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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2011-198092 and 2011-209666
Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF APPELLANT

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2. **Does the Frivolous Proceedings Sanctions Act violate the constitutions of South Carolina and the United States by allowing the state to impose monetary and non-monetary sanctions on a citizen without the benefit of a jury trial?**

3. **Does the Frivolous Proceedings Sanctions Act's requirement that non attorney citizens be held to the standard of a reasonable attorney violate the constitutions of South Carolina and the United States by denying a citizen subject to sanctions under the act due process?**

4. **Does the Frivolous Proceedings Sanctions Act violate the constitutions of South Carolina and the United States by specifically imposing the potential for double jeopardy on a citizen subject to sanctions under the act?**

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STATEMENT OF THE CASE

The Appellant, Dr. Holmes, initiated this case on April 26, 2010, by filing and Serving a Summons and Complaint upon the Respondent, East Cooper Community Hospital, Inc.; Tenet HealthSystem Medical, Inc., (hereinafter referred to as ECCH). (Complaint) ECCH timely answered on September 17, 2010, (Answer) and thereafter filed an amended answer and motion to dismiss based on : 1) Lack of subject matter jurisdiction (On the grounds that this Court lacks subject matter jurisdiction to address a private hospital's staffing or privileging decisions" (Amended Answer/ Motion to Dismiss, Paragraph 49), 2) Failure to state a cause of action recognizable under S.C. law. "South Carolina law does not recognize a cause of action against a private hospital for its credentialing decisions concerning its medical staff." (Amended Answer, paragraph 50), 3) Collateral Estoppel (Amended Answer, Paragraph 51), 4) Res Judicata (Amended Answer, Paragraph 52), 5) Immunity under the SC statute and the Health Care Quality Improvement Act, "Plaintiff's claims are barred under S.C. Code ann. 40-71-10 and the Health Care Quality Improvement Act which provide immunity to the Defendants under the circumstances herein." (Amended Answer, Paragraph 56). The Answer included an attachment of hundreds of pages of copies of documents from prior litigation between the parties. ECCH filed a memorandum in support of its motions to dismiss (ECCH Memorandum in support of Motion to Dismiss). Holmes filed a responsive memorandum. (Plaintiff's Response to Defendant's Motion to Dismiss). Judge Dennis held a hearing on December 16, 2010, during which he denied ECCH's motions, finding that they would be better considered by the Court further into the case. (Hearing Transcript December 16, 2010) December 22, 2010, ECCH filed a motion for reconsideration as to Judge Dennis' decision to deny the motion to dismiss based on subject matter jurisdiction. (ECCH's Motion for Reconsideration, 12-22-10) In the motion for reconsideration, ECCH

specifically raised the argument that "It is improper for the Courts to review decisions of governing boards of private hospitals concerning the staff privileges of practitioners" (ECCH's Motion for Reconsideration 12-22-10). Judge Dennis held a hearing on this motion on March 8, 2011. Whereas, in the December hearing, the Court found that the issues raised called for review of material outside of the pleadings, Judge Dennis reconsidered his position, and gave what can only be interpreted as a final ruling on the issue of jurisdiction, stating to ECCH's Attorney:

> THE COURT: I can help you. You've got a ground for appeal. Mr. Johnson, I assume you want me to deny the Motion to reconsider?
>
> MR. JOHNSON: That's correct, Your Honor.
>
> THE COURT: It's denied. Thank you. Thank you very much. Have a great day.
>
> (Transcript of Hearing, 3-8-22, Exhibit # 1)

ECCH filed a motion for Summary Judgment on June 6, 2011 without supporting memorandum. (ECCH's Motion for Summary Judgment) Dr. Holmes filed a responsive memorandum (Dr. Holmes Response to Summary Judgment), including affidavits from her expert, Dr. Shershow (Plaintiff's Response to Defendant's Motion for Summary Judgment, with exhibits), and two affidavits from Dr. Holmes (Affidavit of Holmes July 5, 2011, Reply Affidavit, July 8, 2011). ECCH filed a memorandum in support of its motion for Summary Judgment (ECCH Memorandum in support of Summary Judgment). A hearing was held before Judge Harrington. (Transcript of hearing July 8, 2011) At the hearing, the Court took the parties' arguments and submissions under advisement, and asked the parties to submit proposed orders. (Transcript, p. 35) Both parties timely submitted proposed orders, as requested. (Proposed Order of ECCH; Proposed Order of Dr. Holmes) On July 26, 2011, Judge Harrington signed the Order proposed by ECCH without any changes. It was filed on July 29th. (Order of July 29, 2011) ECCH filed a motion for

sanctions against Dr. Holmes on August 8, 2011 (Motion for sanctions 11-22-11) Dr. Holmes timely filed a notice of appeal as to the July 29th Order, dismissing the case, dated August 24, 2011. (Notice of Appeal 8-24-11) Dr. Holmes filed her response to the Defendant's motion for sanctions on October 21, 2011. (Response of 10-21-11) A hearing on the motion for sanctions was held before Judge Harrington in Charleston on November 22, 2011. (Transcript of 11-22-11) Judge Harrington then requested that the parties submit proposed orders, which were sent to the Court. (Proposed order of Plaintiff; Proposed Order of Defendant) Judge Harrington signed ECCH's proposed Order without changes on 2-1-2012. (Order of 2-1-12) Dr. Holmes filed a motion for reconsideration on February 21, 2012, and a Notice of Appeal, appealing the 2-1-12 order on March 6, 2012. (Motion for Reconsideration 2-21-12; Notice of Appeal 3-6-12) Judge Harrington denied Dr. Holmes' motion on March 7, 2012. ECCH thereafter filed a response to Dr. Holmes' Motion to Reconsider. On 3-21-12, Dr. Holmes amended her notice of appeal to include Judge Harrington's Order denying the motion for reconsideration. (Amended Notice of Appeal 3-21-12)

FACTS

This case has been consolidated for the purposes of oral argument and record on appeal with the appeal of 10-21-11, appealing Judge Harrington's Order dismissing this case for lack of subject matter jurisdiction. As the cases are consolidated, The Appellant, Dr. Holmes, will refer here to the facts set forth in the Appellant's Final Brief of April 9, 2012, rather than repeat them here.

