THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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 RESPONDENT'S BRIEF OF APPELLANT-RESPONDENT

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Standard of Review

While an appellate court can find facts in accordance with its own view of the preponderance of the evidence, the abuse of discretion standard also applies in sanctions cases. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011). Where the appellate court agrees with the facts of the lower court, it reviews the decision to award sanctions under an abuse of discretion. Id. Under this standard, the lower court's order will not be disturbed on appeal unless it controlled by an error of law or unsupported factual conclusions. Id. Furthermore, under Rule 11, SCRCP, a determination of whether an attorney's actions violate the rule are viewed under a subjective standard. *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."). Even under the more stringent South Carolina Frivolous Proceedings Act, S.C. Code Sec. 15-36-10, an argument advanced by counsel is not frivolous if "under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law[.]" In applying these standards, it is clear that the lower court did not abuse its discretion in declining to award sanctions claimed by Respondent-Appellant Estate of Thompson (hereinafter "Thompson").

ARGUMENT[1]

I. The trial court properly declined to rule that Pee Dee's underlying claims had no merit.

In exercising its discretion, the lower court rejected Thompson's argument that Appellant-Respondents Pee Dee Health Care's ("Pee Dee's") case has no merit from the inception. As discussed more fully in Pee Dee's Initial Appellant's Brief, Thompson was employed by Pee Dee as a physician and was assigned his rights to Medicare payments from patients he treated in exchange for a percentage of Pee Dee's collections. However, Thompson did not disclose to Pee Dee that he was not approved by Medicare to receive payments, and thus, Pee Dee received notification from Medicare in 2007 that it had to pay back all monies received as a result of Thompson's assignment. Pee Dee appealed the decision. The administrative court found that Pee Dee had a non-delegable duty to Medicare to repay the money. Pee Dee then sought to recoup that money from Thompson. Ultimately, the lower court ruled against Pee Dee.

Thompson claims that because the lower court held that the facts on which Pee Dee based its claim were precluded by the administrative proceedings, Pee Dee's action was frivolous. However, as Thompson conceded, the administrative proceedings did not address whether Pee Dee could seek indemnity from Thompson. (Resp. Brief p. 15). The fact that the trial court granted summary judgment against Pee Dee does not render the lawsuit baseless from its inception.

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[1] All arguments previously asserted in the Initial Brief of Appellants and Initial Reply Brief are adopted and reasserted herein.

The administrative court found that Pee Dee had an obligation to repay Medicare that was not excused by Pee Dee's reliance on Thompson's misrepresentations. (ALJ Appeal order of 3-14-08). However, the fact that Pee Dee was not relieved from its duty to Medicare did not indicate that Pee Dee was barred form recouping those payments from Dr. Thompson based on his misrepresentations. As set forth in Pee Dee's Appellant's Brief, no other case seemed to apply collateral estoppel to an administrative hearing, and thus Pee Dee and Mr. Megna had a good faith basis to bring suit against Thompson.

Thompson also argues that Pee Dee's claim that Thompson had misrepresented his Medicare status had no basis, seeming implying that Pee Dee fabricated these misrepresentations. Of course, Thompson had obviously made the same misrepresentation to another employer, First Choice Healthcare, who also received reimbursements for a time period in which Thompson was excluded from Medicare. (See, Record on Appeal in Tracking No. 2011203391, pp. 93-100). To imply that Pee Dee had no grounds for asserting that Thompson misrepresented himself is just improper conjecture.

Furthermore, as argued at the sanctions hearing, this other health care provider received the same notice from CMS that Pee Dee did. Tr. Of Hrg, 3-27-14, p. 40. However, that health care provider appealed and the administrative court ruled in a completely opposite manner than they did in Pee Dee's appeal. Moreover, there is no case law prohibiting a health care provider, who received an adverse ruling in a CMS appeal, from seeking indemnification from its employee. In other words, under the facts and the law, Pee Dee's counsel, Tony Megna ("Mr. Megna") had a reasonable belief that " his claim or defense may be warranted under the existing

law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law[.]" S.C. Code §15-36-10.

II. The trial court correctly refused to award sanctions for the probate matters.

The lower court declined to award any sanctions for matters arising out of the probate court. In that court, Pee Dee properly sought a bond to protect its interest during the court proceedings and appealed the probate court's denial of that bond to the Circuit Court. Mr. Megna, on behalf of Pee Dee, filed an appeal of the Probate Court's decision rendered on September 17, 2010 and filed September 20, 2010. The notice on intent to appeal, filed pursuant to S.C. Code 62-1-308, was properly filed on September 20, 2010. The "grounds for appeal" under the statute was filed on November 9, 2010, which the Circuit Court found to be outside of the 45-day statutory period and dismissed the appeal. Pee Dee then appealed that ruling to the Court of Appeals.

