of frivolity under the existing Frivolous Proceedings Sanction act requires the Court to impose a "reasonable attorney" standard. Where Judge Dennis has made a final judgment on the issue of subject matter jurisdiction, it is certainly reasonable for any attorney to have believed the issue of whether there was subject matter to be at least legitimate and defensible, if not absolutely decided in his favor. Chief Justice Finney put the standard succinctly in the *Hanahan* opinion, stating: "It 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." *Hanahan v. Simpson,* 326 S.C. 140, 485 S.E.2d 903, 912-13 (1997). The fact that Judge Dennis, acceding to Defendant's demand for an immediate decision as to its subject matter jurisdiction

argument, rendered a final decision in Plaintiff's favor on that issue should conclusively preclude a finding of frivolity in this case.

III. Plaintiff's cause of action and, specifically, her position on subject matter jurisdiction in this case is supported by existing law.

Under S.C. Code section 15-36-10:

> An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:
> (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.

In this case, it is clear that the claims made were warranted under, not only the existing law at the time it was filed, but under the existing law as it stands now. Plaintiff brought a claim for breach of contract against the Defendant. The Complaint clearly spells out that the contract at issue is a settlement agreement entered into by the parties in 2002. Plaintiff's attorney, the undersigned, researched and reviewed the cause of action prior to filing, finding that it was a legitimate cause of action, that there was evidence supporting the claim, and that the Court would not be deprived of jurisdiction under the opinion of the Court in the case of *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). The undersigned, concerned about Judge Dennis' past order, dismissing a prior claim for lack of jurisdiction, consulted with other attorneys on the issue, researched the issue, and restricted the claims in the Complaint to those which would fall squarely under the *Lee* holding. Clearly the undersigned, who was adjudged by the Court to be competent in this very case after explaining his reasoning (See Transcript

of Hearing of 12-16-10, pp. 13-15), put significant thought and preparation into the Complaint, and reasonably believed the claim to be legitimate as drafted and warranted under existing law.

After being unsuccessful before Judge Dennis on the Subject matter jurisdiction issue, and receiving a final judgment denying its motion to dismiss on those grounds on March 8, 2011, Defendant brought another motion to dismiss, raising the identical argument, that the Court was deprived of jurisdiction under *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980). and its progeny. Plaintiff, again, argued that *Lee v. Chesterfield* defined the circumstances under which the Court had jurisdiction and showed that the facts of this case were substantially similar to those in *Lee v. Chesterfield*. The Court granted the Defendant's motion to dismiss, finding that *Lee v. Chesterfield* did not apply. The Court stated, in the Order, that, in *Lee v. Chesterfield*, the Plaintiff's cause of action was for conspiracy rather than breach of contract, as the sole explanation for the decision not to apply the holding from the Lee Opinion (Order of July 29, 2011) However, nowhere in *Lee v. Chesterfield*, or in any other case mentioning the *Lee* opinion does any Court ever even imply that its ruling would be limited to cases in which the Plaintiff claims civil conspiracy. The *Lee* Opinion has been cited in Appellate and Supreme Court opinions twelve (12) times, and has never been overturned, modified, curtailed, or challenged on the subject matter jurisdiction issue. (See *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010); *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (S.C. 2006); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (S.C.App. 2004); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (S.C.App. 2004); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (S.C.App. 2000); *Bivens v.*

Watkins, 313 S.C. 228, 437 S.E.2d 132 (S.C.App. 1993); *Mendelsohn v. Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (S.C.App. 1993); *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91 (S.C.App. 1989); *Allen v. Columbia Financial Management, Ltd.*, 297 S.C. 481, 377 S.E.2d 352 (S.C.App. 1988); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (S.C. 1988); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (S.C.App. 1987); *Yaeger v. Murphy*, 291 S.C. 485, 354 S.E.2d 393 (S.C.App. 1987)).

The Court's Order, dismissing this case for lack of subject matter jurisdiction, circumvents the clear ruling of the *Lee* Court by interpreting the opinion as meant only to apply to cases in which the Plaintiff has alleged civil conspiracy. The Order fails to articulate any reasoning for this conclusion and cites no authority, legal or otherwise in support of its conclusion. The Defendant never raised this argument (that Lee is restricted to civil conspiracy allegations) in its extensive briefing of the subject, or at oral argument. If both the Court and the opposing party are unable to articulate any logical reasoning or find any legal authority to support such extraordinary relief as Summary Judgment or dismissal on the basis of subject matter jurisdiction, then it should not be considered frivolous for an attorney pursuing the case (the undersigned) to have relied on good solid law such as the *Lee v. Chesterfield* opinion to overcome Defendant's claim of lack of jurisdiction. The fact that Plaintiff's claims were and *are still* sufficiently supported by existing South Carolina law should preclude any finding that pursuit of those claims was frivolous.

This should stand out in stark contrast to, for example, Defendant's counterclaim for sanctions under the S.C. Frivolous Proceedings Sanctions Act, which allows a party to bring a motion before the Court, requesting sanctions under certain circumstances, and

pursuant to specific notice and opportunity-to-be-heard provisions outlined in S.C. Code section 15-36-10. The proper prerequisite for the filing of such a motion is clearly stated in the statute and is predicated upon the moving party "prevailing":

> (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.
> S.C. Code section 15-36-10 (C)(1)

In this case, the Defendant filed a counterclaim under the statute as part of the answer, and then failed to remove it even after Plaintiff had notified Defendant of the fact that it had been filed without any legal basis. Plaintiff filed a motion to dismiss, which was not ruled upon by Judge Dennis, and then another motion to dismiss, which was heard, but has not been ruled on yet by Judge Harrington. Once the existing South Carolina law is applied, however, there is no other possible outcome, but a finding that he Defendat borught a claim without grounds, and then maintained it even when that fact was made plain. No competent attorney could have misunderstood the statute's prerequisites. Even a cursory amount of research would turn up the South Carolina cases which note the proper timing for the filing of such a claim, which is within 10 days of a final judgment in favor of the moving party. This is the type of claim which actually warrants a review for frivolity, not the Plaintiff's.

III. Reasonable attorney standard/ competence of Counsel

Dr. Holmes, the Plaintiff in this case, has been represented throughout this action. The undersigned was her attorney and has signed all pleadings filed with the Court. A review of the pleadings and the undersigned's responses to Defendant's motions to

dismiss should show that they are well thought out, well researched, and competently articulated. Judge Dennis, in a hearing on December 16, 2010 even mentioned that he found all of the attorneys involved in the case to be competent after hearing arguments on the subject matter jurisdiction issue.

The Defendant has mentioned in prior motions to this Court, that Dr. Holmes, who is a licensed attorney herself, has been prevented, by an order from Judge Dennis, from filing any document with the Court *pro se*. The purpose of this Order, on its face, at least, is to add the requirement that Dr. Holmes have a competent attorney review her pleadings and certify that they are not frivolous. This Order, though challenged, has been complied with in this case. A competent attorney (the undersigned) has signed off on all of the pleadings before the Court. In deciding whether a case is frivolous, the Court has, in the past, found that a determination of frivolity is precluded where it is shown that a competent attorney has signed the pleadings.

> Under Rule 11, SCRCP, and the former FPSA, a good faith analysis was appropriate.[8] The rule indicates "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; *that to the best of his knowledge, information and belief there is good ground to support it*; and that it is not interposed for delay." Rule 11(a), SCRCP (emphasis added); *see Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 (stating under Rule 11, SCRCP, "[t]he party and/or attorney may . . . be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."). By requiring an attorney to attest to the best of his or her *knowledge and belief* that there is good ground to support the matter, the rule effectively requires attorneys to file claims in good faith. Moreover, the FPSA, before being amended, provided, in part, that a claim was not frivolous if the attorney believed in "good faith" the cause of action was not intended merely for an impermissible purpose. S.C. Code Ann. § 15-36-20(3) (2005). Consequently, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel. *Clegg v. Lambrecht*, 678 S.E.2d 260 (S.C. 2009)

Clearly, the undersigned feels that this case was filed in good faith, and has been

judged, by Judge Dennis, in this action, to be a competent attorney. Plaintiff would argue that, under the "reasonable attorney" standard required under 15-36-10, this precludes a finding of frivolity.

CONCLUSION

Should the Defendant file a memorandum or exhibits in support of its motion for sanctions, the Plaintiff requests at least 10 days from the service of the same upon her counsel, to file a response. Despite any argument that Defendant may offer by way of memorandum not yet filed, the Plaintiff would respectfully request that the Court deny the Defendant's motion for sanctions as this pleadings in this case were thoroughly researched and found to be legitimate by a competent attorney, the claims were and are (pending the outcome of the appeal in this matter) sound under existing South Carolina law, and the record shows that the Plaintiff did participate in this action with the intent of prevailing in a trial, the legitimate goal of any litigation.

Respectfully submitted,

October 17, 2011

Chalmers C. Johnson
523 So. G Street, Apt 402
Tacoma, WA 98405
(425) 999-0900
Chalmersjohnson@gmail.com
Attorney for the Plaintiff

INDEX OF EXHIBITS

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1. Transcript of Hearing 12-16-10 (excerpts)

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Cynthia Holmes, M.D.	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 05-CP-10-5113
	)	Case No. 10-CP-10-3410
East Cooper Community Hospital, Inc., Tenet HealthSystems Medical, Inc., John Grady, M.D., and Paul Yantis,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned case was heard on December 16, 2010, before The Honorable R. Markley Dennis, Jr. in Courtroom 4C of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Chalmers Johnson, Esq. (via telephone)
Cynthia Collie Holmes, Esq.
P O Box 187
Sullivans Island, SC 29482-0187
Appearing for Plaintiff Cynthia Collie

Lindsey Yancey-Smith, Esq.
Chip McQueeney, Esq.
PRATT THOMAS EPTING & WALKER
P O Drawer 22247
Charleston, SC 29413
Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

purposes of review as well.

MR. JOHNSON: Thank you. I won't belabor the point by going into the legal arguments that are set forth in the brief, outlined in my brief.

