THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332 (Probate Claim)
CASE NO. 2010-CP-16-0333 (Probate Court Appeal)

Tracking Number: 2014-001275

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

v.

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

RESPONDENT'S BRIEF *OF THE RESPONDENT-APPELLANT*

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STATEMENT OF THE CASE

The procedural history of this case is long and convoluted, but the instant appeal – the fourth filed with this Court in this case -- is fortunately limited in scope. This is an appeal from a trial court order of sanctions issued after a remittitur from this Court. Both parties have appealed the Order. Pee Dee Health Care, P.A. ("PDHC") seeks to overturn the award of sanctions and the Estate of Hugh S. Thompson (the "Estate") seeks additional sanctions. Because the two appeals relate to the same order and inherently address the same issues, the dual sets of Briefs generated by these cross-appeals will likely contain considerable overlap.

This was an action for damages by an employer (PDHC) against the estate of a former employee. PDHC operates a medical clinic and practice in Darlington, South Carolina, and Dr. Hugh S. Thompson, Jr., was a physician in practice with that clinic.

PDHC's alleged damages relate to the overpayment of benefits by Medicare to PDHC occasioned by the failure of PDHC[2] to secure the proper Medicare credentials for its physician employee (Thompson). This action began when PDHC filed a Summons and Complaint in the Probate Court and petitioned for removal of the action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). The Estate filed its Answer on June 17, 2010.

PDHC filed a motion for summary judgment on December 9, 2010. The Estate filed its counter motion for summary judgment on May 20, 2011. The Estate's motion was based upon PDHC's fault with regard to the matters raised by the complaint and the dispositive nature of that fault element with regard to all of PDHC's causes of action. The motions were set for hearing on July 19, 2011 where the hearing proceeded without objection. Before that hearing, the trial court

[2] The employer's (PDHC) fault for not satisfying the non-delegable duty to insure the proper credentialing of its employee (Thompson) has now been litigated in both federal and state forums with the same adverse result to PDHC.

had disqualified one of PDHC's two trial attorneys (Mr. Megna – not Mr. Matthews) because of his clear status as a central witness in the case. This disqualification was first announced from the bench on March 16, 2011, and then put in a formal written order of April 15, 2011.

The trial court announced its decision to grant summary judgment by letter to the parties dated August 12, 2011 and mailed to the parties that same day.[3] This letter called for the preparation of a more detailed order but the letter itself expressed the general basis for the decision. On the same date of this letter, the trial court issued a formal order denying the reconsideration of counsel's disqualification – the next business day (August 15, 2011) PDHC filed a notice of appeal from that formal disqualification order (Court of Appeals Tracking Number 2011197671) and immediately asserted that the trial court no longer had jurisdiction to issue its formal order of summary judgment. Even before its August 15, 2011 interlocutory appeal of counsel's disqualification, PDHC had filed another interlocutory appeal (Court of Appeals Tracking Number 2011185767) that related to the Probate Court's failure to require the Estate to post a bond after concluding a consensual freeze of the Estate's assets was sufficient.

Despite the assertion that it lacked jurisdiction, the trial court did issue a formal order of summary judgment against PDHC dated August 29, 2011 and filed September 1, 2011. The trial court's order specifically found that the trial court did have jurisdiction to issue its formal order under Rules 205 and 241(a) of the SCACR – again an order that merely formalized the decision that had already been made. A notice of appeal from the summary judgment order was filed by

[3] R.pp. 779-780 (Judge Baxley Letter of August 12, 2011 Announcing Summary Judgment – Copied to Clerk of Court for file). This is the same day the trial court denied reconsideration of its previous order disqualifying counsel Megna as a witness. R. pp.10-11 (August 12, 2011 Order).

PDHC with the Court of Appeals on November 7, 2011. (Court of Appeals Tracking Number 2011203391). Again, this was the third appeal made by PDHC in this litigation.

Appeals from these first three matters were addressed by the Court of Appeals in a consolidated opinion dated July 3, 2013 which affirmed the trial court's summary disposition. Subsequent appellate petitions for rehearing and for certiorari were denied. Remittitur was issued by the Court of Appeals on January 7, 2014. Nine days later, on January 16, 2014, the Estate filed its Motion for Trial Court Sanctions. In support of that motion, the Estate filed an extensive set of documents – both in hard bound form and electronic form.

In response to the Estate's Motion for Trial Court Sanctions, PDHC filed a March 11, 2014 Motion to Strike the claim to trial court sanctions as outside of the Court's jurisdiction. PDHC also submitted a Memorandum opposing sanctions dated March 25, 2014. The Estate filed a Response to the Motion to Strike – the Estate's Response was dated March 24, 2014. Both Motions were heard by the Circuit Court on March 27, 2014.

At the hearing on March 27, 2014, the Circuit Court announced that some sanctions would be awarded. The Court further directed that the Estate give a segregated accounting for different elements of counsel's time so that specific sanctions related to the attorney time spent on certain issues could be awarded. A formal written order was anticipated after the accounting directed by the Court. The Estate filed its supplemental affidavit segregating attorney time as directed on April 1, 2014. PDHC filed a memorandum responding to this supplemental memorandum dated April 4, 2014.

On April 15, 2014, his last day on the bench prior to retirement, the Circuit Court signed a written order granting some sanctions but denying additional requested sanctions. PDHC submitted a Motion to Alter or Amend the April 15, 2014 order and that motion was denied

without hearing by the Chief Administrative Judge for the Circuit on May 12, 2014. PDHC filed its present appeal to this Court on June 12, 2014 and the Estate then filed a Notice of Cross Appeal on June 13, 2014.