Thompson now claims that Pee Dee's appeal lost its merit when a statutory deadline was missed and that sanctions should have been assessed when Pee Dee appealed. However, Rule 11, SCRCP does not apply to matters that occurred in the probate court. Rule 1, SCRCP, states that "[t]hese rules govern the procedure in all South Carolina Courts of a civil nature whether cognizable as cases at law or in equity." Here, Thompson is seeking sanctions for Pee Dee's motion seeking a surety bond in the probate court and appeal of that denial. By the very language of the Rules of Civil Procedure, Rule 11 cannot support an award of sanctions for probate proceedings. Even if the appeal to the Circuit Court is one in which sanctions could be sought, Pee Dee had a reasonable basis to believe that the appeal from probate court was timely and should have been reinstated.

At the time, the governing statute stated, in pertinent part:

> The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within ten days after receipt of the written notice of the appealed from order, sentence, or decree of the probate court. The grounds for appeal must be filed in the office of the probate court and a copy served on all parties within forty-five days after receipt of the written notice of the order, sentence, or decree of the probate court.

S.C. Code 61-1-308(a) (2010). The notice of intention to appeal was timely and properly filed, which Thompson does not dispute. While this Court did ultimately find that the "grounds for the appeal" were not filed until fifty days after notice of entry of order, Pee Dee had a valid argument that because the notice of intent to appeal was timely, jurisdiction for the appeal had vested and any deficiencies with the filing of the grounds for appeal could be cured. For example, this Court has held that even though a party did not technically appeal the trial court's order because it was not mentioned in the notice of appeal, the order was attached and thus, the appeal would not be dismissed. *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). See also, *Charleston Lumber Co. v. Miller Housing Corp.,* 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (the court rejected the respondent's attempt to have the appeal dismissed on jurisdictional grounds when the appellant neglected to appeal one of a series of cases tried together, finding no prejudice as a result of the omission). In other words, Pee Dee had good grounds to contest the Circuit Court's dismissal of the appeal as untimely. [2]

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[2] Thompson also argues that the appeal was dismissed because the Statement of Issues was filed in Circuit Court rather than Probate Court. The Court of Appeals indicated that under Rule 204(a) SCACR and Rule 82(b), SCACR, that deficiency might have been able to be corrected if the appeal had been filed timely. In other words, the fact that the filing was in the wrong court would not have been the death knell of the appeal. Interestingly, the current version of the

III. The lower court's limit of sanctions to reconsideration of the disqualification order, rather than Pee Dee's initial opposition to disqualification, was proper.

The lower court awarded sanctions against Mr. Megna for "his refusal to accept this Court's order disqualifying him as counsel" (Order p. 3), but not his original opposition to the motion for disqualification. The lower court's refusal to include the initial opposition was proper. Furthermore, whether Mr. Megna's opposition to the motion for disqualification had merit must be viewed from Mr. Megna's point of view at the time. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 599, 713 S.E.2d 624, 629 (2011) (standard to determine of an attorney violated Rule 11 is subjective). Thompson argues that Pee Dee's current counsel has conceded the matter by arguing to the lower court (at the sanctions hearing) that, "From the get-go Mr. Megna knew he was going to be a witness...he shouldn't have been in from the get-go and your Honor correctly ruled that he was going to be a witness." Resp.-App. Brief p. 18. Thompson has pulled this quote out of context and mischaracterized this statement.

At the hearing on sanctions on March 27, 2014, counsel for Pee Dee/Mr. Megna stated "...and that's *probably* why, you know, he—he shouldn't have been in from the getgo and Your Honor correctly ruled that he was going to be a witness. But you can't say that the lawsuit was no good from the getgo because Mr. Megna knew he was going to be a witness."

Tr. of Hearing 44:15-20 (italics added). Counsel qualified the statement that Mr. Megna should not have acted as an attorney with the word "probably"—a far cry from the concession

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statute states that "the appellant must file with the clerk of **the circuit court** a Statement of the Issues on appeal...." S.C. Code 62-1-308(b)(as amended 2013)(emphasis added).

Thompson claims. Furthermore, at the time this statement was made, the appeal had been decided and disqualification upheld. Thus, contrary to Thompson's claim, Pee Dee has not taken contrary positions, and Thompson's citations to judicial estoppel have no application. At the sanctions hearing, counsel's argument as to whether Mr. Megna should have been counsel in the case was made with the knowledge of the adverse ruling and the benefit of hindsight. However, Mr. Megna was without such knowledge at the time of the original motion for disqualification.

Furthermore, as argued at the sanctions hearing, the Court of Appeals' affirmance of the disqualification of a lawyer from participating pre-trial versus at trial appears to be one of first impression. Rule 3.7 of Rule 407, SCACR, prohibits a lawyer from acting as an advocate at a trial in which the lawyer will be a necessary witness, but contains no prohibition as to pretrial matters. At the time of the initial disqualification motion, Pee Dee and Mr. Megna were advocating a position that had a sound basis in law. Thus, the opposition to the motion for disqualification had a meritorious basis and cannot constitute grounds for sanctions.