THE COURT: Absolutely.

MR. JOHNSON: Mainly it comes down to this, Your Honor. South Carolina law does say that the court does not have jurisdiction to consider the due process implications of a private hospital's credentialing. That makes sense. You can only go against a public hospital and request due process.

Private hospitals have the right to be unfair to anybody that they want to be unfair to. My argument is that East Cooper Hospital can do that, too. They can write bylaws that are unfair, deny due process, due process on an individual level to any doctor that they want to. But -- except Dr. Holmes.

The reason that they can't deny fairness to Dr. Holmes is that they promised that she would have access to that and that makes her different than any other doctors going through the credentialing process.

If she was simply saying that she wasn't treated fairly in the credentialing process and not afforded due process, I would agree that the case should be dismissed for lack of jurisdiction but is not the claim here. The claim is that she has a special status as afforded to her by a private agreement and that private agreement was breached. I do think that the court has jurisdiction to consider that.

THE COURT: All right.

MR. JOHNSON: The remainder of my brief, I wasn't sure whether the defendant was going to be present but -- I need a copy of any memorandum from them. Is there any specific issue that you would like for me to address, Judge?

THE COURT: No. Thank you very much. I think you've covered it, Chalmers. Thank you so much for your succinct argument, as well. I appreciate that.

MR. JOHNSON: Thank you, Judge.

THE COURT: Do you wish to reply, Ms. Smith-Yancey?

LINDSEY SMITH-YANCEY: Briefly, Your Honor.

THE COURT: Sure.

LINDSEY SMITH-YANCEY: Thank you. The term that the Hospital is being accused of breaching is that Dr. Holmes shall have the right to apply for a change in status in accordance with the bylaws. We allowed her to apply and the information attached to the pleadings shows that those applications were considered and processed in accordance with the bylaws. That shows that we are not in breach of the settlement agreement.

THE COURT: Well, let me just respond in this fashion, I -- I appreciate what you've done. My concern, though, is that -- I think the safest for everybody, for review purposes is to have this matter resolved not on a Motion on the pleadings but on a Motion for summary judgment. I just am not -- I understand the jurisdictional issue. There are matters, though, that I -- I really would have to rely on certain things outside of the context of the pleadings. I know that you have incorporated them -- that's creative lawyering, and I don't have any problem with that. I am just concerned insofar as

meeting the test for review for strict judgment on the pleadings. I am afraid that we might run amok with that, and I'm not comfortable with that.

I don't quarrel with anything that you've said. I would remind everybody -- I don't have to, we have very competent lawyers involved in this, but if this is another effort that really is nothing more than -- could be considered frivolous, though I am not making that finding now, and I would not hesitate, nor am I sure any other judge would hesitate, to impose sanctions.

So I -- I just remind everybody what we're doing here because I think that it has to be looked at in a real sense. I think that the there are things, Mr. Johnson, -- no disrespect to you, sir, but -- I understand what you say but it sounds like that might be creative lawyering, too, by using semantics -- and I don't think that it is there. That's not for me to judge today.

I agree with you that it would be a mistake to grant this on the basis of the pleadings. So that's the reason that I am

denying it -- not anything about the merits. Thank you very much.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Happy Holidays, Mr. Johnson.

LINDSEY SMITH-YANCEY: We do have that other matter.

THE COURT: Right. Chalmers, you're not involved in that, are you?

CLERK: He's gone.

THE COURT: He is not, I don't think. Okay. Dr. Holmes?

CYNTHIA COLLIE HOLMES: The plaintiff has a Motion to dismiss the defendant's Motion.

THE COURT: Yes.

CYNTHIA COLLIE HOLMES: So I am here to ---

THE COURT: Defendant's Motion for ---

CYNTHIA COLLIE HOLMES: To enroll the judgment.

THE COURT: I'll be happy to -- if you'all want to hear that, I will be happy to

2. Tramscript of Hearing 3-8-11

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
Cynthia Holmes, M.D.	)	
	)	
Plaintiff,	)	
	)	Case No. 05-CP-10-5113
vs.	)	
	)	
East Cooper Community Hospital, Inc., Tenet HealthSystems Medical, Inc., John Grady, M.D., and Paul Yantis,	)	
	)	
Defendants.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned case was heard on March 8, 2011, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Chalmers Johnson, Esq. (via phone)
Cynthia Collie, Esq.
P O Box 187
Sullivans Island, SC 29482-0187
Appearing for Plaintiff Cynthia Collie

Chip McQueeney, Esq.
PRATT THOMAS EPTING & WALKER
P O Drawer 22247
Charleston, SC 29413
Appearing for Defendant

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

THE COURT: Do we have the phone?

CLERK: Yes.

THE COURT: We need to get Mr. Johnson on the phone. The number that I have is 425-999-0900.

CLERK: (Places conference call).

MR. JOHNSON: This is Chalmers Johnson.

THE COURT: Good morning, Chambers. This is Markley Dennis. How are you this morning?

MR. JOHNSON: Morning, Judge, doing fine; how are you'all?

THE COURT: Fine. Thank you. I have everyone here. Mr. McQueeney, this is your Motion for reconsideration. I will be happy to hear from you.

MR. McQUEENEY: Yes, Your Honor. My name is Chip McQueeney. I represent the defendants in this action, East Cooper Community Hospital, Inc. and Tenant Health System Medical, Inc.

Your Honor, I think is familiar with this case. The plaintiff, Dr. Cynthia Holmes, M.D., is here with us today and filed this

action against the defendants relating to the denial of her medical staff privileges at East Cooper Regional Medical Center in 2006 and 2008.

The defendants filed an 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.

Secondly, under *Eldrich v City of Greenwood*, the plaintiff -- not the defendant -- in an action bears the burden of proving jurisdiction when the defendant challenges it.

Thirdly, *Wood v. Hilton Head Hospital* states that it is well settled in South Carolina ---

THE COURT: I can help you. You've got a ground for appeal. Mr. Johnson, I assume that 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.

(HEARING CONCLUDED)

CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison, official court reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held before The Honorable R. Markley Dennis, Jr., on March 8, 2011;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison

Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
March 29, 2011

3. Deposition of Janie Sinacore-Jaberg (Cover and index)

STATE OF SOUTH CAROLINA)
) SS
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT

DR. CYNTHIA HOLMES, M.D., Plaintiff,	)	
vs	)	10-CP-10-3410
EAST COOPER COMMUNITY HOSPITAL, INC., AND TENET HEALTHSYSTEM MEDICAL, INC., Defendants.	)	

COPY

The deposition upon oral examination of

JANIE SINACORE-JABERG

produced and sworn before me, Nancy E. Cook, at the office of the Steinberg Law Firm, 61 Broad Street, Charleston, South Carolina, on the 6th day of July, 2011, pursuant to the statute with notice as to the time and place. This deposition was taken on behalf of the plaintiff Dr. Cynthia Holmes, M.D. in a civil action now pending in the Ninth Judicial Circuit Court, wherein Dr. Cynthia Holmes is the plaintiff and East Cooper Community Hospital, Inc. and Tenet HealthSystems, Inc. are the defendants.

STATE OF SOUTH CAROLINA)
) SS
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT

DR. CYNTHIA HOLMES, M.D., Plaintiff,	)	
vs	)	10-CP-10-3410
EAST COOPER COMMUNITY HOSPITAL, INC., AND TENET HEALTHSYSTEM MEDICAL, INC., Defendants.	)	

A P P E A R A N C E S

FOR THE PLAINTIFF: Chalmers Johnson
182 East Bay Street
Charleston, SC 29401

FOR THE DEFENDANTS: Lindsey K. Smith-Yancey
PRATT-THOMAS WALKER
16 Charlotte Street
P.O. Box 22247
Charleston, SC 29413-2247

I N D E X

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
DR. CYNTHIA HOLMES, M.D.,	)	C.A. 2010-CP-10-3410
Plaintiff,	)	
Vs.	)	**ORDER DENYING DEFENDANTS' MOTION FOR SANCTIONS**
EAST COOPER COMMUNITY HOSPITAL, INC.; TENET HEALTHSYSTEM MEDICAL, INC.	)	
Defendant.	)	

This matter came before the Court on November 22, 2011, on defendants' motion seeking sanctions against the plaintiff pursuant to Rule 59, SCRCP, and S.C. Code Ann. 15-36-10 (2010) (the Act). After consideration of the record and oral argument by counsel for each side, the Court hereby Orders that the defendants' motion is denied. The Court's decision in this matter is based on the following findings and reasoning.

I. The fact that Defendant unsuccessfully moved for dismissal on the basis of subject matter jurisdiction prior to this Court's final ruling, dismissing the case for lack of subject matter jurisdiction, precludes a finding of frivolity under existing South Carolina law.

Defendant has moved for sanctions under the S.C. Frivolous Proceedings Sanctions Act, S.C. Code Ann. 15-36-10. The Act requires the Court to determine whether the action upon which the Defendant seeks sanctions (in this case, the lawsuit from its inception) was frivolous. In doing so, the Act calls for the Court to apply a "reasonable attorney" standard to the actions and reasoning of the attorney who signed the pleadings. The Act specifies a preponderance of the evidence standard: "Unless the court finds by a prepondeerance 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." S.C. Code Ann. 15-36-10(C)(2) (2010). Under *Hancock*, "we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331, 673 S.E.2d 801 (S.C. 2009).

The South Carolina Appellate Courts have reviewed Circuit Court decisions concerning sanctions under Rule 11, as well as the former and current statutes authorizing equitable awards of fees and costs for the pursuit of frivolous actions. Unanimously, in cases where the issue upon which the case was dismissed was reviewed and decided in favor of the non-moving party earlier in the case, the Court of Appeals and the Supreme Court have ruled that the previous denial precludes a finding of frivolity. The parties dispute which Act applies. Regardless of whether the pre-2005 sanctions act or the post-2005 sanctions act applies to this case, this reasoning would apply to the Court's analysis.

