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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas L. Hughston, Circuit Court Judge

Appellate Case No. 2010-154986

Dr. Cynthia Holmes, M.D.

Appellant/ Petitioner,

v.

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

Respondents.

APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

On June 4, 2014, the Supreme Court filed an opinion in this case. The Supreme Court affirmed the Circuit Court's dismissal of this case on directed verdict by Judge Hughston in the Charleston County Circuit Court. It also affirmed the Circuit Court's imposition of sanctions against Dr. Holmes in the form of non-monetary sanctions and attorney's fees and costs arising from the trial of the case, under Rule 11, SCRCP. The Court did not rule on the Appellant's issues regarding the SCFPSA, whether the Court has a common law inherent power to impose sanctions, or Appellant's claim that the Circuit Court should not have dismissed the causes of action other than legal malpractice (finding that Appellant had abandoned this last argument due to lack of sufficient specificity).The Appellant has reviewed the Court's opinion, and respectfully wishes to identify and be heard, pursuant to Rule 221, SCACR on issues which she feels the Court has overlooked or misapprehended in coming to its conclusions.

I The Court has misapprehended the factual allegations which form the basis of Appellant's legal malpractice claim in the underlying case, fatally affecting its rulings on several key issues.

Dr. Holmes, the Plaintiff, Appellant, and Petitioner in this case, made a claim for professional negligence against the Respondents and Respondents' firm. Certain federal claims were made based on expert opinion of anti-trust counsel (ROA, p. 1845) and that of Respondents. Throughout the Court's opinion, as well as Justice Pleicones' dissent, it is clear that the Court has failed to grasp what, exactly, Dr. Holmes has been alleging that the Respondents did wrong. In the Court's Opinion, and in the dissent, it is plain that the Court has viewed Dr. Holmes' claim of professional negligence to be that the

Respondents failed to properly pursue a complex anti-trust action in the Federal Court, resulting in the federal claims being, ultimately, dismissed on summary judgment by the U.S. District Court. The Supreme Court has based many of its findings and conclusions in the Opinion on this premise. This premise is factually incorrect. Dr. Holmes is not claiming that the respondents' malpractice was ultimately, failing to prevail on federal claims under the Sherman Anti-Trust Act. Her claim is, and always has been, that the respondents committed professional negligence when it refused and failed to protect the injunction that it had obtained allowing Dr. Holmes to perform surgery at East Cooper Hospital. The broad scope of the Respondents' representation is made clear both in the initial engagement letter between the parties and the actions of the Respondent in carrying out the representation. The initial engagement letter calls for the Respondent law firm to represent Petitioner in challenging the denial of her request for continuing surgical privileges at East Cooper Hospital. There was no restriction on the manner of pursuing this objective. In fact, there is no question that the Respondent did represent the Petitioner through the initial administrative hearings with the hospital, that it intended to pursue state claims on her behalf (Respondent testified that it suggested filing, originally, in State Court because it was pursuing state claims), and that it obtained a temporary injunction in order to maintain the status quo for Petitioner at the hospital so that she could continue to perform surgeries for her patients during the pendency of the federal case. The temporary injunction was, as such orders must be, based, in part, on a finding that a change in the status quo regarding Petitioner's surgical schedule and ability to continue to perform surgeries would cause her irreparable harm. Petitioner, in this case, objects to the fact that Respondents were not diligent in pursuing a particular part of the representation that

Respondents undertook. Specifically, she claims that Respondent failed to pursue the federal case per Judge Duffy's scheduling order, and that Respondents failed to timely respond to East Cooper's motion to dissolve the injunction, both of which were reasons for the dissolution of the injunction. She also objects to the fact that, while the motion to dissolve the injunction was pending, the Respondents insisted on renegotiating and discussing the fee arrangement between Respondents and Petitioner, rather than taking steps to protect the injunction. She objects to the Respondents filing a motion to withdraw without consent and breaching confidentiality citing a fee dispute, and offering to appear at the hearing regarding the dissolution of the injunction only if Petitioner signed a renegotiated fee agreement and paid the Respondents $43,000.00. She produced evidence showing that, as a direct result of the loss of the injunction, she lost income from surgeries which had been scheduled during and because of the existence of the injunction. There is a great distinction between the factual claims that the petitioner has been asserting and the Court's finding that her claim had to do with the specifics of how an attorney should pursue a claim under the Sherman Anti-Trust Act.

Petitioner has, on two occasions, specifically, sought to clarify this matter to the Court, directly. The first was in reply to the Respondents' brief. Respondent had argued that Judge Hughston was correct in refusing to allow Petitioner, who was a licensed attorney, to testify as an expert on the standard of care in her case because Petitioner did not have experience in pursuing claims under the Sherman Anti-Trust Act. It was Petitioner's impression that Respondents were trying to re-frame the facts to support its arguments. In order to clarify her position to the Court, so that there would not be a misapprehension as to the factual basis of her claim, the Petitioner submitted a Reply

Brief, which included a section, specifically addressing this issue:

- **Respondent's discussions opposing the application of the "common knowledge exception" to the "case within a case" portion of a legal malpractice claim misstate the scope of Dr. Holmes' claims.**

Throughout its Response, Haynesworth asserts that, in order to prevail on a claim for professional negligence, Holmes would have to prove that the particular claims dismissed by the Federal Court (under the Sherman Anti-Trust Act) would have been successful but for Haynesworth's actions or omissions. The Appellate Court should not accept this premise as an accurate framing of the issue. The case that Haynesworth was hired to pursue included both federal claims under the Sherman Anti Trust Act and several claims under South Carolina State law. It is clear both from the record, and from Haynesworth's own recitation of the facts in its brief that Respondent understands this. Holmes' case against Haynesworth is and never has been restricted to a claim that Haynesworth failed to prevail on the federal anti-trust claims. It is the loss of the injunction due to Haynesworth's negligence, extortion of fees for trial which were not returned, and abandonment of her state claims, which when pursued by Dr. Holmes, actually did result in a settlement of a quarter of a million dollars, which are the bases of the allegations in this case against Haynesworth.

(Appellant's Reply Brief, p. 2)

The undersigned also enjoyed the privilege and opportunity to address the same issue with the Justices and Chief Justice of the Supreme Court during oral argument of this case. A copy of the hearing transcript has been appended to this Petition as Exhibit #1. At the beginning of his first opportunity to address the Court, the undersigned directed the Court to a particular section of the record, pages 1509 through 1560, and asserted that the evidence contained in those pages established duty, breach, and damages in the case. On page 11 of the transcript, he states "This case, if we want to actually make a case that Judge Hughston should have seen, was about the injunction." On page 12, lines 10-11, the undersigned explained "I think it is our case that she lost the injunction and the damages ensued from that." As the undersigned continued on the topic of the scope of Petitioner's claims, he said, on page 15, lines 8-11, "Your Honor, I think her entitlement to perform the surgeries was based on the fact that the Judge did grant her the injunction. The reason that the injunction was lost is why this case shouldn't have been thrown out." To that, the Chief Justice replied "Well, I – I think we understand your position on that." (Hearing transcript p. 15, lines 13-14)

Immediately after that exchange, Justice Kittredge asked Mr. Johnson what the Respondents should have done differently as it related to the professional negligence claim. Mr. Johnson replied: "They should have spent their time between the injunction and the loss of the injunction responding to discovery, which was already overdue at the time the discov-, the injunction was granted, and listening to Judge Duffy, who told them that they better stick to the scheduling order, which they didn't, and that's why Judge Duffy undid the injunction, and they should not have generated thirty-five pages of dickering with their client about fee renegotiations, including ---" (Hearing Transcript p

15, line 22 – p 16, line 5). Later in the hearing, Chief Justice Toal recaps this assertion, stating "Well, we get – we get into this issue about the fee, uh, because of your assertion, uh, in answer to Justice, uh Kittredge's question 'what should Haynsworth have done,' that there shouldn't have been all this back and forth about fees." (Hearing transcript p 21, lines 18-22)

Mr. Johnson concluded his discussion with the Justices on page 22, lines 17-24, continuing to argue that the gravamen of the appeal at issue was whether, under a directed verdict standard, there was any evidence upon which a jury could have based a verdict for the Petitioner where the allegation was that the Respondents failed to meet deadlines while dickering over fee renegotiations. "I think the question is what could the jury have found because this is a directed verdict, and if there's some – (indiscernible) of evidence to support my claim that a jury could have found that the reason she lost this injunction is because her attorneys were not doing their job and were dickering with her over fees instead, that we might have won this case," (Hearing transcript p 22, lines 17-24)