ARGUMENT

I. Standard of Review

The issues raised in this portion of this consolidated appeal deal specifically with whether the Trial Court erred in awarding monetary and non-monetary sanctions against a party (Dr.

Holmes) under the S.C. Frivolous Proceedings Sanctions Act, S.C. Code section 15-36-10. The determination of whether attorney's fees should be awarded under the Act is treated as one in equity. *In re Beard,*359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App.2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* The abuse of discretion standard plays a role in the appellate review of a sanctions award only in a case where the appellate court agrees with the trial court's findings of fact. In that case, it reviews the decision to award sanctions under an abuse of discretion standard. *Id.*." *Ex parte Gregory,*378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.*, *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (S.C.App. 2011)

II. Allowing the Circuit Court to determine whether a claim, which has been dismissed, is frivolous on a motion for sanctions under the Frivolous Proceedings Sanctions Act while the order dismissing the case is under appeal causes a conflict with the South Carolina Rules of Appellate Procedure, and creates unnecessary litigation. This conflict can be resolved by staying the Circuit Court's consideration of whether a claim is frivolous or not, under these circumstances, until jurisdiction is returned to the Circuit Court by remittitur after the resolution of the appeal.

Judge Harrington issued an Order dismissing the Plaintiff's claim for breach of contract for lack of subject matter jurisdiction on July 29, 2011 (Order of 7-29-11). Dr. Holmes timely appealed that Order. (Notice of Appeal 8-29-11) ECCH filed a motion for sanctions under SC Code section 15-36-10 as well. (Motion for Sanctions) The Actdoes not set a deadline the filing of a motion for sanctions, however South Carolina law requires that a motion for sanctions under the Act under section A(4) be filed within 10 days of "final judgment." *Rutland v. Holler, Dennis,*

Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 637 S.E.2d 316, 319 (S.C.App. 2006) ("The established case law is that 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) . "[B]ecause 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." *Pitman v.Republic Leasing Co.,*351 S.C. 429, 431, 570 S.E.2d 187, 189 (Ct.App.2002) .)

The Act also states, in section (I), "This act shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules." S.C. Code 15-36-10(I) The legislature, when creating the SCFPSA, appears to have built a conflict into the Act, which is distinctly illustrated in this case. Specifically, the requirement that a motion for sanctions be filed (and that the Court make a determination of frivolity) within ten days of the Trial Court's final judgment, in a case where the final judgment has been appealed, or could be appealed, calls for the Court to both violate or at least conflict with, the SC Rules of Appellate Procedure, and to consider the issue of frivolity prematurely, leading to much unnecessary trial court and appellate litigation.

The SCFPSA's requirement of a motion for sanctions being filed within 10 days of the final judgment from the trial court comes into conflict with Rule 241(a) of the SCACR, staying the matters decided in and relief granted by an order during the pendency of the appeal. The SCFPSA, in section (I), specifically states that it shall not alter the Rules of Appellate Procedure. However, in a case where the Appellant has filed a notice of appeal prior to the filing of a motion for sanctions under the SCFPSA, the Court's consideration of the motion for sanctions does conflict with the SCACR, specifically with Rule 241:

Rule 241. STAY AND SUPERSEDEAS IN CIVIL ACTIONS

(a) General Rule. As a general rule, the service of a notice of appeal in a civil matter acts to

automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241, SCACR stays the matters decided in an order, as well as the relief afforded in the order during the pendency of the appeal. This rule serves an obvious purpose. If an Order is under appeal, it might be overturned. It would not make sense to allow a party to benefit from the relief granted in an Order which might be vacated. The "relief" in an Order dismissing a Plaintiff's claims for lack of subject matter jurisdiction is that the case was dismissed. Where such an Order is on appeal, the relief and the findings in the matters decided in the Order (the grounds for dismissal) are stayed. For the Act to call for a Trial Court to determine whether an action was frivolous, based on the trial Court's dismissal of the action while the dismissal, itself, is under appeal conflicts with SCACR 241.

Rule 241 does allow exceptions to the stay. In pertinent part, it states:

Rule 241. STAY AND SUPERSEDEAS IN CIVIL ACTIONS

> **(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with.

Not only does the SCFPSA not contain any provision for an exception to a stay under Rule 241 SCACR, but it specifically declines any conflict with the rules of Appellate Procedure: "This act shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules." S.C. Code 15-36-10(I) The only logical approach, then, is to require that any hearing or decision by the Court on a motion for sanctions under the Act be stayed as well, until it is clear whether the Order dismissing the case will be upheld, amended, or vacated.

The result of allowing a Trial Court to make a determination under the SCFPSA under these circumstances leads to a premature decision, a second appeal, and hours and hours of

unnecessary litigation, as it has in this case. It appears that this conflict between the SCFPSA and the SCACR should be resolved in favor of the Appellate Court Rules. The Appellant respectfully requests that the Supreme Court vacate the Trial Court's Order of 2-1-12 and require the issue of sanctions to be considered only after remittitur of this case to the jurisdiction of the Circuit Court. At that time, even if the dismissal of the case were upheld, the Trial Court can have the benefit of any insight or wisdom which would be imparted via the Opinion on the case when addressing the issue of frivolity.