STATEMENT OF THE FACTS

Introduction: Limited Facts Presented Here, Others in Cross-Appeal

Of course, both the trial court's dispositive Orders and this Court's prompt opinion of July 2013 found this litigation to be without merit. Indeed, every aspect of the case was frivolous and pursued in bad faith.[4]

As Respondent for purposes of this Brief, the Estate seeks affirmation of the trial court's limited order of sanctions; accordingly, this statement of facts will focus on those factual aspects of the matter relied on in the trial court's order. As Appellant in the cross-appeal, the Estate seeks additional sanctions; accordingly the statement of facts in that Brief will focus on those aspects overlooked or not considered in the sanction's order. A complete summary of facts, approximately two dozen pages or so, can be found in the Motion for Sanctions designated for the Record on Appeal.[5] R. pp. 279- 318.

The Trial Court's Order of Sanctions

The trial court's order of sanctions relied upon "three distinct, segregated areas of the procedural history" of this case. R. pp. 56- 57. While the Estate contends that bad faith and lack of merit dominated all aspects of the case, the areas identified by the trial court for consideration in its award of sanctions were: (1) Disqualification (actually the "continuing failure" (R. p. 57) of Mr. Megna to accept the order of the disqualification); (2) subpoenas sent to uninvolved

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[4] Clearly this characterization is denied by PDHC, but the facts are presented here in accordance with SCACR 208(b)(1)(D) which provides that a party may include a separate statement of facts which may include "contested matters" presented as part of the "party's contentions."

[5] Despite suggestions to the contrary, the facts relied upon for circuit court sanctions were segregated from that conduct previously presented to this Court in the Estate's Motion for Appellate Court Sanctions.

attorneys; and (3) the Estate's time in preparing the Motion for Sanctions in the Circuit Court. Here are the relevant facts in the record with regard to these three areas.

1) Disqualification of Mr. Megna

A) Counsel's Disqualification Raised Even Before The Motion.

In April 2010, over nine months before the Estate resorted to a Motion to Disqualify and prior to the filing of any claim, Mr. James, counsel for the Estate, had corresponded with Mr. Megna and advised him, both in writing and by telephone, that he (Mr. Megna) was probably a witness.[6] Initially, Mr. Megna acknowledged as much by reply email.[7] Mr. Megna thus knew that Estate's counsel would challenge his serving as counsel, which they did within about seven weeks of his first official appearance in the case.[8]

After that April 13th e-mail, Mr. Megna became indignant to Mr. James' valid concerns and hyperbolic about the underlying claims. For example, in the May 21, 2010 e-mail of Mr. Megna to Mr. James (R. pp. 862-863), Mr. Megna continues to deny sufficient involvement for disqualification ("Think as you please" and "Ben's involvement is out of an abundance of caution"), continues to suggest a non-existent confession by the decedent ("He did not tell the truth"), and suggest "the estate has no reasonable defense to PDHC's claims & we intend to pursue every option available to recapture the total losses sustained – which are considerably

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[6] On April 13, 2010, Defendant's counsel e-mailed Mr. Megna as follows: "Are you counsel of record for PDHC? If not, who is? I suspect that if the matter is controverted, it will be necessary for you to be a witness." R. pp. 616-617.

[7] In reply to the concern as raised by Estate's counsel (see footnote 7 above), Mr. Megna replied that same day, "If the PR decides to dispute the claim, & I am a witness, we will go from there." R. p.616.

[8] The Estate filed its motion to disqualify Mr. Megna in the trial court on January 31, 2011. R. pp. 204-216.

more than the amount PDHC had to pay Medicare." The e-mail also suggests that PDHC had no choice but to litigate as much as the PDHC officials "did not wish to go this route...." The e-mail concludes with "I suggest you reconsider your email to Ben." Mr. James prior email to Ben Matthews had acknowledged service and suggested "At this stage of things I consider Tony to be a fact witness as well as the chief executive officer of the adverse party. I simply should not be communicating with him." Mr. James was right and Plaintiff's counsel knew or should have known it.

B) Clear Basis for Disqualification

Review of one simple document, incorporated into this case from the very beginning, confirms the frivolity of PDHC's insistence that Mr. Megna was not disqualified. In its complaint (¶ 13)(R. pp.530-531), PDHC alleges that the decedent Thompson made "contact" with PDHC by sending a letter to PDHC in which he is alleged to have "admitted" not providing "accurate information to [PDHC] upon and during his employment with the [PDHC]...."

The unsigned letter was submitted at the hearing on the Motion to Disqualify, without objection. The letter was addressed to "Tony." R. p.547. The same document was submitted as Exhibit HH to the PDHC response to the Motion to Disqualify. R. pp. 236 and 562.

At Page 15 (line 10) of its Return to the Motion to Disqualify (R. pp. 236 and 562), PDHC described this letter as the "cover letter Decedent addressed to the undersigned" (i.e., Mr. Megna). Thus, Mr. Megna was the alleged recipient of an alleged communication from Dr. Thompson in July 2007 – a communication identified as a key exhibit in PDHC's Complaint.

PDHC's discovery response to Request for Production number 2 identifies the same alleged letter from decedent Thompson to Tony Megna as a document that relates to a claim or

defense in the case. That discovery response also references other "information sent to Tony Megna by Dr. Thompson relating to the SC Board of Medical Examiners." R. pp. 596-597.

