

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Hon Thomas L Hughston, Jr ,
Circuit Court Judge

Case No 2007-CP-10-01444

Cynthia Holmes,

Appellant,

v

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

Respondents

FINAL RESPONDENTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I Did the trial court properly grant a directed verdict to the Respondents, where the Appellant did not present sufficient evidence to support her legal malpractice and related claims, and those claims also failed as a matter of law?

II Did the trial court correctly impose sanctions upon the Appellant, where she forced the Respondents to defend against her meritless claims for more than seven years, and through numerous improper and interlocutory appeals, only to have the trial judge grant the Respondents a directed verdict?

III Did the trial court properly deny the Appellant's last-minute motion for a continuance, where the chief administrative judge had previously set the case for a date certain trial, and the Appellant's purported "trial counsel" had never entered an appearance on her behalf, had not participated in any of the pre-trial matters, and had never signed any document as Appellant's counsel?

STATEMENT OF THE CASE

This is a legal malpractice case with a long and tortured procedural history. Unfortunately, a full description of that history is necessary for the Court to understand part of the trial judge's motivation for awarding sanctions against the Appellant, which is one of the primary issues on appeal.

The Appellant Cynthia Holmes ("Holmes") filed a Summons and Complaint against the Respondents Manton Grier, James Becker, and Haynsworth Sinkler Boyd, P A (collectively "Haynsworth") on April 1, 2002, in Charleston County [R p 112]. In the Complaint, Holmes alleged Haynsworth committed legal malpractice in handling a federal antitrust action against East Cooper Hospital in

Mount Pleasant, South Carolina The federal case ended in April, 2000, when the district court granted the hospital's motion for summary judgment as to Holmes' federal causes of action and dismissed her supplemental state law claims without prejudice [R p 1472-1494] The district court found Holmes had failed to present any of the requisite evidence to support her claims under the Sherman Antitrust Act, and therefore, the hospital was entitled to judgment as a matter of law

Holmes appealed the district court's judgment *pro se* and, upon losing in the United States Court of Appeals for the Fourth Circuit on November 17, 2000, petitioned the United States Supreme Court for writ of certiorari [R p 1657] The Supreme Court denied that petition on October 1, 2001 Holmes then filed her state and common law claims in the Court of Common Pleas for Charleston County on May 16, 2000, and settled all those claims with the hospital in 2003 [R p 1594]

As discussed above, Holmes filed the initial pleadings in the case at bar around the same time she was proceeding in her state court action against the hospital However, Holmes did not deliver copies of the Summons and Complaint to the Richland County Sheriff's Department for service upon Becker and Grier (both Richland County residents) until after April 30, 2003 That was more than a year after she filed her complaint in Charleston County [R pp 56, 72]

Before that service occurred, Haynsworth¹ successfully moved to transfer venue to Richland County. Holmes filed a Notice of Appeal on March 12, 2003, challenging the transfer of venue [R p 1698]. The Court of Appeals dismissed the appeal as interlocutory in an Order filed on May 1, 2003 [R pp 22-23]. Holmes then filed a petition for rehearing, which this Court denied on June 16, 2003.

Holmes filed a petition for a writ of certiorari in the Supreme Court on July 14, 2003. The Supreme Court denied that petition on April 8, 2004 [R p 25]. Although the rules do not allow for petitions for rehearing after denial of a certiorari petition, Holmes filed one anyway. The Supreme Court effectively ignored that petition and issued the remittitur on April 22, 2004 [R p 27]. Holmes responded by filing a “Motion to Reinstate the Appeal” and a “Petition for Original Jurisdiction” on April 23, 2004, and April 26, 2004, respectively. The Supreme Court refused to accept the first petition for original jurisdiction, which only prompted Holmes to file a second one. The Supreme Court denied that petition on June 9, 2004. Holmes then filed a petition for rehearing en banc, which the Court denied. This finally ended Holmes’ first interlocutory appeal more than a year after it began.

The case returned to the circuit court at that point, but it did not remain there for long. On August 17, 2004, the circuit court ordered Holmes, who had been attempting to prosecute the case under a “J Doe” pseudonym, to proceed

¹ Actually, the motion was filed by Haynsworth’s predecessor in interest, Sinkler & Boyd, P A. For the sake of simplicity, the Respondents will use the name Haynsworth throughout this brief, rather than switching between “Haynsworth” and “Sinkler & Boyd.”

under her real name [R p 28] Holmes filed a notice of appeal on September 24, 2004 Haynsworth filed a motion to dismiss the appeal as interlocutory, which the Court of Appeals granted on January 12, 2005 [R p 30] Holmes petitioned for rehearing, and when the Court of Appeals denied that petition, she filed a petition for a writ of certiorari in the Supreme Court on June 20, 2005 [R p 32]² The Court denied that petition on October 19, 2006 [R p 35]

While this second appeal was pending, the circuit court in Charleston County dismissed motions Holmes had filed there because venue in the case had been transferred to Richland County The judge issued that decision verbally on October 28, 2004, and Holmes filed another notice of appeal the next day The Court of Appeals dismissed the appeal on June 16, 2005 Holmes then filed a petition for rehearing (June 28, 2005) and, when that was denied, another certiorari petition (April 14, 2006) The Supreme Court denied the petition on October 19, 2006 This occurred at roughly the same time as the decision not to accept Holmes' second appeal Thus, the entire case returned to the circuit court in late October 2006

Holmes then attempted to conduct some deposition discovery, issuing numerous subpoenas that did not comply with Rule 45, SCRPC Haynsworth properly objected to the subpoenas and Holmes filed several discovery-related motions Eventually, all of Holmes' motions came before the circuit court in Charleston County³ The presiding judge issued comprehensive orders on those

² Holmes also filed a motion for sanctions against Haynsworth, which was denied

discovery motions in March 2008, sustaining Haynsworth's objections and denying Holmes' motions [R pp 45-50] Holmes once again commenced an interlocutory appeal on June 27, 2008 The Court of Appeals dismissed the appeal on August 12, 2008 [R p 54]