In *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), our Supreme Court reversed an award of sanctions under the previous version of the Act. *Id.* at 158, 485 S.E.2d at 913. The court stated: "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims." *Id.* The court considered that there is a split of authority as to whether sanctions may be awarded notwithstanding the denial of summary judgment. *Id.* at 157, 485 S.E.2d at 912. The court concurred with the view that "a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions after a trial on the surviving claims. In order to receive attorney's fees and/or court costs as a sanction under the FCPSA, the aggrieved party must show that the party sought to be sanctioned acted 'frivolously.' *See, e.g., Hanahan v. Simpson,* 326 S.C. 140, 485 S.E.2d 903

(1997); *Father v. South Carolina Dept. of Social Services,* 353 S.C. 254, 578 S.E.2d 11,13 (S.C. 2003); *Southeastern Site Prep, LLC, v. Atlantic Coastal Builders and Contractors, LLC,* No. 4845 (S.C. Ct. App., June 22, 2011) (Shearouse Adv. Sh. No. 21).

Defendant's motion to dismiss herein, filed on September 17, 2010, and subsequent motion for reconsideration upon denial of that motion clearly raised the issue of subject matter jurisdiction under the same arguments which were raised before this Court at summary judgment. Defendant was unsuccessful on both the initial motion to dismiss, which addressed the issue of subject matter jurisdiction among other Rule 12, SCRCP, bases for dismissal, and the motion for reconsideration, which was focused solely on the motion to dismiss for lack of subject matter jurisdiction. Ultimately, this Court did grant the Defendant's third attempt to challenge subject matter jurisdiction, dismissing the case. The Court finds that *Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC,* 4845 (SCCA) , *Hanahan v. Simpson,* 326 S.C. 140, 485 S.E.2d 903 (1997), and *Father v. South Carolina Dept. of Social Services,* 353 S.C. 254, 578 S.E.2d 11,13 (S.C. 2003) are controlling on the issue of determining whether the case was frivolously brought and pursued. Where the Defendant has previously, and unsuccessfully, moved for dismissal on the same grounds upon which the case was ultimately dismissed by the Circuit Court, a finding of frivolity is precluded. Thus the Defendant's motion for sanctions must be denied.

II. Mr. Johnson's reliance on an interpretation of *Lee v. Chesterfield*, which was different from a previous Circuit Court Order in a prior case, was not unreasonable as Orders from the Circuit Court are not binding precedent.

Under S.C. Code section 15-36-10, an attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(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.

In this case, the "existing law" at issue includes an appellate opinion, *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986), and an Order signed by Judge Dennis, sitting as Circuit Court Judge on a different, previous case. Although this Court ultimately disagreed with Mr. Johnson's interpretation of *Lee v. Chesterfield*, the Court does recognize that a Circuit Court Order from another case does not present binding precedent. Thus, Mr. Johnson was not in the position of making an argument for the reversal of existing law, but rather arguing, in good faith, his interpretation of existing South Carolina Appellate law. The Court also recognizes that the Plaintiff, in this case, has appealed the Court's dismissal and is thereby following the proper route to challenge the Circuit Court's interpretation of *Lee v. Chesterfield*. In open Court, Mr. Johnson, as an officer of the Court, described his reasoning and preparation in deciding to pursue this case. He noted that he did consider the prior Order from Judge Dennis, discussed the case with other attorneys in his community, and reviewed existing appellate opinions prior to concluding that there were tenable grounds on which to take the case forward. It is apparent that the Plaintiff in this case has hired a competent attorney, who put a great deal of thought and research into the decision to accept and pursue this case prior to filing it. Mr. Johnson correctly points out that neither the prior Order by Judge Denins, nor this Court's Order dismissing the instant case cites any appellate authority in support the Courts' interpretations of *Lee v. Chseterfield*. Likewise, Defendant has never cited any appellate authority which directly contradicts Mr. Johnson's interpretation. It is not unreasonable for

an attorney to pursue a case based on his interpretation of existing law, especially where there is no appellate opinion in opposition to his position.

Finally, the fact that Mr. Johnson was successful in defending the Defendant's motion for dismissal on the grounds of subject matter jurisdiction on two occasions prior to this Court's decision is relevant to the Court's inquiry into whether his actions in bringing and pursuing this action are reasonable. It is certainly reasonable for Mr. Johnson to have believed that his client's position on whether there was subject matter jurisdiction sufficient to bring the claim was at least legitimate. The same Judge who had signed an Order dismissing a prior case for lack of subject matter jurisdiction under similar arguments from the Defendant declined to do so in this case, on two different occasions. Chief Justice Finney put the standard succinctly in the *Hanahan* opinion, stating: "It 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." *Hanahan v. Simpson,* 326 S.C. 140, 485 S.E.2d 903, 912-13 (1997). Likewise, it would be untenable to argue that Mr. Johnson was unreasonable in taking Judge Dennis' denial of Defendant's motions to dismiss and denial of Defendant's motion for reconsideration as anything but affirmation that the position he took was, at least, not frivolous.

This Court finds that, although unsuccessful in the Circuit Court, Mr. Johnson's actions in pursuing this case under the theory that *Lee v. Chesterfield* supported his position on subject matter jurisdiction were not unreasonable. Thus, the Court finds that this case was not initiated or pursued frivolously. Defendant's motion for sanctions must be denied.

III. Plaintiff's constitutional challenge to the South Carolina Frivolous Civil Proceedings Sanctions Act

The Court notes that the plaintiff has made a constitutional challenge to the South

Carolina Frivolous Civil Proceedings Sanctions Act, arguing that the Act fails to provide adequate notice to the general public because it provides for a "reasonable attorney standard," yet, it can be applied to sanction non-attorney members of the public. Plaintiff pointed out that this standard is beyond the knowledge and expertise of the public at large. Plaintiff also advanced the argument that the Act also fails to pass constitutional muster on due process grounds as it requires that the Court, upon a finding of frivolity, report the attorney who signed the pleadings to the Supreme Court and to disciplinary counsel. Under S.C. Code Sec. 15-36-10(M), all violations of the provisions of this section must be reported to the South Carolina Supreme Court. S.C. Code Sec. 15-36-10(M). The effect of this provision is to prevent or obstruct objective appellate review even before any sanctions award is final for that case as well as any other unrelated matter involving that party. As Plaintiff argues, this conflicts with due process requirements of providing an unbiased appellate review. Although the Court recognizes the Plaintiff's arguments, this Court finds that the issue of constitutionality need not be considered by the Court at this time, as there are other grounds to deny the Defendant's motion.

IV. Defendants did not properly file the motion for sanctions pursuant to Rule 59

Plaintiff challenges timeliness of defendants' motion in that the defendants failed to timely comply with all provisions of Rule 59, SCRCP. Defendants argue that the failure does not affect jurisdiction. However, the Act expressly provides for and the express legislative intent requires compliance with the SCRCP and specifically Rule 59(g), SCRCP. See SC Code Ann. 15-36-10(I) (2011). In *Gallagher v. Evert*, the circuit court acknowledged that it did not timely receive a copy of the Rule 59 motion, and "on this ground alone" it ***could*** deny the motion. *Gallagher v. Evert*, 353 S.C. 59,577 S.E.2d 217 (S.C.App. 2002). In *Gallagher*, the Court did opt

to go ahead with the hearing and issued an order despite the failure of the moving party to comply with the rule. This Court notes that whether the motion may be dismissed for improper filing under the rule is within the discretion of the Court before which the motion is brought.

In interpreting S.C. Code Ann. 15-36-10, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget & Control Bd.,* 313 S.C. 1, 437 S.E.2d 6 (1993). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Town of Mt. Pleasant v. Roberts,* 27005 (SCSC) (July 11, 2011), quoting *Gay v. Ariail,* 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). When considering a statute, such as S.C. Code Ann. 15-36-10, which creates new liability and fixes the time within which that action may be commenced the time factor is "an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." *Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund,* 277 S.C. 604, 291 S.E.2d 667 (S.C.1982) quoting *Hemingway v. Shull,* 286 F.Supp. 243, 246 (D.S.C.1968).

In a case such as this, where the moving party is seeking extreme sanctions, including a request for an award of future attorney's fees and a requirement that, prior to filing future lawsuits, Plaintiff be compelled to post a bond to pay defendant's attorney's fees if she is not successful, the Court finds that strict adherence to the statute and rules should be required. In addition to the other grounds set forth for denial of the Defendant's motion, the Court finds that the Defendants failed to comply with Rule 59, SCRCP, including failure to timely provide the presiding judge with a copy of the motion. The Court acknowledges that is has heard the motion and ruled by denying it. However, for purposes of potential review, the untimely filing is additional or alternative grounds for denial.

V. **Defendants are not the "prevailing party" as an appeal of its motion to dismiss is still pending**

The South Carolina Frivolous Proceedings Sanctions Act expressly provides that the moving party must have "prevailed." S.C. Code Ann. 15-36-10(C)(1). Although the Defendant was successful on its motion to dismiss for lack of subject matter jurisdiction at summary judgment, because the Order granting the dismissal is pending appeal, defendants cannot show that the matter is final. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson,* 367 S.C. 7, 625 S.E.2d 205 (2005);*Culbertson v. Clemens,* 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); *Bolding v. Bolding,* 283 S.C. 501, 323 S.E.2d 535 (Ct.App.1984). Specifically, S.C. Code Ann. 15-36-10(I) states: "This Act shall not alter the SCRCP or the SCACR, South Carolina Appellate Court Rules." S.C. Code Ann. 15-36-10(I). Rule 203, SCACR, provides that when a Rule 59, SCRCP, motion has been made, the action is not final. Rule 203, SCACR. The issue of finality need not be reached by this Court as the Court has determined that a finding of frivolity would be precluded in this case regardless of the outcome of the pending appeal.

ORDER OF THE COURT:

Based on the reasoning and findings set forth above, **IT IS HEREBY ORDERED THAT** Defendant's motion for sanctions is DENIED.