III. The SCFPSA is constitutionally flawed and should be stricken by the Supreme Court

SCFBSA violates the rights guaranteed to the citizens of South Carolina by our State's constitution as well as by the Constitution of the United States of America. Most obviously, the Act deprives the subject to sanctions of a jury trial. The SCFPSA's application of a "reasonable attorney" standard to pro se litigants and parties who are not attorneys (where the former act required the Court to find that the party did not believe her case could prevail and had ulterior motives for bringing it) effectively chills the participation of non-attorney citizens and the right of access to the Courts, a right specifically guaranteed by the state and federal constitutions. Further, the reasonable attorney standard is not reasonable notice nor a reasonable standard for non-attorneys subject to the Act. By holding all citizens who enter the court system to the same standards as trained and licensed practicing attorneys, it also affects the citizens' rights of free speech and the right to petition the government for redress. It deprives the citizens of due process rights by not affording them a fair opportunity to be heard. Whereas the Common law claim for abuse of process and Rule 11 of the S.C. Rules of civil Procedure afford the litigants and the Court the same redress as the SCFPSA, but without the constitutional infringements, there is no "rational basis" for having created a law through which a non-attorney subject to the act is faced with the

impossible task of showing that he acted as a "reasonable attorney" in order to avoid sanctions from the Court, and a potential judgment for the moving party, while simultaneously being deprived of a jury trial. The State has no compelling interest to support the creating of such a law. In fact, the only interest which would be served by this kind of legislation is one which would limit or prohibit the constitutional right of citizens to seek redress in the South Carolina Courts.

A. The SCFPSA violates Article I, section 14 of the South Carolina Constitution by denying the accused the right to a jury trial while also creating a lower standard for sanctions and eliminating temperance through judicial discretion which is provided under Rule 11, SCRCP.

The SCFPSA is an act which is essentially redundant in general purpose and in relief to both the Common law action for abuse of process and Rule 11 of the South Carolina Rules of Civil Procedure. The difference is that through the use of the SCFPSA, the State both denies the victim the right to a jury trial which would have been inherent in the common law claim, and denies the victim the protection of judicial discretion provided by Rule 11, subjecting non-attorneys to the standard to which attorneys are held. The South Carolina Constitution preserves the right to a jury trial inviolate. A statute which allows the government to sanction a litigant or attorney without the right to a jury trial should only be allowed where there is a compelling need of the State, which outweighs the danger of violating constitutional rights. Article I, section 14 of the Constitution of South Carolina states:

CONSTITUTION OF THE STATE OF SOUTH CAROLINA
Article I. Bill of Rights
§ 14. Trial by jury; witnesses; defense
The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

The SCFPSA allows basically the same damages sought in an abuse of process type claim to be

awarded without a jury trial or the opportunity to cross examine witnesses. The question for the Court has to be whether the denial of the right to a jury trial under the SCFPSA is justified by a need to allow litigants to petition for sanctions. It is not.

In this case, the Respondent, ECCH, brought counterclaims against Dr. Holmes in the Answer, including an abuse of process and a FCPSA claim. (Answer and Counterclaims) The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Id.* Clearly, a common law claim for bringing a frivolous lawsuit (or even a legitimate suit, but not for proper purposes) has existed in South Carolina for some time. It does allow the accused a jury trial, and therefore satisfies the goal of allowing the victim of a frivolous lawsuit the right to seek redress. Rule 11 of the S.C. Rules of Civil Procedure allows the Court to impose sanctions on a litigant for the same violations (bringing a frivolous action or defense) which trigger sanctions under the SCFPSA. With the common law claim of abuse of process available, and Rule 11 available, the SCFPSA is redundant in its purpose. The denial of the constitutional guarantee of a jury trial for the purpose of allowing the Court and parties to do what they can already do through other means does not justify the impingement of a citizen's right to a jury trial.

B. The 2005 SCFPSA denies a citizen due process in that it holds the non-attorney citizen to the standard of a reasonable attorney, rather than having the Court consider what the litigant's intention was in pursuing an action. Thus the SCFPSA essentially denies the due process right of allowing the accused to be heard in his own defense.

Our State and Federal constitutions guarantee all citizens the right to due process, when the state is proceeding against them to divest them of a property right, as is done through prosecution

under the SCFPSA.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA
Article I. Bill of Rights
§ 3. Privileges and immunities; due process; equal protection of laws
The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

In order to meet the requirements of procedural due process, the State must provide adequate notice, adequate opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) also a meaningful opportunity for objective appellate review. The former SCFPA called for the Court or the moving party to prove, by a preponderance of the evidence, that the accused had not had a good faith belief in his or her case. This allowed the accused, who was facing a taking by the state, to be heard as to his intentions, and, rightfully, put the balance of the burden of the Court's inquiry, in determining the person's intentions. Under the 2005 SCFPSA, the pro se litigant or non-attorney party is held to a standard of expertise which the layperson and affected party do not possess. Holding a citizen to a standard of a professional licensed attorney is not reasonable notice and denies the citizen any meaningful opportunity to be heard.

C. The SCFSPA allows for monetary and non-monetary sanctions to be granted against a litigant by the state in addition to sanctions imposed for the same infraction under other rules and claims, thus imposing double jeopardy in violation ofArticle I. § 12 of the South Carolina Constitution.

Section (K) of the SCFPSA states "The provisions of this section apply in addition to all other remedies available at law or in equity." S.C. Code 15-36-10(K) The legislature, therefore, has created an act which specifically allows a litigant or attorney to be punished twice for the same offense. For example, the Act would preclude a Judge from refraining from issuing the same sanction to an attorney who violated this act which he had received in a Rule 11 Order on the basis

that the sanction had already been imposed. This section of the SCFPSA puts the Act squarely in conflict with the State and Federal constitutional guarantees of protection against double jeopardy. S.C. Constitution, Article I. Bill of Rights§ 12. Double jeopardy Because the SCFPSA creates this potential for a violation of basic constitutional rights, with no rational basis, the Act should be stricken as unconstitutional.

D. The SCFSPA requires the Court to Determine whether sanctions will be imposed upon a non-attorney litigant through the application of a "reasonable attorney" standard to the non-attorney public. This will have a chilling effect on the public's right to access the Courts and to free speech, which is not justified, as the redress offered by the SCFSPA is redundant to less restrictive existing rules and common law actions.

The South Carolina Constitution guarantees the public the right of free speech and to seek justice and redress in the South Carolina courts.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA
Article I. Bill of Rights
§ 9. Courts; speedy remedy
All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.

CONSTITUTION OF THE STATE OF SOUTH CAROLINA
Article I. Bill of Rights
§ 2. Religious freedom; freedom of speech; right of assembly and petition
The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.