As Holmes had previously done, she continued to pursue the appeal after its dismissal Holmes filed a rehearing petition, which the Court of Appeals denied on November 21, 2008 Holmes then filed a petition for a rehearing en banc, which the Court also denied On January 10, 2009, Holmes submitted a "Petition for Writ of Certiorari in Original Jurisdiction and Petition for Certiorari" to the Supreme Court After the Supreme Court denied those petitions on April 24, 2009, Holmes filed a "Motion Pursuant to Rule 224(j) for Panel Review of an Order by an Individual Justice " The Supreme Court denied that motion on May 13, 2009, although it had previously issued the Remittitur on April 29, 2009 [R pp 60-61]

After the Supreme Court remanded the case, it resumed its place on the jury trial roster, where it soon became the first case for trial⁴ Holmes again filed numerous motions for continuance over Haynsworth's objections At a hearing on one such motion, the Chief Administrative Judge for Charleston County set the case for a date certain trial to begin on June 8, 2009 On the Friday before the trial was scheduled to begin, Holmes again moved for a continuance [R p

³ The Richland County circuit court had granted a motion by Holmes to transfer venue back to Charleston County

⁴ The parties had been notified the case had been transferred to the jury trial roster pursuant to Rule 40 in April, 2008 Thereafter, the chief administrative judge issued a scheduling order, which Holmes moved the court to reconsider

1742] The trial judge heard that motion on the first morning of the trial and denied it [R pp 548-552] Throughout trial, Holmes reiterated her pleas for a continuance, all of which the trial court denied. The judge also heard Haynsworth's pending summary judgment motion, which he denied simply because he had not had enough time to review the court's extensive file materials [R pp 100, 571-572] As a result, the trial began on June 8, 2009.

Holmes, who is licensed to practice law in South Carolina, acted as her own attorney at trial. Though she repeatedly referred to unnamed "trial counsel" who was out-of-state, no attorney had ever appeared in the case as Holmes' counsel, and she had always appeared pro se. Although Holmes testified on her own behalf as a lay witness, the trial judge denied her request to testify as a legal expert [R p 1192] The judge concluded Holmes was not qualified to do so because she had not actually practiced law in close to 30 years and had little or no experience representing clients in court proceedings [R pp 1187, 1192] Holmes did not offer or present any other expert to testify in support of her legal malpractice claims. Holmes also failed to offer any expert testimony regarding the elements of the "case within a case" she was required to prove in order to establish those claims.

Due to numerous delays caused primarily by Holmes' inexperience in the courtroom, the trial lasted all week. Finally, on June 12, 2009, the trial judge announced his decision to grant Haynsworth a directed verdict on all causes of action [R p 1430] The judge signed and filed a formal Order to that effect on July 14, 2009 [R p 72]

Holmes filed a motion for a new trial on July 19, 2009 [R p 1754] A few days later, Haynsworth filed a post-trial motion asking the trial judge to award sanctions against Holmes [R p 1762] The judge conducted a hearing on all of the post-trial motions⁵ on September 29, 2009 In an Order filed on November 18, 2009, the trial judge denied Holmes' motion for a new trial, but granted Haynsworth's motion for sanctions [R pp 98-110] After finding ample evidence of Holmes harassing Haynsworth by pursuing her baseless claims and using tactics intended primarily for vexation and delay, the judge ordered Holmes to pay Haynsworth \$200,000 as partial reimbursement for Haynsworth's legal fees and defense costs [R p 109]

Holmes filed a Notice of Appeal on November 28, 2009 At this point, Holmes was still acting as her own attorney On December 2, 2009, the Supreme Court issued an Order in another matter involving Holmes, which directed all clerks of court in South Carolina to refuse any future filings by Holmes unless they were signed by another licensed South Carolina attorney [*Doe v Duncan*, S C Supreme Court Order filed Dec 2, 2009] Pursuant to that Order, the Court of Appeals dismissed Holmes' appeal on February 24, 2010, because she had failed to have a South Carolina attorney sign her appellate pleadings

On March 10, 2010, Holmes' current attorney appeared on her behalf for the first time, and moved to reinstate the appeal After the Court allowed the appeal to proceed, Holmes failed to file and serve her Initial Brief within the time

⁵ While her new trial motion was pending, Holmes also filed several motions seeking to dismiss Haynsworth's motion for sanctions

prescribed under the South Carolina Appellate Court Rules. Apparently, Holmes insisted on unspecified changes and corrections to the verbatim trial transcripts she had ordered and received. As a result, Haynsworth moved to dismiss the appeal on May 2, 2011. The Court of Appeals granted the motion and again dismissed the appeal on June 10, 2011.

Holmes filed another motion to reinstate the appeal on June 15, 2011. Despite not receiving any ruling on that motion, Holmes filed and served her Initial Appellant's Brief and Designation of Matter on July 14, 2011.⁶ Finally, on August 24, 2011, the Court issued an order accepting those materials and reinstating the appeal. Notably, this occurred more than two years after the trial concluded and over nine years after the filing of the Summons and Complaint.

STATEMENT OF THE FACTS

Cynthia Holmes is a licensed medical doctor, who practices ophthalmology in Mt Pleasant, SC [R p 1197]. Holmes is also licensed as an attorney, but she has not practiced law in close to 30 years [R p 1187]. The Respondent Haynsworth Sinkler Boyd, P A, is one of the largest law firms in South Carolina, and the Respondents James Becker and Manton Grier are shareholders in that firm [R pp 768, 932].

