

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED  
APR 09 2015  
SC Court of Appeals

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

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

Respondents.

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**INITIAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

1. **Can a counterclaim be dismissed without an order dismissing the claim where a responsive pleading has been filed?**

### 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., (ECCH). (Summons and Complaint) ECCH timely answered on September 17, 2010, (Answer) The Answer included three counterclaims, one for abuse of process, another for malicious prosecution, and a third, stylized as a "counterclaim and motion: for relief under the South Carolina Frivolous Proceedings Sanctions Act SC Code section 15-36-10. The Defendants thereafter filed an amended answer and counterclaims, which included the same counterclaims. (Amended Answer). The case progressed through an unsuccessful motion to dismiss by the Defendant. Plaintiff filed a motion to dismiss Defendants' counterclaims for malicious prosecution and for sanctions pursuant to the South Carolina Frivolous Proceedings Sanctions Act (SCFPSA). The motion also included a motion to strike irrelevant material from the Defendant's Answer, which had been filed with over a hundred pages of attached documents and averments which were irrelevant unnecessary in the pleading. (Plaintiff's Answer to Counterclaims and motion to dismiss and motion to strike).

ECCH filed a motion for Summary Judgment and a motion to dismiss for lack of jurisdiction on June 6, 2011 without supporting memorandum. (Defendant's Motion for Summary Judgment) Dr. Holmes filed a responsive memorandum (Response to Summary Judgment), including affidavits from her expert, Dr. Shershow and an affidavit from Dr. Holmes both supporting her claims. ECCH filed a memorandum in support of its motion, but never did file a responsive brief to Plaintiff's motions to dismiss and the motion to strike. (Defendants'

Memorandum in support of Summary Judgment) A hearing was held before Judge Harrington on July 8, 2011. At the hearing, the Court took the parties' arguments and submissions under advisement, and asked the parties to submit proposed orders. (Hearing transcript 7-8-11) Both parties timely submitted proposed orders, as requested. (Three proposed orders, located at ROA 1415, 1422, 1425 of the original appeal) Plaintiff's proposed order included rulings on the motions to dismiss two of the three counterclaims and on the motion to strike. The ECCH proposed one order granting its motion and another denying Plaintiff's motion to dismiss. On July 26, 2011, Judge Harrington signed the Order proposed by ECCH regarding the dismissal of Plaintiff's claims for lack of jurisdiction. It was filed on July 29<sup>th</sup>. (Order 7-29-11) Judge Harrington did not sign either of the proposed orders regarding Plaintiff's motions to dismiss the two counterclaims and strike parts of the Answer. The Court simply failed to respond at all on these issues, leaving the counterclaims for malicious prosecution and abuse of process as active claims. ECCH filed a motion for sanctions against Dr. Holmes on August 8, 2011 under the SCFCPSA. Dr. Holmes timely filed a notice of appeal as to the July 29<sup>th</sup> Order on August 24<sup>th</sup> and her response to the Defendant's motion for sanctions on October 21, 2011. Judge Harrington held a hearing on the motion for sanctions in Charleston on November 22, 2011. Judge Harrington granted the motion for sanctions against the Plaintiff in an Order drafted by defendants, and signed 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. After the denial of a motion for reconsideration on March 7<sup>th</sup>, Dr. Holmes filed an amended notice of appeal on 3-21-12 to include Judge Harrington's Order denying the motion for reconsideration. The Appeals were ultimately combined and heard by the Supreme Court on March 19, 2013. The Supreme Court issued an Opinion affirming the dismissal of the Plaintiff's claims and the order for sanctions a year later, on

March 26, 2014. (Supreme Court Opinion, March 26, 2014)

