RECEIVED

MAR 1 1 2015

SC Court of Appeals

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.

APPELLANT'S BRIEF *OF THE RESPONDENT-APPELLANT*

TURNER, PADGET, GRAHAM & LANEY, P. A.

J. René Josey
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

PAULLING AND JAMES, LLP
John Jay James, II
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

ATTORNEYS FOR RESPONDENT-APPELLANT

INDEX

Page

I. TABLE OF AUTHORITIES iii

II. STATEMENT OF ISSUES ON APPEAL 1

III. STATEMENT OF THE CASE 2

IV. STATEMENT OF THE FACTS 6

V. ARGUMENT 14

THE TRIAL COURT ERRED IN FAILING TO GRANT ADDITIONAL SANCTIONS

A) GIVEN THE LAW OF THE CASE, THE TRIAL COURT ERRED IN CONCLUDING THAT THE UNDERLYING CLAIM HAD "GOOD GROUND TO SUPPORT IT"

B) GIVEN THE LAW OF THE CASE, THE TRIAL COURT ERRED IN CONCLUDING THAT THE PROBATE APPEAL HAD "GOOD GROUND TO SUPPORT IT"

C) GIVEN THE LAW OF THE CASE, THE TRIAL COURT ERRED IN CONCLUDING THAT PDHC'S INITIAL OPPOSITION TO COUNSEL'S DISQUALIFICATION HAD "GOOD GROUND TO SUPPORT IT"

D) THE TRIAL COURT ERRED IN CONCLUDING THAT THE CLAIM TO SANCTIONS UNDER THE FCPSA WAS UNTIMELY THEREBY DENYING THE CORRESPONDING AWARD OF FEES FOR TIME SPENT IN RESPONSE TO PDHC'S MOTION TO STRIKE

VI. CONCLUSION 27

TABLE OF AUTHORITIES

Page

I. STATUTES AND COURT RULES

South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code § 15-36-10 et. Seq. 24

S.C. Code § 15-36-10(C) (1)....................24

S.C. Code § 18-9-270....................26

S.C. Code § 19-11-20....................19

S.C. Code § 62-1-302....................2, 7

S.C. Code § 62-1-308....................10, 17

Rule 11, South Carolina Rules of Civil Procedure 7, 16, 17, 18, 20, 23, 25

Rule of Professional Conduct 3.7, SCACR 407 19

Rule 222, South Carolina Rules of Appellate Procedure....................26

II. CASES

Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999) 25

In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005)....................11, 17

Droste v. Julien, 477 F. 3d 1030 (8th Cir. 2007) 20

Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010)....................15

Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002)....................11, 17

Hamm v. Southern Bell, 305 S.C. 1, 406 S.E.2d 157 (1991) 26

Hayne Federal Credit Union v. Bailey, 327 S.C. 242,489 S.E.2d 472 (1997) 18

Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) 8

McDowell V. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) 26

Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993) 25, 26, 27

Pitman v. Republic Leasing Company, Inc.,
351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002) 23, 24, 25, 26, 27

Quinn v. Quinn, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) 18

Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) 25

Rutland v. Holler, Dennis, et.al., 371 S.C. 91, 637 S.E.2d 316 (2006) 24

United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993) 25

Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996) 11, 17

World Youth Day, Inc. v. Famous Artist Merc. Exchange, Inc., 866 F .Supp. 1297 (D. Colo. 1994) 20

III. OTHER AUTHORITIES

Hon. G. Ross Anderson, Jr., Discovery Sanctions, 6 S.C. Lawyer 14 (1995) 25

STATEMENT OF ISSUES ON APPEAL

GIVEN THE LAW OF THE CASE, DID THE TRIAL COURT ERR IN NOT AWARDING ADDITIONAL SANCTIONS?

DID THE TRIAL COURT ERR IN CONCLUDING THAT THE CLAIM TO SANCTIONS UNDER THE FCPSA WAS UNTIMELY THEREBY DENYING THE CORRESPONDING AWARD OF FEES FOR TIME SPENT IN RESPONSE TO PDHC'S MOTION TO STRIKE?