Despite its own interrogatory responses, and its own reference to this exhibit *in the Complaint*, PDHC nevertheless insisted to the trial court that Mr. Megna was not a witness. Mr. Megna was the claimed recipient of documents and information relevant to claims and defenses in the case. Questions regarding the authenticity of this letter, the circumstances of its alleged receipt, and its alleged contextual meaning were all fairly directed to Mr. Megna. Carrying its frivolity one step further, PDHC argued to the trial court that these communications between Dr. Thompson and Mr. Megna -- *used in the Complaint itself* -- were protected by attorney-client privilege thereby precluding Mr. Megna's availability as a witness. R. p.257.

C) Blatant And Needless Disregard Of Disqualification Order.

In its Disqualification of Counsel Order, dated April 15, 2011, R. p.9 (incorporating footnote 11), the trial court had provided:

> **The Court orders complete disqualification effective with the execution of this order. The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist even with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.**

(emphasis added). Of course, the trial court's written order reinforced the directive given directly to counsel in the Courtroom on March 16, 2011, "It begins now." R. p.119 lines 5-6.

After the disqualification order, counsel for the Estate raised concerns regarding Mr. Megna's authority to continue participation in a letter to the trial court, copied to all PDHC counsel, on May 20, 201. R. pp. 781-782. Despite these expressed concerns, Mr. Megna continued to fully participate in matters before the trial court including the filing of a motion to

reconsider the disqualification – the trial court's present order of sanctions awards an amount relating to the Estate's attorney's fees in responding to that motion to reconsider. R. p. 57 (Order item 1).

Despite the clarity of its Order, the trial court did allow the disqualified Mr. Megna the limited opportunity to argue the summary judgment motions so as to prevent any possible claim of prejudice; but in reaffirming the disqualification, the court dismissed other activity by disqualified counsel as unauthorized.

> **The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED.**

R. p.10 (August 12, 2011 Order) (emphasis added). The order was sent by the Court to Mr. Matthews as "Plaintiff's remaining counsel" with instructions for Matthews to serve the order upon all parties. The trial court's summary judgment letter of the same date was also sent to attorney Matthews alone as counsel for PDHC. R. pp.779-780. The Estate also raised the issue specifically in its 6 page Response to Motion for Reconsideration of Summary Judgment filed on September 20, 2011. R. p. 783.

As this Court's affirmation provided, "the circuit court provided clear and unequivocal notice to PDHC that Mr. Megna was only allowed to orally argue the motions for summary judgment and was disqualified from all other appearances and activities following his disqualification." R. p. 521.

2) <u>Subpoenas to Uninvolved Attorneys</u>

After his disqualification in the trial court, Mr. Megna sent out multiple subpoenas to numerous attorneys, across the state, who were not counsel for any party in this matter, including

Desa Ballard, Celeste Jones of the McNair Firm, and Kenneth P. Woodington of Davidson & Lindemann, PA. He also sent parallel subpoenas to the law firms representing the Estate in this matter. These subpoenas provoked a series of filed objections, motions for protection, and a motion for sanctions – actual compliance with the subpoenas was rendered moot by the Court's *sua sponte* quashing of such material.

While the purpose of these quashed subpoenas is not entirely clear, they echoed discovery sent out in other litigation seeking to solicit the communications of various members of the bar who were all involved in unrelated litigation matters with attorney Megna. As Estate counsel explained at the March 2011 hearing on the motion to disqualify Mr. Megna, a public document in the so-called "Lake City litigation"[9] was attached to the motion to disqualify solely to demonstrate that Mr. Megna was CEO of PDHC and therefore likely to be a witness.[10] R. p. 92 lines 2-14). Attorneys in the "Lake City litigation" helped undersigned counsel locate those public documents. Undersigned counsel is not involved in the "Lake City litigation" but understand it involves the ownership/control of the Lake City hospital.

As the trial court has already determined, this use of process by Mr. Megna was inappropriate and unauthorized as he had already been disqualified from serving as counsel in this matter. This abuse of process is but one part of many such infractions – which disrespect the trial court and its processes.

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[9] Mr. Megna references the "Lake City Litigation" in his March 11, 2011 response to the Motion for Disqualification. In that rant-like response, Mr. Megna accused the Estate and its counsel of "defamatory litagation [sic] strategy." This response also contained the first unsupported bald assertion of the trial court's need to recuse itself. R. p. 567. The bizarre response asserted systemic unethical and conspiratorial conduct without any evidence thereof.

[10] Because Mr. Megna was a witness in the matter at bar, Estate counsel also sought to monitor the proceedings of Richland County litigation where court findings would have been relevant to Mr. Megna's credibility.

3) The Trial Court Motion for Sanctions

Affidavits of Estate counsel filed with the trial court before the hearing on the Motion for Sanctions revealed a grand total of 453.9 hours combined had been spent by Estate counsel on this matter related to Circuit Court proceedings alone – through March 24, 2014.[11] R. pp.967-972. At the hearing held on March 27, 2014, the trial court directed Estate's counsel to prepare and file a supplemental affidavit within five days that restructured the previous statement of the Estate's attorney's fees into segments. R. p.194 lines 22-25 and p.195 lines 8-13.

In compliance with the Court's directive, counsel for the Estate filed a supplemental fee affidavit segregating their time into 8 components. R. pp. 973-977 (Supplemental Affidavit). For purposes of this appeal as Respondent, the Estate only includes those components affirmatively used by the trial court in making its award. Those included paragraphs 2, 4, 5, 7, and 8: [12]

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[11] Counsel believes these totals to be under-inclusive. Notably, the fees billed to the Estate do not include time spent by counsel dealing with the workers compensation conflict issue (discussed *infra* at footnote 27) and responding to the ethics complaint filed with the Office of Disciplinary Counsel (ODC) by the PDHC Vice-President of Operations. Those complaints were dismissed but not without considerable time invested by Estate counsel. These hours were tracked, recorded, and can be produced although counsel determined it not appropriate to bill the Estate for this time.