During his rebuttal, Mr. Johnson made a very direct statement, explaining that the professional negligence claim did not apply to a failure to successfully litigate the case overall, but to the specific loss of the injunction by the respondent: "This isn't a malpractice case where we're claiming that, 'my lawyers didn't do a good job, and therefore I lost the case, and here's what I would have won," Dr. Holmes actually won the case pro se; she settled it. She got a quarter of a million dollars and a promise from the hospital that they'd allow – that they'd put her back in her position and allow her to re-apply." (Hearing transcript p 39, lines 17-23) When it became clear, at the end of the

rebuttal, that the Court was still under the impression that Petitioner's claims included an allegation that the Respondents were negligent in the overall pursuit of the federal anti-trust claim in federal court, Mr. Johnson clarified, "Because, Your honor, you're -- you're missing the trees for the forest. Um, the case is about the injunction. She mitigated her damages by continuing her own case and settling it. They didn't lose the case for her; she ended up winning it herself. What they did lose is the injunction that protected her right to do surgeries while the case was pending." (Hearing transcript p 43, lines 15-21) Just before the conclusion of Mr. Johnson's time before the Supreme Court, Mr. Johnson and the Chief Justice had the following exchange:

> CHIEF JUSTICE JEAN TOAL: "So you're saying you didn't need an expert to show the case within the case, your proof of the case within the case is the loss of the four surgeries on the preliminary injunction?"
>
> CHALMERS JOHNSON: Correct, Your Honor.
>
> CHIEF JUSTICE TOAL: I see.
>
> (Hearing transcript p 44, lines 13-20)

It appears, from reviewing the Supreme Court's opinion in this case, that somewhere in the one year and eight months between oral argument on October 16, 2012 and the completion of the Opinion, the Court's understanding of the Petitioner's factual basis for her legal malpractice claim slipped back into a misapprehension of the facts. This is not a harmless error. As is argued below, this particular misapprehension of the facts has had a great impact on the Court's evaluation of many of the critical issues in this appeal. Petitioner's position is that, if the Supreme Court reviews this case under the correct factual basis for the scope of the Petitioner's claim, it would lead the Court to reverse the

directed verdict in this case.

A. Had the Court not misapprehended the factual scope of the Petitioner's claim, it would have found that the "common knowledge" exception to the need for expert testimony would have applied.

In footnote 13, on page 53 of the Supreme Court's Opinion in this case, the Court addresses Petitioner's claim that Judge Hughston erred in requiring expert testimony to establish her claim for legal malpractice. The Court states "Here, Appellant overestimates the legal knowledge of a layperson to understand the complex issues of her case, including the intricacies of civil procedure, the standard for applying the granting of injunctions, and how to successfully pursue a federal anti-trust claim. Therefore, we find that Appellant's claim does not fall within the exception." The Court's misapprehension of the Petitioner's allegations in this case has clearly led it to this conclusion. Without a doubt, a layperson would not be expected to know the best way of pursuing an anti-trust claim. But, in order to judge whether the respondent failed in its duties to its clients, the jury would not have to know this. Petitioner's claim was very simple. Her lawyers failed to heed the time limits imposed by the Federal court in an expedited "rocket docket" scheduling order directing strict compliance. They spent all their time trying to get money from their client and trying to re-negotiate their fee agreement while deadlines passed. She lost an injunction that was protecting her right to make money by performing surgeries as a result. She actually had to cancel four surgeries because the injunction was lost. There is no need to have any specialized knowledge to understand this. In fact, during the trial of this case, Judge Hughston took judicial notice of the Rules of Professional Conduct. Petitioner presented factual evidence and her testimony regarding

her claims. All the jury would have been required to do is apply the Rules to the facts and evidence presented. This is something that all jurors must be qualified to do in order to sit on a jury. Had the Court viewed this issue in light of loss of the injunction, rather than the intricacies of anti-trust litigation, the Petitioner believes that it would have found that the common knowledge exception to the requirement for expert testimony in a malpractice case would have applied. Such a finding would have resulted in the reversal of the directed verdict.

B. The Court's misapprehension of the scope of Petitioner's claim was the basis for its finding that Judge Hughston did not err when he declined to allow Petitioner to testify as an expert.

In its opinion, the Supreme Court affirmed Judge Hughston's decision to decline to allow Petitioner, who is a licensed attorney, to testify as to the standard of care at trial. The basis for the Supreme Court's decision was the misapprehension that Petitioner's claim involved an allegation that her attorneys failed to properly pursue her Sherman Anti-Trust claims in federal court. "Appellant argues that the mere fact that she is a licensed attorney qualifies her as an expert in the field of the applicable standard of care in a federal anti-trust action." (Opinion p. 53) The eloquent Dissent in this case makes it clear that the basis for the Court's decision was erroneous as well, with a discussion of whether an expert should have to be an expert in a particular area of a profession in order to be able to testify as to the standard of care for the profession. The dissent also notes that the South Carolina Courts have never required that an expert be qualified as an expert in a narrow aspect of a field of expertise in order to establish a standard for conduct in general. This is, indeed the case. Had Petitioner been trying to establish that

there was a failure to pursue the anti-trust claims, then the Court's having deviated from the rule of law which existed at the time would call for, in fairness, a remand so that Petitioner would have the opportunity to find and engage an expert with sufficient specific qualifications to discuss the anti-trust case as Judge Norton of the U.S. District Court did in *Weil v. Killough*, (2:12-cv-00856-DCN United States District Court, D. South Carolina, Charleston Division August 8, 2012). This however, is academic, as Petitioner never made a claim that involved the intricacies of anti-trust litigation. In fact, Petitioner was trying to establish the most basic of standards of care imposed on not only lawyers, but any business person who is engaged to perform a service for a client. Her testimony would have been, essentially, "Missing deadlines that were given to you in writing from a Judge, resulting in harm to your client is below the acceptable standard of care for a lawyer. Knowingly letting deadlines run, and using the threat of the harm that will result from a lack of response to force the client to pay you money and re-negotiate a fee agreement, without taking any precautions to protect the client's interests is even worse." Any lawyer who has passed the ethics portion of any State's bar exam ought to know this. In fact, this standard can be applied to any number of professions. It could be equated to a roofer, who puts on half a roof, and then demands payment and re-negotiation of the price for the roof while a storm approaches, without doing anything to protect the homeowner's house. The explanation for the basis of affirming Judge Hughston's decision on this matter in the Opinion seems to make it clear that, had the Supreme Court correctly understood the factual basis for Petitioner's claim it would not have affirmed, and a reversal of the directed verdict would have followed.

C. Dr. Freeman's testimony is relevant and applicable in the context of the Petitioner's factual basis for her claim of legal malpractice.

In Its Opinion in this case, the Supreme Court rejected Petitioner's argument that Professor Freeman's testimony could have established a standard of care and breach in her legal malpractice claim. The Court wrote that Petitioner was taking Dr. Freeman's testimony out of context. The Court wrote "In his testimony, Professor Freeman repeatedly and unequivocally stated that he believed Respondents did not commit malpractice and nothing Respondents did in representing Appellant would have altered the result given applicable federal anti-trust law." Here, footnote 14 reads "For example, Professor Freeman testified, Appellant lost the 'lawsuit because there was no case there – no federal antitrust case, and the judge found various technical, legal failings with the case." (Supreme Court Opinion, P. 54) This makes it clear that, again, the Court is evaluating this issue in light of the mistaken belief that Petitioner was claiming that Respondents committed malpractice by losing the federal anti-trust case. Beyond the fact that Courts have generally recognized that no witness can ever predict the decision of a jury (by way of example, see *Whitley v. Chamouris,* 574 S.E.2d 251, 265 Va. 9 (Va. 2003), and the federal case was a jury trial the testimony from Professor Freeman does, in fact, support Petitioner's claim when viewed in light of the fact that she is claiming that Respondent, knowing that Petitioner had an injunction at risk, and surgeries scheduled in jeopardy with a deadline approaching, spent its efforts on re-negotiating a fee agreement and requiring Petitioner to pay $43,000.00 before it would appear to defend the motion to dissolve the injunction, while, in the meantime, prejudicing the Petitioner's ability to keep the injunction in place. When viewed in that context, Professor Freeman's testimony, which is quoted on page 54 of the Supreme Court's Opinion, is relevant,

applicable, and probative of both the standard of care and that it was breached. Had the Court not been working under a misapprehension of the facts, it would have found that Professor Freeman's testimony as an expert would have sufficed as establishing the standard of care and a breach, and the directed verdict in this case would have been reversed, rather than affirmed.