In or around 1999, Holmes lost her privileges to admit patients and perform procedures at a local hospital [R pp 1198-1199]. Holmes approached Haynsworth about representing her in attempts to regain those privileges [R p 1199]. Haynsworth agreed to represent Holmes, and the parties signed an

⁶ Although this is Holmes' seventh appeal in this action, it is the first one in which she has actually gotten as far as filing an initial brief.

engagement agreement [R pp 1509-1511] The agreement explained that Haynsworth would charge fees based on increments of time worked on the file at specified hourly rates [R pp 1509-1511] Holmes signed the agreement, and Haynsworth began to bill Holmes for its work on the case

Haynsworth pursued an appeal through the hospital's administrative process, which was unsuccessful Afterwards, Holmes wanted to file an action against the hospital in federal court [R p 996] Haynsworth warned against bringing an action in federal court, but Holmes insisted on that course of action [R pp 997] Haynsworth agreed to file the action, but made it clear the firm would not be obligated to pursue an appeal on Holmes' behalf if the action failed [R pp 1009, 1115]

As the federal case began, Haynsworth filed a request for a temporary injunction allowing Holmes to perform procedures at the hospital The federal judge granted this request, primarily because Holmes submitted an affidavit claiming she had patients who were in immediate need of surgery [R pp 967-68, 1057] Despite receiving this injunction, Holmes did not perform any surgeries while the case was pending [R pp 969, 1058]

Around that same time, Haynsworth and Holmes became involved in a dispute over a large amount of unpaid bills for legal services Throughout this period Holmes repeatedly asked Haynsworth to accept the case on a contingency fee basis, Haynsworth repeatedly and emphatically declined [R pp 944-945, 1021, 1509-1512, 1514, 1523, 1528] When Holmes appeared unwilling to pay her bills and continued to misconstrue their agreement regarding

the terms of engagement, Haynsworth filed a motion to be relieved as counsel [R pp 1022-1023, 1026] The parties eventually resolved the dispute, however, and Haynsworth withdrew the motion. On January 25, 2000, Holmes executed an Addendum to her engagement agreement that set forth the specific terms of Haynsworth's engagement going forward [R pp 942, 1535] There is no indication anywhere in the record that Haynsworth agreed at any time to represent Holmes on a contingency fee basis.

The hospital filed a motion to dissolve the injunction. After learning Holmes had not performed a single surgical procedure and also finding out Holmes was herself an attorney and had frustrated both her own lawyers and the hospital's lawyers' attempts to conduct discovery, the federal judge summarily dissolved the injunction [R p 969] Haynsworth saw no merit in an immediate appeal of that decision and declined to pursue one [R pp 1118-1119]

Shortly thereafter, Holmes filed a pro se motion asking the federal judge to reconsider his decision [R p 1536] In that motion, which was filed on January 31, 2000, Holmes indicated she was dissatisfied with Haynsworth's representation, and she openly criticized how Haynsworth had handled her case [R pp 1536-1540]

On April 17, 2000, which was the eve of trial, the federal judge granted summary judgment in the hospital's favor as to the federal claims for violations of Sections 1 and 2 of the Sherman Antitrust Act [R pp 1472-1494] To reach that decision, the judge extended existing law, thereby making the antitrust claim

inapplicable to hospital decisions regarding privileges⁷ [R p 999] The federal judge also dismissed the pendent state law claims without prejudice Pursuant to the terms of its written engagement agreement with Holmes, Haynsworth declined to appeal the federal judge's decision, although it assisted Holmes in commencing the appeal [R pp 1114-1115] Haynsworth also declined to represent Holmes in the state court action [R p 1114] At this point, Haynsworth's relationship with Holmes ended

Holmes then pursued her state and common law claims in state court and obtained a settlement in the amount of \$250,000 [R p 1000] She proceeded pro se for much of the action, but retained an attorney shortly before trial Though she agreed to settle her claims against the hospital, Holmes nevertheless also sued her attorneys in that action for malpractice That malpractice action ultimately resulted in the Supreme Court's order in *Doe v Duncan*, which was discussed above

ARGUMENT

I The trial court properly granted a directed verdict to the Respondents

a The undisputed evidence showed Holmes failed to commence her action against the individual defendants within the statute of limitations

Contrary to the arguments in the Appellant's Brief, the trial court did not render any finding that it lacked personal jurisdiction over Becker and Grier Rather, the court granted a directed verdict in their favor because Holmes failed

⁷ The United States Court of Appeals for the Fourth Circuit affirmed the judge's decision, and the United States Supreme Court denied Holmes' pro se petition for writ of certiorari

to commence her action against them within the three-year statute of limitations Holmes admitted (pursuant to Rule 36, SCRCP) she did not commence her action against Becker and Grier until more than three years after she knew or should have known she had a potential cause of action against them Thus, the trial court properly concluded the only evidence at trial warranted a directed verdict in favor of Becker and Grier

The Appellants' Brief does not address this legal conclusion in any substantive manner Again, it mistakenly discusses the directed verdict for Becker and Grier in terms of personal jurisdiction – an issue the trial court never considered or ruled upon Holmes' failure to present arguments and authorities on this issue means she has waived any challenge to this ruling on appeal See *Ahrens v State*, 392 S C 340, 357, 709 S E 2d 54, 63 (2011) (an issue raised on appeal, but not argued in the brief will be deemed abandoned and the appellate court will not consider it) Therefore, this Court should affirm the directed verdict in favor of Becker and Grier

b Holmes failed to present any evidence to support her claims

As a threshold matter, the trial court properly excluded Holmes from testifying as an expert The court concluded Holmes was not qualified to testify as an expert witness because she lacked any experience as an attorney that would permit her to testify regarding the applicable standard of care for attorneys handling a federal antitrust law suit The trial court found Holmes had never appeared as an attorney representing any person other than herself, and she

had never represented any client in federal court. These facts rendered Holmes ineligible to give expert testimony on any of the issues involved in her claims.

Having determined Holmes' testimony would be neither reliable, nor qualified, the court properly exercised its discretion in its gatekeeping function to exclude Holmes' opinion testimony regarding the conduct of her prior attorneys. See *State v. White*, 382 S.C. 265, 274, 684 S.E.2d 684, 689 (2009) (in discharging its gatekeeping role, the trial court must assess the threshold foundation requirements of qualifications and reliability). The court correctly concluded Holmes was not qualified to give expert testimony and her opinions in regard to such testimony were unreliable.

Although Holmes is a licensed attorney in South Carolina, she has not practiced law for nearly 30 years. Holmes earns her living as a physician, and she does not represent clients in legal proceedings (or in any other capacity, for that matter). Under those undisputed circumstances, the simple fact that Holmes holds a law license does not *ipso facto* qualify her to testify as an expert regarding the applicable standard of care or a breach of that standard in litigation involving complex antitrust and other business law claims. Holmes still had to demonstrate, to the trial court's satisfaction, that she had the knowledge and experience necessary to present reliable testimony. The judge concluded she did not, and the record clearly supports that exercise of his broad discretion. Cf. *Nelson v. Taylor*, 347 S.C. 210, 553 S.E.2d 488 (2001).