_____
The Honorable Kristi Lea Harrington
Chief Administrative Judge
Ninth Judicial Circuit

Date:_____

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. NO.: 2010-CP-10-3410
	)	
Dr. Cynthia Holmes, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER AWARDING SANCTIONS**
	)	
East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc.,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on Defendants' motion pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, codified at section 15-36-10 of the South Carolina Code (hereinafter referred to as the "FCPSA" or "the Act"). A hearing on Defendants' motion was held on November 22, 2011. As indicated more fully below, this Court grants Defendants' motion, sanctions the Plaintiff pursuant to the Act, and awards judgment against Plaintiff in the amount of $53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100 Dollars) payable to Defendants for reimbursement of attorneys' fees and other expenses incurred in the defense of this action.

In addition, in light of the Plaintiff's long history of vexatious litigation against Defendants and others, the Court finds injunctive relief pursuant to section 15-36-10(G)(3) appropriate. Consequently, this Court hereby orders that any future litigation filed on behalf of the Plaintiff against the Defendants in any way premised upon the status of her medical staff membership, categorization, or privileges or her prior litigation with the Defendants shall be accompanied by a $50,000.00 bond or letter of

credit, paid in to the Clerk of Court, to be applied to Defendants' attorneys' fees and other litigation expenses in the event Defendants are the prevailing party and the Court finds them to be entitled to reimbursement of their attorneys' fees and other litigation expenses. If the Plaintiff fails to post such a bond or letter of credit, Defendants may present a certified copy of this Order to the Clerk of Court, upon which the Clerk shall summarily dismiss the action.

Factual/Procedural Background

The Plaintiff herein is a medical doctor specializing in the field of ophthalmology. Her current Complaint alleges causes of action for breach of contract and breach of the covenant of good faith and fair dealing concerning her medical staff privileges at Defendant East Cooper Community Hospital, Inc., which owns and operates East Cooper Medical Center (hereinafter referred to as the "Hospital").

This is the fourth lawsuit filed by the Plaintiff against Defendants arising out of her medical staff privileges at the Hospital. The Plaintiff's first lawsuit, Doe v. Tenet HealthSystem Medical, Inc., et al., Civil Action Number 2:99-0833-23, was filed in the United States District Court for the District of South Carolina, and Defendants were granted summary judgment. The Plaintiff's second lawsuit, Doe v. Tenet HealthSystem Medical, Inc., et al., Civil Action Number 2000-CP-10-1888, was filed in the Charleston County Court of Common Pleas. The parties resolved the second lawsuit through a Settlement Agreement and General Release in Full (the "Settlement Agreement") in 2002.

The Plaintiff's third lawsuit, Holmes v. East Cooper Community Hosp., Inc., et al., Civil Action Number 2005-CP-10-5113, was also filed in the Charleston County Court of

Common Pleas. The Plaintiff's allegations in Paragraphs 31-36 of the Amended Complaint in Case Number 2005-CP-5113, stating an alleged cause of action for breach of a covenant of good faith and fair dealing, are almost identical to the allegations in Paragraphs 12-16 of the Plaintiff's Complaint in the present lawsuit.[1] In her third lawsuit, the Plaintiff contended, among other things, that the Defendants breached the Settlement Agreement in their consideration of her 2002 and 2004 applications for reappointment to the Hospital's medical staff, advancement in staff category, and surgical privileges. She made the same argument in the instant case with respect to her 2006 and 2008 applications.

Defendants were awarded summary judgment in the Plaintiff's third lawsuit, and Plaintiff was ultimately sanctioned pursuant to the Act. Defendants were awarded a $90,000.00 judgment against Plaintiff. The Plaintiff's appeals of these orders were dismissed and remitted by the South Carolina Court of Appeals.

Plaintiff's allegations in the current lawsuit relate to her applications for reappointment to the Hospital's medical staff, advancement in staff category, and request for surgical privileges in 2006 and 2008. On July 29, 2011, this Court entered an order granting summary judgment to Defendants. On August 8, 2011, Defendants filed and served this motion.

Law/Analysis

I. The FCPSA Standard

[1] The Plaintiff's Amended Complaint in Case Number 2005-CP-10-5113 includes two separate paragraphs labeled 31 through 36. This Court is referring to the second such set of paragraphs therein.

The FCPSA allows for the imposition of sanctions for the initiation and prosecution of civil lawsuits without merit. Section 15-36-10(C)(1) of the FCPSA provides when an action has been dismissed by summary judgment, upon motion of the prevailing party, "the court shall proceed to determine if the claim . . . was frivolous." Section 15-36-10(C)(1) further provides that a party shall be sanctioned for a frivolous claim if the Court finds that the party 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.*

(emphasis added).

Section 15-36-10(E) of the Act sets forth the elements a Court should consider when determining whether a party 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;
> (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.

Section 15-36-10(G) of Act sets forth the sanctions allowable, including (1) reasonable costs and attorneys' 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.

In Rutland v. Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 98, 637 S.E.2d 316, 320 (Ct. App. 2006), the South Carolina Court of Appeals affirmed the circuit court's award of sanctions to the defendant, emphasizing that "Respondents were able to show that the primary purpose for which the proceedings were initiated 'was not that of securing the proper . . . adjudication of the civil proceedings.'" The Court recognized: "A review of the record reveals that the lawsuit at issue alleged causes of action for the same complaint as the previous lawsuits, *i.e.,* Rutland's dissatisfaction with Corbett and his law firm." Id. "In light of this unsuccessful procedural history, it is inconceivable that Rutland reasonably believed that his claims against Respondents were valid." Id.

II. Defendants are entitled to sanctions under the FCPSA for continuing to argue that this Court has jurisdiction to review the privileging decisions of a private, for-profit hospital.

The Plaintiff herein violated the Act by initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against the

Plaintiff that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations.

The Plaintiff contends in this action, as she did in Case Number 2005-CP-10-5113, that rather than asking the Court to review the decisions made regarding her credentialing process, she seeks a determination of whether Defendants breached the Settlement Agreement in their consideration of her applications for advancement in staff category and surgical privileges. In her previous 2005 lawsuit, the Honorable R. Markley Dennis, Jr., not only granted summary judgment to Defendants on the basis that the circuit court lacked jurisdiction over such claims, but also sanctioned the Plaintiff for raising the argument. The case for sanctions is even stronger in this case—if the argument was frivolous the first time, it is clearly frivolous the second time.[2]

"Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Metts v. Mims, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009). "It is well settled in South Carolina, and throughout the country, that it is improper for the courts to review

[2] In this respect, Judge Dennis's order sanctioning the Plaintiff in the 2005 lawsuit for arguing that the circuit court has jurisdiction to review the Defendants' privileging decision also binds the Plaintiff in this case. See Pye v. Aycock, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) ("In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action. A plea of *res judicata* applies to those matters actually adjudicated in the former action."); Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994) ("Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). This alternative ground also supports this Court's award of sanctions against the Plaintiff.

the decisions of governing boards of private hospitals concerning the staff privileges of practitioners." Wood v. Hilton Head Hosp., Inc., 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987). Thus, "the implementation of the regulations of a private hospital which are initiated to restrict a practitioner's practices are not subject to judicial review." Id.

As this Court recognized in its Order granting summary judgment to Defendants: "Though styled as a breach of contract action, as her multiple previous lawsuits against Defendants were, the Plaintiff's claims all arise out of the peer review process at the Hospital and, as such, are not subject to judicial review." **Summ. J. Order filed 07/29/2011, p.5.**

As previously discussed, in the 2005 lawsuit, Judge Dennis granted summary judgment to Defendants. **Summ. J. Order filed 05/23/2007 in 2005-CP-10-5113.** In addressing the allegations set forth above relating to the Plaintiff's 2004 application, which are almost identical to the claims set forth in the current case relating to the Plaintiff's 2006 and 2008 applications, Judge Dennis held, in pertinent part:

> *The Plaintiff's Amended Complaint seeks judicial determination of whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws*. Specifically, she requests the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. *The Plaintiff's claims all arise out of the peer review process at East Cooper Hospital and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and the Plaintiff has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.*

Summ. J. Order filed 05/23/2007 in 2005-CP-10-5113, p.4 (double emphasis added).

Judge Dennis re-emphasized its ruling in a subsequent order sanctioning Plaintiff for litigating the issue:

> *Despite clear case law to the contrary, the Plaintiff filed this action seeking judicial determination of whether the decisions regarding her credentialing and privileges were reasonable and in compliance with the Hospital's Bylaws.* Specifically, she sought the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The Plaintiff's claims all arose out of the peer review process and, under South Carolina law, are not subject to judicial review, and the Plaintiff presented no evidence or reason to persuade the Court to depart from this long-standing principle.

Sanctions Order filed 08/06/2009 in 2005-CP-10-5113, p.15 (double-emphasis added).

The present lawsuit regurgitates the Plaintiff's allegations and arguments in her 2005 lawsuit. The Plaintiff alleges, as she did in 2005, that the Defendants breached the Settlement Agreement in reviewing her applications for medical staff privileges. **Compl.** In the 2005 lawsuit, Judge Dennis considered this argument and rejected it in two separate orders. **Summary Judgment Order; Sanctions Order.** In one of those orders, he sanctioned the Plaintiff for making the argument. **Sanctions Order.** With the Plaintiff being sanctioned in 2005 for making the argument, no reasonable attorney could contend that the argument is not frivolous in this action.

Notwithstanding the foregoing, the Plaintiff contends that the present lawsuit was filed under a good faith argument for the extension of Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). This argument has no merit. Initially,

Judge Dennis considered and rejected this exact same argument in his order sanctioning the Plaintiff in the 2005 case:

> Plaintiff's interpretation and reliance on *Lee* v. *Chesterfield General Hospital, 289* S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), in an effort to justify her quest to have the Court review the decisions regarding her credentialing is without merit. In *Lee* the Court confirmed the decision reached in *Gowan* but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. *Lee* at 10. Here the Plaintiff asked the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that *Strauss, Gowan;* and *Wood* decisions sought to prevent.