III. The Court's finding that Judge Hughston's award of attorney's fees under Rule 11 was based on the fact that "Appellant engaged in dilatory litigation tactics..." (Opinion p. 62) contradicts the actual award, which applied only to fees incurred during trial.

Judge Hughston awarded non-monetary and monetary sanctions against the Petitioner in this case. The monetary sanctions were specifically limited to:

1) Attorney's fees for trial
2) Expert witness fees paid by defendant for trial testimony
3) Time spent preparing for trial

(ROA 108-110)

The Judge gave three separate bases for his authority to award the sanctions, 1) the S.C. Frivolous Civil Proceedings Sanctions Act; 2) A common law, inherent right of the Judiciary to issue sanctions; and 3) Rule 11, SCRCP. Petitioner appealed and set forth arguments to the Court regarding all three bases for the award. Because Judge Hughston found that the Petitioner's case was frivolous, and only awarded trial fees and costs as sanctions, Petitioner argued that *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), would preclude a finding of frivolity under any of the three. The Supreme Court, in its opinion, has affirmed the award for sanctions under the authority of Rule 11, opting not to reach consideration of the FCPSA or the common law power to sanction. Should a

rehearing be granted on the matters raised in this petition, a discussion of the application of the FCPSA in this case would be inevitable. Judge Hughston's original order, granting sanctions was predicated, in part on the recognition of the applicability and application of FCPSA by Judge Dennis in a previous order.

The Supreme Court has avoided the application of *Hanahan v. Simpson* , which defines limits applicable to a finding of frivolity, by stating that the award for sanctions was meant to sanction Petitioner because she brought and pursued several appeals during the pendency of her case. This finding, however, is based on a misapprehension of fact, and, if not reheard, leaves the case in a state of uncertainty as to whether any monetary sanctions were actually affirmed. The fact is, Judge Hughston specifically and only awarded sanctions as to the costs and fees for the trial of the case. He awarded no costs or fees in connection with any of the appeals. In fact, there was no request for the Court to consider any such award. At this point, Petitioner has not received proper notice of a consideration of sanctions as to those matters. Rule 11 does require notice and an opportunity to be heard as to the allegations forming the basis of consideration of the use of this rule. *See Burns v. Universal Health Services Inc.*, 532 S.E. 2d 6, 340 S.C. 509 (S.C.App. 2000) Although Petitioner was on notice that the Defendant had asked for sanctions including compensation for trial costs and fees based on its claim that the overall case was frivolous, there never has been any motion before the Court, nor has there been notice of a *sua sponte* motion by the Court for sanctions based on appellate activity during the case. The Appellate Court never made any finding of frivolity on any of the appeals that Petitioner filed during the case. Notably, the appellate court does have an opportunity, specifically, to do so, when denying an appeal. The Appellate Court was

never asked to make such a finding, nor did it do so on its own as to any of the appeals filed. It simply dismissed the appeals as interlocutory. The Supreme Court could only have come to the conclusion that the sanctions against Petitioner were brought to sanction her for having brought appeals during the pendency of the case by failing to recognize that the monetary sanctions awarded pertained only to the trial of the case.

"The intent of Rule 11 is primarily to deter baseless filings, and the Rule may only be invoked with regard to pleadings, motions, and other papers. Under Rule 11, the court is limited to an assessment of reasonableness and proper purpose at the time the offending paper is signed." Wall." Righting a Wrong The South Carolina Frivolous Proceedings Sanctions Act." *South Carolina Lawyer*, Vo. 6, No. 3, (1994:36, 38-39) An application of the proper legal standard for review under Rule 11 requires applying a subjective standard. *Ex Parte Bon Secours-St. Francis Xavier Hosp., Inc.* 713 S.E.2d 624, Fn. 8, 393 S.C. 590 fn. 8 (S.C. 2011). The subjective standard requires a finding of intent. Judge Hughston did, in fact, find that Petitioner believed that she was properly pursuing cognizable claims. "Thus, as of January 31, 2000, Dr. Holmes, who is herself a licensed attorney, clearly believed she had potential claims against the Defendants." (ROA p 76) In his Order granting sanctions, he stated "Given my opportunities to observe and hear Dr. Holmes, I have no doubt that she is sincere in her beliefs about this case." (ROA 106)

Petitioner would argue that this calls for a rehearing to clarify this matter. The sanctions awarded were based on a finding by Judge Hughston that Petitioner's case was frivolous. *Hanahan v. Simpson* precludes a finding of frivolity where a case survives summary judgment and proceeds to trial. *Id.* at 157-158 So does Rule 11, where the court finds that the party who initiated proceedings had a subjective good faith reason for doing

so. The Court's misapprehension of the basis for the sanctions has led to a conclusion that would be reversed if the case was reheard in light of the correct facts.

IV. The Court misapprehends the issue raised by the Appellant as to the causes of action other than legal malpractice.

In the Complaint in this case, the Petitioner raised many causes of action besides the legal malpractice claim. Judge Hughston dismissed the legal malpractice claim on directed verdict, because he found that Petitioner had failed to provide expert testimony to establish a standard of care and breach. Then the Judge dismissed all other causes of action, en mass, saying that they were "subsumed" by the legal malpractice claim. Appellant argued, in this appeal, that the Court's decision was overly broad, that it should be reversed, that these issues should be remanded so that Petitioner could address them one at a time before the Court. Petitioner has taken the stance that, since the legal malpractice claim was the only one that actually may have required expert testimony to establish a standard of care and breach, the other causes of action cannot have been "subsumed" by that claim. The Supreme Court has found that Petitioner abandoned that argument because she has not set forth specific arguments and addressed each element of each claim that was dismissed. Petitioner feels that the Court may have failed to understand the issue being raised, and would request a rehearing so that it can be properly addressed. Petitioner took issue with the Court dismissing claims with lower standards of proof and finding that they were "subsumed" in a cause of action which had different elements. For example, breach of fiduciary duty occurred after legal representation was terminated when Respondents failed to return unearned fees paid in advance for trial. This breach is not "subsumed" within the legal malpractice claim and does not require

expert testimony, neither is breach of contract, both of which were pled. *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169 (S.C. 2009). Petitioner specifically discussed this in her reply brief. She also addressed the elements, causes of action, and case law supporting her position in the Record on Appeal, pages 1899-1930. Petitioner would request a rehearing so that the Court can consider whether it was proper for the trial judge to make such a broad finding, simply dismissing all other causes of action, without affording Petitioner notice and an opportunity to be heard on each claim.

CONCLUSION

In reviewing the transcript from the oral argument in this case, it is evident the Court was struggling with the identification of the factual basis for the Petitioner's claim. At oral argument, Petitioner's counsel attempted to clarify his position that Petitioner's claims were about the dissolution of the injunction, rather than the ultimate loss of the federal anti-trust case. With respect to the dismissal of this case on directed verdict, the dispositive issues in the Court's opinion were mistakenly analyzed in the context of a claim for failure of the anti-trust action. This mistake formed the basis for the Court's decision regarding the requirement of anti-trust expert testimony, which is pivotal for the decision to affirm directed verdict. A rehearing is necessary to correct this misapprehension of fact.

As to the sanctions issue, the opinion seems to be affirming a sanction for Petitioner's seeking appellate review during the case, rather than for bringing a frivolous claim. This may steer the Court away from having to apply the holding from *Hanahan v. Simpson*, but it results in an order which is inconsistent with itself. It does not make sense for the

Petitioner be sanctioned for bringing appeals during the pendency of the case, by being required to pay for Respondents' trial costs. This is especially conflicting when Judge Hughston has made it clear that, in his opinion, a trial would not have been necessary at all had he taken the time to prepare for and properly consider the Respondent's summary judgment motion. The Petitioner respectfully requests that the Supreme Court consider grant a rehearing on these issues.

Respectfully Submitted,

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July 5, 2014

C. Holmes, M.D.,)
Appellant,)
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vs.)
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Haynesworth Sinkler Boyd, P.A.,)
successor to Sinkler & Boyd, P.A.,)
Manton Grier, and James Y. Becker,)
Respondents.)