The SCFPSA unconstitutionally inhibits both of these constitutional guarantees(South Carolina and Federal). Whereas South Carolina legislators have claimed that the purpose of the frivolous civil proceedings sanctions act is to protect the targets of frivolous claimsby punishinglitigants who engage in bringing frivolous claims or asserting frivolous defenses, the act is overbroad. The Legislature has provided this expansive remedy, allegedly, out of concern for the

instigation of frivolous legal proceedings. However the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech and public access to the Courts--especially when the overbroad statute imposes monetary civil sanctions. See *Schaumburg v. Citizens for a Better Envt.*, 444 U.S. 620, 634 (1980); *Bates v. State Bar of Ariz.*, 433 U.S.350, 380 (1977); *NAACP v. Button*, 371 U.S. 415, 433(1963). Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through litigation, will choose simply to abstain from protected speech for fear of financial loss--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas and a proper forum for the resolution of conflict between citizens. Because the Act imposes a restriction on the content of protected speech, it is invalid unless South Carolina can demonstrate that it passes strict scrutiny. The State must specifically identify an actual problem in need of solving, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822-823 (2000), and the curtailment of free speech must be actually necessary to the solution, see *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992).This arduous standard has not been met and, the Plaintiff submits, cannot be met under the current wording, and application by the Courts of the act, especially in light of the fact that Rule 11 SCRCP and the common law claim for abuse of process afford the same protections in manners which do not restrict free speech or the right to seek redress in the Courts.

To practice law in the State of South Carolina, thereby to be "an attorney" requires years of education and training, testing, a formal oath, and submission to the Courts and the South Carolina Bar. South Carolina attorneys, by the very nature of the requirements for practice, are highly trained and specialized professionals who work in and understand the law in a way that non-attorney citizens do not. Attorneys are held to standards of professional ethics which are above and beyond those imposed on non-attorney citizens and other professionals. To have a

statute, like the SCFPSA, which subjects non-attorney litigants to monetary and non-monetary sanctions by the state, based on standards which the ordinary citizenry do not understand, have not been afforded training in, and are not held to in any other setting, will have a chilling effect on the public's constitutionally protected right of access to the Courts. Any citizen should have the right to proceed in court and seek redress or justice with or without a lawyer. Allowing the SCFPSA to stand, with the reasonable attorney standard intact will severely inhibit the public's willingness to enter the courts. As argued above, the chilling effect it will have on the right of access to the Courts cannot be justified where the asserted goals of the SCFSPA are already achieved through the availability of common law claims and under Rule 11. The Appellant respectfully requests that the Court find the SCFPSA to be unconstitutional and, in doing so, vacate the Trial Court's Order of February 1, 2012.

IV. ECCH failed to prevail on its first and second motions to dismiss for lack of subject matter jurisdiction, which, undercontrolling South Carolina law, precludes a finding of frivolitywhere the case was ultimately dismissed upon a third and identical motion to dismiss brought before a different judge.

The South Carolina Appellate Court has reviewed Circuit Court decisions concerning sanctions under Rule 11, as well as the former and current statues authorizing equitable awards of fees and costs for the pursuit of frivolous actions. Unanimously, in cases where the issue upon which the case was dismissed was reviewed and decided in favor of the party potentially subject to sanctions earlier in the case, and even when the prevailing party had simply been unsuccessful on a prior motion to dismiss, the Appellate Courts and the Supreme Court have ruled that this precludes a finding of frivolity and therefore precludes sanctions.

Under *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). In *Hanahan*, our supreme court reversed an award of sanctions under the previous version of the Act. *Id.* at 158, 485 S.E.2d at 913. The court stated: "[W]here a party survives a summary judgment motion, it is not subject to sanctions after a trial on the merits of the surviving claims." *Id.* The court considered that

there is a split of authority as to whether sanctions may be awarded notwithstanding the denial of summary judgment. *Id.* at 157, 485 S.E.2d at 912. The court concurred with the view that "a party who survives pre-trial motions to dismiss and for summary judgment [is] not subject to sanctions after a trial on the surviving claims.

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

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

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

Dr. Holmes filed the Complaint in this case on April 26, 2010. ECCH filed An answer, , counterclaims, and motion to dismiss on September 17, 2010. (Motion to Dismiss) In the motion to dismiss, ECCH moved to dismiss on several grounds, including the identical grounds and arguments submitted in ECCH's motion for Summary Judgment. (Motion for Summary Judgment) Judge Harrington's Order, granting Summary Judgment, dismisses the case based on a finding of a lack of subject matter jurisdiction. (Transcript of 7-8-11; Order 2-1-12) ECCH's initial motion to dismiss included a request for dismissal of the case based on lack of subject matter jurisdiction, "On the grounds that this Court lacks subject matter jurisdiction to address a private hospital's staffing or privileging decisions" (Answer/ Motion to Dismiss, Paragraph 49) ECCH's position was briefed extensively and argued before Judge Dennis on December 16, 2010. The Judge, having considered the briefs of the parties and oral argument as to ECCH's motion to dismiss, opted not to grant the motion to dismiss. (Transcript 12-16-10) Thus, the result of the motions were that they were not successful. A review of the pertinent portion of the transcript clearly shows that, at that initial hearing, the Judge felt that there were sufficient grounds to allow the case to continue beyond the question of law presented by ECCH as to jurisdiction. (Transcript of Hearing 12-16-10, pp. 15-17) On December 22, 2010, ECCH filed a motion for reconsideration

as to Judge Dennis' decision to deny the motion to dismiss based on subject matter jurisdiction. (Defendant's Motion for Reconsideration, 12-22-10) In the motion for reconsideration, ECCH argued that the Court could entertain a motion to dismiss for lack of subject matter jurisdiction at any time, and insisted that Judge Dennis reconsider his decision not to grant its motion to dismiss on subject matter jurisdiction. Specifically, the motion to reconsider raised the argument that "It is improper for the Courts to review decisions of governing boards of private hospitals concerning the staff privileges of practitioners" (Defendant's Motion for Reconsideration 12-22-10). Judge Dennis held a hearing on this motion on March 8, 2011. ECCH, in its motion for reconsideration, insisted that Judge Dennis render decision on subject matter jurisdiction forthwith, rather than simply denying it so that it could be considered at a later date. Judge Dennis clearly acceded to the Defendants' request that he consider the motion to dismiss based on subject matter jurisdiction and gave his order, denying that motion to dismiss on March 8th, 2010 addressing counsel for ECCH initially:

> THE COURT: I can help you. You'vegot a ground for appeal. Mr. Johnson, I assume you want me to deny the Motion to reconsider?
>
> MR. JOHNSON: That's correct, Your Honor.
>
> THE COURT: It's denied. Thank you. Thank you very much. Have a great day.
>
> (Transcript of Hearing, 3-8-22)

It seems clear that the Court intended the decision as to jurisdictional issues to be a denial of the motion to dismiss, making the judgment final for the purposes of appeal.South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. By statute, an appeal from an interlocutory order is permitted in certain circumstances, including when the order is one involving the merits ... [or] affecting a substantial

right.*Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34, 38 (S.C.App. 2011). As a general rule, only final judgments are appealable. *Culbertson v. Clemens,*322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996); *Bolding v. Bolding,*283 S.C. 501, 323 S.E.2d 535 (Ct.App.1984). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." *Ex parte Wilson,*367 S.C. 7, 625 S.E.2d 205 (2005). At the very least, any reasonable attorney who should have been aware of *Charleston County DSS v. Father,*317 S.C. 283, 454 S.E.2d 307 (1995) (one judge may not overrule another judge of the same court), would have believed that the issue of subject matter had been determined by a denial of ECCH's motion to dismiss.

Thereafter, ECCH opted not to engage in ANY discovery. No interrogatories, requests for Production, or requests for admission were served. The Defendants noticed no depositions, not even of Dr. Holmes. This is significant, as ECCH's claim for abuse of process would require ECCH to prove that Dr. Holmes' intentions were other than the legitimate goals stated in the Complaint. Whereas Dr. Holmes did provide expert opinions, affidavits, and subpoenaed the deposition of the former CEO of the hospital (See deposition of Janie Sinacore-Jaberg, Motion for Reconsideration) ECCH then moved, once again, to dismiss and prevailed ONLY on the grounds of subject matter jurisdiction. (Motion for Summary Judgment, Order of 2-1-12)

A determination of frivolity under the existing SCFPSA requires the Court to impose a "reasonable attorney" standard to the conduct of the person who is the target of a motion under the Act. Where Judge Dennis had made not one, but two decisions to deny ECCHs motion to dismiss based on subject matter jurisdiction, it should be clear that any reasonable attorney, especially one who was familiar with the doctrine of "the law of the case" would have believed, in good faith,that position that theclaim would survive an identical motion to dismiss was at least legitimate and

defensible, if not absolutely the law of the case. Chief Justice Finney put the standard succinctly in the *Hanahan* opinion, stating: "It is simply untenable to suggest that, notwithstanding the trial court was convinced the issue was one for the jury, *Hanahan* did not reasonably believe in the existence of her claim." *Hanahan v. Simpson,* 326 S.C. 140, 485 S.E.2d 903, 912-13 (1997). Judge Dennis, acceding to Defendants' demand for a decision as to subject matter jurisdiction, rendered a final decision in Plaintiff's favor on that issue. This became the law of the case and should have conclusively precluded a finding of frivolity as to Dr. Holmes' position on subject matter jurisdiction.

V. Plaintiff's cause of action and, specifically, her position on subject matter jurisdiction in this case is supported by existing law and therefore could not be considered to have been frivolously pursued.

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

> An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:
> (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
> (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

In this case, it is clear that the claims made were warranted under, not only the existing law at the time it was filed, but under the existing law ***as it stands now***. Dr. Holmes brought a claim for breach of contract against ECCH. The Complaint clearly spells out that the contract at issue is a settlement agreement entered into by the parties in 2002. When the settlement agreement was put on the record before Judge Rawl, the Judge specifically stated that the Circuit Court would maintain jurisdiction over any conflicts arising from the settlement agreement. (ROA p. 138)Dr. Holmes' attorney, the undersigned, researched and reviewed the cause of action prior to filing, finding that it was a legitimate cause of action, that there was evidence supporting the claim, and

that the Court would not be deprived of jurisdiction under the opinion of the Court in the case of *Lee v. ChesterfieldGeneral Hosp., Inc.,* 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). The undersigned attorney (Chalmers C. Johnson), concerned about Judge Dennis' past order, dismissing a prior claim against the hospital for lack of subject matter jurisdiction, consulted with other attorneys on the issue, researched the issue, and restricted the claims in the Complaint to those which would fall squarely under the *Lee* holding, which he read as restricting the immunity granted to private hospitals from suits requesting a due process review of credentialing decisions to those claims which actually requested a due process review, rather than to other types of common law claims. The Complaint in this matter focuses very specifically and clearly on the fact that Dr. Holmes is claiming that the settlement agreement from 2002 was breached, avoiding any general due process challenge to the bylaws of the hospital. Clearly the undersigned, who was adjudged by the Court to be competent in this very case after explaining his reasoning (See Transcript of Hearing of 12-16-10, pp. 13-15), put significant thought and preparation into the Complaint, and reasonably believed the claim to be legitimate as drafted and warranted under existing law.

After being unsuccessful at two hearings before Judge Dennis in attempts to have the case dismissed for lack of subject matter jurisdiction under the immunity theory, ECCH requested a third hearing raising the identical argument before a different judge of the same Court (Judge Harrington), without, in its motion, disclosing that Judge Dennis had already ruled on the same issue in the same case. In the third identical motion to dismiss for lack of subject matter jurisdiction, this one before Judge Harrington, ECCH again argued that the circuit court was deprived of jurisdiction under *Gowan v. St. Francis Community Hospital,* 275 S.C. 203 268 S.E.2d 580 (1980) and its progeny. (Motion for Summary Judgment)Dr. Holmes, in addition to notifying

Judge Harrington that Judge Dennis' decision was the law of the case, again, argued that *Lee v. Chesterfield* defined the circumstances under which the Court had jurisdiction and showed that the facts of this case were substantially similar to those in *Lee v. Chesterfield.* (Response to Motion to dismiss)Judge Harrington granted ECCH's motion to dismiss, finding that *Lee v. Chesterfield* did not apply. In the *Lee* Decision, the Court held that, because the Plaintiff in that case had plead a claim for conspiracy rather than seeking a due process review of the hospital's credentialing decision, the Court was not deprived of subject matter jurisdiction.