Once the case was remitted to the Charleston County Circuit Court, Dr. Holmes filed a motion to withdraw the motion to dismiss counterclaims and to strike. (Motion to withdraw motions) At that point, as the Supreme Court had finally ruled as to the dismissal of the Plaintiff's claims. The counterclaims remained pending, and the motion to dismiss the counterclaim for malicious prosecution, which was based on an argument that the Plaintiff's claims had not been finally adjudicated, was moot. The Defendants, rather than responding to the motion, sent a letter to Judge Dennis, asking him to administratively strike Dr. Holmes' motion from the roster, rather than hear it. (Letter of October 16, 2014) The Judge did set a hearing for October 27, 2014. The defendants never filed a response to the motion, but were present at the hearing. Judge Dennis heard arguments on October 27, 2014 (Transcript of hearing 10-27-14) and dismissed the motion with a form Order dated November 3, 2014. (Order 11-3-14) Dr. Holmes then submitted a motion for reconsideration, which she signed herself, on November 19, 2014. (Motion for reconsideration) That motion was denied by form order, by Judge Dennis, on December 3, 2014. (Order of 12-3-14) Dr. Holmes filed a notice of appeal dated December 3, 2014 that she signed herself, and another dated January 15, 2015, signed by attorney Charles Goldberg, appealing the two orders, respectively. (NOA 12-3-14; NOA 1-15-15) This Court granted a motion for the undersigned to substitute for Mr. Goldberg as Appellant's attorney of record on February 26, 2015. Respondent has filed a motion for dismissal, raising some procedural issues regarding the notices of appeal. Appellant has responded. Respondent replied. This motion is currently pending the Appellate Court's review and decision.

### FACTS

The facts relevant to the issues raised in this appeal are somewhat bizarre, if not unique. Dr.

Holmes filed a complaint against the Defendants in 2010. The nature of the claims is not relevant to this appeal. Generally, she was alleging a breach of a former settlement agreement between the parties under a breach of contract cause of action. (Complaint) The defendant responded with a denial, affirmative defenses, and three counterclaims. (Answer) Two were actual causes of action recognized by South Carolina common law, abuse of process and malicious prosecution. The third, a request for sanctions under South Carolina's Frivolous Civil Proceedings Sanction Act (FCPSA), was to be treated as a motion because the statute did not actually create a cause of action, but rather a vehicle for a motion. Initially, Plaintiff filed a motion to dismiss the counterclaim for malicious prosecution and the FCPSA claim on the grounds that both required that the action complained of be terminated before a claim could be made. Abuse of process did not have this requirement. (Answer to Counterclaims and Motion to dismiss and strike 10-11-10) The Defendants had also made a motion to dismiss as part of their Answer. The motion to dismiss was unsuccessful. Whether it was denied or not remained a point of contention for years to come, and is not relevant here. Plaintiff's motion to dismiss and to strike did not come before the Court until July 8, 2011, when Judge Harrington heard the Defendants' motion to dismiss. After the hearing, she asked for proposed orders from the parties. Dr. Holmes submitted a proposed order which addressed the Defendants' motions as well as her motions to dismiss and to strike. (Plaintiff's proposed order) Defendants submitted a proposed order as to their motion and a separate one regarding Plaintiff's motion. (Defendants' two proposed orders) Judge Harrington signed the Order regarding the Defendants' motion to dismiss but never addressed the Plaintiff's motions. (Order granting Defendant's motion to dismiss) To date, no order has ever been given addressing the Plaintiff's motion to dismiss the two counterclaims or the motion to strike scandalous and irrelevant portions of the Answer. Once Plaintiff's claims had been dismissed, Defendants brought

the motion for sanctions under SCFCPSA and were successful. (Order granting sanctions) Plaintiff pursued appeals of both orders and was ultimately unsuccessful, as they were affirmed in an Opinion from the Supreme Court filed on March 26, 2014. (S.Ct. Opinion 3-26-14) The question then remained, "what happened to the two remaining counterclaims for abuse of process and malicious prosecution?" Plaintiff's outstanding motions to dismiss were based on an argument that Defendant could not show that the Plaintiff's claims had been finally adjudicated (a required element for each). After the March 26<sup>th</sup> opinion from the Supreme Court, the Plaintiff's claims had clearly been adjudicated. Thus the pending motions to dismiss would be moot, or at least incorrect. Once the case was remanded to the Circuit Court, however, the counterclaims, at least for malicious prosecution and abuse of process, were still pending. No order had ever been entered dismissing either one. Plaintiff had demanded a jury trial in the initial filing (Civil Action Cover Sheet filed with Complaint 4-26-10) and wanted to exercise her right to defend herself in a jury trial as to the remaining counterclaims against her. Because the motions to dismiss the Counterclaims were now based on incorrect information, Dr. Holmes filed a motion to withdraw her October 2010 motion to dismiss upon which Judge Harrington had simply never ruled. (Motion to withdraw motions) Rather than actually responding to the motion, Defendants' attorneys wrote a letter directly to Judge Dennis, a judge who had sanctioned Dr. Holmes in the past and actually initiated a disciplinary action against her. The Defendants were aware of this because they were the ones who had been awarded sanctions and urged Judge Dennis to initiate the ethics complaint against Dr. Holmes, who was also a licensed South Carolina attorney. In their letter, the Defendants' attorneys asked Judge Dennis, as Chief Administrative Judge, to strike the Plaintiff's motion from the calendar rather than having a hearing. The purpose of this request, candidly stated by Defendants' attorneys, was to do away with the counterclaims in such a manner