Sanctions Order filed 08/06/2009 in 2005-CP-10-5113, pp.15-16.

While the Plaintiff contends that this previous circuit court order is not binding precedent and that Judge Dennis's decision in this instance was incorrect, the Plaintiff ignores that, "[u]nder the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Plaintiff failed to offer any argument as to why Judge Dennis's decision does not collaterally estop her in this action. Moreover, the Plaintiff's argument on this point emphasizes her intention to re-litigate the case she lost in 2005.

In addition, by its express terms, the Lee decision was limited to civil conspiracy claims and has no application to the actions alleged by the Plaintiff in this case. The

Plaintiff cites no cases or authority from South Carolina or any other jurisdiction purporting to extend the Lee decision to her breach of contract claim asserted in this case. The Plaintiff also fails to distinguish the well-settled rule in South Carolina that the parties may not, by agreement or otherwise, consent to confer subject matter jurisdiction on the court. See Eldridge v. City of Greenwood, 331 S.C. 398, 408, 503 S.E.2d 191, 196 (Ct. App. 1998) ("Claims of lack of subject matter jurisdiction may be raised at any time, and subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court.").

Based on the ample case law on this issue, a reasonable attorney in the same circumstances would believe that under the facts herein, the Plaintiff's claim 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. As such, Defendants are entitled to sanctions under the Act.

III. Defendants are entitled to sanctions under the Act because the Plaintiff initiated and continued the present action despite the Defendants' compliance with the plain language of the Bylaws.

Even if this Court had subject matter jurisdiction to review the privileging decisions of the Hospital, there is absolutely no evidence that the Defendants failed to comply with the Settlement Agreement or the Medical Staff Bylaws in reviewing the Plaintiff's application.

The Settlement Agreement provides, in pertinent part: "Dr. Holmes shall have the right to apply for a change in status in accordance with the Bylaws." **Settlement Agreement, pp.1-2.** The construction of a clear and unambiguous contract is a

question of law for the court. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

The record in this case shows that the Plaintiff failed to produce any evidence in support of her allegations that the subject Settlement Agreement was breached. Indeed, the affidavit of her expert witness failed to even mention the Settlement Agreement and only addressed whether the Hospital's Bylaws were followed. Defendants produced testimony from relevant committee and board members involved in the Plaintiff's credentialing process, who all testified that the Plaintiff's reappointments were conducted in compliance with the Bylaws.

Notwithstanding the foregoing, the Plaintiff failed to conduct *any* discovery on these allegations (or otherwise) until the eve of the summary judgment hearing, when she noticed and took the deposition of Janie Sinacore-Jaberg, the Hospital's former CEO. In the 2005 lawsuit, the circuit court looked to the Plaintiff's failure to conduct any discovery as supporting its award of sanctions: "[Plaintiff] failed to conduct any discovery, written or otherwise, on this or any other claim pled in her Complaint." **Sanctions Order, p.13.**

In this case, after the hearing on Defendants' motion for summary judgment was set, Plaintiff noticed and took the deposition of Sinacore-Jaberg. **Ex. 3 to Plt.'s Response to Defs.' Mot. for Sanctions.** While the Plaintiff points to Sinacore-Jaberg's deposition transcript to show that she conducted discovery in the present case, it is telling that the Plaintiff did not cite to Sinacore-Jaberg's substantive testimony in either her response to Defendants' motion for summary judgment or her response to Defendants' motion for sanctions. Moreover, the Plaintiff's expert witness never even

mentioned Sinacore-Jaberg's testimony in his affidavit, and Sinacore-Jaberg was never asked about the Settlement Agreement. Defendants never designated Sinacore-Jaberg as a witness or submitted an affidavit from her in support of their motions.

The Plaintiff produced absolutely no evidence that Defendants failed to comply with the Settlement Agreement or the Bylaws in considering her 2006 or 2008 reappointment applications. The lack of any factual basis for the Plaintiff's claim and the Plaintiff's failure to conduct substantive discovery relating to the Settlement Agreement also support sanctions against her.

IV. The factors in section 15-36-10(E) of the Act support an award of sanctions.

This Court has considered each of the factors in section 15-36-10(E) of the Act in determining whether the Plaintiff violated the Act. Neither the number of parties nor the complexity of the legal issues involved in this case appears to have confused the Plaintiff in any manner. It is the Plaintiff's continued refusal to consider applicable case law and prior court orders which caused her to file this frivolous lawsuit, not the complexity of the issues involved. If the Plaintiff had even cursorily reviewed her previous filings, prior Court orders, the Settlement Agreement, and the Bylaws prior to filing this lawsuit, it would have shown her the unreasonableness of her actions.

The Plaintiff has been in possession of or had access to the dispositive facts of this action—the 1999 federal suit complaint, the 2000 state court complaint, the Settlement Agreement, the 2005 filings, the prior Court orders, and the Bylaws—since before she filed this action. As the Court's records reflect, she also had roughly four (4) months to reconsider the filing of this lawsuit before she served it.

Factor (5) requires this Court to consider previous violations of this section in determining whether the Plaintiff violated the Act. This factor weighs strongly in favor of sanctions against the Plaintiff. Two separate circuit court judges have sanctioned the Plaintiff under the Act. In addition, the Supreme Court of South Carolina has emphasized the Plaintiff's vexatious litigation activities involving the Defendants in two separate orders. Judge Dennis in the instant case warned the Plaintiff that she might be sanctioned early in the present litigation, during a hearing on Defendants' motion to dismiss. Despite these sanctions and warnings, the Plaintiff has continued her frivolous litigation against the Defendants. This factor also strongly supports the injunctive relief provided herein.

With respect to the sixth factor, while the Plaintiff has asserted several procedural reasons as to why she believes she should not be sanctioned, the only substantive argument she offered was her apparent belief that the Lee decision supported this lawsuit. As previously discussed, the Plaintiff was placed on notice in her 2005 lawsuit that Lee afforded her no relief.

V. Pursuant to section 15-36-10(G)(1) of the South Carolina Code, Defendants are entitled to their attorneys' fees and other litigation expenses incurred in defending this lawsuit against the Plaintiff.

Section 15-36-10(G)(1) of the South Carolina Code provides that sanctions under the Act may include: "[A]n order for the party represented by an attorney . . . 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 . . . ." Id.

In Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), the Supreme Court of South Carolina set forth the six (6) factors a court should use in determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services."

In support of their request for attorneys' fees, Defendants submitted an affidavit setting forth the actual fees incurred in the defense of this action and a detailed itemization of said fees. Defendants request costs and attorneys' fees in the amount of $53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100ths Dollars).

In considering the factors set forth in Glasscock, the Court finds that the time and charges submitted for defending this action is comparable to the compensation charged by and paid to other attorneys with comparable legal ability, experience, success and standing within the South Carolina Bar in connection with healthcare litigation throughout the State of South Carolina; that the services set forth in the record for defending this matter were reasonable under the circumstances; that Defendants' requirement to pay for the defense of this case was not contingent on the outcome; and that counsel for Defendants obtained beneficial results in this action through the granting of summary judgment of the remaining claims and the successful prosecution of the present motion.

Based on the foregoing, I hereby order judgment entered in favor of Defendants against the Plaintiff in the amount of $53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100ths Dollars), with said judgment to be enrolled against the Plaintiff Cynthia Holmes, as well as against her alias, Cynthia Elaine Collie. I further give the Defendants leave to move upon remand for taxation of their additional attorneys' fees and expenses expended in defending this action on appeal of both the summary judgment order and this order pursuant to Rule 54, SCRCP, provided they are the prevailing party in the appeals.

VI. Pursuant to section 15-36-10(G)(3) of the South Carolina Code, Defendants are entitled to injunctive relief.

Section 15-36-10(G)(3) of the South Carolina Code provides that sanctions may include "a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith." "The court has the discretion and the power to restrict a litigant who abuses the judicial system, and has authority to enjoin persons engaged in a manifest abuse of judicial process." 43A C.J.S. Injunctions § 96. "A court has both the duty and the power to protect the courts, citizens, and opposing parties from the abuse of a party who uses the judicial process not to vindicate his or her rights, but to harass and intimidate his or her adversaries by repeatedly filing groundless and vexatious claims against them." Id. "In order to preserve court resources, courts may place reasonable limits on the filings of litigants who abuse the judicial system, although such a sanction should be drawn narrowly." Id.

"A court's equity jurisdiction may properly be invoked to enjoin a multiplicity of successive suits at law by the same plaintiffs." 43A C.J.S. Injunctions § 99. "A party

litigant who brings successive law suits involving the same issues against the same parties that are vexatious in nature may be enjoined from continuing such actions." Id.

"The power of the court to grant an injunction is in equity." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "The court will reserve its equitable powers for situations when there is no adequate remedy at law." Id. "The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." Id. "In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case." Id.

In this case, the Defendants have made a detailed showing of the Plaintiff's pattern of filing abusive and frivolous litigation. The Plaintiff has filed lawsuit after lawsuit after lawsuit against Defendants, not to mention two separate lawsuits against her former attorneys, all arising from a medical privileging dispute which began in 1997. This Court is the third separate circuit court judge to recognize the Plaintiff's vexatious litigation activities.

It is also clear that the Defendants have no adequate remedy at law. Defendants have already been awarded their attorneys' fees and costs under the Act in the 2005 lawsuit, and this judgment had no impact on the Plaintiff's desire to file the current frivolous lawsuit. In this respect, the Honorable Thomas L. Hughston, Jr., has also sanctioned the Plaintiff in another lawsuit, against her former attorneys, awarding those former attorneys $200,000.00 in attorneys' fees and costs in an order filed on November 18, 2009. This Order also clearly had no impact on the Plaintiff's decision to file the

present lawsuit, and the Plaintiff has shown that she is unwilling to be deterred by judgments against her. Simply put, the Defendants have no other avenue of relief short of an injunction.