LOWER COURT NO. 02-CP-10-1448
AND AFTER CHANGE OF VENUE NO. 07-CP-10-1444

APPELLATE CASE NO. 2010 - 154986

* *

TRANSCRIPT OF APPEAL HEARING

* *

BEFORE THE SOUTH CAROLINA SUPREME COURT
THE HONORABLE JEAN HOEFER TOAL, CHIEF JUSTICE
THE HONORABLE COSTA M. PLEICONES, JUSTICE
THE HONORABLE KAYE G. HEARN, JUSTICE
THE HONORABLE JOHN W. KITTREDGE, JUSTICE
THE HONORABLE DONALD W. BEATTY, JUSTICE

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APPELLATE CASE NO. 2010 - 154986

A P P E A R A N C E S

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I N D E X

CHIEF JUSTICE JEAN TOAL: Next case for oral argument is, uh, Holmes against Haynesworth. Uh, Madam Clerk, before you start the clock or hit it and make it start, uh, Mr. Johnson, uh, your -- your client is, of course, a medical doctor, but your client is also an attorney, uh, in good -- in regular good standing. Am -- am I correct about that? You may assume the podium.

CHALMERS JOHNSON: Thank you. Yes, that's correct, Your Honor.

CHIEF JUSTICE JEAN TOAL: Uh, as you may know, uh, we have had, uh, some, uh, issues about contacting, uh, uh, your client and receiving things from your client over the long course of this litigation, both in this court and in some of the other courts that have dealt with this case. As you know, attorneys now, who are in -- who are in regular good standing and are not, uh, retired or disabled are required to have an e-mail, uh, address and required to register that with the attorney information system. Uh, I, while in the process of getting ready for this case, checked our A.I.S. system, and I see that your client is registered under the designation that we just fill in for retired attorneys in their nursing homes. Uh, that needs to change.

CHALMERS JOHNSON: Yes, Your Honor. I'll see that it's done.

CHIEF JUSTICE JEAN TOAL: So, uh, uh, I'm going to, uh, entreat you and your client, uh, when this, uh, oral argument is over to please get in touch, uh, with the appropriate, uh, uh, folks within the court system, uh, to get her -- she surely -- if she doesn't have an e-mail address, and I can't believe she wouldn't have one professionally, she can use her medical address, but we need an operational, uh, e-mail account for, uh, Ms. Kiley / Holm -- Dr. Holmes. Uh, and we need to have an accurate way to be in touch with her should it be necessary to be in touch with her. Can you help us with that?

CHALMERS JOHNSON: Yes, Your Honor. I'll see that it's done.

CHIEF JUSTICE JEAN TOAL: Wonderful. And, uh, before the oral argument begi-, begins, uh, we miss you, Mr. Johnson, and we're glad to have you back in our courtroom.

CHALMERS JOHNSON: Thank you, Your Honor. I'm happy to be here.

JUSTICE JOHN KITTREDGE: Gone all west coast on us, have you?

CHALMERS JOHNSON: Perhaps, Your Honor. It's beautiful out there, and you've got to fit in.

CHIEF JUSTICE JEAN TOAL: You may proceed.

CHALMERS JOHNSON: Thank you. Chief Justice Toal, Justices of the Supreme Court, my name is Chalmers Johnson. I'm here, um, representing Dr. Cynthia Holmes today. In this appeal, we're asking, uh, that the court overturn an order which granted a directed verdict against her on claims of professional negligence and others that were against her former attorneys, Mr. Grier, Mr. Becker, and Haynesworth, um, Sinkler & Boyd. We'll also be addressing an order which granted sanctions after that trial against Dr. Holmes for instituting a frivolous lawsuit.

CHIEF JUSTICE JEAN TOAL: Go ahead.

CHALMERS JOHNSON: Thank you, Your Honor. Directed verdict should not have been granted in this case. Um, I know we have a huge record on appeal, and just a -- a laundry list of issues, which I hate to do in any appeal, but if I do nothing else today, it's my goal to focus your attention on fifty pages of the record on appeal, and on one piece of extra testimony from the trial. The particular pages that I hope that you will pay attention to are pages 1509 to 1560. These fifty pages, which are exhibits from the trial, present a succinct chronology of events and provide evidence of a duty, a negligent breach of that duty, damages, and causation.

JUSTICE JOHN KITTREDGE: I don't want to interrupt the flow of your argument, Mr. Johnson, but why isn't this case over on the statute of limitations issue?

CHALMERS JOHNSON: Your Honor, the statute of limitations issue only applies to the two individual defendants. So even if it was found that they were not ---

JUSTICE JOHN KITTREDGE: Well, as to them?

CHALMERS JOHNSON: Okay. As to them, Your Honor, our argument is that they availed themselves of the court to the point where they should have -- the court should have considered to have personal jurisdiction over them within the time period of the ---

JUSTICE JOHN KITTREDGE: So ---

CHALMERS JOHNSON: --- statute of limitations.

JUSTICE JOHN KITTREDGE: So coming -- coming to court and submitting to the jurisdiction of the court waives a party's ability to assert affirmative defenses?

CHALMERS JOHNSON: It doesn't necessarily waive the right

to af-, assert affirmative defenses, Your Honor, but as to personal jurisdiction and when the court has personal jurisdiction, I don't think that South Carolina recognizes a special appearance, and especially when you go so far as to actually defend the case at trial and obtain a directed verdict. You've certainly availed yourself of the court, shown up, and, um, evidenced your receipt of notice of the case and your time to prepare.

JUSTICE JOHN KITTREDGE: I -- I understand that in the context of being able to subsequently assert a jurisdictional challenge, but I don't understand how an appearance forecloses a party's ability, uh, to assert affirmative defenses, including statute of limitations.

CHALMERS JOHNSON: Uh, it wouldn't, Your Honor. The only way -- the only argument I have on that is to come at it from a personal jurisdiction standpoint, and I think you put your finger right on it; I won't belabor the point any. Um, the best argument I can come up with is that they've availed themselves of the court. I think that the court had personal jurisdiction over them from the very beginning, which would have been within the statute of limitations. Um, and that's -- that's how I come at that, Your Honor.

CHIEF JUSTICE JEAN TOAL: Let's go to what you would like us to focus on, pages, uh, 1509 to 1560.

CHALMERS JOHNSON: Yes, Your Honor.

CHIEF JUSTICE JEAN TOAL: They include, as it looks like to me from just a brief look, the initial engagement letter, uh, the addenda, uh, uh, to that engagement letter, uh, and certain other pleadings surrounding the order of Judge Duffy.

CHALMERS JOHNSON: Yes, Your Honor.

CHIEF JUSTICE JEAN TOAL: Uh, is that correct?

CHALMERS JOHNSON: That's correct, Your Honor.

CHIEF JUSTICE JEAN TOAL: Alright, sir. Uh, go forward and tell us what is succor about those ---

CHALMERS JOHNSON: Thank you.

CHIEF JUSTICE JEAN TOAL: --- documents.

CHALMERS JOHNSON: Here's what I want to focus on. This case is -- you know -- we're actually in front of you in this

very case later this year, I believe, or next year. Um, it has involved a lengthy process, with lots of different things happening. This case, if we want to actually make a case that Judge Houston should have seen, was about the injunction. Dr. Holmes was able to, um, obtain and injunction, which allowed her to continue with doing surgeries.

JUSTICE KAYE HEARN: And she did no surgery during the course of that injunction, isn't that correct?

CHALMERS JOHNSON: Correct, Your Honor. The junction was granted at the end of November, and the, uh, injunction was reversed in January. So ---

CHIEF JUSTICE JEAN TOAL: And, of course, why, the standard for keeping such an injunction in place, uh, is both the, uh, harm that might ensue, uh, as, uh, before the case is tried, as well as likelihood of success on the merits, and I guess that's where, if you can get past the fact that, uh, she's, uh, not demonstrated that her practice was really hurt because she didn't admit anybody, uh, you've got the, uh, ruling by Judge Duffy on the merits, uh, affirmed by the Fourth Circuit, cert declined by the Supreme Court, and then fully explicated again by Judge Pieper in his order dismissing the antitrust, uh, uh, uh, and allied, uh, causes, uh, in

State Court. Those are the causes -- those two federal causes are those that would support that injunction. Uh, so if on the merits, according to the various judges I recited, she is not entitled to any relief, then what Haynesworth, Becker, and Grier did or did not do in pursuing the preliminary junction really doesn't make any difference, does it?