Furthermore, Holmes failed to provide any expert testimony to establish her burden of proof of the "case within a case," which is a prerequisite in an

attorney malpractice case. As the trial court recognized, Holmes' burden was to establish not what would have been, but what should have been. See Doe v Howe, 367 S C 432, 626 S E 2d 25, 31, n 18 (Ct App 2005). Here, this means Holmes was required to demonstrate sufficient evidence to establish a case under either Section 1 or Section 2 of the Sherman Antitrust Act. In other words, she had to prove she had a meritorious and legally viable claim under those authorities in order to establish the existence of malpractice.

Despite that requirement, Holmes failed to present expert testimony regarding any of the prerequisites for establishing a case under the Sherman Antitrust Act.⁸ Holmes failed to present expert testimony to establish, by statistical evidence, the relevant geographic market and the relevant product. [R pp 78-80] Holmes also failed to establish through expert testimony the hospital's market share in the relevant market and its market power both before and after the hospital adopted the bylaw Holmes challenged in her federal suit. [R pp 78-80] Finally, Holmes failed to present expert testimony of an antitrust injury or a violation of the "rule-of-reason" by the hospital. [R pp 78-80]

In short, Holmes failed to present any admissible evidence of an unreasonable restraint of trade or market injury that would have been a violation of the Sherman Act. [R pp 78-80] For her malpractice case, Holmes was

⁸ As the trial court noted, Judge Duffy's Order of April 17, 2000, set forth exactly what elements Holmes lacked in her federal antitrust action and determined what Holmes would have had to prove in order to satisfy her burden in the federal case. [R pp 78-80] Judge Duffy's order is the law of the case, and the Respondents respectfully direct the Court to the discussion in that Order. The things Holmes failed to prove in the federal case are the same things she did not prove at trial in this action. [See R pp 1472-1494]

required to prove the credentials requirements at the hospital unreasonably restrained trade under a “rule-of-reason” analysis. Holmes failed to elicit any testimony in support of this position, nor did she submit even a scintilla of evidence in this regard. Stated bluntly, Holmes did absolutely nothing to establish the “case within a case” element of her malpractice claim.

Having failed to present any expert testimony regarding the Respondents’ standard of care and breach thereof, or any testimony or evidence to establish the case-within-a-case, Holmes did not satisfy her burden of proof. The complete absence of any supporting evidence meant there was no issue of fact for a jury to determine. The record before the trial judge permitted only one reasonable inference or conclusion – *i.e.*, that the Respondents did not breach the applicable standard of care in their representation. Therefore, the trial court properly granted a directed verdict to the Respondents on this basis, and this Court should affirm that decision.

Furthermore, Holmes’ reliance on the “common knowledge” exception to the requirement of expert testimony in a legal malpractice case is misplaced. Holmes appears to argue her claim was based on “common sense,” such that a jury would not have needed expert testimony to understand it. This theory not only overestimates the legal knowledge of a layperson, but also ignores the “case within a case” requirement of a malpractice claim.

Even if one assumes (erroneously) that expert testimony would not otherwise be needed, Holmes certainly needed expert testimony to establish the prerequisites and elements of a claim under the Sherman Antitrust Act. Holmes

cannot credibly argue a jury would not need expert guidance on those issues, and, indeed, she does not even attempt to do so. Instead, she overlooks this matter entirely. For this reason, her arguments based on the “common knowledge” exception are wholly without merit, and this Court should affirm the result below.

c The only record evidence on this issue demonstrates the Respondents complied with the standard of care and did not commit malpractice.

Despite the absence of any evidence from Holmes to support her malpractice claim, the Respondents presented evidence to refute it. The Respondents offered the opinion testimony of Professor John Freeman, whom the trial court readily acknowledged as a qualified expert. The court relied upon Professor Freeman’s testimony, in conjunction with the lack of any evidence from Holmes, as support for the decision to grant the Respondents a directed verdict. The Appellants’ Brief fails to demonstrate any error in that decision, and therefore, this Court should affirm.

Holmes’ primary argument on this issue appears to be a suggestion that Professor Freeman conceded some malpractice on the Respondents’ part. This is patently false. As even a cursory reading of Professor Freeman’s testimony demonstrates, he expressed the opinion that the Respondents did not breach any duties of care or commit any malpractice while representing Holmes. [R pp 1275, 1281-1284, 1288-1295] Professor Freeman’s testimony in that regard was clear and unequivocal. He believed the Respondents did not do anything wrong, and he firmly and repeatedly stated that opinion during the trial.

In addition, Professor Freeman opined that nothing the Respondents did (or did not do) would have altered the result because the federal court extended existing law and found Holmes had no federal remedy under the antitrust laws [R pp 1286, 1294, 1305, 1309-1310, 1331] Once the federal court decided to extend the antitrust laws' "rule-of-reason" analysis to hospital credentialing criteria and decisions, nothing could have saved Holmes' case As Professor Freeman explained, the Respondents could not have done anything to win or lose the antitrust case under those circumstances [R pp 1286, 1294, 1305, 1309-1310, 1331]

Holmes bases her argument entirely on a response by Professor Freeman that she takes out of context At one point during her cross-examination of Professor Freeman, Holmes asked him to consider a hypothetical situation in which an attorney bound by a contingency fee agreement threatened to harm his client's case unless the client made a cash payment [R pp 1342-1343] Professor Freeman responded to that hypothetical with the answer quoted on page 8 of the Appellant's Brief [R p 1343] Significantly, though, Professor Freeman had already explained there was no evidence of any contingency fee agreement between Holmes and the Respondents [R pp 1341-1342] This made the hypothetical inapplicable to the present case Indeed, the trial court sustained the Respondents' objection to the entire line of questioning because it assumed facts not in evidence [R p 1344] The Appellant's Brief fails to explain any of this

Viewed within its proper context, Professor Freeman's testimony did not come close to saying what the Appellant's Brief suggests. Professor Freeman never agreed the Respondents engaged in any wrongdoing, and he certainly never conceded any malpractice on their part. In fact, Professor Freeman repeatedly challenged and disagreed with Holmes when she asked questions designed to elicit such a response. For this reason, Holmes' attempt to support her malpractice claims with any of Professor Freeman's trial testimony is misguided, at best, and must fail. Therefore, this Court should affirm the directed verdict in the Respondents' favor.

d The terms of the Respondents' representation of Holmes were contained in unambiguous writings that Holmes signed.