This Court also notes that Judge Hughston and the Supreme Court of South Carolina have already enjoined the Plaintiff from filing lawsuits in South Carolina courts without a licensed attorney signing on her behalf. Despite these injunctions, the Plaintiff filed the present lawsuit, which was signed by her counsel of record in this lawsuit and the 2005 lawsuit, Chalmers C. Johnson. These injunctions also provided no relief to Defendants.

Under these circumstances, this Court hereby enjoins the Plaintiff, or anyone on her behalf, filing a lawsuit against East Cooper Community Hospital, Inc.; Tenet HealthSystem Medical, Inc.; or their directors, officers, agents, servants, employees, attorneys, or related entities without such filing being accompanied by a bond or letter of credit, paid into the Clerk of Court at the time of filing, in the amount of $50,000.00. Such bond or letter of credit will be applied to pay the attorneys' fees and other litigation expenses of any of the foregoing if they are the prevailing party in the action and if they are entitled to such attorneys' fees and other litigation expenses through the imposition of sanctions or otherwise. Furthermore, if the Plaintiff, or anyone on her behalf, files a lawsuit without such a bond or letter of credit, the Defendants may present a certified copy of this Order to the Clerk of Court and, upon presentation, the action should be summarily dismissed by the Clerk.

This Court has carefully considered this relief in an attempt to issue an injunction which is no more comprehensive than required by the facts of this case and the long

history of the Plaintiff's frivolous litigation activities. The Plaintiff has been sanctioned or warned multiple times by multiple courts. She has been given every opportunity to conform her conduct to the standards of a reasonable attorney, as well as a reasonable human being. She has rejected these opportunities time and time again.

VII. Plaintiff's procedural arguments for denying Defendants' motion are without merit.

Most of the Plaintiff's arguments for denying the Plaintiff's motion are procedural in nature. This Court rejects these arguments for the following reasons:

1. Plaintiff contends the pending appeal of this Court's summary judgment order warrants a stay of this motion. In Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986), the Supreme Court of South Carolina held that a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion, which includes a motion for sanctions under the Act.

2. Plaintiff contends that Defendants failed to comply with Rule 59(g), SCRCP, which requires a party to provide a copy of a motion to alter or amend to the judge within ten (10) days after the filing of the motion. In Gallagher v. Evert, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002), the South Carolina Court of Appeals held that Rule 59(g) does not affect the timeliness of a post-trial motion, nor does it impact the circuit court's jurisdiction.

3. Plaintiff contends that Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997), compels this Court to deny the Defendants' motion. In Hanahan, the Supreme Court of South Carolina recognized: "Other courts . . . hold that a party who survives pre-trial motions to dismiss and for summary judgment are not subject to sanctions after a trial on the surviving claims." Id. at 157, 485 S.E.2d at 912. "The theory behind these

cases is that if a case is submitted to the jury, it cannot be deemed frivolous." Id. Hanahan has no applicability to the facts of the case because this case was not submitted to the jury, and the Plaintiff did not survive pre-trial motions to dismiss or for summary judgment. While the Plaintiff points to the consideration by Judge Dennis of a previous motion to dismiss in this matter as supporting a finding that she survived a pre-trial motion, Judge Dennis clearly stated at the hearing of that motion that he deemed the motion premature and was not ruling on its merits. He never denied the motion. The motion was renewed after a sufficient time to conduct discovery, and summary judgment was entered against the Plaintiff.

Conclusion

Defendants have shown that this lawsuit was a simple re-hash of the Plaintiff's frivolous 2005 lawsuit against them. The allegations and arguments were the same, and the Plaintiff fails to explain how they are different.

The Plaintiff has shown a long history of ignoring plain facts, clear legal precedent, and previous warnings and sanctions of other Courts. In 1999, the Honorable Patrick Michael Duffy criticized the Plaintiff for flaunting the Hospital's rules and the Court's rules. Unfortunately for the Defendants, nothing has changed since that time.

Under the circumstances, this Court hereby sanctions the Plaintiff pursuant to the Act, awards Defendants their requested attorneys' fees and other litigation expenses, and enjoins the Plaintiff from filing further lawsuits against the Defendants without a bond or letter of credit as set forth herein.

The Honorable Kristi Lee Harrington
Chief Administrative Judge
Ninth Judicial Circuit

December ___, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Dr. Cynthia Holmes Plaintiff, vs. East Cooper Community Hospital, Inc.; Tenet Healthsystem Medical, Inc. Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-10-3410 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
Chalmers C. Johnson, Bar No. 11583 Address: 523 So. G Street, Apt 402 Tacoma, WA 98405 Phone: 425-999-0900Fax 360-692-7578 E-mail: chalmersjohnson@gmail.comOther:	Lindsay Smith-Yancey, Bar No. _____ Address: P.O. Drawer 22247 Charleston, SC 29413-2247 Phone: _____ Fax_____ E-mail: _____Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration/ Alter or amend judgment/ Rule 59 SCRCP/Rule 60
Estimated Time Needed: 15min Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted 2-15-12

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. 2010-CP-10-3410
	)	
DR. CYNTHIA HOLMES, M.D.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**PLAINTIFF'S MOTION TO RECONSIDER, ALTER OR AMEND THE COURT'S ORDER OF FEBRUARY 1, 2012**
	)	
EAST COOPER COMMUNITY HOSPITAL, INC.; TENET HEALTHSYSTEM MEDICAL, INC.	)	**RULES 59(e) and 60(b)(1) SCRCP**
	)	
	)	
Defendant.	)	
	)	

Pursuant to Rule 59(e) and Rule 60(b)(1) of the South Carolina Rules of Civil Procedure, the Plaintiff hereby requests that the Court alter, amend, and reconsider its Order of February 1, 2012, awarding sanctions against the Plaintiff. The Order contains several material mistakes of law and fact, which, if corrected, should mandate a reconsideration of the February 1, 2012 Order and the issuance of a new Order, denying and dismissing Defendant's motion for sanctions. Plaintiff's counsel received notice of the Court's Order on February 6, 2012 by mail from the Charleston Clerk of Court. A copy of this motion and exhibits has been sent directly to Judge Harrington, who issued the Order herein addressed, pursuant to the requirements of Rule 59, and Rule 60(a) SCRCP.

I. Material mistakes of fact in the Court's Order of February 1, 2012.

A. The Court made an error of fact in stating or basing its decision on the theory that the Plaintiff's case was dismissed pursuant to the doctrine of collateral estoppel or res judicata.

In the 2-1-12 Order, the Court bases its finding that no reasonable attorney would have argued Mr. Johnson's interpretation of *Lee v. Chesterfield General Hosp.*,

Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), and *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and its progeny on the theory that collateral estoppel applied in this case. In fact, the Court not only did not apply collateral estoppel/ res judicata, but included a footnote specifically stating that it did not consider the prior orders from Judge Dennis in other cases in reaching its conclusion as to the dismissal for lack of subject matter jurisdiction. (Order 7-26-11, p. 7) At most, the Court adds, as dicta, its belief that the Orders from Judge Dennis would act as collateral estoppel, if reviewed. If the Court itself declined to apply collateral estoppel to dismiss the Plaintiff's case, and did not take into account Judge Dennis' previous orders, how can it find that no reasonable attorney would have failed to expect collateral estoppel to apply? The Court should consider clarifying the fact that its dismissal was not related to collateral estoppel/ res judicata, and removing any reference to collateral estoppel, res judicata, or to Judge Dennis' prior orders as a basis for a finding that the Plaintiff's actions in pursuing a claim for breach of contract in this case was frivolous. In fact, collateral estoppel did not apply in this case (See Plaintiff's arguments regarding collateral estoppel and res judicata in the Plaintiff's Response to Defendant's Motion for Summary Judgment.)

B. The Court erred in stating that "Plaintiff failed to offer any argument as to why Judge Dennis' decision does not collaterally estop her in this action."

In the Order of 2-1-12, the Court erroneously states that the Plaintiff failed to offer any argument in regards to Defendant's claim that the doctrines of collateral estoppel or res judicata barred Plainiff's suit. Plaintiff's response to Defendant's motion for summary judgment, dated July 6, 2011, contains an argument as to collateral estoppel,

and one that was sufficiently compelling that the Court not only avoided making collateral estoppel/ res judicata one of the grounds for dismissal, but opted to expressly state, in the order that it had **not** to considered Judge Dennis' former Circuit Court Orders in other cases as a basis for the decision to dismiss Plaintiff's case. The Court specifically declines to consider previous orders, stating, in what should be considered as dicta that they "operate as collateral estoppel as to the issue, and also support the Court's decision." (Order of 7-26-11, p. 7) The Court should amend its order to clarify to the reviewing court that it did not dismiss the underlying case in this matter under the doctrine of collateral estoppel or res judicata, and that the Plaintiff did, in fact provide compelling arguments explaining why collateral estoppel did not apply.

C. The Court has made a mistake in fact by mischaracterizing its order of July 26, 2011 as granting summary judgment, when it actually dismissed solely on the grounds of subject matter jurisdiction.

Beginning on page 9 of the Court's Order of 2-1-12, the Court discusses the facts of the underlying case as if it had determined that there was no genuine issue of material fact and granted summary Judgment, when, in fact, the Order clearly avoids this issue all together and grants the defendant's motion to dismiss solely on the grounds of a lack of subject matter jurisdiction. (Order of 7-26-11) In fact, the Plaintiff did meet her burden of producing facts sufficient to support her case. Plaintiff refers to the Plaintiff's response to Summary Judgment and accompanying affidavits and exhibits, as well as craving reference to the Judge's order dismissing this case, which, although mistakenly referring to summary judgment, actually grants the defendant's motion to dismiss under Rule 12(b)(1) of the S.C. Rules of Civil procedure. (Plaintiff's Response to Defendant's Motion for Summary Judgment, July 6, 2011, Affidavit of Plaintiff, Order of July 26,

2011) This is a material mistake of fact, as it improperly implies that the Court considered this case on the merits, which it did not. 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, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. This is because summary judgment is an adjudication of the merits of the case, whereas dismissal for lack of subject matter jurisdiction is not an adjudication on the merits. *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (S.C.App. 1993) See also *Gulledge v. Young,* 242 S.C. 287, 130 S.E.2d 695 (1963); *Nauful v. Milligan,* 258 S.C. 139, 187 S.E.2d 511 (1972); *Prakash v. American University,* 727 F.2d 1174 (D.C.Cir.1984). The Court should amend its Order to show that this case was never considered on its merits, as it was dismissed for lack of subject matter jurisdiction pursuant to Defendant's motion to dismiss brought under Rule 12(b)(1), SCRCP.