Because of the overlapping periods of both appellate court jurisdiction and trial court jurisdiction, 15.6 hours of time were mixed in dealing with matters in both courts. For these hours, counsel only included half so as to avoid any duplicate recovery. Actual time records were not submitted to the trial court because of privacy and privilege concerns and because of PDHC's misuse of such records obtained in other matters. Counsel offered to submit such records pursuant to protective terms and conditions, but the trial court did not require it.

[12] The trial court's order also makes reference to paragraph 6 of the supplemental affidavit which relates to time associated with the Estate responding to the Motion to Strike the sanctions' request. The trial court did not award this segment of fees which is addressed in the Estate's cross appeal.

2. Time Related to Reconsideration of Disqualification: 26.8 hours of Circuit Court work related to the reconsideration of Mr. Megna's disqualification (11.3 James and 15.5 Josey totaling $6,910).[13]

4. Time Related to Discovery Requests Issued By Disqualified Attorney & Follow-Up Thereto: 30.8 hours of Circuit Court work related to responding to discovery subpoenas issued by disqualified counsel and quashed by this Court followed by participation as counsel of record in related hearings triggered by successful sanctions efforts of third-parties (1.7 James and 29.1 Josey totaling $9,070).[14]

5. Time Related to Initial Preparation of Sanctions Motion: 45 hours of Circuit Court work related to preparation of the Defendant's Motion for Sanctions (4.8 James and 41.2 Josey totaling $13,320).[15]

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[13] For each designated component, the Estate provided a short summary of why that component should be considered as part of the court's sanctions award. For this segment, the Estate stated: "Fees for this time should be awarded under Rule 11 because this reconsideration was filed by the disqualified Mr. Megna himself and represents part of his unreasonable but consistent and continual resistance to clear grounds for disqualification."

[14] For this segment, the Estate stated: "Fees for this time should be awarded under Rule 11 because this reconsideration was filed by the disqualified Mr. Megna himself which was found to be unauthorized by both this Court (and affirmed by the Court of Appeals). *It is such continued participation after disqualification that has already served as the basis for this Court's award of sanctions to third-parties subpoenaed in this matter* (Desa Ballard and Doug Truslow)." R. p. 974-975 (¶ 4). **Indeed, in the trial court's original consideration of these requests for sanctions, the Court issued a directive for Mr. Megna to self-report to the Office of Disciplinary Counsel and *sua sponte* issued a preliminary ruling that Mr. Megna serve 30 days of incarceration for criminal contempt. R. pp. 44-45. This criminal sanction was later withdrawn *ex parte* by the trial court.**

[15] For this segment, the Estate stated: "Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves)."

7. Other Time Related to Preparing and Arguing The Sanctions Motion: 11 hours of Circuit Court work related to preparation to argue and arguing the Defendant's Motion for Sanctions (5.5 James and 5.5 Josey totaling $2,750).[16]

8. Time Related to Court Directed Follow-Up To The Sanctions Motion : 8 hours of Circuit Court work related to time segregation by issue and preparation of this Court directed supplement (3.0 James and 5.0 Josey totaling $2,100).[17]

[16] For this segment, the Estate stated: "Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves)."

[17] For this segment, the Estate stated: "Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves)."

ARGUMENT

A) THE ESTATE'S MOTION FOR SANCTIONS WAS TIMELY.

PDHC argues that the trial court should have dismissed the motion for circuit court sanctions as untimely and outside the Court's jurisdiction. PDHC Brief at 4. Specifically, PDHC suggests that the Defendant's motion should have been filed within 10 days of the Court's decision to grant summary judgment (PDHC Brief at 5); ironically, PDHC has previously argued to both this Court and the Court of Appeals that the summary judgment order itself was entered without jurisdiction because of the previous interlocutory appeal of counsel's disqualification. Indeed, the additional confusion and litigation effort necessitated by PDHC's multi-staged appeals and repetitive manipulative efforts was part of the very basis of the Estate's motion for sanctions and the very reason that such motion was more efficiently filed and considered upon remittitur of the consolidated appeals.

The Estate could have filed a motion for sanctions after the trial court's decision (appealed) to dismiss the Probate Court Appeal (C/A No. 10-CP-16-0633), then filed a second motion for sanctions after the trial court's decision (appealed) to disqualify counsel, and then filed a third motion for sanctions within 10 days of the trial court's summary judgment decision (also appealed but jurisdictionally challenged in the trial court first) – but Estate counsel did not want to file three such motions further confusing the situation and taxing judicial resources. Moreover, Estate counsel did not want to appear to be using the threat of sanctions for some tactical advantage (prohibited by Rule 4.5 of the Rules of Professional Conduct and the same conduct for which sanctions were sought by the Estate). A piecemeal approach would not be an effective use of the trial court's time and is not required by the Rules because general jurisdiction

exists for the trial court's post-remittitur comprehensive consideration of sanctions in light of the totality of conduct demonstrated.