The only evidence presented at trial established conclusively that the terms of Respondents' engagement by Holmes were set forth in clear written documents. Pursuant to those documents, Holmes agreed to pay the Respondents on an hourly basis for their work on her case. [R pp 1509-1511] There are no written documents containing an agreement for a contingency fee (either at the outset of the representation or at some later time), and the Respondents presented testimony that Haynsworth flatly rejected Holmes' request for such an arrangement. [R pp 944-945, 1021] Therefore, the trial court properly rejected Holmes' claims based on an a purported contingency fee agreement, and this Court should affirm that decision.

At trial, Holmes attempted to argue the Respondents committed malpractice by asking her to make a fee payment while the case was ongoing. According to Holmes, the Respondents threatened to withdraw from the case if

she did not make that payment⁹ What Holmes has failed to acknowledge, however, is that this was neither a demand for “new” money, nor a proposed amendment to the original retainer agreement Rather, the evidence demonstrates it was an attempt by the Respondents to collect some of the large amount of unpaid bills Holmes had outstanding at that time Holmes has never presented any evidence or authorities to support a contention that it is malpractice for an attorney or law firm to expect its clients to pay their bills pursuant to a binding agreement

Perhaps knowing she cannot present any such evidence or authorities, Holmes relies upon an allegation of a contingency fee agreement with the Respondents Essentially, Holmes claims the Respondents acted unethically by entering into a contingency fee agreement and then later asking for fee payments during the case The problem for Holmes is that there never was a contingency fee agreement It is a figment of Holmes’ imagination that appears nowhere in the record Holmes was unable to present a copy of any such document at trial, and she similarly could not produce any corroborating testimony about it Thus, there was no record evidence of any such agreement¹⁰

There was, however, ample evidence of the actual agreement between the parties In addition to the trial testimony of Becker, Grier, and William Boyd,

⁹ Holmes repeats these arguments on pages 7 and 8 of her Appellant’s Brief

¹⁰ Any argument that Holmes’ unsupported claims about a contingency fee agreement were sufficient to create a jury question is without merit To the extent Holmes gave any actual testimony on this issue, it was an attempt to contradict or alter the terms of a written instrument with extrinsic evidence This was impermissible under the parol evidence rule See McGill v Moore, 381 S C 179, 188, 672 S E 2d 571, 576 (2009)

the Respondents presented numerous exhibits documenting the terms of the representation [See R pp 1509-1535] Those documents revealed Holmes agreed to an hourly fee arrangement with Haynsworth [R pp 1509-1535] Holmes' signature on the agreements established that fact Moreover, the exhibits and testimony showed Holmes actually paid those fees throughout the representation The Respondents would not have submitted monthly or periodic bills – and Holmes certainly would not have paid them – if a contingency fee agreement had been in place Thus, the evidence at trial lent no support whatsoever to Holmes' allegations of a contingency fee arrangement In fact, the evidence supported only the opposite conclusion

Holmes also argued it was malpractice for the Respondents not to pursue an appeal on her behalf in the federal action As the trial court correctly found, however, the Respondents had no obligation to represent Holmes in that appeal ¹¹ The trial exhibits fully supported that conclusion, and Holmes could not produce any evidence the Respondents ever agreed to represent her in the appeal Holmes' unfounded claims to the contrary were insufficient as a matter of law to create any factual issue at trial

The nature and terms of the Respondents' representation of Holmes appeared in clear language in written documents that Holmes signed Those documents, which constituted the agreement between the parties, did not say anything at all about a contingency fee agreement They also did not create any

¹¹ To the contrary, the Respondents at least arguably had an ethical responsibility not to pursue the appeal because they considered it, in their professional judgment, to be without merit

responsibility or obligation for the Respondents to represent Holmes in an appeal. Therefore, the trial court correctly concluded there was no basis for any claim by Holmes arising from those allegations. The resulting decision to grant the Respondents a directed verdict was likewise proper, and this Court should affirm.

e All of Holmes' claims failed as a matter of law.

Contrary to the assertion set forth in Holmes' brief, the trial court did not simply rule that each of her 15 separate causes of action were subsumed into her claim for professional negligence and dismissed. Rather, the court analyzed the essential elements of each individual claim and determined Holmes had failed to adduce a shred of evidence to support any of those separate claims. [See R p 88-95] This conclusion was accurate, and this Court should affirm.

After acknowledging Holmes bore the burden of proof, the trial court separately analyzed Holmes' purported causes of action for (a) professional negligence, (b) breach of contract, (c) breach of contract accompanied by a fraudulent act, (c) breach of fiduciary duty, (e) unfair trade practices, (f) abandonment, (g) civil conspiracy, (h) promissory estoppel, (i) defamation, (j) constructive fraud, (k) conversion, (l) negligent misrepresentation, (m) negligent supervision, (n) fraud and misrepresentation, and (o) quantum meruit. The court specifically explained why each of these claims failed based on Holmes' inability to submit any supporting evidence. As noted above, the court devoted roughly seven pages of its Order to this discussion. Thus, there is absolutely no basis for Holmes to argue the trial court merely dismissed all of the claims because the

malpractice cause of action failed. The court set forth more than a sufficient explanation for its decision as to each individual cause of action.

Significantly, this appears to be the only appellate argument Holmes has presented with regard to those other causes of action. The Appellant's Brief does not explain why those claims should have succeeded, or what pieces of evidence should have created jury issues on those claims. In fact, the Appellant's Brief does not even attempt to make that showing. The Appellant's Brief merely disputes the trial court's decision that the other claims were subsumed into the legal malpractice cause of action and failed along with that primary claim. It does not address the merits of those other claims or the trial court's decisions regarding them.