as to avoid an order being entered which could be appealed by Dr. Holmes. (Letter of October 16, 2014) Of course, dismissing a counterclaim without an Order where a responsive pleading has been filed violated Rule 41 of the South Carolina Rules of Civil procedure, as is discussed in more detail below. Judge Dennis did, in fact, schedule a hearing before himself regarding Plaintiff's motion. At the hearing, he issued a fairly bizarre finding and Order from the bench. He found that there were no counterclaims pending and that "there's no motion to dismiss because there's nothing to dismiss." (Transcript of hearing October 27, 2014) He issued a form order, noting that it ended the case, stating "Plaintiff's motion to withdraw the motion to dismiss, filed on 7/07/2014, is not a viable motion; no viable motions pending in this resolved case." *Id.* The question in this appeal is whether the Defendants' counterclaims could simply have disappeared without any order actually dismissing them, thereby denying her the right to defend herself on such claims before a jury or to address the dismissal of those claims through an appeal or otherwise.

## ARGUMENT

### **I. Standard of Review**

The alleged errors at issue in this case are errors of law. This court is free to decide matters of law with no particular deference to the lower court. *Pressley v. REA Constr. Co.*, 374 S.C. 283, 287, 648 S.E.2d 301, 303 (Ct. App. 2007).

### **II. A counterclaim cannot be dismissed without an order dismissing the claim where a responsive pleading has been filed.**

In this case, the Defendants brought counterclaims, two causes of action plead under South Carolina common law, against the Plaintiff. (Answer and Amended Answer) The record clearly reflects that Plaintiff had made a proper demand for a jury trial (see Complaint and Civil Cover sheet) in the Charleston County Circuit Court, and properly answered the counterclaims, denying liability. Rule 41 of the South Carolina Rules of Civil Procedure governs the dismissal of

counterclaims. As the rule (provided below) clearly states, a counterclaim may not be dismissed without an order unless it is done so before a responsive pleading is filed. Because Plaintiff filed an answer to the counterclaims and motion to dismiss, the Defendants' counterclaims (*See Plaintiff's Answer to Counterclaims*) could not have been dismissed without an order.

## Rule 41. Dismissal of Actions

### (a) VOLUNTARY DISMISSAL.

#### (1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) DISMISSING A COUNTERCLAIM, CROSSCLAIM, OR THIRD-PARTY CLAIM. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. **A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:**

**(1) before a responsive pleading is served; or**

**(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.**

(Rule 41, SCRPC, emphasis added)

It is undisputed that there has never been any order actually dismissing those counterclaims.

The discourse on the subject between Mr. Johnson, counsel for Dr. Holmes, and Judge Dennis at the October 27<sup>th</sup> hearing makes it perfectly clear that the Court recognized this as well:

MR. JOHNSON: Your Honor, I just don't have any order saying that the counterclaims were ever dismissed, and I'm just trying to defend my client.

THE COURT: Well, I appreciate that. I think it really goes without an order when everything is resolved. It's basically – It's been done. It's moot at this point as far as the Court is concerned. So I don't think there's any motion to be heard. Thank you.

(Hearing transcript 10-27-14)

The Appellant's position is that, legally, this claim cannot be dismissed without an Order. The undersigned has not been able to find any instance, in any jurisdiction, where a claim or counterclaim that was answered is dismissed without any action from the Court, in the form of an Order. Orders are necessary, not only to give an aggrieved party, who disagrees with the Order, something to appeal, but Orders are the very vehicle for the Court to express its decision and exercise its authority. Even after finding that the counterclaims in this case were somehow dismissed without an Order, Judge Dennis, himself, expresses the Appellant's position in this appeal:

THE COURT: We will just do a form order that says no viable motion pending. I don't know of any other – we've got to do something to dismiss it.