In the Order dismissing Dr. Holmes' claim for breach of contract, Judge Harrington stated that in *Lee v. Chesterfield*, the cause of action was for conspiracy rather than breach of contract (the sole cause of action in Sr. Holmes' complaint) as the sole explanation for the decision not to apply the holding from the Lee Opinion (Order 7-29-11) However, nowhere in *Lee v. Chesterfield*, or in any other case mentioning the *Lee* opinion does any Court ever even imply that its ruling would be limited to cases in which the Plaintiff claims civil conspiracy. The *Lee* Opinion has been cited in Appellate and Supreme Court opinions twelve (12) times, and has never been overturned, modified, curtailed, or challenged on the subject matter jurisdiction issue. (See *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.App. 2010);*Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (S.C. 2006); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (S.C.App. 2004); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (S.C.App. 2004); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (S.C.App. 2000); *Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132 (S.C.App. 1993); *Mendelsohn v. Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (S.C.App. 1993); *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91 (S.C.App. 1989); *Allen v. Columbia Financial Management, Ltd.*, 297 S.C. 481, 377 S.E.2d 352 (S.C.App. 1988); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (S.C. 1988); *Island Car Wash, Inc. v. Norris*,

292 S.C. 595, 358 S.E.2d 150 (S.C.App. 1987); *Yaeger v. Murphy*, 291 S.C. 485, 354 S.E.2d 393 (S.C.App. 1987)).

The Court's Order, dismissing this case for lack of subject matter jurisdiction, circumvents the clear ruling of the *Lee* Court by interpreting the opinion as meant only to apply to cases in which the Plaintiff has alleged civil conspiracy. The Order fails to articulate any reasoning for this conclusion and cites no authority, legal or otherwise in support of its conclusion. (Order 7-29-11) ECCH never raised this argument (that *Lee* is restricted to civil conspiracy allegations) in its extensive briefing of the subject, or at oral argument. If both the Court and the opposing party are unable to articulate any logical reasoning or find any legal authority to support such extraordinary relief as dismissal on the basis of subject matter jurisdiction, then it should not be considered frivolous for an attorney pursuing the case (the undersigned) to have relied on *Lee v. Chesterfield* to overcome Defendant's claim of lack of jurisdiction, especially in light of the fact that he successfully defended that position on two occasions at prior motions in the same case. Dr. Holmes' claim for breach of contract and her position that the immunity afforded private hospitals under Gowan and its progeny would not preclude a common law claim for breach of contract as opposed to a request for a due process review was and *is still* sufficiently supported by existing South Carolina law. This should preclude any findingfrivolity.

VI. A litigant should not be subject to sanctions under the SCFPSA where she was competently represented by counsel.

Dr. Holmeshas been represented throughout this action. The undersigned was her attorney, signed all pleadings filed with the Court, and appeared on her behalf at all hearings. A review of the pleadings and the undersigned's responses to Defendants' motions to dismiss should show that they are well thought out, well researched, and competently articulated. (Complaint, Response to Motion to dismiss, Response to motion for reconsideration, Response to Motion for Summary

Judgment, motion for reconsideration) Mr. Johnson appeared at hearings before Judge Dennis and Judge Harrington well prepared and explained his positions articulately. Neither Judge accused Mr. Johnson, at any hearing, of being unprepared, or of being unable to support his positions on the motions at issue.Judge Dennis, in a hearing on December 16, 2010, expressly stated that he found all of the attorneys involved in the case to be competent immediately after hearing argument on the issue of subject matter jurisdiction. (Transcript 12-16-10). In deciding whether a case is frivolous, the Court has, in the past, found that a determination of frivolity is precluded where a competent attorney has signed the pleadings.

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

Clearly, the undersigned feels that this case was filed in good faith, and the undersigned has been judged, by Judge Dennis, in this action, to be a competent attorney. There has been no allegation by ECCH, nofinding by the Court, no indication from anyone on the record or off, that the undersigned is not a competent or reasonable attorney. As a result, it seems clear thatthe "reasonable attorney" standard required under Section 15-36-10 has been met, precluding a finding of frivolity.

VII. The Trial Court's Order of February 1, 2012, is based on fatal material errors of fact

and is unsupported by the record.

After the Trial Court's order of February 1, 2012 was granted, sanctioning Dr. Holmes, she filed a motion to reconsider. (Motion to Reconsider) This was summarily denied by Judge Harrington in a form 4 order, before ECCH had even filed its response, without a hearing or further comment from the Court. (Order of 3-7-12) Both Orders are under appeal here. All of the issues raised in this section and the next (mistakes of fact and law in the order) were raised before the Trial Court in the motion for reconsideration.

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

In the 2-1-12 Order, the Court bases its finding that no reasonable attorney would have argued Mr. Johnson's interpretation of *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), and *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and its progeny on the theory that collateral estoppel applied in this case. In fact, the Court not only did not apply collateral estoppel/ res judicata, but included a footnote expressly stating that it did not consider the prior orders from Judge Dennis in other cases in reaching its conclusion as to the dismissal for lack of subject matter jurisdiction. (Order 7-26-11, p. 7) At most, the Court adds, as dicta, its belief that the Orders from Judge Dennis (without ever specifying which ones) would act as collateral estoppel, if reviewed. If the Court itself declined to apply collateral estoppel to dismiss the case, and did not take into account Judge Dennis' previous orders, how can it find that no reasonable attorney would have failed to expect collateral estoppel to apply?