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[1] 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 the 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

[1] 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.

hearing on July 19, 2011 where the hearing proceeded without objection. Before that hearing, the trial court 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. [2] 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

[2] 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).

that had already been made. A notice of appeal from the summary judgment order was filed by 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

Just as the poet Elizabeth Barrett Browning suggested the need for enumeration in response to the question "How do I love thee?", the Estate has carefully and repeatedly attempted to count and delineate the ways in which PDHC and its trial counsel litigated in bad faith and/or without meritorious positions. A complete recitation of the offending facts is lengthy and detailed. A more comprehensive summary of facts, approximately two dozen pages or so, can be found in the Motion for Sanctions. R. pp. 279-318.[3]

As Appellant for purposes of this Brief, the Estate seeks additional trial court sanctions; accordingly this statement of facts will focus on those evidentiary aspects overlooked or not considered in the trial court's existing sanctions order. As Respondent in the related appeal filed by PDHC, the Estate only seeks affirmation of the trial court's limited order of sanctions; accordingly, the statement of facts in that Brief will focus on those factual aspects of the matter relied on in the trial court's order.

As this Court is aware, three separate components of this case have previously been appealed to this Court by PDHC : the appeal from a Probate Court ruling on a bond issue (tracking number 2011185767), the Circuit Court ruling on the counsel disqualification issue (tracking number 2011197671), and the Circuit Court decision to grant the Estate summary judgment on the merits (tracking number 2011203391). After consolidated argument in the three appeals, a consolidated opinion denied PDHC relief in all three appeals. The Estate will present the relevant facts in each of these three areas.

---

[3] Despite suggestions to the contrary, a review of the facts in that motion confirms that 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.

The Estate will begin with the summary judgment issue because the Estate's position, first and foremost, is that the underlying claim of PDHC never had merit and never had "good ground to support it" as required by Rule 11 and was persistently pursued in bad faith. Hence the Estate sought (and through this appeal seeks) an award of sanctions equal to all of its trial court related attorney's fees. The Estate will also address facts in the area of the disqualification issue and the probate appeal – both of which are part of the entirety of this case triggered by PDHC's initial frivolous probate claim.

I. The Initial Probate Claim And The Law of The Case

A. Summary of The Claim

As described above, 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 before his death.

PDHC's alleged damages relate to the overpayment of benefits by Medicare to PDHC occasioned by the failure of PDHC[4] to secure and verify 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.

[4] 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.

B. The Law of The Case Here

Most, if not all, of the relevant facts have been determined with finality such that they are now the "Law of the Case" and cannot be disputed or reconsidered. Moreover, the trial court's findings affirmed through the appeal process were then not reviewable or subject to reconsideration upon remittitur – at that point, they had become "the law of the case" and they remain "the law of the case." "[I]t is well settled in this jurisdiction that a decision of this court on a former appeal is ***the law of the case***. The questions therein decided are res judicata and this court will not on a subsequent appeal review its former decision . . . . We are not convinced that our former opinion was erroneous, but even if it were, we are precluded, under the settled rule, from reviewing it on this subsequent appeal." Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) (emphasis added).

1) Blame-Shifting Theory For Medicare Overpayment Had Been Litigated To Finality Without Success.

A federal judge (Decision of March 14, 2008) and administrative appellate body (Medicare Appeals Council decision dated October 6, 2008) found that PDHC was at fault as the employer with its own non-delegable duty to confirm employee credentials *before* accepting Medicare payments for the employee's services. R.pp. 15-16 (Summary Judgment Order ¶¶ 6-7). That finding of fault became final when Plaintiff did not pursue further appeals and that finding served as the basis for Medicare's recoupment of funds paid to PDHC. Thus, PDHC knew the issue of fault had been litigated to finality in the federal forum in 2008 before it sought in this 2010 action to shift that fault to the unsuspecting Estate of the muted[5] decedent.

[5] As the trial court noted in its Order of Summary Judgment, Finding of Fact 7: "Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, *who would have been a pivotal witness as to what representations*

Accordingly, PDHC and its counsel knew before even signing and filing the complaint that the federal holdings could be used against them through the doctrine of non-mutual collateral estoppel.

