THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

Pee Dee Health Care, P.A.....Appellant-Respondent.

v.

Estate of Hugh S. Thompson.....Respondent-Appellant.

INITIAL BRIEF OF APPELLANT-RESPONDENT

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Statement of the Case

This matter was initiated in 2010 in Darlington County. Appellant-Respondent Pee Dee Health Care, Tony R. Megna, and Matthews & Megna, LLC (collectively "Pee Dee")[1] previously appealed certain rulings to this Court.[2] While that appeal was pending, Respondent-Appellant Estate of Thompson ("Thompson") moved for costs and attorney's fees, which were granted by this Court's Order dating March 28, 2014, and for sanctions, which were denied by separate order on the same date.

After remand to the Circuit Court, Thompson filed a Motion for Sanctions against Pee Dee's prior counsel, Tony R. Megna and Benjamin R. Matthews, and their law firm. A hearing was held on March 27, 2014 (the day before this Court granted certain fees to Respondent). On April 15, 2014, the Honorable J. Michael Baxley issued an Order Granting Rule 11 Sanctions Against Plaintiff, Tony R. Megna, Esq., Matthew & Megna, LLC, and any Successors or Assigns. Pee Dee moved to alter or amend the order. By Order dated May 12, 2014, the Honorable Paul M. Burch[3] denied Pee Dee's motion and this appeal follows.

Statement of Facts

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[1] The lower court's order was directed to Pee Dee, and its counsel Tony Megna, and Matthews & Megna, and all of these entities or individuals filed the Notice of Appeal. However, this Court provided the case caption, which directed that only Pee Dee appear in the caption and referreed to Pee Dee as a singular Appellant-Respondent.

[2] The two appeals that have some relevance to this case were given Tracking Nos. 2011103391 and 2011197671. Some references to those cases may be made herein, and this Court can take judicial notice "of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

[3] After the issuance of the order granting sanctions, Judge Baxley retired. Judge Burch, as the Chief Administrative Judge for the Fourth Judicial Circuit thus undertook review of the motion.

This case has a long history, having originally been filed in 2010, and having already certain issues appealed to this Court. Pee Dee Health Care, LLC, sued an employee, Dr. Thompson (Cmpt.). Pee Dee paid Dr. Thompson to treat patients and exchange, Dr. Thompson assigned to Pee Dee his Medicare payments for treating patients. (Id.) Pee Dee billed Medicare for those services pursuant to its assignment with Dr. Thompson. However, unbeknownst to Pee Dee, Dr. Thompson was not approved by Medicare to receive payment for treating patients and in 2007, the Centers for Medicare and Medicaid demanded that Pee Dee repay over $200,000. Pee Dee sought reimbursement from Dr. Thompson (or his estate). Id.

During the litigation, Thompson sought to disqualify Pee Dee's attorney, Tony R. Megna. By order of April 19, 2011, Mr. Megna was disqualified, and he appealed this order (Order of Disqualification). While the appeal on disqualification was pending, the Circuit Court issued an order granting Thompson summary judgment. (Order on Summary Judgment). Pee Dee's Rule 59(e) motion, requesting reconsideration, was denied and Pee Dee appealed that order. (Order denying Rule 59(e) motion).

By unpublished decision filed July 3, 2011, this Court issued an opinion the appeals of the disqualification and summary judgment orders. This Court did not determine the merits of the disqualification, finding it was mooted by the dismissal of the summary judgment appeal. Pee Dee filed a Petition for Rehearing, which was denied on August 8, 2013. Pee Dee filed a Petition for Writ of Certiorari which was declined.

While the matter was pending on appeal, Thompson filed motions for attorney's fees and for sanctions in this court. Thompson filed a Motion for Sanctions in the Circuit Court (Motion for Circuit Court Sanctions, Dated: 1-16-14). The Motion sought sanctions under the South Carolina Frivolous Proceedings Act and Rule 11 of the South Carolina Rules of Civil Procedure.

At the March 27, 2014 hearing, counsel for Thompson informed the Circuit Court a motion for sanctions was pending before this Court for the same essential reasons as set forth in the Motion for Sanctions before the Circuit Court (Tr. of 3/27/14 Hearing P. 27-28). By order dated March 28, 2014, this Court denied Thompson's Motion for Sanctions against Pee Dee and its counsel.[4]

The Circuit Court granted the Motion for Sanctions under Rule 11 only, but it limited compensation to time spent by Thompson's attorneys in three areas, that it categorized as follows:

1) Mr. Megna's continuing failure to accept the court's ruling on disqualification;

2) Responding to various subpoenas; and

3) Pursuing the motion for sanctions.