CHALMERS JOHNSON: I think it makes -- I think that is the case, Your Honor. Uh, not -- not that you're correct, but I think it is our case that she lost the injunction and her damages ensued from that. You can ---

CHIEF JUSTICE JEAN TOAL: Well, I understand that, but the -- the -- it's not just that simple. Just because she lost the injunction doesn't mean she would be entitled to damage had she suffered any damages, and that's another big issue, as to whether this record discloses any damages, uh, uh, since she didn't admit any patients during the time she definitely had the injunction. Uh, it's arguable that she suffered no damages. Uh, if that -- but beyond all that, if she had suffered some damages in the sense that, uh, she had lost the opportunity to admit patients, if she wasn't entitled to the injunction in the first instance, how in the world does it make any difference that the preliminary injunction was dissolved?

CHALMERS JOHNSON: She was entitled to the injunction in the first instance. The judge ---

CHIEF JUSTICE JEAN TOAL: She really wasn't. Uh, that's the ruling that all the federal courts have made. The entitlement is not just because of, uh, harm, it's because you have a likelihood of success on the merits. As it develops, she had no likelihood of success on the merits.

CHALMERS JOHNSON: Your Honor, ---

CHIEF JUSTICE JEAN TOAL: None.

CHALMERS JOHNSON: Your Honor, I -- I respectfully disagree. The federal court only granted partial summary judgment. It dismissed the remainder of her state claims.

CHIEF JUSTICE JEAN TOAL: The state court claims are not involved with this preliminary injunction. The preliminary injunction is purely involved and is purely bottomed on the federal action, what you're talking about.

CHALMERS JOHNSON: Right, Your Honor. And at the end of this, um, set of papers, you'll see Judge Duffy, um, correctly

recognizes that -- I mean, this injunction had only been in place for about six or seven weeks. He collec-, correctly recognizes that Dr. Holmes had four surgeries scheduled for the next, uh, month or two, and he tell-, p-, tells her, "You better cancel your surgeries and do something about it." On the very next day, she gets her letter from the hospital cancelling all four surgeries.

CHIEF JUSTICE JEAN TOAL: Well, that -- of course that is what happened, but, again, what he also tells her very definitively is that she was never entitled to the injunction to begin with because her entitlement has to be bottomed on likelihood of success, and she did not have a viable cause of action for the federal causes.

CHALMERS JOHNSON: And, Your Honor, that's so, but she would have ---

CHIEF JUSTICE JEAN TOAL: Well, if that's so, end of conversation.

CHALMERS JOHNSON: She would have had the four surgeries done and collected the money for them. I think she has damages.

CHIEF JUSTICE JEAN TOAL: No, sir. That -- the fact that she might or might not have is not the inquiry. The inquiry on damages is going to be whether she was entitled to it, not whether she could have gotten a windfall if it had stayed in place. Her entitlement is based on the legitimacy of that federal action.

CHALMERS JOHNSON: Your Honor, I think her entitlement to perform the surgeries was based on the fact that the judge did grant her the injunction. The reason that the injunction was lost is why this case shouldn't have been thrown out.

CHIEF JUSTICE JEAN TOAL: Well, I -- I think we understand your position on that.

JUSTICE JOHN KITTREDGE: Let me -- let me use that comment to ask you about this professional negligence claim. What should her attorneys have done differently? How should they have performed differently that would have likely changed the results?

CHALMERS JOHNSON: They should have spent their time between the injunction and the loss of the injunction responding to discovery, which was already overdue at the time the discov-, the injunction was granted, and listening to

Judge Duffy, who told them that they better stick to the scheduling order, which they didn't, and that's why Judge Duffy undid the injunction, and they should not have generated thirty-five pages of dickering with their client about fee renegotiations, including ---

CHIEF JUSTICE JEAN TOAL: Well, she's the one that generated that by taking the completely unsubstantiated position by anything that's in this record that she had an entitlement to a contingent fee arrangement. That was the source of the disputation, and every piece of written material here, except a letter she sent saying, uh, uh, that she had received a phone conversation different, which is just another piece of self-serving information on her part. There is no independent writing between the parties that supports anything other than a fee-based arrangement.

CHALMERS JOHNSON: Actually, Your Honor, uh, one of those letters that I have referred you to, Haynesworth actually offers a contingency fee agreement.

CHIEF JUSTICE JEAN TOAL: Which one is that? Show me specifically in the record.

CHALMERS JOHNSON: Let me find it, Your Honor. It is

letter #3, January 10th, 2000. Page 1523. In this one, Haynesworth asked for $3,000 in advance for costs, $40,000 advance fee for attorneys fees that will cover until the end of trial, ---

CHIEF JUSTICE JEAN TOAL: No, the -- that $43,000 was not advanced -- covered the end of trial. They had suffered a good deal of lost fees that she had never paid them, and the $43,000, as I understand it, was an attempt to calculate what was past due, and they said, "We will take this $43,000, we will not insist in anything more until the end of trial," but the arrangement is a fee-based one. Where in this letter does it talk about contingent fees?

CHALMERS JOHNSON: They mention in the letter, on page 1523, they offer -- if the case is -- if they recover over $150,000, Haynesworth wants twenty percent of that. So they actually offer her a contingent fee at some point.

CHIEF JUSTICE JEAN TOAL: Alright. But, again, sh-, show me exactly where you are.

JUSTICE COSTA PLEICONES: You're on 1523?

CHIEF JUSTICE JEAN TOAL: Yes, sir. Show -- show me ---

CHALMERS JOHNSON: Yes, Your Honor. Let me flip ---

CHIEF JUSTICE JEAN TOAL: --- exactly where you are.

CHALMERS JOHNSON: --- to the page myself.

CHIEF JUSTICE JEAN TOAL: I'm looking straight at 1523, and I no-, notice in the second paragraph, "We have clarified, and you understand, that we are not currently representing you on a contingent fee basis. We explored and considered that possibility, but the nature of your case precludes this as a viable option." That's in the -- and then they repeat that, "For all business actio-, aspects of our legal representation, the terms of our engagement letter dated May the 5th, 1998, will control, except that they may be modified by a subsequent writing." Now, show me the ---

JUSTICE DONALD BEATTY: You're on 1526?

CHALMERS JOHNSON: Correct, Your Honor; sorry. It was the end of that letter. I -- I apologize. I wrote down the beginning of the letter to mark it for myself. It starts with the, "With this narrowed focus of discovery and legal claims," underlined, and at the end they say, "Haynesworth will receive ---"

CHIEF JUSTICE JEAN TOAL: "We agree to limit or cap your legal fees through the conclusion of the trial at $40,000 in additional fees."

CHALMERS JOHNSON: Correct. So that was the advanced ---

CHIEF JUSTICE JEAN TOAL: "That's a cap ---

CHALMERS JOHNSON: --- payment.

CHIEF JUSTICE JEAN TOAL: "--- on additional fees to try the case. It is possible that your additional legal fees will be less than that amount, but we can't guarantee it. In the event that any recovery of damages through settlement of trial exceeds $150,000 exclusive of a fee award by the court, you agree that Sinkler & Boyd will receive twenty percent of the excess recovery in addition to its fees as set forth above."

CHALMERS JOHNSON: That's a contingency fee, Your Honor.

CHIEF JUSTICE JEAN TOAL: Right. Now, uh, where did she sign accepted?

CHALMERS JOHNSON: She did not. The question that Your Honor posed to me, in -- in fact, I think stated to me, was

that there was no evidence whatsoever that there was any discussion of a contingency fee.

CHIEF JUSTICE JEAN TOAL: No -- no. I did not say that, but if I -- if you think I did, let me clarify what I'm asking you. There is no evidence in this record that the parties reached a written agreement as to a contingent fee arrangement.

CHALMERS JOHNSON: Oh, that's correct.

CHIEF JUSTICE JEAN TOAL: That is correct, right?

CHALMERS JOHNSON: Correct.

CHIEF JUSTICE JEAN TOAL: Okay.

JUSTICE JOHN KITTREDGE: And at best, this is just a hybrid. I mean, uh, -- because in December, I think it was December 15th, they wrote a letter. Categorically said no contingency fee. This is, uh, -- shortly thereafter, apparently, communication back and forth, and to placate the client, um, they're still going to bill $40,000 up to through the conclusion of the trial and thereafter.