(Hearing Transcript 10-27-14)

In this case it seems overwhelmingly clear that the Defendants and the Court are trying to avoid issuing an order dismissing the Defendants' counterclaims because they want to do away with the remaining claims in the case in a way specifically and intentionally designed to deny a party an opportunity to appeal. The letter from the defendants to the Judge says it all. I urge the Court to read it in its entirety. (Letter of October 16, 2014)

What is so patently unjust about this situation is that, throughout about two and a half years, while Dr. Holmes was appealing the sanctions order from Judge Harrington, the Defendants had

these two counterclaims pending as a “back up” should the appeal successfully defeat the sanctions order, which would have allowed them a “second bite at the apple.” The Defendants have had the right to file a motion to voluntarily dismiss the counterclaims at any time, but they did not. Certainly, had Dr. Holmes’ appeal of the sanctions awarded to the Defendants been successful, they would have insisted on pursuing her through the pending counterclaims. Only when the appeal had failed to reverse the sanctions order did the Defendants, who had now gotten what they wanted without ever having to actually prove their claims of abuse of process and malicious prosecution on the merits, try to get out of having to actually face Dr. Holmes on the merits of their claims before a jury. Rather than simply move to dismiss voluntarily, they tried to do so in a manner which was highly irregular, if not unique in the history of practice here in South Carolina, writing a letter to the judge who had previously sanctioned the Appellant and asking him to simply strike the motion from the calendar rather than have a hearing, a plan that was designed to make it impossible for Dr. Holmes to plead her case before a jury, to exercise appellate rights or to move for any sanctions regarding the counterclaims.

Although, at first glance, in the big picture, it may appear absurd for the Appellant to be insisting that claims against her should not be dismissed, she is, quite simply, correct, in this matter of law, and dead set on at least having an opportunity to be judged by a jury of her peers regarding the claims that the defendants have brought against her. The right to a jury trial is no mere procedural matter, but one of the most, if not the most sacred constitutional right that is reserved to “the people,” as citizens of the United States and of the State of South Carolina. 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.

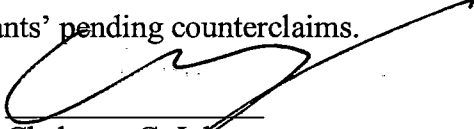
Appellant has advanced arguments as to the constitutionality of allowing a litigant to pursue damages through SCFPSA (which allows a motion which sets extremely low standards for awarding sanctions and allows the respondent no opportunity for a jury trial) in Supreme Court on two occasions, but did not receive a ruling on the issue. Generally, the argument is that 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 (one of the counterclaims brought by the Defendants in this case) 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. 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 would have 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 more easily. It is not.

While the constitutionality of the SCFPSA may not be the issue before this court, directly, in this appeal, the issue before the Court, whether claims can be dismissed without an order, is just as important to the protection of the sanctity of our constitutional right to a jury trial, due process, and

the opportunity for judicial review.

**CONCLUSION**

Counterclaims cannot be dismissed without some Order from the Court dismissing them, once a responsive pleading has been filed. To allow this denies any aggrieved party the right to oppose the motion, to jury trial regarding the issues raised and to appellate review. The Defendants' counterclaims in this case should have either been tried or dismissed on order of the Court. The Court's authority is executed through orders. Just saying that the case was concluded and the counterclaims have vanished does not make it so... not without an Order. The Appellant respectfully requests that the Appellate Court remand this case to the Charleston County Circuit Court for further proceedings regarding the Defendants' pending counterclaims.



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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 on this date, April 6, 2015.



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April 6, 2015

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South Carolina Court of Appeals  
The Honorable Jenny Abbott Kitchings  
Clerk of Court  
1015 Sumter Street  
Columbia, SC 29201

Re: Holmes v. ECCH  
App. Case No. 2015 - 000187

Dear Ms. Kitchings:

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

Cc:  
Lindsay Smith-Yancey  
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