Order, p. 2. The lower court requested that Thompson's counsel submit an amended fee affidavit for those areas only. Id. Thompson submitted an affidavit in the amount of $60,300, to which Pee Dee objected. The lower court ultimately awarded $6,910 on the disqualification issue; $9,070.00 for discovery requests issued by Mr. Megna; and $18,170.00 for time spent on the sanctions motion. Id.

Pee Dee moved to alter or amend the lower court's order, and on May 12, 2014, the court denied the motion. This appeal followed.

Argument

I. The lower court erred by failing to dismiss Respondent-Appellant's Motion for Sanctions for lack of jurisdiction and as untimely.

Thompson's claims for sanctions under Rule 11, SCRCP, should have been denied as untimely, and thereby depriving the court of jurisdiction. In *Russell v. Wachovia, NA.* 370 S.C. 5,

[4] Respondent then requested this Court determine the matter *en banc,* but this request was denied. (Order denying Defendant's Motion for Sanction). The Defendant did not request review by the Supreme Court.

20, 633 S.E.2d 722, 730 (2006) the Supreme Court reversed the lower court's ruling that a Rule 11 sanctions motion was untimely because it was filed after ten (10) days from the the date the order was signed, father than from the date judgment was entered. The Supreme Court recognized that this ten (10) day jurisdictional limitation applies to Rule 11 sanctions motions, as well as motions under the FPA, but concluded that the trial judge calculated the dates incorrectly. The Court stated:

> Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. *Ex parte Beard,* 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct.App.2004). An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the judge retains control of the case. *Upchurch v. Upchurch,* 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006). As a result, a motion for sanctions must be filed within ten days of the notice of entry of judgment. *Pitman v. Republic Leasing Co., Inc.,* 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct.App.2002).
>
> In the present case, the trial judge signed the order granting summary judgment on April 27, 2001....However, judgment was not entered by the clerk until May 8, 2001. The Williams Children filed their motion for sanctions on May 14, 2001, which is within the ten day time limit. Therefore, the trial court erred in finding that it lacked jurisdiction to consider the motion. Accordingly, the issue of sanctions pursuant to the FCPSA and Rule 11 should be remanded to the trial court.

Russell, 370 S.C. at 20, 633 S.E.2d 730 (2006).

Here, as noted above, the Circuit Court's order granting summary judgment was filed September 1, 2011. However, the Motion for Sanctions was not filed until January 16, 2014, clearly outside of the ten-day period.

Moreover, the time period to file the Rule 11 sanctions motion was not tolled by the prior appeal of this action. The filing and service of a notice of appeal before a party files a timely post-trial motion does not deprive the lower court of jurisdiction to consider the motion. *Hudson v. Hudson* 290 S.C. 215, 349 S.E.2d 341 (1986). Therefore, under *Russell v. Wachovia*, the Thompson were required to file the motion for sanctions under the Rule within ten (10) days of

the Circuit Court's order grant summary judgment,[5] even if there was a notice of appeal had been filed at that time.

Because the Thompson failed to file the motion within ten (10) days from the date the Circuit Court entered summary judgment, the Circuit Court lost jurisdiction to consider the motion.

II. The lower court erred in awarding Respondent-Appellant Rule 11 sanctions because the filings and arguments were not frivolous.

Under Rule 11, S.C. Rules Civ. P. a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it. *Runyon v. Wright*, 322 S.C. 15, 18-19, 471 S.E.2d 160, 161-62 (1996) *See Link v. School District of Pickens County,* 302 S.C. 1, 393 S.E.2d 176 (1990). The standard for determining whether an attorney's actions violate Rule 11 is subjective. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.,* 393 S.C. 590, 599, 713 S.E.2d 624, 629 (2011)("The notes to the rule demonstrate that the subjective standard has not been changed."); Rule 11, SCRCP note ("This version of Rule 11(a) is not nearly so stringent as the latest version of the Federal Rule which became effective August 1, 1983."). Additionally, Rule 11 sanctions may only be imposed against the represented party and/or the

[5] The decision of *McDowell v. South Carolina Department of Social Services*, 300 S.C.24, 386 S.E.2d 280 (Ct. App. 1989) cited by the Defendant has no bearing on this issue. *McDowell* involved the interpretation of a statute that allows for the recovery of attorneys' fees "as court costs" from the State in certain civil actions brought by the State. The statute requires that the party must file a petition "within 30 days *following final disposition of the case.*" S.C. Code § 15-77-310. Here, the Act requires that the motion be made "*at the conclusion of a trial and after a verdict for or against damages has been rendered or a case has been dismissed by direct verdict, summary judgment, or judgment notwithstanding the verdict.*" S.C. Code §15-36-10 (C)(1).

attorney who signed a pleading, motion or other paper in violation of the Rule, or otherwise made a frivolous argument.