CHALMERS JOHNSON: Right. It's a very twisted set of events. If you read the letters that I've pointed to you, you can follow it. I actually had to do that on note cards to figure out where they were going with this, but it's a back and forth. She -- in the beginning, it's very clear. I'll just boil it down. She believed that they were going to have a contingency fee afterwards. She says that was based on a discussion with Becker. In the very first letter here, on the, 1509, Becker's writing her, saying, "I'm so sorry you misunderstood. What I was really telling you is that I would run a contingency fee by my partners and see if they would agree to it." But guess what, they didn't agree. Then you get in this big fight between the two of them, and guess what, the law firm spends all its time and energy and effort fighting with this client, trying to renegotiate its fees, while ---

CHIEF JUSTICE JEAN TOAL: Well, we get -- we get into this issue about the fee, uh, because of your assertion, uh, in answer to Justice, uh, Kittredge's question, "What should Haynesworth have done," that there shouldn't have been all this back and forth about fees. Well, there was a good deal of back and forth because of, uh, her, uh, beliefs, not supported by any of the written documents, uh, that they would have signed together about this contingent fee arrangement.

So you say that's one thing they should have done. Would that -- that -- that fuss back and forth, uh, uh, accomplished what in terms of making them liable for, uh, professional negligence?

CHALMERS JOHNSON: They missed every single deadline for discovery, and the judge withdrew the, uh, injunction as a result. They also failed to file a response to a motion to dissolve the injunction in federal court, which, if you don't file within fourteen days, the court considers that -- can consider that consent.

CHIEF JUSTICE JEAN TOAL: If she were never entitled to an injunction, why did that matter? That's, I think, what's being asked here.

CHALMERS JOHNSON: Your Honor, I -- the question -- I think the question is what could the jury have found because this is a directed verdict, and if there's some -- (indiscernible) of evidence to support my claim that a jury could have found that the reason she lost this injunction is because her attorneys were not doing their job and were dickering with her over fees instead, that we might have won this case, especially when John Freeman said ---

CHIEF JUSTICE JEAN TOAL: The jury would not have been permitted to make that finding if, in the first instance, she were never entitled to the injunction. Am I not right?

CHALMERS JOHNSON: I don't believe so, Your Honor. She got the injunction whether she was entitled to it or not. Her attorneys did a good job to get it. They should have kept it.

JUSTICE JOHN KITTREDGE: What's the effect, if any, maybe not, what -- is there any effect or relevance to the plaintiff not availing herself of the purposes for which the federal court issued the injunction in the first place?

CHALMERS JOHNSON: Your Honor, I fail to -- I don't understand why people keep saying that, that she never did any surgeries. It was only in place for six or seven weeks. She had four surgeries set for February and March.

CHIEF JUSTICE JEAN TOAL: No, she never made any attempt until right at the end, uh, to -- when she was on a pro se status to set any surgeries. They weren't even -- those surgeries, uh, were set way at the end, uh, after Judge Duffy, uh, uh, had that status conference. Uh, uh, what she'd been advised is, uh, from what I understand the record to be, as soon as that injunction was obtained, she was advised by her

attorneys, "Immediately start scheduling some surgeries so that you will be able to show the court, uh, that, uh, uh, this is necessitous to keep in place." This thing was on a rocket docket, uh, she had not really put it -- put forth any substantial information about, uh, what it would take to get the preliminary injunction, so the advise was, "We've got this on a very hurried basis, you need to go on and schedule some surgeries." That's why it's being asked.

CHALMERS JOHNSON: And, Your Honor, the answer is page 1464, a letter of January 26th, the day after the preliminary injunction which dissolved from East Cooper Hospital specifically cancelling four scheduled surgeries. She must have had those surgeries scheduled before the preliminary injunction was dissolved, otherwise East Cooper wouldn't have sent her that letter dissolving them. Judge Duffy also recognizes that she had four at the hearing and tells her she's going to have to cancel them. I think there is sufficient evidence for the jury to find that she lost something. Thank you, Your Honors.

CHIEF JUSTICE JEAN TOAL: Alright. Mr. Johnson, you have been asked a lot of questions, and you have a lot of issues. Uh, I don't want you -- you, of course, are going to have some time on reply.

CHALMERS JOHNSON: Yes, Your Honor.

CHIEF JUSTICE JEAN TOAL: Uh, but if there are some other things you'd like to say, briefly, by way of outlining your position, uh, in opposition to the summary judgment that was granted, uh, I don't want you to, uh, not highlight the significant things. I know they have a lot of issues, but they kind of, uh, focus in on what the jury could have found, as you're arguing it, so, uh, I want to let you conclude your beginning argument in a way that's satisfactory to you.

CHALMERS JOHNSON: And thank you, Your Honor. I very much appreciate that. Um, the issues that we've just discussed is exactly what I was hoping you would ask me about, um, and I've been able to set forth the arguments that I've wanted to about directed verdict because I think that's the crux of this entire case. The judge simply shouldn't have taken it away from the jury when it was right there.

CHIEF JUSTICE JEAN TOAL: Thank you, Mr. Johnson.

THORNE BARRETT: Thank you, Your Honor. May it please the court, I'm Thorne Barrett here with Rich Dukes on behalf of the respondents. I want to start by agreeing with something that Mr. Johnson said about the injunction issue. When you were asking him what difference would it make if she was not legally entitled to begin with, and he said her lawyers did a good job in getting her the injunction in the first place. I think that's true. I don't think that any conduct by the attorneys played a role or lead to the injunction being dissolved. I think ---

JUSTICE DONALD BEATTY: Why was the injunction, in your view, dissolved?

THORNE BARRETT: I think Judge Duffy makes his rationale very clear. It's on page, uh, 1559 and 1560 of the record in the hearing. There was no formal order. The basis for his ruling is in the hearing, in the status conference that was made. And if you read that, you can almost read stage directions in there as if it were a play. Clearly, when Judge Duffy heard that he had, in a sense, given Dr. Holmes a break and given her this preliminary injunction on the belief that she had surgeries lined up that needed to be done, when he heard that she hadn't done that, the entire demeanor of the -- of the proceedings changed. He had been critical before, he

became angry after that, and I think the record clearly demonstrates that that was the basis for his reasoning. That's when he cut everything short, that's when he said, "I'm granting the motion," that's when that issue ended. We would submit there's nothing her attorneys could have done in that instance to force her to be in a position where Judge Duffy would not have taken that position. Now, addressing the, uh --

CHIEF JUSTICE JEAN TOAL: Well, he certainly spent some time discussing other matters, uh, Mr. Barrett.

THORNE BARRETT: He did.

CHIEF JUSTICE JEAN TOAL: Uh, that have to do with what Mr. Johnson's been arguing, which is, uh, uh, delays in discovery. Uh, what role did that play?

THORNE BARRETT: Your Honor, I think that he was critical of what had happened, of not -- of the discovery not being done on time, although the record does also show that Mr. Becker tried to explain what had happened, and Judge Duff-, Judge Duffy basically says, "Look, I know you're trying to fall on your sword for your client, I'm not interested in hearing that." He was still focusing on Dr. Holmes's

unwillingness or inability to get them information to respond to the discovery. And, again, it all goes back to if he's -- even if he's critical of that, the tipping point is the fact that she had not done surgeries, and, as Your Honor pointed out, she was never legally entitled to this to begin with. This was going away because summary judgment was eventually granted.

CHIEF JUSTICE JEAN TOAL: Well, I think we understand everybody's position on the preliminary injunction, and I don't want to get stuck there. Uh, uh, uh, let's move on to the trial of this matter. Uh, much is made, uh, by, uh, uh, the appellant of the, uh, denial of summary judgment, uh, to begin with, uh, right before the case was tried by Judge Houston, uh, and the contention is made that, uh, that denial of summary judgment, uh, precluded you from receiving the large award of, uh, sanction and attorneys fees. I don't want this argument to get away before you address that, uh, because it seems that we have said, uh, uh, some pretty direct things about that issue in the Hanahan case, uh, and the court of appeals has in Whitfield and other cases, so let's talk about that.

THORNE BARRETT: And -- and my response is two-fold on that, Your Honor, and I'll -- I'll go first addressing Hanahan

and Whitfield and the Southeastern Construction -- those lines of cases. What I think is important to remember here is the court, this court, stated rationale for which rule it adopted in Hanahan. As court knows, it was faced with two, uh, competing views about whether to rule. Denial of summary judgment does prevent a finding of frivolous action, or it does not. This court sided with the rule that says denial of that motion does, but the court said in that case that -- and I -- and I have the quote hear, and I apologize for reading; it is brief. "The theory behind these cases is that if a case is submitted to a jury, it cannot be deemed frivolous." The notion of it being submitted to a jury appears two times in the paragraph leading up to the court's holding in Hanahan.