2) **<u>Prior Judicial Holdings Not Immediately Shared with Estate Counsel</u>.**

Discovery requests seeking the administrative records were acknowledged by Mr. Matthews in a letter dated June 24, 2010. R. pp.437-440. PDHC objected to the production of the administrative record asserting attorney-client privilege, the work product doctrine, and the Dead Man's statute. The records of the federal administrative law judge and the Medicare Appeals Counsel were not produced to the Estate until it made a Freedom of Information Act request for them through Medicare.[6]

II. The Appeal from Probate Court to Circuit Court

Although Plaintiff's claim against the Defendant Estate was itself removed to Circuit Court for disposition, the Plaintiff filed a motion in Probate Court seeking to block the Estate's payment of legal fees to counsel (which potentially could have eviscerated the Estate's ability to defend itself[7]) and seeking to have the Defendant Estate purchase a commercial bond for

---

passed between the parties as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court." Order. R. pp. 16 (emphasis added).

[6] The Estate sought to advise this Court of this previous litigation outcome as soon as possible after it was confirmed. When it was presented as background information at the disqualification hearing on March 16, 2011, PDHC's counsel interrupted the presentation to object to the introduction of this dispositive history (R. p. 88 line 24 – p. 90 line 12); while this Court safely sustained the objection at that time, this dispositive history was later successfully introduced as part of the Estate's motion for summary judgment.

[7] This purpose of evisceration is demonstrated in Mr. Megna's letter of February 16, 2011 which not only predicts litigation "over the next few years as these and related matters are determined by the courts"; it confirms PDHC/Megna's belief and intent that the personal representatives of the Estate "remain restrained from exercising any powers of the office….." R. p. 482. Plaintiff's counsel Mr. Matthews made a similar prediction of "years" of litigation in a

Plaintiff's claims in an amount equal to the damages asserted by Plaintiff through counsel – even though the requested bond amount would have exceeded the actual value of the Estate itself.

A. Not needed -- Estate's Assets Were Protected Without Appeal.

In response to this excessive effort, the Estate offered to subject the Estate assets to Court oversight such that no disposal of assets would occur without Probate Court approval; this proposal was accepted by the Probate Court.[8] Thus, the Probate Court order fully protected Plaintiff to the extent it could recover from the Defendant Estate – but Plaintiff appealed the Probate Court order anyway because it did not provide the potential (but unjustified) bounty of a bond in excess of the Estate value.

B. The Law of the Case -- Appeal Procedurally Flawed Despite Legal Guidance.

The appeal taken from the Probate Court to the Circuit Court was procedurally flawed and was dismissed by this Court as such. The Court of Appeals' affirming opinion likewise found that the Plaintiff failed to satisfy the statutory requirements of S.C. Code § 62-1-308(a) in two respects and these failures – particularly the failure to meet the 45 day deadline[9] – warranted the trial court dismissal. These procedural requirements were not new and were not hidden. They are clearly spelled out for any litigant and any attorney in the statute. Moreover, South Carolina case law relied upon by the Circuit Court has previously confirmed the dispositive

---

letter to the Estate's counsel dated June 24, 2010. R. pp. 437- 440. The misrepresentations found in Mr. Matthews' letter are further discussed below.

[8] Defendant Estate made this offer to accommodate the Probate Court and in anticipation of a prompt resolution of the matter upon summary judgment. Unfortunately, *through no fault of the courts*, the ultimate resolution has not been prompt.

[9] The other failure was the filing of the grounds of appeal in the wrong court.

nature of failing to satisfy the statutory requirements.[10] Despite the clarity of the statute and despite the guidance provided by existing precedents, a fatally flawed appeal was made from the Probate Court to the Circuit Court anyway.

III. The Disqualification of Mr. Megna

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

On April 13, 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.[11] Initially, Mr. Megna acknowledged as much by reply email.[12] 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.[13]

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

---

[10] In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005); Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002); Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996).

[11] 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.

[12] 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.

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

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 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. 65-66 or 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. p. 236.

At Page 15 (line 10) of its Return to the Motion to Disqualify (R. p. 236 or 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 (PDHC Response to Motion to Disqualify).

Because certiorari was denied by our State Supreme Court, the disqualification is also now the law of the case – as acknowledged by PDHC's new counsel as discussed below. With regard to disqualification, this Court's affirming opinion noted "we find the circuit court did not err in disqualifying Mr. Megna as counsel for PDHC. ... we find the circuit court did not err is disqualifying M. Megna as a necessary witness. ... we agree with the circuit court that PDHC's assertion that the attorney-client privilege, the work product doctrine, and the Dead Man's Statute would bar [Megna's] testimony is without merit.". R. p. 522.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO GRANT ADDITIONAL SANCTIONS.