The underlying facts regarding the dispute between the parties are fairly straight forward. Pee Dee employed Dr. Thompson as a physician and paid him to treat patients of Pee Dee. In exchange for receiving payment for his services directly from Pee Dee, Dr. Thompson assigned to Pee Dee his rights to Medicare payments for treating patients. Beginning about 1998 and continuing to sometime in 2000, Dr. Thompson treated patients at Pee Dee's facilities, received payment for his services from Pee Dee and Pee Dee billed Medicare for those services under the assignment. Medicare paid Pee Dee for these assigned claims. However, unbeknownst to Pee Dee, Dr. Thompson was not approved by Medicare to receive payment for the treatment of patients.

In or about 2007 CMS demanded that Pee Dee pay back more than $200,000 it had received for the assigned claims. Pee Dee appealed the decision through the administrative appeals process and lost. The administrative court concluded that PDCH had a non-delegable duty to Medicare. Furthermore, the administrative court found that Pee Dee should have known about the exclusion status of its employees through due diligence prior to entering the employment relationship and that Pee Dee could have easily determined Dr. Thompson's status by checking the OIG website. Dr. Thompson was not a party to the administrative appeal and the administrative court did not address whether Pee Dee could seek indemnification from Dr. Thompson.

Thereafter, Pee Dee commenced a lawsuit against Dr. Thompson's Estate to obtain reimbursement of the money Pee Dee had to pay back to CMS. Pee Dee through its attorneys pled various causes of action seeking to obtain essentially the same relief. In essence, Dr. Thompson provided an assignment of payments from Medicare to Pee Dee when he did not have the right to

receive any such payments. Pee Dee paid Dr. Thompson for this assignment and ultimately did not receive the benefit of its bargain with Dr. Thompson.

On September 1, 2011, the lower court granted Respondent summary judgment concluding that Pee Dee was collaterally estopped from seeking reimbursement from Dr. Thompson's estate as a result of the administrative ruling. The lower court's order granting summary judgment appears to be a ruling of first impression. Although the doctrine of collateral estoppel certainly is not novel, its application to administrative hearings is not always clear. In *Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 108-09, 723 S.E.2d 813, 817 (Ct. App. 2012), Chief Judge Few of the S.C. Court of Appeals explained:

> Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals [citations omitted]. However, not every factual determination by an administrative agency is entitled to preclusive effect. In *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), our supreme court held that the factual findings of the employment security commission are not preclusive in a subsequent action for wrongful discharge. The *Shelton* court set forth the starting point for analyzing whether a particular agency's findings are preclusive:
>
> > In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question.... The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand *unless some compelling countervailing consideration necessitates relitigation.*

397 S.C. at 108-09, 723 S.E.2d at 817 (emphasis added).

There appear to be no other reported South Carolina decisions, other than the lower court's summary judgment Order, applying the doctrine of collateral estoppel to administrative rulings from an appeals of a decision by CMS demanding repayment of Medicare funds. Furthermore, as noted by Chief Judge Few, not all factual determinations are entitled to preclusive effect. Rather, only those determinations that were (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Crosby v. Prysmian Commc'ns*

Cables & Sys. USA, LLC, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012). Lastly, collateral estoppel is an affirmative defense that if not pled will be waived. See, *Duckett v. Goforth*, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007)(Collateral estoppel is an affirmative defense which must be pled)

The record in this case fully establishes that there were good grounds to support the Complaint filed and served against the Estate. Clearly, there was a factual basis to believe that the Estate owed Pee Dee money as a result of the invalid assignment provided to Pee Dee by Dr. Thompson. Moreover, the administrative ruling did not address the merits of any claims that Pee Dee may have against Dr. Thompson. Furthermore, until the lower court issued its ruling, there does not appear to be any South Carolina decisions applying the doctrine of collateral estoppel from a proceeding involving an appeal of a Medicare decision.

Lastly, the factual findings that were used to bar Pee Dee's claims were not necessary to the administrative court's ruling that Pee Dee had a non-delegable duty to CMS. The lower court obviously disagreed and found those factual determinations were necessary to the administrative court's ruling. However, the fact that the lower granted summary judgment against the Pee Dee is not dispositive of the sanctions issue. Rather, the lower court and all others are called upon to decide questions that are not clear.[6]

III. Respondent-Appellant is not entitled to the reimbursement it claims for the time related to discovery requests served upon third parties.