In fact, collateral estoppel would not have applied to this case. The facts of the case herein allege an act of bad faith by ECCH, breaching a settlement agreement from 2002 between the

parties, and resulting in a termination of Dr. Holmes' privileges and the subsequent barring of her ability to engage in a process to contest that termination. Termination had not occurred at the time of the orders which ECCH alleges form a basis for collateral estoppel.

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

In the Order of 2-1-12, the Court erroneously stated that Dr. Holmes failed to offer any argument regarding Defendants' claim that the doctrines of collateral estoppel or res judicata barred Plaintiff's suit. Dr. Holmes' response to ECCH's motion for summary judgment, dated July 6, 2011, contains an argument as to collateral estoppel, and one that was sufficiently compelling. In fact, the Court not only avoided making collateral estoppel/ res judicata one of the grounds for dismissal, but opted to expressly state, in the order that it had **not** considered Judge Dennis' unrelated orders as a basis for the decision to dismiss the case. In the February 1, 2012 Order, Judge Harrington specifically declines to consider previous orders, stating only, in what should be considered as dicta that they "operate as collateral estoppel as to the issue, and also support the Court's decision." (Order of 7-26-11, p. 7) The Trial Court did not dismiss the underlying case in this matter under the doctrine of collateral estoppel or res judicata. Dr. Holmes did, in fact, provide compelling arguments, explaining why collateral estoppel did not apply (Plaintiff's response to motion for Summary judgment, Motion for reconsideration), sufficiently compelling so that Judge Harrington would expressly state that she did not base her decision to dismiss the case on those grounds in her Order of 2-1-12. (Order 2-1-12)

C. The Order of February 2, 1012 mischaracterizes the Trial Court's order of July 26, 2011 as granting summary judgment, when it actually dismissed solely on the grounds of subject matter jurisdiction.

Beginning on page 9 of the Court's Order of 2-1-12, the Court discusses the facts of the underlying case as if it had determined that there was no genuine issue of material fact and granted summary judgment. In fact, the Order clearly avoids this issue all together and grants the motion to dismiss solely on the grounds of a lack of subject matter jurisdiction. (Order of 7-26-11) Indeed, Dr. Holmes did meet the burden of producing facts sufficient to support her cause of action for breach of contract. This is clearly set forth in Dr. Holmes' response to Summary Judgment and accompanying affidavits and exhibits. The order dismissing this case, which, although mistakenly referring to summary judgment, actually dismisses the case solely by grantingECCH's motion to dismiss under Rule 12(b)(1) of the S.C. Rules of Civil procedure. (Plaintiff's Response to Defendant's Motion for Summary Judgment, July 6, 2011, Affidavit of Expert Witness Dr. John Shershow, Affidavit of Plaintiff, Order of July 26, 2011) The Court's characterization of the dismissal of this case as having been pursuant to Rule 56 is a material error of fact, as it improperly implies that the Court considered this case on the merits, which it did not. The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. This is because summary judgment is an adjudication of the merits of the case, whereas dismissal for lack of subject matter jurisdiction is not an adjudication on the merits. *Woodard v. Westvaco Corp.*, 315 S.C. 329, 433 S.E.2d 890 (S.C.App. 1993) See also *Gulledge v. Young,*242 S.C. 287, 130 S.E.2d 695 (1963); *Nauful v. Milligan,*258 S.C. 139, 187 S.E.2d 511 (1972); *Prakash v. American University,*727 F.2d 1174 (D.C.Cir.1984).

D. In her Order granting sanctions against Dr. Holmes, Judge Harrington made a fatal error of fact by erroneously failing to recognize Judge Dennis' Order of March 9, 2011, as denyingthe Defendant's motion to dismiss for lack of subject matter jurisdiction.

In its Order of 2-1-12, the Court made a material mistake of fact, by stating, "(T)he plaintiff

did not survive pre-trial motions to dismiss," and by stating, "He [Judge Dennis] never denied the motion." (Order of 2-1-12, p. 17). This is obviously a glaring error of fact when one takes the time to do even a cursory review of the circuit court record in this case. On record is a Form 4 Order, signed by Judge Dennis, stating "The Defendants' Motion to Reconsider is denied." (Order of 3-2-11) Also, the notice of entry of judgment issued by the circuit court states "Order/Defnt's Mot to Reconsider is denied." (Notice of 4-25-11) The transcript of the March 9th hearing clearly shows that Judge Dennis denied ECCH's motion to dismiss based on a lack of subject matter jurisdiction, even telling ECCH's attorney that he had given ECCH grounds for an appeal by doing so. (Transcript of March 9, 2011) Finally, the transcript documents that Judge Dennis was denying the ECCH's Motion for Reconsideration, in which Defendants specifically raise the subject matter jurisdiction issue and only that issue before Judge Dennis. (Defendant's Motion to Reconsider 12-22-10; Transcript of March 9, 2011) This error of fact is material because the denial of the motion to dismiss by Judge Dennis in this case on March 9, 2011, legally prohibits Judge Harrington from countermanding it at a later date in the same case. The doctrine of the "law of the case" prohibits one judge from overruling another judge of the same court. Not only is Judge Harrington's order dismissing this case reversible as a matter of law,(See *Charleston County DSS v. Father,*317 S.C. 283, 454 S.E.2d 307 (1995) (one judge may not overrule another judge of the same court)), but the fact that ECCH has unsuccessful on two pre-trial motions to dismiss precludes a finding of frivolity and precludes sanctions.*Swanson v. Stratos*, 350 S.C. 116, 564 S.E.2d 117, 121 (S.C.App. 2002) citing *Hanahan v. Simpson,*326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997).

VIII. The Trial Court's Order of February 1, 2012, granting sanctions against Dr. Holmes contains Material mistakes of law fatal to the logic of the Order.

All of the issues raised under this section were raised in Dr. Holmes' motion for reconsideration, which was summarily denied even before the filing of ECCH's response. (Motion for reconsideration, Order denying reconsideration, ECCH's response)

A. Judge Harrington's assertion that "by its express terms, the Lee decision was limited to civil conspiracy claims" when referring to *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), in her Order of February 1, 2012 is not correct. There is no such language in the *Lee* Opinion.