This is important because it represents a failure to challenge all of the grounds for the trial court's decisions on the other causes of action. This, in turn, implicates the two issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v Lott*, 387 S C 339, 346, 692 S E 2d 900, 903 (2010). Here, the trial court set forth multiple reasons for granting a directed verdict on all of the non-malpractice causes of action. By failing to address all of those grounds in the Appellant's Brief, Holmes has effectively abandoned and waived any challenges to the directed verdict on those claims. Therefore, this Court should affirm based on the two issue rule.

Again, though, even if the two issue rule were not applicable, the directed verdict should nevertheless stand. The trial court's merits decisions on all of the non-malpractice claims are correct and based on an accurate view of the record at trial. Simply put, Holmes failed to present any evidence to support those claims. As a result, those claims fail as a matter of law, and this Court should affirm the result below.¹²

II The trial court properly awarded sanctions against Holmes based on her vexatious litigation tactics and the meritless nature of her claims

The trial court did not enter sanctions against Holmes lightly or for no legitimate reason. Rather, the court considered the tempestuous history of this case and the complete absence of any evidence to support Holmes' claims. Based on that careful examination, the court concluded Holmes' overall conduct in this action warranted a significant sanction. There is more than sufficient support for that decision, which this Court should affirm.

In South Carolina, "a trial judge has wide discretion in ordering sanctions." *Ex parte Bon Secours St Francis Xavier Hosp, Inc*, 393 S C 590, 598, 713 S E 2d 624, 629 (2011) (emphasis added). As the Supreme Court has explained:

A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed. The imposition of sanctions, however, will not be disturbed on appeal absent a clear abuse of discretion by the lower court.

¹² For the sake of space, the Respondents will not repeat the trial court's analysis in this brief. The Respondents obviously concur with the trial court's reasoning, and it respectfully directs the Court's attention to pages 17-24 of the Order [R pp 88-95].

Runyon v Wright, 322 S C 15, 19, 471 S E 2d 160, 162 (1996) Thus, while a trial court must set forth specific reasons for its decision to award sanctions, the reviewing appellate tribunal should grant wide latitude to that decision

In the present case, the trial court acted well within its discretion in imposing sanctions against Holmes The trial court also provided a thorough and insightful explanation of its decision Indeed, this Court need not guess about what prompted the lower court to sanction Holmes Even the following brief synopsis plainly demonstrates the basis for the sanctions

Plaintiff filed a non-meritorious and baseless lawsuit Prior to filing suit, Plaintiff obviously conducted no serious investigation of the facts she would be required to prove to substantiate her wide ranging claim Rather the entire tenor of Dr Holmes' case appears to be her belief that she is right and her former lawyers and 4 other courts are all wrong Plaintiff failed to develop any evidence that could satisfy her burden of proof at trial Any reasonable attorney would conclude that Plaintiff's entire case was completely frivolous and was brought, and continued, for seven years, without any reasonable basis

[R pp 99-100] This passage alone is sufficient to support the sanctions against Holmes, but it tells only part of the story The proverbial devil is in the details, and when one examines the record the trial court considered, the ultimate decision becomes even clearer and more justified

Throughout this case's tortured history, Holmes used every conceivable procedural device to cause delays, frustration, and increased costs for both the Respondents and the lower court It was of no apparent consequence to Holmes that many of those devices were actually unavailable to her and inappropriate

under the court rules. Indeed, the rules mattered so little to Holmes that she repeatedly tried to create new delaying tactics from whole cloth. Even when the rules clearly prohibited her from taking a course of action, Holmes routinely pursued it anyway.¹³ This is the sole reason the present case is still ongoing despite being filed in 2002.

The Statement of the Case in this brief fully describes the long and twisted procedural history leading to this appeal. The Respondents will not repeat that discussion here. Even a brief and simplified review, however, will suffice to demonstrate the improper and vexatious manner in which Holmes pursued her frivolous claims.

Holmes appealed most of the numerous interlocutory orders in this case – and saw every single appeal dismissed as premature. Specifically, Holmes appealed the trial court’s rulings on (1) the Respondents’ motion to change venue, (2) the Respondents’ motion to require the case be brought by the real party in interest, (3) the Charleston County court’s “dismissal” of motions filed after the case had been moved to Richland County, and (4) orders granting the Respondents’ motions to quash improperly issued deposition subpoenas and various discovery matters.¹⁴ In nearly every one of those baseless and interlocutory appeals, Holmes requested en banc hearing by this Court, writs of

¹³ For example, Rule 221(b), SCACR, forbids a rehearing petition for a decision to deny a petition for a writ of *certiorari*. In clear violation of that rule, Holmes filed a rehearing petition every time the Supreme Court denied her numerous *certiorari* petitions.

¹⁴ In fact, there were multiple appeals on this last category, including appeals relating to matters in which Holmes was actually the prevailing party.

certiorari from the Supreme Court, and review by the entire Supreme Court of a decision by a single justice (*i e*, orders denying the certiorari petitions and the improper rehearing petitions) Holmes even sought some sort of appellate review of Chief Justice Toal's denial of her request to assign the case to the Business Court

Every time the gavel struck, on even the most inconsequential matter, Holmes sought reconsideration and then pursued an appeal Holmes showed utter unfamiliarity with trial and appellate procedure, and she failed to make even the simplest attempt to gain the knowledge she needed to evaluate the propriety of her actions [R pp 99-101] As the trial court recognized, Holmes was litigious and dilatory at every stage of this case [R pp 99-101] She was obdurate in her refusal to evaluate the merits of her own case or the proper options for responding to interlocutory orders [R p 109] Holmes abused the legal process and the Respondents – not just in this case, but also in others she has brought See R pp 105, 109, *Doe v Duncan, et al, supra*

This constant pattern of delay and harassment would warrant sanctions even for a litigant pursuing a case with arguable validity But that is not the situation here As the trial court's decision indicates, Holmes had no evidentiary basis for any of her claims against the Respondents Those claims were, therefore, frivolous and without any merit This fact obviously adds to the impropriety of Holmes' conduct Simply put, it is bad enough to pursue this course of conduct for a viable case, it is much worse to do it for a hopeless quest with no evidence and no support

The trial court found Holmes' entire case was a frivolous and baseless exercise in futility. She had done no meaningful investigation into the merits of her claims against her former attorneys, and the court found that, in pursuing her frivolous claims, Holmes abused the legal process and the Respondents [R pp 108-109]. She filed motion after motion, all to no effect and without any apparent point. In the end, Holmes' tactics did nothing to further her cause or to rebut the Respondents' defenses. As the court properly determined, Holmes' tactics were dilatory, vexatious, and unreasonable, and, on that basis, her conduct warranted severe punishment [R p 105].