The lower court awarded Thompson's counsel 30 hours of time relating to responding "inappropriate discovery requests issued by Mr. Megna and the follow-up thereto." (Order of April 15, 2014). While the lower court indicated that counsel's time related to the third party

[6] This Court did not address the application of collateral estoppel to bar all of Pee Dee's claims. Rather, the Court dismissed the appeal as untimely in an unpublished decision.

subpoena sanctions hearing should be included, it appears that more than 30 hours exceeds the amount of time that is either reasonable or necessary for counsel to prepare for and attend the motion to quash hearing. The Amended Fee Affidavit does not detail what was done in connection with the preparation for this hearing. The Amended Fee Affidavit simply does not provide sufficient information for which the lower court to determine that the amount of time claim was reasonable and necessary. See, *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 570, 511 S.E.2d 372, 380 (Ct. App. 1998). Therefore, the lower court erred in granting Thompson's request for fees relating to the motion to quash the third party discovery.

IV. The lower court erred in the amount it awarded awarding Respondent-Appellant as reimbursement for time spent on the initial preparation of the sanctions motions.

The lower court awarded $18,170.00 for the time spent on preparation and argument of the Motion for Sanctions as well as the submission of a supplemental affidavit. Thompson is not entitled to an award of all fees incurred in relation to the sanctions motion because the Thompson did not prevail on all the claims alleged. Thompson sought sanctions under the South Carolina Frivolous Proceedings Act (FPA) and Rule 11 for all of their attorneys' fees incurred in Circuit Court from the inception of the case. However, the lower court denied this request and only granted sanctions under Rule 11. Thus, the fees for preparation and arguing the motion should be reduced proportionally. The lower court erred in refusing to reduce the amount awarded and provided no basis for its refusal (Order of May 12, 2014).

V. Respondent-Appellant's own inequitable conduct should bar them from receiving sanctions, an equitable remedy.

The determination of whether attorney's fees should be awarded under Rule 11 or under the Act is treated as one in equity. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). One of the key maxims

in equity is one "who seeks equity must do equity." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011). In other words, a party is required to do equity when asking the court to invoke the aid of equity. Id.

Here, Thompson was awarded fees in the amount of $34,150.00. However, the firm of one of Thompson's counsel (Mr. Josey) was previously paid approximately $20,000 for representing Pee Dee in a workers compensation case involving an employee who had a finger amputated (which counsel referred to as a "finger prick" in argument before this Court), and that firm continued to represent both Pee Dee and Thompson in this action until Pee Dee complained about this irreconcilable conflict. (Motion to Strike). To resolve this conflict, the firm simply withdrew from representing Pee Dee. The lower court failed to take into account Thompson's inequitable conduct in awarding sanctions.

CONCLUSION

The lower court erred in awarding any sanctions to Thompson as the motion was untimely and the lower court no longer had jurisdiction. Alternatively, the amount awarded was not proper and should be reduced as set forth herein.

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Columbia, SC
September 8, 2014

THE STATE OF SOUTH CAROLINA
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Pee Dee Health Care, P.A.....Appellant-Respondent.

v.

Estate of Hugh S. Thompson.....Respondent-Appellant.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A. do hereby certify that I have served a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on September 8, 2014, by causing a copy of same to be deposited in the U.S. Mail, proper postage prepaid addressed as follows:

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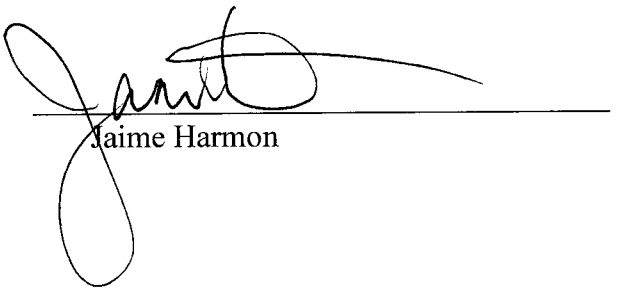

Jaime Harmon

This 8th day of September, 2014.

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September 8, 2014

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Pee Dee Health Care, P.A. v. Estate of Hugh Thompson
Appellate Case No. 2014-001275

Dear Ms. Kitchings:

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of the following documents:

(1) Appellant-Respondent's Initial Brief

(2) Designation of Matter to be Included in the Record on Appeal

Please file these documents and return the clocked in copy to the courier.

If you have any questions, please do not hesitate to contact this office.

With best regards, I am

Very truly yours,

Jaime Harmon
Assistant to James M. Griffin

/jh
Enclosures

cc: John James, Esquire (Via U.S. Mail)
Renee Josey, Esquire (Via U.S. Mail)