The Trial Court Here Chose To Rely Only On Rule 11

The trial court here chose to award sanctions pursuant to Rule 11. In the Estate's corresponding Brief in the cross-appeal, it argues that the Motion for Sanctions was also timely under the Frivolous Civil Proceedings Sanctions Act, S.C. Code § 15-36-10 et. Seq. (the "FCPSA") and therefore, the time responding to the Motion to Strike should also have been considered in making an award of sanctions.[18] For purposes, of responding to PDHC's appeal, however, it is sufficient for the motion to have been timely under Rule 11 alone.[19]

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[18] This time was excluded by the trial court in its April 15th order of sanctions which concluded that "in essence" PDHC had prevailed with regard to its motion addressed to the FCPSA. While the Motion was primarily focused on the FCPSA, it was not limited to that provision as the trial court's order suggest. It was the Memorandum in Opposition to the Motion for Sanctions (R.pp. 916-917) that first misrepresented the holding in Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006), suggesting it applied to Rule 11 sanctions as well barring them as untimely – something clearly rejected by the trial court.

[19] Notably, in addition to Rule 11 and the FCPSA, the Estate also relied upon the inherent power of the trial court to impose sanctions as needed to "impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers." United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993). Indeed, "[a]ny abusive litigation practice is sanctionable against a lawyer or client." Hon. G. Ross Anderson, Jr., Discovery Sanctions, 6 S.C. Lawyer 14 (1995). This is especially true when a lawyer's conduct rises above zealous representation to the level of manipulation of the legal system in an effort to inflict harm on an opposing party. See Shaffer Equip. Co. at 458 (stating that a lawyer's duty to "advocate vigorously [is] trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.")(emphasis added). The Estate would ask this Court to consider this inherent power as an additional sustaining ground if needed to affirm the award made by the trial court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) ("a respondent - the "winner" in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.").

Russell Case Misrepresented, *Again*

In its Brief (page 5), PDHC relies upon the case of Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) and represents that "The Supreme Court recognized that this ten (10) day jurisdictional limitation applies to Rule 11 sanctions motions, as well as motions under the FPA ...." ***This representation is simply not true.*** To the contrary, the Court expressly footnoted (footnote 11 of the opinion) that

> "There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment. See Ex parte Beard, 359 S.C. at 359-60, 597 S.E.2d at 839 (holding that a motion for sanctions pursuant to the FCPSA must be filed within ten days of notice of entry of judgment but not a motion under Rule 11). As a result, we decline to address what time limit is proper with regard to the Rule 11 sanctions because the issue is not before us."

Not only is the Russell case misrepresented to this Court, this misrepresentation occurs after footnote 11 was pointed out both in the Estate's original motion for sanctions (footnote 2) and in the Estate's Response to the Motion to Strike (page 5). Moreover, at the trial court hearing on sanctions, PDHC counsel acknowledged "there's a footnote in Russell which I frankly overlooked..." R. p. 177 lines 9-10). Somehow PDHC has overlooked that footnote *again* despite counsel's acknowledgment of the same in open court.[20]

[20] Indeed, in the wake of the Russell opinion, one Circuit Court Judge has recognized how the different time frame allowed by Rule 11 might render a timeliness argument under the FCPSA "moot as a practical matter." R. p. 895 (Hammer v. Hammer Circuit Court Order)(holding that multiple harassing actions brought by the Plaintiff "have resulted in Defendant incurring attorneys' fees and costs in two actions sponsored by him." FCPSA motion filed while awaiting formal summary judgment order but not served until some 13 days after the formal order). This order for sanctions was affirmed by an unpublished opinion which is not cited pursuant to SCACR 268(d).

The Precedent For Longer Time For Rule 11 Sanctions

While the Russell opinion did not need to reach or specify a specific time window for Rule 11 sanctions, a window as long as 363 days has been approved by this Court in Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004). Of course, Beard was cited in the PDHC's motion to strike because it followed the Court's previous limitation of FCPSA found in Pitman. ***What is most notable about Beard, however, is not that it followed existing law found in Pitman for the FCPSA, but that it inherently made new law by allowing a very different time window for sanctions under Rule 11.*** [21] Again, this different time frame for Rule 11 sanctions is misrepresented in PDHC's brief (page 5).

Remittitur Reopens A Window Of General Trial Court Jurisdiction

As noted in the Estate's Motion for Sanctions in the trial Court, our Supreme Court has clearly provided that the issuance of the remittitur returns general jurisdiction to the trial court for actions consistent with the appellate court ruling. See Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999)(Supreme Court recognized that original trial judge may exercise jurisdiction following an appeal – in a manner consistent with the appellate decision – even if that original judge is not a resident of or then assigned to the circuit where the case arose); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)(*"Once the remittitur is sent down from this Court, Circuit Court acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court ruling."*) (emphasis

[21] Also important is the type of "jurisdiction" generally lost by a trial court after a matter is concluded – as the Supreme Court also noted in Russell, "Jurisdiction refers to the trial court's authority to retain jurisdiction over the case, *not the court's subject matter jurisdiction.* See Ex parte Beard, 359 S.C. at 358 (Explaining that the ten day rule is a time limitation on the court's ability to retain the case not the power of the trial court to hear cases of that nature)." (emphasis added). In Beard, the Court agreed that the rules limiting time for post-trial motions were "rules of limitation, not of jurisdiction." Id.

added)[22]; Hamm v. Southern Bell, 305 S.C. 1, 406 S.E.2d 157 (1991) ("Further, although we did not expressly "remand" the case, no such instruction was necessary under the facts of this case. Section 18-9-270 provides that "the Supreme Court may reverse, affirm or modify the judgment decree or order appealed from in whole or in part and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to the law."); see also McDowell V. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) (holding that statutory time within which to petition for attorney's fees began to run following remittitur – the "final disposition"). PDHC's Brief, like its earlier Motion to Strike, fails to address any of these cases supporting the return of general jurisdiction to the trial court after an appeal. While the Estate does not suggest that the window of opportunity is without any limitation, such as that imposed by the equitable doctrine of laches, there is ample support for the trial court's ruling here that the window for Rule 11 sanctions was open for at least 10 days following remittitur of a complex multi-staged appeal. Indeed, PDHC has recognized that window in other litigation before this Court.