IV. The trial court correctly declined to grant the motion for sanctions under the Frivolous Proceedings Act because it was untimely.

In *Pittman v. Republic Leasing Co., Inc.* 351 S.C. 429, 570 S.E.2d 187 (2002), the South Carolina Supreme Court ruled that a party must file a motion under the Act within the ten (10) day time limit applicable to post-trial motions under Rule 59. Furthermore, if the party does not file the motion within the ten (10) days as provided under Rule 59, the trial judge loses jurisdiction to hear the matter. Specifically, the Court explained:

> Because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely

> if filed within ten days of judgment. Here, however, Republic Leasing waited until almost two months after the grant of summary judgment to move for sanctions under the Act. At that time, the trial judge no longer had jurisdiction over the case.
>
> We cannot accept Republic Leasing's argument that because proceedings under the Act sound in equity, the trial judge retains jurisdiction to consider a motion for sanctions limited only by the equitable defenses of estoppel and laches. Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. *See Cox v. Fleetwood Homes of Ga., Inc.,* 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999) (stating that an exception to the rule that a judge assigned to a circuit must exercise his judicial powers while within the territorial limits of that circuit "is that a judge retains jurisdiction to consider timely post-trial motions even though no longer assigned to the circuit.") (citing Rules 50(e), 52(c), and 59(f), SCRCP).
>
> 351 S.C. at 432-433, 570 S.E.2d at 189-190.

The Supreme Court re-affirmed this ruling two years later in *In re: Beard*, 359 S.C. 351, 597 S.E.2d 835 (2004), stating "[t]he established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."

Thompson argues that because there was an appeal, this ten day window is expanded. Thompson also claims that since the motion was filed within ten days of remittitur from the Court of Appeals, it should have been found to be timely. However, the trial court's decision was made in an exercise of its discretion. As Thompson acknowledges, there is no appellate case law on a request for sanctions under the Frivolous Proceedings Act (FPA) after an appeal. (Resp. Brief, p. 25). Moreover, there is no law on whether the issuance of remittitur reopens a window for Thompson to file a motion for sanctions under FPA. Thus, in the absence of any controlling law, the trial court could not have abused its discretion (or made an error of law) in limiting sanctions to Rule 11, rather than FPA.

V. Sanctions under either the Frivolous Proceedings Act or Rule 11 are equitable and Thompson's inequitable conduct should bar sanctions.

As previously argued in Pee Dee's initial Appellant's Brief and Reply Brief, whether sanctions should be awarded under either the Frivolous Proceedings Act (S.C. Code § 15-36-10, et seq.) or Rule 11, SCRCP are treated as matters in equity. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011). 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 addition, a party seeking equity must not have "unclean hands." *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 74-75, 698 S.E.2d 244, 247 (Ct. App. 2010) *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.").

Here, the firm of one of the attorneys for Thompson represented Pee Dee in a worker's compensation case involving a serious injury of an employee – an amputated finger. Mr. Josey's firm continued to represent Pee Dee while it also undertook the representation of Thompson. When Pee Dee complained of the conflict, the firm chose to withdraw from representing Pee Dee—its original client – instead of declining to represent Thompson, or even declining to represent either one. Thompson's appeal for more sanctions should be denied on the grounds that its own inequitable conduct toward Pee Dee bars his claim.

CONCLUSION

For the reasons set forth herein, the lower court did not abuse its discretion in refusing to award the additional sanctions sought by Thompson.

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Columbia, SC
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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 Initial Respondent's Brief of Appellant-Respondent on December 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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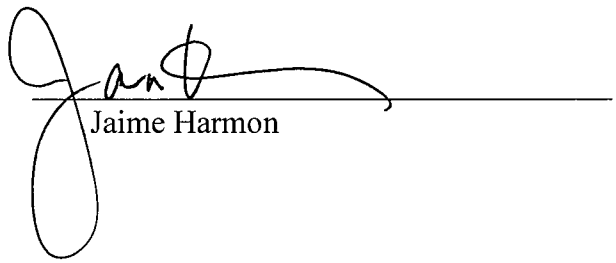

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This 8th day of December, 2014.

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December 8, 2014

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
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Columbia, South Carolina 29201

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

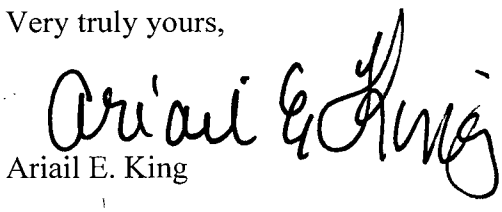
Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Respondent's Brief of Appellant-Respondent. Please file these documents and return the clocked in copy to our courier.

By copy of this letter, I am hereby serving a copy of the same to counsel of record.

With kind regards, I am

Very truly yours,



Ariail E. King

AEK/jh
Enclosure

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