D. The Court has made a mistake of fact by erroneously failing to recognize Judge Dennis' Order of March 8, 2011, in which he denied the Defendant's motion to dismiss for lack of subject matter jurisdiction.

In it's Order of 2-1-12, the Court stated, in reference to the Defendant's previous two motions to dismiss based on a 12(b)(1) subject matter jurisdiction argument "the plaintiff did not survive pre-trial motions to dismiss" and "He [Judge Dennis] never denied the motion." (Order of 2-1-12, p. 17) This is obviously a glaring error of fact when one takes the time to do even a cursory review of the Court record in this case. On record is a Form 4 Order, signed by Judge Dennis, stating "The Defendant's Motion to Reconsider is denied." (Order of 3-8-11) Also, the notice that was sent out by the Courts states "Order/Defnt's Mot to Reconsider is denied." (Notice of 4-25-11) The transcript of

the March 8th hearing clearly shows that Judge Dennis denied the Defendant's motion to dismiss based on a lack of subject matter jurisdiction, even telling Defendant's attorney that he had given Defendant grounds for an appeal by doing so. (Transcript of March 8, 2011) Finally, in case the Court is still not clear as to what Judge Dennis was actually denying, the Plaintiff points to the Defendant's Motion for Reconsideration, in which the Defendant specifically brings the subject matter jurisdiction issue before Judge Dennis, who had previously declined to rule on it, and insists on a ruling. (Defendant's Motion to Reconsider 12-22-10) This mistake of fact by the Court is particularly important to rectify, as the denial of the motion to dismiss by Judge Dennis in this case on March 8, 2011, legally prohibited Judge Harrington from countermanding it at a later date in the same case. This violates the "law of the case doctrine" and is directly counter to established South Carolina law. *Charleston County DSS v. Father,* 317 S.C. 283, 454 S.E.2d 307 (1995) (one judge may not overrule another judge of the same court). Once this error is corrected, and the holding from *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) properly applied, the Court, in order not to run afoul of the *Hanahan* holding and related cases, should reconsider and deny the Defendant's motion for sanctions.

II. Material mistakes of law in the Court's Order of February 1, 2012

A. The view that *Lee v. Chesterfield* is restricted to cases in which the Plaintiff has alleged civil conspiracy is not expressly stated in *Lee v. Chesterfield.*

The Court has made a mistake of law by failing to properly cite *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). In the Court's Order, the Court states "by its express terms, the Lee decision was limited to civil

conspiracy claims" (Order 2-1-12, p. 9) The Court has made an error in making this statement, as there are no express terms in the Lee decision which so limit the opinion's holding. The Court's finding that no reasonable attorney could possibly have interpreted the *Lee v. Chesterfield* decision the way that the undersigned did is clearly based on the assertion that the case **expressly** states that Mr. Johnson's interpretation is invalid. The Court should be able to quote the express statement from the opinion and, it would seem, should feel compelled to do so, if it in fact exists. If the statement, "by its express terms, the Lee decision was limited to civil conspiracy claims" is untrue, the Court should remove it from the Order of 2-1-12 and alter its judgment to deny the Defendant's motion for sanctions.

B. The Judge made an mistake of law in considering the holding of *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) to be a "procedural issue."

The Court addresses several issues at the end of the Order as "procedural arguments." However, the case law and arguments raised under the holding from *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) were substantive arguments, rather than mere issues of courtroom procedure. For the sake of clarifying the standard of review for the Appellate Court review, the Plaintiff would ask that the Court address and correct this error of law. As the argument regarding *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) was a substantive argument, the standard of review by the Appellate Courts on this issue would be de novo, rather than for abuse of discretion.

Because the holding from *Hanahan v. Simpson* is substantive, and controlling law, the fact that the Plaintiff did actually survive the identical motion to dismiss for lack of subject matter jurisdiction on not one but two occasions in this case prior to July 26th, requires the Court to reconsider its decision to award sanctions in this case. The

Defendant's motion for sanctions must be denied, as the *Hanahan v. Simpson* holding absolutely prohibits a finding of frivolity in this case.

C. The Court failed to address the Plaintiff's arguments regarding the constitutionality of the Frivolous Proceedings Sanctions Act.

The Plaintiff made an argument before the Court, contesting the constitutionality of the S.C. Frivolous Proceedings Sanctions Act on the grounds that the Act deprives the party against whom it is used of proper procedural due process. Specifically, the requirement that the Court report the party to the Supreme Court of the State for an ethical investigation causes the Supreme Court, who would also later eventually review the appeal of the same Order, to have been involved in issuing a decision in the case prior to reviewing an appeal, thereby depriving the party against whom the order issued from having an opportunity for review by an impartial hearing officer prior to being deprived of property or substantial rights (such as property or the right to file a lawsuit in court without posting a $50,000.00 bond) by the State, as is required for procedural due process.

The Act also unconstitutionally inhibits free speech. Whereas South Carolina legislators have claimed that the purpose of the Frivolous proceedings sanctions act is to punish litigants who engage in bringing frivolous claims or asserting frivolous defenses, the act is overbroad. The Legislature has provided this expansive remedy, allegedly, out of concern for the instigation of frivolous legal proceedings. However the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes monetary civil sanctions. See *Schaumburg v. Citizens for a Better Envt.*, 444 U.S. 620, 634 (1980); *Bates v. State Bar of Ariz.*, 433 U.S.350, 380 (1977); *NAACP v. Button*, 371 U.S. 415, 433(1963). Many persons, rather

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than undertake the considerable burden (and sometimes risk) of vindicating their rights through litigation, will choose simply to abstain from protected speech for fear of financial loss--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas and a proper forum for the resolution of conflict between citizens. Because the Act imposes a restriction on the content of protected speech, it is invalid unless South Carolina can demonstrate that it passes strict scrutiny. The State must specifically identify an actual problem in need of solving, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822-823 (2000), and the curtailment of free speech must be actually necessary to the solution, see *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992).This arduous standard has not been met and, the Plaintiff submits, can not be met under the current wording, and application by the Courts of the act.

These arguments were raised before the Court, and submitted as part of the Plaintiff's proposed order requested by the Court. In that they are substantially important arguments, the Court should at least address them in its order, so that proper review can be afforded.

CONCLUSION

The Plaintiff respectfully submits to the Court that the Order of February 1, 2012 contains several material factual and legal mistakes, which the Court should have an opportunity to correct before this matter is presented for review to the Appellate Courts. The Plaintiff requests that the Court alter, amend, and reconsider the Order of February 1, 2012, and issue a new order, denying the Defendant's motion for sanctions in this case based on the arguments and information presented to the Court to date.

REQUEST FOR ADVANCE NOTICE OF HEARING DATE

If the Court decides that a hearing is necessary to consider this motion, the Plaintiff respectfully requests that the Court give as much notice as possible of the hearing date so that Plaintiff's counsel can make arrangements to appear in person. Plaintiff's counsel is in Washington State and will have make travel and flight arrangements in advance.

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

February 15, 2012

INDEX OF EXHIBITS

1. Order of July 26, 2011
2. Plaintiff's Response to Defendant's Motion for Summary Judgment, with exhibits – July6, 2011
3. Affidavit of Holmes – July 5, 2011
4. Order - March 8, 2011
5. Notice of Order - April 25, 2011
6. Transcript of Hearing - March 8, 2011
7. Defendant's Motion to Reconsider - December 22, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lee Harrington, Circuit Court Judge

Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

NOTICE OF APPEAL

The Appellant appeals the Order of Judge Kristi Lee Harrington Filed February 1, 2012. Plaintiff received notice of the order by mail from the Court on February 6, 2012. A copy of the Order under appeal is attached.

Dated: March 1, 2012

Chalmers C. Johnson
S.C. I.D. #11583
523 So. G St. Apt. # 402
Tacoma, WA 98405
(425) 999-0900
Attorney for the Appellant

Counsel of Record for Respondents:
Lindsay Smith-Yancey
E.D. Pratt-Thomas, Esq.
POD 22247
Charleston, SC 29413

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. NO.: 2010-CP-10-3410
	)	
Dr. Cynthia Holmes, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Defendants' Memorandum in Opposition to the Plaintiff's Motion to Reconsider, Alter or Amend the Court's Order of February 1, 2012**
	)	
East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc.,	)	
	)	
Defendants.	)	
	)	

Defendants East Cooper Community Hospital, Inc. and Tenet HealthSystem Medical, Inc., (collectively "Defendants") hereby submit this Memorandum in Opposition to the Plaintiff's Motion to Reconsider, Alter or Amend the Court's Order of February 1, 2012.

Rule 59(f), SCRCP, provides that a motion to reconsider, alter or amend "may in the discretion of the court be determined on briefs filed by the parties without oral argument." Because the Plaintiff's motion raises issues which have been previously argued, fully considered, and properly decided, Defendants respectfully request that the Court exercise its discretion in this case to dispense with oral arguments and deny the motion on the briefs submitted by the parties.

Although it is clear from the Plaintiff's present motion that she disagrees with the Court's decision, the Plaintiff has not demonstrated that the Court overlooked or misapprehended any of the arguments previously raised by the parties. Instead, the Plaintiff simply re-hashes arguments which this Court has previously considered. For this reason alone, the Plaintiff's motion should be denied.