Interestingly, Holmes does not spend much (if any) time in her Appellant's Brief attempting to defend her conduct throughout this case. Holmes never tries to justify or excuse her multiple interlocutory appeals and appellate petitions. She also fails to explain why, if her claims were meritorious (or at least non-frivolous), she was unable to produce even a scintilla of evidence to support them after nearly ten years of active litigation. In short, Holmes does not raise any serious argument that the trial court lacked any justification for sanctioning her. Instead, Holmes focuses almost exclusively on her claim that the trial court somehow lacked authority to impose that sanction. As discussed below, that argument lacks any merit.

The trial court found Holmes was subject to sanction based upon multiple grounds – both iterations of the South Carolina Frivolous Civil Proceedings Act (“FCPA”), Rule 11, SCRPC, and the Court's inherent authority to sanction those who act in bad faith or for oppressive and improper purposes. Each of those

reasons finds ample support in the record, and the sanction imposed, while insufficient to remedy fully the harm imposed upon the Respondents and their attorneys, was fully justified [R p 109]

Under the version of the FCPA in effect when Holmes first filed her Complaint, and under Rule 11, SCRCP, the standard for imposing sanctions was frivolity or a bad faith filing *Southeastern Site Prep, LLC v Atlantic Coast Builders & Contractors, LLC*, 394 S C 97, 713 S E 2d 650 (Ct App 2011) The trial court specifically concluded Holmes filed her entire case in bad faith, for an improper purpose, and the case against her attorneys was completely frivolous [R pp 99-100, 106-107] Having observed Holmes' conduct of the case, the court found her apparent beliefs regarding the merits of her claims were unreasonable [R pp 106-107] The court likewise determined no reasonable, competent, and experienced trial attorney would have told Holmes she had a case at all [R pp 106-107] Yet, Holmes pursued the case for almost a full decade, only to present no relevant evidence during a week-long trial Thus, the trial court had a sufficient legal basis for imposing sanctions under these standards

As our Supreme Court has held, "a trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing " *Ex parte Bon Secours St Francis Xavier Hosp Inc* , 393 S C 590, 597, 713 S E 2d 624, 628 (2011) The trial court expressly concluded Holmes' entire case, from beginning to long-delayed end, was based upon no grounds whatsoever Under the rule

acknowledged in *Secours*, therefore, sanctions were appropriate. This provided another legitimate basis for the trial court's decision.

Holmes' conduct also merited stern sanctions under the FCPA as revised in 2005. Holmes filed her original Complaint in 2002. That Complaint contained sixty-two paragraphs and only five causes of action. The Respondents filed a motion for a more definite statement, which the circuit court granted following Holmes' first round of appeals over the case being transferred to Richland County [R p 101]. The dismissal of Holmes' appeal of that order became final in 2006 [R p 101]. On December 1, 2006, Holmes filed an amended complaint – with 129 paragraphs and fifteen causes of action [R p 102]. The Respondents first served a responsive pleading in January 2007. Holmes again moved to transfer venue from Richland to Charleston¹⁵. On February 3, 2007, Holmes again amended her Complaint, which the Respondents answered [R p 102]. Holmes then proceeded under this greatly expanded pleading all the way through trial in June 2009. As the trial court noted, this amended complaint was also the frivolous civil proceeding on which the Respondents based their Motion for Sanctions [R p 102].

Notwithstanding the volume of Holmes' allegations, the trial court determined none of them had any merit, or any basis in fact. Rather, throughout this action, Holmes relied only on her personal, self-serving narrative as the

¹⁵ The primary basis for Holmes' motion to transfer venue was an affidavit from Holmes averring she had more than fifty physicians who were potential trial witnesses. At trial, Holmes called only one physician as a witness, and the trial court concluded that doctor's proposed testimony was completely irrelevant [R p 102, n 1].

“proof” of her claims [R p 103] Holmes failed to adduce an iota of evidence to support her wild and far-reaching claims against her former attorneys [R p 103]

All of this conduct provided more than a sufficient basis for a finding of sanctions pursuant to the FCPA. The Act states a claim is frivolous, and thus subject to sanctions, if “a reasonable attorney in the same circumstances would believe that [the] procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party.” S C Code Ann §15-36-10(C)(1)(b). Sanctions are also warranted if “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.” S C Code Ann §15-36-10(C)(1)(c). As fully described above, all of those things happened here. Consequently, the current version of the FCPA also justified the sanctions award.

In addition, courts have the inherent authority to sanction bad faith and vexatious conduct by litigants. See, e.g., *State Record Co v State*, 332 S C 346, 349, 504 S E 2d 592, 593 (1998) (recognizing the “inherent authority of a court to protect its proceedings”), *Miller v Miller*, 375 S C 443, 453, 652 S E 2d 754, 759 (Ct App 2007) (courts have “inherent authority” to punish offenses “calculated to obstruct, degrade, and undermine the administration of justice”). See also *Robinson v Ritchie*, 646 F 2d 147, 148 (4th Cir 1981) (citing *Alyeska Pipeline Serv Co v Wilderness Soc’y*, 421 U S 240 (1975)). Holmes’ claims

were totally meritless and her tactics were unreasonable, ineffectual, and dilatory. Thus, the trial court acted within the scope of its inherent authority to protect its proceedings and the administration of justice.¹⁶

There is no denying the trial court awarded a large sanction against Holmes. But it is nevertheless appropriate. Holmes has forced the Respondents to devote countless hours and dollars to a decade-long war over claims ultimately found to have no merit. Though she is a licensed attorney charged with knowledge of all court rules, Holmes engaged in tactics that clearly violated those rules. At every turn, Holmes prolonged this case, seemingly for no other reason than to harass the Respondents and satisfy some sort of personal agenda.