CHIEF JUSTICE JEAN TOAL: Well, uh, uh, I, I understand that, but this case, uh, would survive that because it went before a jury. It just didn't finish before the jury. But this is, uh, uh, another way of saying (indiscernible) -- instead of, uh, uh, taking the case out before the jury hears it, jury has a chance to act on it, and then a decision is made. Uh, that's -- that's where the dividing line is in these other states.

THORNE BARRETT: And we would submit, Your Honor, that, "submitted to the jury," indicates the case goes to the jury,

not that it (indiscernible) -cludes a directed verdict being found. And the reason for that -- the reason why we would contend there is not and should not be this bright line per se rule, "Denial summary judgment always means no finding of a frivolous action," is demonstrated by what actually happened in this case. As the record makes clear, the judge began the trial, they started with picking the jury, and then he says, "What motions do we need to take up?" He finds out there's an outstanding motion for summary judgment that's not been heard, he looks and sees two boxes full of documents, which results from the manner in which she has pursued the case, with interlocutory appeals and motions and whatnot. He basically says, "I don't have time to do this, we've got to get started." And he never makes an actual ruling on the motion, and I think that's significant because I ---

CHIEF JUSTICE JEAN TOAL: Because -- I mean, he says they're denied.

THORNE BARRETT: He says they're denied, but he ---

CHIEF JUSTICE JEAN TOAL: I -- uh, there's been apparently some, uh, uh, uh, uh, criticism of the way he handled that, but, uh, uh, what he says is, uh, uh, "I'm not going to penalize the plaintiff by taking her case away on

summary judgment, uh, uh, uh, and I'm not going to penalize the defendant, either, so I'm denying." There were cross-motions for summary judgment, he said, "We're going to go forward and try this case."

THORNE BARRETT: I agree, Your Honor, and the important thing, though, is something that he did not say, and I think that's a key distinguishing factor with the Southeastern Site Prep case in particular. In that case, when summary judgment was denied, the judge made an express finding, and this quote was, "We've got a pretty good question of fact here." There was a finding that there was a factual dispute that a fact finder -- and it was a fact finder because in Southeastern Site Prep it was a non-jury matter, that a fact finder needed to address. Here, Judge Houston never made that ruling. Not when he denied the summary judgment motion at the beginning of trial, not even when he denied the original directed verdict motion at the close of the plaintiff's case. His only stated ground for that was, "Well, I see the defendant's expert is sitting here, let's see what he has to say."

CHIEF JUSTICE JEAN TOAL: Well, now, if we go on Whitfield because it was a court of appeals case, uh, you go even further than that. You wouldn't even have to have a ruling on the summary judgment, uh, to have it, uh, uh, moving

forward to trial and have a proclusive effect on frivolous, uh, pleadings. I'm not saying that I think Whitfield is right or wrong. Uh, we never reviewed Whitfield.

THORNE BARRETT: Well, and -- but ---

CHIEF JUSTICE JEAN TOAL: Uh, uh, the court of appeals held that if it survives summary judgment, and survival in that case was just a judge never ruled on it, if it survived summary judgment, that frivolous, uh, uh, uh, pleading, uh, type sanctions and damages are precluded.

THORNE BARRETT: And I agree with -- you -- you were saying you're not -- weren't saying that Whitfield was right or not, and I think that what Whitfield does because of its unique circumstances, I'm not sure to distinguish Whitfield, that Whitfield has to be deemed wrongly decided because it gets back to the point I was raising about submission to a jury being an element of that. Whitfield was a non-jury matter, so there was no chance of it being submitted to a jury, but it went through this bench trial proceeding, and then eventually there was a dismissal, but it was the functional equivalent of a ruling after the judge had con-, uh, conducted this bench trial proceeding. So I think when you go back to the rationale of Hanahan and apply it not to a

non-jury matter but to a jury matter, we still contend there's a two step process, that there is a denial of a motion, and there is submitting a case for the jury. And I think that a bright line rule on that, the problem with it is it -- it ignores, essentially, the realities of practice in a lot of cases. Many, many times, a summary judgment motion is not heard, cannot be heard, until a trial begins. And many, many times, trial judges will say, "Everybody's here, let's go ahead and get started, I'll visit these issues at the directed verdict stage." And the pro-, and this case reveals why that can lead to an absurd result because following that rule rigidly here would lead to a finding that a case that was -- would have been deemed frivolous if the judge had made his ruling on Monday, as he later admitted he should have done, somehow became not frivolous just because he made the exact same ruling and kept it from a jury on Friday. That the span of days --

JUSTICE KAYE HEARN: Mr. Barrett, let me ask you -- I understand your discussion of Hanahan and Whitfield, but isn't it true that, that your entitlement, the sanctions, doesn't necessarily rise or fall on that? Aren't -- isn't the award of sanctions here supportable on other grounds outside the Frivolous Proceedings Act?

THORNE BARRETT: I think they are, Your Honor. On -- on rule 11 in particular, although that's a -- that's a similar standard as the court has held to the old version. I think, also, that it's important to look at the fact that there is, we contend, at least some applicability of the amended version of the act because she filed an amended complaint in 2007, which was after the effective date of the new act, and this was not a run of the mill amendment that just changed a couple of things here and there, it vastly expanded the scope of the case. It added numerous causes of action, which were all deemed to be without merit. She filed and pursued that after the effective date. She filed and pursued one of her numerous interlocutory appeals after the effective date, and she continued at least one of her previous interlocutory appeals after the effective date of the new statute. Now, the new statute has a slightly different standard. Our contention is that this case -- the record supports a finding of a frivolous action no matter what standard is applied, but the reason I think it's important to examine the amended act as a basis for the ruling is that under subsection C1 of the new act, it -- the legislature seems to have installed a rule that does not follow the hand in hand rationale of the denial of a motion automatically precluding a finding of sanctions. Uh, and I have the -- a copy of the statute here, and if -- if the court will permit me to read, briefly, from it, subsection C1 says,

"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." So think if there is applicability of the new act, which we believe there is, and I understand the ruling in Southeastern Site Prep, I think there are differences here because it's not just a motion for relief being filed after the effective date. There were frivolous proceedings and claims asserted and pursued here after the act. But I think that if the new amended version of the act applies, then the Chief Justice's questions don't come into play here because it seems that the legislature has spoken on that issue, and so, yes, we believe there are other basis as well. And, Your Honor, I'll answer any other questions depending on how ---

CHIEF JUSTICE JEAN TOAL: Well, it -- we've kind of short-circuited your argument on -- on a liability, Mr. Barrett. So if you have other things to say, uh, there, uh, uh, directed towards, uh, uh, the liability part of the case, uh, uh, the expert witnesses, the case within the case, all of that, no, uh, we don't want to prevent you from covering those issues, uh, briefly.

THORNE BARRETT: And, Your Honor, uh, our -- very briefly, our position, I think -- I think we rely on the positions that we've stated in our brief there. I think she was given every opportunity, more than enough opportunity, to present evidence to support her case. She had -- from the time she filed her original complaint until the time of the trial, she had seven years to get an expert to develop some sort of evidence to support her claims. When the trial came that she said she wanted and then did everything she could to avoid, when it finally came, she had nothing to air but her own grievances, and that gets back to the final point I want to make, Your Honor, which is this really is not about a lawsuit and claims, this is really about an obsession, and she had over a decade in which she dragged the respondents up and down the appellant chain, throughout courts and different places, filing motion after motion, appeal after appeal, and then the trial judge finally got it, finally heard what she had to say, and what she had to say amounted to nothing that could support her claims. That's why we think that enough is enough on this. The trial judge correctly granted directed verdict, he correctly granted sanctions. In fact, as the trial judge recognized, we contend the only error he made was not ending this case on Monday before it even began.

CHIEF JUSTICE JEAN TOAL: Thank you, Mr. Barrett.

THORNE BARRETT: Thank you, Your Honor.

CHIEF JUSTICE JEAN TOAL: Mr. Johnson, in reply?