Part of the Trial Court's decision to sanction Dr. Holmes for taking the stance that *Lee v. Chesterfield*would except her claim for breach of contract from the immunity granted to private hospitals for claims seeking due process reviews of credentialing decisions was, necessarily, the Court's finding that no reasonable attorney could have interpreted *Lee v. Chesterfield* in that fashion. To support this position, the Court indicated that no reasonable attorney could possibly have come to that conclusion, as the opinion***expressly*** limited its holding to cases in which the complaint contained a claim for civil conspiracy. The Court has made a fatal mistake of law by failing to properly cite *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). In the Court's Order of 2-1-12, the Court states "by its express terms, the Lee decision was limited to civil conspiracy claims" (Order 2-1-12, p. 9) The Court has made an error in making this statement, as there are no express terms in the *Lee* decision which so limit the opinion's holding.

The Court's finding that no reasonable attorney could possibly have interpreted the *Lee v. Chesterfield* decision the way that the undersigned did is clearly based on the assertion that the case **expressly** states that Mr. Johnson's interpretation is invalid. If the Court was going to base such an extreme decision as awarding sanctions and a finding of frivolity upon the fact that a case expressly stated some position, with such clarity and vehemence, that no reasonable attorney could

have ever, in good faith, argued against it, then the Court should be able to quote the express statement from the opinion and, it would seem, should feel compelled to do so, if it in fact existed. Because the statement, "by its express terms, the Lee decision was limited to civil conspiracy claims" is untrue (nowhere in that opinion does the Court expressly restrict its holding to cases in which conspiracy is claimed as opposed to other causes of action), then the Sanctions order of 2-1-12 should be vacated. Mr. Johnson, Dr. Holmes' attorney has drawn a reasonable interpretation of the Opinion based on what the opinion***actually*** says.

B. In the Order of February 1, 2012, the Trial Judge made an error of law in stating that the holding of *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997), which precludes a finding of frivolity where the party moving for sanctions has, prior to the dismissal of the case, unsuccessfully moved for dismissal, to be a "procedural issue."

In the Order of February 1, 2012, Judge Harrington addresses several issues at the end of the Order as "procedural arguments." However, the case law and arguments that Dr. Holmes has raised under the holding from *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) were substantive arguments, rather than mere issues of courtroom procedure. Our supreme court has held that if a cause of action survives pre-trial motions to dismiss or a summary judgment motion and goes to the jury, the cause of action cannot be considered frivolous. *Swanson v. Stratos*, 350 S.C. 116, 564 S.E.2d 117, 121 (S.C.App. 2002) citing *Hanahan v. Simpson,* 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997).

In her motion for reconsideration, Dr. Holmes asked Judge Harrington, for the sake of clarifying the standard of review for the Appellate Court review, to address and correct this error of law. As the argument regarding *Hanahan v. Simpson*, 326, S.C. 140, 485 S.E.2d 903 (1997) was a substantive argument, the standard of review by Courts on appeal as to this issue would be de novo, rather than for abuse of discretion. Because the holding from *Hanahan v. Simpson* is substantive, and controlling law, the fact that Dr. Holmes' case did actually survive the identical

motion to dismiss for lack of subject matter jurisdiction on not one but two occasions in this case prior to the July 26th Order, dismissing the case for lack of subject matter jurisdiction, precludes a finding of frivolity and precludes sanctions. As a matter of law, ECCH's motion for sanctions cannot be granted and the Order granting sanctions against Dr. Holmes should be vacated.

CONCLUSION

The Trial Court's Order granting monetary and non-monetary sanctions against the Plaintiff should be vacated. Under existing South Carolina law, an action simply cannot be found to have been frivolous when the Defendant has failed to prevail on a motion to dismiss on the same grounds at two different hearings before a different judge of the same court earlier in the case. The Order should also be vacated because Dr. Holmes was represented by a competent attorney, who did a diligent job in researching and pursing a legitimate action, and who took a legal position which is supported by existing South Carolina law. Beyond the many reasons why a sanctions order was not warranted in this case, the Court should carefully scrutinize the South Carolina Frivolous Proceedings Sanctions Act and see its constitutional flaws. It is an attempt by the legislature to circumvent the safeguards of Judicial wisdom inherent in Rule 11 and the right to a jury trial in common law actions for abuse of process, an abrogation of common law rights. That Act creates a deterrent and punishment for legitimate claims, substitutes "loser pays" instead of following the American rule and is used to discourage citizens from suing those businesses and potential defendants who can afford lobbyists to get this kind of draconian legislation passed so that it can then be outrageously abused as it was in this case. The only sword available to the people when this kind of legislation is created is the Constitution, and those capable of wielding that sword in the name of fairness and the good of our citizens are the Honorable Justices of the Supreme Court. In the public interest and on behalf of all good citizens seeking access to the

Courts for resolution of a legal dispute, I respectfully request that the Court find the South Carolina Frivolous Proceedings Sanctions Act to be unconstitutional.

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Date: 6-13-12

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2011-198092 and 2011-209666
Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

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

Respondents.

PROOF OF SERVICE FOR
APPELLANT'S INITIAL BRIEF AND
APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED
IN RECORD ON APPEAL

I certify that I have served a copy of the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record for Respondents, Case No. 2010-CP-10-3410, on this date, August 13, 2012.

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August 13, 2012

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

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

Dear Ms. Hopkins:

Enclosed please find the following:

1) Appellant's Initial Brief;

2) Appellant's designation of matter to be included in the record on appeal;

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

4) Self Addressed Stamped Envelope

Please file the Appellant's Initial Brief, Appellant's designation of matter to be included in the record on appeal, and the original proof of service. Please return a clocked copy of the Proof of Service to me in the enclosed envelope. Thank you.

Sincerely,

Chalmers C. Johnson

Enclosures: 1) Appellant's Initial Brief; 2) Appellant's designation of matter to be included in the record on appeal; 3) Proof of service (one original and one copy); 4) Self Addressed Stamped Envelope

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