Notwithstanding the foregoing, the Plaintiff's motion should also be denied on the following alternative grounds:

1. In its Order Awarding Sanctions, the Court properly applied the doctrine of collateral estoppel. At the hearing on Defendants' motion for sanctions, the Plaintiff characterized Judge Dennis' orders in one of the prior lawsuits brought by the Plaintiff against Defendants as incorrect and "non-binding." The Court held that, while the order would not be binding on other litigants in other cases, it was binding on the Plaintiff as a party to the prior action. There was no error, and this ground for the Plaintiff's motion should be denied.

2. In its Order Awarding Sanctions, the Court correctly held that the "Plaintiff failed to offer any argument as to why Judge Dennis' decision does not collaterally estop her in this action." The Plaintiff points to purported arguments she made in opposing summary judgment, which are conclusory and concede that the subject matter jurisdiction issue had been previously decided against the Plaintiff, in pertinent part: "The orders dismissing the prior cases all find a lack of subject matter jurisdiction. In his order of August 6, 2009, Judge Dennis awarded sanctions against Dr. Holmes based on a finding that the Court did not have jurisdiction to decide the prior cases." The Plaintiff never submitted any argument on collateral estoppel in opposing Defendants' motion for sanctions, and there is no substance to the purported arguments raised by the Plaintiff in opposition to summary judgment.

3. In its Order Awarding Sanctions, the Court properly characterized its July 29, 2011, order as granting summary judgment to Defendants. The Order is entitled, "Summary Judgment Order." The Order was issued in response to Defendants' motion,

entitled "Defendants' Notice of Motion and Motion for Summary Judgment." In fact, the Court's "Summary Judgment Order" concludes: "For the foregoing reasons, there is no genuine issue of material fact as to the causes of action asserted by the Plaintiff and Defendants' Motion for Summary Judgment is GRANTED."

4. In its Order Awarding Sanctions, the Court properly held that Judge Dennis refused to rule on the merits of Defendants' motion for judgment on the pleadings. On December 16, 2010, Judge Dennis held a hearing on the motion and ruled that the motion was premature. In so ruling, Judge Dennis specifically explained that he was not ruling on "anything about the merits." Defendants moved to reconsider Judge Dennis's decision that the motion was premature, and Judge Dennis denied that motion, as well. Contrary to the Plaintiff's contention in the present motion, Judge Dennis never addressed the merits of the Defendants' motion to dismiss on the grounds of subject matter jurisdiction. Notably, this Court rejected the same argument in the order granting summary judgment to the Defendants.

5. In its Order Awarding Sanction, the Court properly interpreted Lee. To the contrary of the Plaintiff's unsupported assertion, in Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 9-10, 344 S.E.2d 379, 381 (Ct. App. 1986), the South Carolina Court of Appeals expressly limited its ruling to civil conspiracy claims, recognizing that a private hospital is otherwise free "to decide the nature and extent of medical practice permitted to persons it grants staff privileges." The Court continued: "Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review." Id. Nevertheless, the Court held that "it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review" because "[t]he

question to be decided is not whether the rules are valid or reasonable or medically sound, but whether the rules were imposed in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiffs." Id. There is no indication in Lee or any other case that the ruling in Lee could be extended further, and the Plaintiff points to no contrary reasoning or authority for this proposition.

6. In its Order Awarding Sanctions, the Court properly applied Hanahan. Initially, as this Court ruled, "Hanahan has no applicability to the facts of the case because this case was not submitted to the jury, and the Plaintiff did not survive pre-trial motions to dismiss or for summary judgment." This is a correct interpretation of Hanahan v. Simpson, 326 S.C. 140, 158, 485 S.E.2d 903, 913 (1997), which provides, in relevant part: "We hold that where a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims."

7. The Plaintiff abandoned her argument regarding the constitutionality of the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"). In her motion to reconsider, the Plaintiff contends that the Act deprives a party of procedural due process because "the requirement that the Court report the party to the Supreme Court of the State for an ethical investigation causes the Supreme Court, who would also later eventually review the appeal of the same Order, to have been involved in issuing a decision in the case prior to reviewing an appeal . . . ."

This argument is conclusory, lacks any citation to authority, and generally makes no sense. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (recognizing short, conclusory statements made without supporting authority are deemed abandoned). There is also nothing substantiating the

Plaintiff's allegations that an ethical investigation would lack procedural due process, nor is the Supreme Court necessarily required to review any appeal of this case, as the Plaintiff apparently contends. See Rule 242, SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.").

8. In the Order Awarding Sanctions, the Court narrowly tailored the scope of the injunction to avoid any constitutional concerns regarding free speech. "The court has the discretion and the power to restrict a litigant who abuses the judicial system, and has authority to enjoin persons engaged in a manifest abuse of judicial process." 43A C.J.S. Injunctions § 96. "A court has both the duty and the power to protect the courts, citizens, and opposing parties from the abuse of a party who uses the judicial process not to vindicate his or her rights, but to harass and intimidate his or her adversaries by repeatedly filing groundless and vexatious claims against them." Id. "In order to preserve court resources, courts may place reasonable limits on the filings of litigants who abuse the judicial system, although such a sanction should be drawn narrowly." Id.

"A court's equity jurisdiction may properly be invoked to enjoin a multiplicity of successive suits at law by the same plaintiffs." 43A C.J.S. Injunctions § 99. "A party litigant who brings successive law suits involving the same issues against the same parties that are vexatious in nature may be enjoined from continuing such actions." Id.

The Plaintiff cites to no decisions in any jurisdiction analyzing whether any legislation similar to the Act inhibits free speech. Instead, the Plaintiff relies on cases involving an ordinance prohibiting door-to-door or on-street solicitation of contributions

by certain charitable organizations, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); a state law restriction on attorney advertising, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); the federal regulation of sexually-explicit broadcasting, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); and a city ordinance prohibiting expressive conduct, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992). None of these cases are on point here.

In the present proceeding, the Court correctly addressed the Act's impact on the litigants' constitutional and other rights, crafting an injunction well within its discretion.

Conclusion

Based on the foregoing, the Plaintiff's motion should be summarily denied, since it regurgitates past arguments already considered and dispensed with by the Court.

Respectfully Submitted,

Daniel S. McQueeney, Jr. (S.C. Bar No. 6802)
Direct telephone: (843) 727-2256
Email: dsm@p-tw.com
Lindsay K. Smith-Yancey (S.C. Bar No. 9083)
Direct telephone: (843) 727-2211
Email: lsy@p-tw.com

Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, South Carolina 29413-2247
Telephone: (843) 727-2200
Fax: (843) 727-2231
Attorneys for Defendants

March 6, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lee Harrington, Circuit Court Judge

Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

AMENDED NOTICE OF APPEAL

The Appellant has previously and recently appealed the Order of Judge Kristi Lee Harrington Filed February 1, 2012. At that time, there were outstanding motions for relief from judgment under Rul6 60 SCRCP and to alter or amend the February 1 Order. The Court has issued an order denying those motions, dated March 1, 2012 and filed March 7, 2012. Plaintiff received notice of the order by email from the Court . The Plaintiff hereby amends her March 1 appeal in this case to include the order of March1, 2012. A copy of the Order under appeal is attached.
Dated: March 19, 2012

Chalmers C. Johnson
S.C. I.D. # 11583
523 So. G St. Apt. # 402
Tacoma, WA 98405
(425) 999-0900
Attorney for the Appellant

Counsel of Record for Respondents:
Lindsay Smith-Yancey
E.D. Pratt-Thomas, Esq.
POD 22247
Charleston, SC 29413

Chalmers Carey Johnson
923 N. 13th Street, Apt. # 1
Tacoma, WA 98403
(425) 999-0900
chalmersjohnson@gmail.com

October 8, 2012

Supreme Court of South Carolina
Clerk of Court
Attn: Debbie Hopkins
P.O. Box 11330
Columbia, SC 29211

Re: Holmes v. ECCH
App. Case No. 2012-21078
Case No. 2010-CP-10-3410

Dear Ms. Hopkins:

Enclosed please find the following:

1) One original unbound copy of the Second Supplemental Record on Appeal;

2) Fourteen (14) bound copies of the Second Supplemental Record on Appeal;

2) Appellant's Certificate of Compliance with Rule 210

3) Proof of service (one original and one copy);

4) Self Addressed Stamped Envelope

Please file the second supplemental record on appeal, and the original proof of service. Please return a clocked copy of the Proof of Service to me in the enclosed envelope. Thank you.

Sincerely,

Chalmers C. Johnson

Enclosures: 1) 15 copies of Second Supplemental record on appeal; 2) Certificate of compliance with Rule 210(g) 3) Proof of service (one original and one copy); 4) Self Addressed Stamped Envelope

Cc:
Lindsay Smith-Yancey
Daniel S. McQueeney
E.D. Pratt-Thomas, Esq.
POD 22247
Charleston, SC 29413

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

App. Case No. 2012-21078
Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

PROOF OF SERVICE FOR
SECOND SUPPLEMENTAL RECORD ON APPEAL
AND CERTIFICATE OF COMPLIANCE

I certify that I have served a copy of the Second Supplemental Record on Appeal and certificate of compliance on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, at : Lindsay Smith-Yancey, Daniel S. McQueeney. E.D. Pratt-Thomas POD 22247 Charleston, SC 29413.

Chalmers C. Johnson
923 N. 13th St., Apt. #1
Tacoma, WA 98403
425.999.0900
Attorney for the Appellant

Date: 10-9-12

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
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The Honorable Kristi Lea Harrington, Circuit Court Judge

App. Case No. 2012-21078
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Appellant,

v.

East Cooper Community Hospital, Inc.;
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Respondents.

COUNSEL'S CERTIFICATE OF COMPLIANCE
SCACR 210(g)

As Counsel for the Appellant, I certify that, the Second Supplemental Record on Appeal contains all materials proposed to be included by the parties, and which comply with SCACR 210 and not any other material.

Chalmers C. Johnson
923 N. 13th St., Apt. # 1
Tacoma, WA 98403
425.999.0900
Attorney for the Appellant