Judicial Estoppel -- PDHC Also Recognizes A Sanctions' Window After An Appeal

In a Brief filed with this Court appealing the award of sanctions to Attorney Doug Truslow in the Anasti case (Tracking Number 2013-001461), PDHC acknowledged the trial

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[22] In Muller, the prevailing party failed to file his petition for appellate fees and costs (under SCRAP 222) on time as the remittitur had already been sent to the trial court. The prevailing party then petitioned for both trial and appellate fees and costs in the Circuit Court – filing that Circuit Court petition *more than* 26 days after the remittitur had been sent (actually the Rule 222 petition to the Court of Appeals was filed 26 days after remittitur, then, after that appellate petition was rejected as jurisdictionally tardy, the Circuit Court petition was filed). The Muller trial court held that it was without jurisdiction. On appeal, the Supreme Court responded *"The holding of Circuit Court that it was without jurisdiction to adjudicate the issue of attorney's fees was erroneous.* Id. at 415, 438 S.E.2d at 249 (emphasis added).

court's reacquisition of jurisdiction to decide a sanction's motion following a remittitur.[23] On page 10 of that Brief, the same PDHC asserts an argument entitled "**The lower court erred in allowing Truslow to proceed on a motion for sanctions filed more than ten days after remittitur of the Anasti case.**" Citing valid authorities for the trial court's reacquisition of jurisdiction to enforce judgments and take actions consistent with the appellate court's rulings, PDHC states, "Here, the remittitur was issued on October 7, 2011, but Truslow's motion was not filed until November 21, 2011 – much more than ten days after the remittitur." R.p. 909-910. Having implicitly recognized the trial court's jurisdiction to consider a request for sanctions filed within 10 days of remittitur, PDHC now inconsistently argues that those 10 days are not available to this Estate. In the Anasti sanctions' appeal, PDHC recognized the renewed window for Rule 11 Sanctions was open for 10 days following remittitur; PDHC should now be judicially estopped from taking a contrary position.[24] See e.g., Hayne Federal Credit Union v. Bailey, 327 S.C. 242,489 S.E.2d 472 (1997) (doctrine of judicial estoppel prohibits a party that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings); Quinn v. Quinn, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000)(As Judge Ralph King Anderson's concurrence put it, "a litigant cannot 'blow both hot and cold'.").[25]

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[23] In the Anasti case, Truslow allegedly sought sanctions only after remittitur under Rule 11.

[24] The authority cited by Plaintiff in its Anasti brief for the 10 day limit to Rule 11 jurisdiction following remittitur includes Pitman which is neither a Rule 11 case nor a post-remittitur case. Likewise, Plaintiff also cites SCRCP 59 regarding post-trial motions -- not expressly applicable to the post-remittitur general jurisdiction of the trial court. Finally, the Plaintiff cites Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999). Cox is not a sanctions case but it does stand for the proposition, discussed in the text above, that the original trial judge reacquires jurisdiction to deal with remanded issues following an appeal regardless of that judge's subsequent venue or residency.

[25] The window of jurisdiction opened by remittitur may not be limited to 10 days– the Supreme Court allowed more than double that in Muller where, like both Rule 11 and the FCPSA, the

B) THE TRIAL COURT'S FINDINGS OF SANCTIONABLE CONDUCT HAVE REASONABLE SUPPORT IN THE RECORD.

In relevant part, Rule 11(a) SCRCP provides: "Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar." The Rule further provides that by his signature, the submitting attorney is certifying 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. Rule 11 expressly provides for sanctions in the case of violations, stating "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

Pursuant to Rule 11, "the Court may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) (emphasis added) (upholding imposition of sanctions where statements in affidavit were contradicted by affiant's deposition testimony).

1) Limited Scope of Review for Rule 11 Sanctions

"On appeal, the imposition of sanctions pursuant to this rule will not be disturbed absent

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statutory provision expressed no clear cap on the duration of available jurisdiction. In McDowell, the statutory fee provision provided for both a trigger ("final disposition") and a duration of availability ("30 days"). Again, the Estate would concede that any post-Appeal jurisdictional ability to initiate consideration of sanctions could be limited by laches under both Rule 11 and FCPSA. No one has suggested laches here – and it is clearly not applicable.

an abuse of discretion." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) (also quoting Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) ("An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support.")).[26] This limited scope of review alone prohibits the kind of *de novo* equitable review suggested by Section V of PDHC's Brief as Appellant.[27]

2) The Trial Court Conclusion That The Request For Reconsideration Of Disqualification Was Sanctionable Has Reasonable Factual Support In The Record.

As outlined in the Statement of Facts, Mr. Megna's conflict in this matter was obvious from the moment the probate claim was asserted. Indeed, the Estate argues in its cross-appeal that Mr. Megna's insistence on making any appearance in the filed litigation was without merit. Certainly by the time the Court had issued its thorough and well-reasoned order on April 15,

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[26] Notably, this limited scope of review of a Rule 11 order of sanctions differs from review of attorney fee awards under the FCPSA where an appellate court "takes its own view of the evidence." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 18, 633 S.E.2d 722, 729 (2006) (citing Father v. S.C. Dep't of Soc. Services, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003)). See also Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002) (Chief Judge Hearn noting that as a statutory attorney fee award, the FCPSA sounds in equity and is subject to the appellate court's own view of evidence). Of course, the difference in review is derived from the fact that Rule 11 is not a statutory provision for attorney's fees – it is a provision for discretionary sanctions which may include, but does not have to include, an award of attorney's fees.