One can perhaps feel some sympathy for Holmes' deluded obsession – as did the trial judge – but this does not change the fact that the Respondents suffered real harm as a result of it. Faced with the extreme circumstances of this case, the trial court had no choice but to impose a harsh sanction. Both this case's history and the applicable law support that decision, and this Court should affirm.¹⁷

¹⁶ The need to protect the judicial system from Holmes' conduct is not something the trial court in this case dreamed up. In an appeal from another case involving Holmes, the Supreme Court issued an order instructing all clerks of court throughout South Carolina not to accept filings from Holmes unless another licensed South Carolina attorney has signed them. See Doe v Duncan, supra. While that order is not dispositive of the issue of sanctions in this case, it does demonstrate that even our Supreme Court has deemed Holmes' litigation tactics worthy of sanctions.

¹⁷ The Respondents will not address Holmes' argument that the trial judge's Orders should be reversed because he somehow stood in violation of the Judicial

III The trial court properly denied the last-minute continuance request

After its long and convoluted pretrial history, this case made its first trial roster appearance pursuant to Rule 40, SCRCP, on April 8, 2008. The clerk of court notified the parties of the transfer to the trial roster at that time. [R p 1735] On August 8, 2008, the circuit court issued a scheduling order stating the case would not be subject to trial before January 1, 2009. [R p 53]

After a round of appeals stemming from a circuit court order addressing a variety of discovery motions filed by Holmes, this Court issued another remittitur on April 30, 2009. [R p 60] On May 1, Holmes filed a motion to strike the case from the jury trial roster. The Chief Administrative Judge for the Tenth Judicial Circuit denied that motion, noting the case had originally appeared on the trial roster back in 2008. Thus, after the Supreme Court denied Holmes' petition for rehearing, the judge returned the case to the jury roster.

The circuit court properly called the case for trial on May 18, 2009, but the court granted Holmes a one-week continuance. [R pp 65-66] The court then set the case for a date-certain trial to begin on June 8, 2009. [R pp 65-66] In the order, the chief administrative judge noted Holmes had previously requested numerous continuances to obtain counsel, but she had failed to do so. [R p 66] Holmes responded by filing several desperate motions in another attempt to stave off trial, but no lawyer appeared on her behalf at any time prior to trial.

Canons of Ethics That unsupported argument serves only to illustrate the point that Holmes has shown no limit on her willingness to grasp at every conceivable justification for her belief that she is right and everyone else is wrong. Needless to say, the Respondents assert the trial judge did nothing to violate any ethical standards, as even a cursory review of the record demonstrates.

Consequently, the circuit court denied Holmes' continuance requests and allowed the case to proceed to trial on June 8, 2009, pursuant to the order

Holmes completely misapprehends the manner in which circuit courts manage their jury rosters. Under Rule 40, transfer to the jury roster is automatic, and once on the trial roster, a case remains there, even though some issue might be on appeal. Once the appeal concludes, the case does not go to the end of the line, but resumes its place on the roster based upon its date of filing, or, in this matter, based upon its case number.¹⁸ Holmes argues her case should have started all over on its march to the top of the roster every time she filed one of her frivolous and dilatory appeals. There is no rationale behind this belief, only a thorough misunderstanding of how Rule 40 operates.

Nevertheless, the chief administrative judge gave Holmes extra time when she continued the case in May, 2009. This gave Holmes an opportunity to get an attorney, but no one appeared on her behalf as counsel of record. Given that failure (not to mention the extreme age of the case), the circuit court was justified in denying Holmes' continuance request.

As our Supreme Court has explained, "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal." *Plyler v Burns*, 373 S.C. 637,

¹⁸ This case was actually given a new case number after Holmes' first rounds of appeal in 2004 and 2006, pursuant to an order from one of the judges who dealt with the case in Richland County. The case was assigned its 2007 case number upon being transferred from Richland to Charleston.

650, 647 S E 2d 188, 195 (2007) (internal citation omitted) (emphasis added)

This is precisely the situation here Holmes moved for a continuance, claiming she needed more time to prepare, even though the case had been pending since 2002 Holmes did not provide any other reasons for requesting a continuance, and she did not give the circuit court any basis for granting it Therefore, the court acted properly and well within its considerable discretion in denying that request This Court should now affirm that decision

CONCLUSION

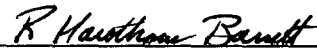
For nearly 10 years, Holmes has harassed the Respondents and forced them to incur substantial expenses defending against meritless claims Holmes chased her obsession up and down the appellate chain numerous times, and the Respondents had no choice but to participate and oppose those efforts Then, when Holmes finally got the trial she supposedly desired, she did nothing more than air her personal grievances against the Respondents She did not present one iota of evidence to support any of her ludicrous claims, and she utterly failed to demonstrate any malpractice or other improper conduct Simply put, what began in 2002 ended with a resounding whimper in the summer of 2009

The Respondents respectfully submit that 10 years is long enough It is well past time for the Respondents to be allowed to put this case behind them and move on Holmes no doubt disagrees, but she has no legal or evidentiary basis for that opposition She also has no excuse whatsoever for her vexatious crusade against the Respondents Therefore, the trial court properly granted a

directed verdict in the Respondents' favor, and the court also was correctly in its decision to impose sanctions

For these reasons, and further based upon all other grounds appearing in the Record on Appeal, this Court should affirm the result below in its entirety

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Hon Thomas L Hughston, Jr ,
Circuit Court Judge

Case No 2007-CP-10-01444

RECEIVED

MAR 16 2012

SC Supreme Court

Cynthia Holmes,

Appellant,

v

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

Respondents

Proof of Service

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **16th day of March, 2012**, served a copy of the **Final Respondents' Brief** upon counsel of record for the Appellant by causing it to be deposited in the United States mail, first-class postage prepaid, addressed to Chalmers Johnson, Esq , 523 So G St , Apt 402, Tacoma, WA 98405

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v

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Rule 211(b) Certification

The undersigned, an attorney in this matter for the Respondents, certifies that this Final Respondents' Brief complies with Rule 211(b), SCACR

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