CHALMERS JOHNSON: First, having gotten involved in this cl-, in this case and read the voluminous records and what everybody has to say about it, it appears to me that passion has entered this. Dr. Holmes has made a lot of people mad, and I think it's easy to look at Dr. Holmes and not look at her case, and I think that may be what happened here with Judge Houston. And on page 1555 of the record, before Judge Duffy, Mr. Becker actually says, "But for the unfortunate misunderstanding regarding our engagement, Your Honor, I think we would have completed discovery in that timeframe." If the jury read Judge Duffy's transcript, which was before then, they could find that Judge Duffy was fed up with the fact that the lawyers hadn't completed discovery (indiscernible) warned them in the very order granting the injunction that they needed to stick to the schedule, and he would not change it. And they could also find that, "but for the unfortunate misunderstanding regarding our engagement," thirty-five pages of letters where the law firm spent all its time trying to renegotiate a fee with Dr. Holmes and let every deadline run. That that was the reason she lost it. They could find ---

CHIEF JUSTICE JEAN TOAL: Well, what -- what has to be done, though, as I understand a professional malpractice case

is, you've got those materials that I think you've done a very good job of putting forward, uh, the position on, but as the case then begins to be tried in state court, what is required is to have, uh, testimony about the case within the case, and, uh, that's what I'm wondering about. Uh, there was (indiscernible), and, of course, uh, Dr. Holmes, uh, uh, attempted to project herself as the expert, but however that might have run, what was there in the record that projected the case within a case that would support a med-, a professional malpractice verdict?

CHALMERS JOHNSON: Dr. Holmes settled it. That's the evidence.

CHIEF JUSTICE JEAN TOAL: Dr. Holmes ---

CHALMERS JOHNSON: Settled it. This isn't a malpractice case where we're claiming that, "my lawyers didn't do a good job, and therefore I lost the case, and here's what I would have won," Dr. Holmes actually won the case pro se; she settled it. She got a quarter of a million dollars and a promise from the hospital that they'd allow -- that they'd put her back in her position and allow her to re-apply. Haynesworth could have done that, too. They probably could have done better.

CHIEF JUSTICE JEAN TOAL: Now, ---

CHALMERS JOHNSON: That was her case.

CHIEF JUSTICE JEAN TOAL: The, the, the state case, uh, against each couple ---

CHALMERS JOHNSON: One and the same, Your Honor.

CHIEF JUSTICE JEAN TOAL: --- settled for $250,000. How does that prove the vitality of the case in the case that we are talking about, which is the federal antitrust case?

CHALMERS JOHNSON: They're one and the same case, Your Honor. All the state claims were brought in federal court in original ---

CHIEF JUSTICE JEAN TOAL: No, sir, the -- the -- the antitrust matters were knocked out, uh, in federal court.

CHALMERS JOHNSON: Correct.

CHIEF JUSTICE JEAN TOAL: Affirmed by the U.S. Supreme Court, or declined to be further reviewed by them, and then in

the state case, the first thing that was done by Judge Pieper was to knock out those federal ---

CHALMERS JOHNSON: Correct.

CHIEF JUSTICE JEAN TOAL: --- causes and say they could not be pursued because of, uh, the rulings in federal court.

CHALMERS JOHNSON: Correct, Your Honor.

CHIEF JUSTICE JEAN TOAL: So where is the evidence that then was presented to show that was incorrect or somehow the experts, uh, could show that she could have prevailed? Because so much of what you're arguing about her damages proceeds from that.

CHALMERS JOHNSON: Your Honor, in the very first engagement letter, which includes three pages about fees and one sentence about scope, the scope was, "It is my understanding you wish for us to provide advice and counsel regarding your medical staff privileges with East Cooper Regional Medical Center." They represented her through, um, an appeal with the Medical Center, then they helped her file this lawsuit in federal court, including state claims, and they chose to file original jurisdiction rather than file it

in state and let it be removed. When the case was dismissed --

CHIEF JUSTICE JEAN TOAL: Well, she insisted on that, as I understand it. They advised that, uh, a state filing would be the better way to go. She insisted on a federal filing, as I am -- isn't that correct?

CHALMERS JOHNSON: I believe so, Your Honor. So they filed it in federal court. When the federal court dismissed the federal claims, it declined to exercise jurisdiction over the state claims. Then she said, "Well, you're my attorneys, proceed, go to state court," and they said, "No, we don't think so. Here's a copy of the complaint, you go ahead in state court," and dumped her. So those claims ---

CHIEF JUSTICE JEAN TOAL: Well, how -- if -- if all that occurred, uh, how was she injured? She -- she settled. She agreed to a settlement of $250,000. So in terms of the state claims, uh, what -- what has she got by way of professional negligence if she settled in ---

CHALMERS JOHNSON: She lost the four surgeries that she would have had had the injunction been maintained. If these guys had done their job, the injunction would not have been

let go, and a jury could find that.

CHIEF JUSTICE JEAN TOAL: But the injunction has nothing to do with these state claims.

CHALMERS JOHNSON: Doesn't matter, Your Honor. The -- the reason ---

CHIEF JUSTICE JEAN TOAL: The injunction is totally founded on the federal suit and the vitality of the federal suit. The federal suit was gone. She then went to state court. Now, explain to me again how if she settled for $250,000, these surgeries have got any place in the analysis?

CHALMERS JOHNSON: Because, Your Honor, you're -- you're missing the trees for the forest. Um, the case is about the injunction. She mitigated her damages by continuing her own case and settling it. They didn't lose the case for her; she ended up winning it herself. What they did lose is the injunction that protected her right to do surgeries while the case was pending, and I understand, Your Honor, ---

CHIEF JUSTICE JEAN TOAL: (Indiscernible) was totally contingent on the vitality of the federal case, and the federal courts have ruled it had not vitality, was not a good

case.

CHALMERS JOHNSON: Now, Your Honor, I understand that, but I think if you present to the jury Judge Duffy's words telling her, "Well, you better go ahead and cancel those surgeries that you have and find some other doctor to do them," and then you look at the letter the very next day specifically cancelling four surgeries, that shows that she lost something. She has damages. Had that injunction continued even for six weeks, she would have done those surgeries.

CHIEF JUSTICE JEAN TOAL: So you're saying you didn't need an expert to show the case within the case, your proof of the case within the case is the loss of the four surgeries on the preliminary injunction?

CHALMERS JOHNSON: Correct, Your Honor.

CHIEF JUSTICE JEAN TOAL: I see.

CHALMERS JOHNSON: Um, and that's why -- um, I'm out of time, Your Honor. If you'll allow me to ---

CHIEF JUSTICE JEAN TOAL: Oh, absolutely.

CHALMERS JOHNSON: --- say one more thing ---

CHIEF JUSTICE JEAN TOAL: Certainly.

CHALMERS JOHNSON: Um, as to the -- the argument about -- that -- I'm sorry -- respondent made concerning the new act and the fact that Hanahan may not apply to the new act, um, in fact, the new act does require the judge to find the case frivolous before sanctions can be awarded, and Hanahan and Southeastern Site Prep all talk about a -- a finding of frivolity, not sanctions. They don't say you can't award sanctions, they say you can't find it frivolous. The reason they say you can't find it frivolous all goes back to the duty of loyalty that attorneys owe their clients and that clients expect from them. Similar to the order that you just passed on July 30th, um, that required that even when an attorney is dismissed under bad circumstances, unfair circumstances by their client, they owe a duty to fight for the client to the very end, and, Your Honor, that's what this is all about. Both the sanctions and to this case. I don't care if the client is arguing about your fees, is being difficult, is making your life a holy hell by calling your office all the time, you have a duty to go into court and fight for your client and be their sword and shield until a judge tells you

you don't have that duty anymore, and they've breached that duty. Thank you, Your Honor.

CHIEF JUSTICE JEAN TOAL: Thank you, Mr. Johnson. Court will be in recess.

(THE HEARING IN THIS CAUSE CONCLUDED)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Thomas L. Hughston, Circuit Court Judge

Appellate Case No. 2010-154986

Dr. Cynthia Holmes, M.D.

Appellant/ Petitioner,

v.

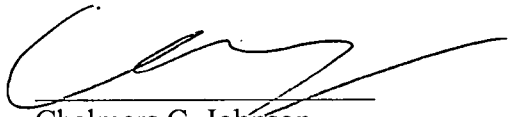
Haynsworth, Sinkler & Boyd, P.A.,
Successor to Sinkler & Boyd, P.A.,
Manton Grier and James Y. Becker,

Respondents.

PROOF OF SERVICE FOR
APPELLANT'S PETITION FOR REHEARING

I certify that I have served a copy of the Appellant's Petition for Rehearing on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, on this date, July 5, 2014 at the following address.

Richard S. Dukes
Turner Padget Graham & Laney, P.A.
P.O. Box 22129
Charleston, SC 29413



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