[27] In Section V of PDHC's Brief as Appellant, it again raises the issue of Turner Padget's unrelated and terminated representation of PDHC in an older worker's compensation matter. The suggestion of this terminated relationship being inequitable, unethical, or disqualifying for Turner Padget has been considered and rejected by the worker's compensation commission, by the Circuit Court, by the Office of Disciplinary Counsel, and by this Court. PDHC does accurately cite to Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011) for the proposition that the determination of whether to award sanctions is treated as one in equity. Southeastern Site relies upon the Beard and Gregory cases, however, to expound upon a somewhat mixed scope of review; all three cases also involved review under the FCPSA. The Russell language used above is more recent than the Beard decision and is also uniquely focused upon Rule 11 at that point in the opinion. Regardless of the scope of review, there is no evidence that the Estate's conduct has been inequitable.

2011, the facts necessitating Mr. Megna's disqualification were obvious and his refusal to accept those facts led to frivolous efforts including the motion to reconsider the disqualification. Thus, the trial court's award of sanctions for this conduct is well supported in the record. Moreover, at the hearing before the trial court, PDHC counsel conceded that Mr. Megna "shouldn't have been in from the get-go and your Honor correctly ruled he was going to be a witness." R. p. 186 lines 16-18. Given this concession, PDHC should be *judicially estopped* to argue that the Motion to Reconsider Disqualification was not frivolous. Again, as Judge Ralph King Anderson put it, "a litigant cannot 'blow both hot and cold'." Quinn v. Quinn, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000).

As important as the right to counsel of choice is, that right does not remove the ethical grounds for disqualification clearly present and repeatedly ignored in this case. Indeed, both the trial court (twice)[28] and this Court (R. p. 522) have itemized the areas in which Mr. Megna's undenied role as CEO of PDHC renders him a necessary witness for relevant and needed factual inquiry. By ignoring this role, these facts, or the applicability of Rule 3.7 of the Rules of Professional Conduct, PDHC and Mr. Megna do a disservice to themselves but more importantly do a disservice to the Courts, the profession, and the Defendant. This disservice warrants the sanctions sought herein.

The protests of Mr. Megna and the PDHC to his disqualification also failed to ring true when the involvement of experienced co-counsel from the very beginning is noted. While Mr. Megna has subsequently suggested that Mr. Matthew's involvement was merely "ministerial"[29],

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[28] R. p.1 (Original Disqualification Order) and R. p.10 (Order Denying Reconsideration of Disqualification).

[29] This description was used by Mr. Megna in oral argument before this Court when responding to a question from Judge Williams at seeking to confirm lawyer Matthews's involvement in the

the Estate suggests that the requirements of SCRCP 11 do not allow involvement of record counsel to be so limited.

Moreover, the Record reflects that Mr. Megna's most visible involvement in the case (such as signing pleadings, discovery requests and responses, etc.) didn't begin until eight months after the case started and then only after the grounds for the Probate Court appeal were filed late by Mr. Matthews. R. p. 598-615 (Grounds for the Probate Court appeal as filed in both Circuit Court and Probate Court).

3) The Trial Court Conclusion That The Subpoenas Issued By Disqualified Counsel Were Sanctionable Has Reasonable Factual Support In The Record.

The disqualification of Mr. Megna was made clear by the trial court on March 16th and again on April 15, 2011. Despite this clear disqualification, on or about July 27, 2011, Mr. Megna prepared and served a comprehensive set of subpoenas on each counsel for the Estate, their law firms, as well as other lawyers and firms not of record in this matter. R. pp. 979-990 (copies of subpoenas). Each counsel for the Estate filed an objection to the subpoena as unauthorized and filed a corresponding motion for protective order. The Estate's motion for protective order stated in part:

> While defense counsel chose not to object to the limited role of former counsel Megna in arguing summary judgment motions and a motion to reconsider, Mr. Megna is, in fact, disqualified in this litigation. It has been defendant's consistent position that Mr.

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matter. When asked why Mr. Matthews didn't just sign the Rule 59(e) Motion on Summary Judgment, Mr. Megna suggested that Mr. Matthews didn't really know anything about the case. In response, Judge Williams pointed out fact that Mr. Matthews had signed the Complaint (in addition to other documents not raised by Judge Williams); Judge Williams' response prompted the "ministerial" characterization.

Notably, immediately after oral argument, it was Mr. Matthews who was knowledgeable enough to file a bizarre post-argument Motion to Vacate. Mr. Matthews also wrote the Court of Appeals in response to the Estate's Reply to that post-argument motion.

> Megna should not be involved in discovery or trial as counsel given his status as a witness. Thus, Defendant objects to any further involvement by Mr. Megna.
>
> Defense counsel is well aware that Mr. Megna has also continued to correspond with the Court subsequent to the motion hearing, and defense counsel believes it best not to respond to non-pleadings; this does not, of course, signify any agreement or acquiescence to the content of the Megna correspondence. ***Moreover, these non-pleadings provide no basis for the Court to delay determination of the merits of Defendant's pending motion for summary judgment – which is based upon the preclusive effect of an existing federal judicial determination regarding the Plaintiff's credentialing failures – a basis immune from anything sought in the subject subpoenas or raised in the Megna correspondence.***

R. pp. 271-273 (Motion for Protective Order with Attached Objections). The other attorney recipients of similar subpoenas filed their own objections to these unauthorized and irrelevant discovery attempts; these other motions included requests for sanctions against Mr. Megna in this case. Although the Estate's counsel chose not to seek such sanctions at the time because of the on-going multi-staged litigation, Estate's counsel did have to monitor and attend multiple hearings and related communications related to these motions. R. pp. 974-975 (Supplemental Affidavit).

Before any hearing on the motions filed in response to the numerous subpoenas drafted and served by Mr. Megna, the trial court issued its order of August 12, 2011 holding that "all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED." R. p.10 . Regardless of this order, however, the effort of the other attorneys to recover sanctions continued; indeed, the trial court's ultimate order of civil sanctions is on appeal to this Court now.

The trial court's order of summary judgment followed by this Court's affirmation – both available to the trial court when the Estate ultimately asked for the instant sanctions – made it

clear that this attempted discovery was without merit. Counsel was properly disqualified and therefore not authorized under Rule 11 to execute any pleadings or discovery. Moreover, the well-discussed merits of the underlying Medicare administrative issue confirmed the total irrelevance of any such discovery. Thus, the trial court's decision to issue corresponding sanctions has reasonable support in the record.

C) THE TRIAL COURT'S AWARD FOR THE SANCTIONABLE CONDUCT HAS REASONABLE SUPPORT IN THE RECORD.

In PDHC's Brief as Appellant (pages 9-10), it is argued that the trial court's award is erroneous because it contains inappropriate time elements and/or lacks "sufficient information" to determine if the claimed time was "reasonable and necessary." The record, however, contains detailed affidavits of counsel which clearly delineate the time spent on various aspects of the case as requested by the trial court. These affidavits provide reasonable support for the trial court's award which is all that is necessary given this Court's limited scope of review.[30]

Ignoring the Supreme Court's holding in Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (legal fees also incurred in seeking sanctions themselves may be recovered),[31] section IV

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[30] The case of First Union National Bank v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998), cited by PDHC is not a sanctions case -- it is a case in equity where the scope of review is much broader. Moreover, the appellate court did not reverse the trial court's award of fees to the Respondent trustee (the Bank) but rather only remanded the matter for a greater refinement of the attorney fee claim since the record made it impossible to determine the time devoted to the relevant issue. In this case, the supplemental affidavits provide just such refined detail. Moreover, if somehow inadequate, the remedy is not to deny the claim as PDHC's Brief suggest but rather remand the matter. But given the reasonable support in the record and limited review, remand is certainly not needed.

[31] Gregory involved parallel claims under both Rule 11 and the FCPSA. The Supreme Court found that with regard to Rule 11 sanctions, the trial court "did not abuse its discretion by awarding sanctions against the appellant." The trial court's award of Rule 11 "sanctions" included attorney's fees and costs incurred in defending the matter and pursuing sanctions. The Appellant argued that the latter portion of the award was not allowed by the FCPSA. The court also found that the provisions of the FCPSA clearly allowed for the recovery of fees and costs incurred by a party in seeking sanctions.

of PDHC's Brief suggest that the trial court erred in awarding fees corresponding to time spent on the Motion for sanctions itself. PDHC argues that because only one of the Estate's bases for sanctions (three actually) was relied upon by the trial court then the sanctions awarded should be reduced proportionally. This section of the PDHC's Brief cites no legal precedent or authority. PDHC made this same argument before the trial court and the trial court, in its discretion allowed by Rule 11, chose to set sanctions based upon certain elements; that decision certainly has reasonable support in the record.

CONCLUSION

In this matter, the interlocutory appeals of probate issues and disqualification issues led the Estate to delay the pursuit of trial court sanctions until the matter was again consolidated and finalized. This delay should be approved by the Court – because it promoted efficient use of legal and judicial resources – and because it is consistent with the law of this State.

Abusive practices like those pursued by the PDHC and its lawyers in this Court are not only harmful to the other litigants in this case and the disposition of justice in this case – but to the public trust in the entire judicial system and the rule of law. Only sanctions will address these abuses and deter others inclined to employ such tactics. Only sanctions can help restore the Estate to an equitable position and only sanctions can restore the erosion of trust brought about in this case.

Through no fault of their own, and without any liability of their father's Estate, the heirs of the Estate have incurred substantial legal fees far beyond anything they anticipated or could afford. These heirs have already borne the emotional hardship of uncertainty and delay; they should not have to bear these costs as well. Under Rule 11, the trial court has discretion to determine sanctions provided there is reasonable factual support for its decision in the record.

Here there is abundant support for the trial court's limited award of sanctions as well as much more. At the very least, the existing award should be affirmed.

Respectfully Submitted,

Florence, South Carolina

March 5th, 2015

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ATTORNEYS FOR RESPONDENT-APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
MAR 11 2015
SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332 (Probate Claim)
CASE NO. 2010-CP-16-0333 (Probate Court Appeal)

Tracking Number: 2014-001275

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Brief of the Respondent-Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

3/10/2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Respondent's Brief of the Respondent-Appellant, together with its Rule 211(b) certificate of compliance, and this certificate of service, have been served on counsel for the Appellant Respondent by depositing one copy each of the same in the United States mail, postage prepaid, and addressed to James M. Griffin, Esq., and Ariail E. King, Esq., Lewis Babcock and Griffin, LLC, PO Box 11208, Columbia, South Carolina 29211 on March 10, 2015.

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