A) GIVEN THE LAW OF THE CASE, THE TRIAL COURT ERRED IN CONCLUDING THAT THE UNDERLYING CLAIM HAD "GOOD GROUND TO SUPPORT IT."

Perhaps understandably weary of these proceedings, after ordering Mr. Megna to be incarcerated for 30 days (R.pp.44-45) earlier in the litigation, the trial court, in his final hearing in this case, refused to label the entirety of this litigation frivolous. R. p. 194 lines 4-9 and p. 198 lines 17-20). Neither, however, does the trial court ever affirmatively state that the underlying matter had any merit based upon the record. ***Moreover, it is precisely the trial court's affirmed findings – the law of the case – that render this action frivolous and without good ground to support it – findings well known to PDHC before it even initiated the case.*** Moreover, it is the conduct of the litigation that demonstrates that the case is not only frivolous but pursued in a deceitful fashion.

Despite the law of the case, PDHC continues to boldly argue that the underlying matter had merit. In its Appellant's Brief (Page 9), PDHC argues:

> the record in this case fully establishes that there were good grounds to support the Complaint filed and served against the estate. Clearly, there was a factual basis to believe that the estate owed PDHC money as the result of the invalid assignment provided to PDHC by Dr. Thompson. ***Moreover, the administrative ruling did not address the merits of any claims that PDHC may have against Dr. Thompson.***

(emphasis added). This self-serving proclamation is neither true nor the law of this case. In fact, the very opposite is true, as the trial court stated in its order of summary judgment, **"all of plaintiff's claims derive from a core set of factual claims – and preclusive facts have been**

adjudicated with finality by federal administrative decisions." R.p. 20 (Summary Judgment Order, § D). [14]

The Estate argued for sanctions not only because the claim was without merit but because it was falsely presented by counsel. Most notably, after receiving the Estate's Answer and discovery requests (which included a request for all administrative rulings), Mr. Matthews on June 24, 2010, wrote to Estate's counsel and:

- Asserted the administrative record was protected under attorney-client privilege and the work product doctrine, and based thereon, refused to provide the requested material (which the estate later received only after making a FOIA request to Medicare); and

- Despite not producing the administrative record and claiming it was privileged, claimed that:

  (i) "All administrative decisions were determined adversely to Dr. Thompson" (who was not even a party to those proceedings); and

  (ii) "They [Medicare] imputed the false statements made by Dr. Thompson to PDHC as he was an employee of PDHC...They stated that PDHC was liable for repayment because Dr. Thompson, as an employee of PDHC, should have informed PDHC of his disbarment from Medicare." (Actually, the Court ruled that the theory of liability was that PDHC had a non-delegable duty to know and check the credentials of its employees before accepting an assignment of Medicare benefits).

- Mr. Matthews went on to suggest a settlement of the case whereby the Estate would admit liability and submit to the Court the issue of damages.

R.pp. 437-440. Thus, without providing the administrative record, Mr. Matthews proceeded to completely misrepresent that record while seeking to secure some favorable settlement or concession. [15]

[14] While PDHC's Appellant's Brief (Page 7) accurately states that "the administrative court did not address whether PDHC could seek indemnification from Dr. Thompson", the trial court here held that the administrative findings of fact would nevertheless prohibit a claim to equitable indemnification because "an equitable indemnitee (as PDHC proposes itself to be) must demonstrate that it was without fault or liability for the damages it seeks." R. p. 20 (Summary Judgment Order) (citing Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010)).

The Estate submits that this letter--full of outright falsehoods--was itself grounds for Rule 11 sanctions against Mr. Matthews, his law firm, and his client. The letter also offers insight into the bad faith motives of counsel and client in filing the Complaint. From the start, PDHC's claimed, without proof, that Dr. Thompson (muted from making reply by his death) made misrepresentations to PDHC, [16] on which it justifiably relied, to its detriment.[17] By withholding the administrative record, completely misrepresenting it, and knowing that it would doom its case if known by the estate, PDHC then sought to force the estate into an early and expensive settlement. Once the estate received the administrative record, it was able to secure Summary Judgment on the merits because the core common element of a "right to rely" was completely vitiated by the administrative record.

[15] Ironically, after falsely representing the federal adjudication (not yet known to the Estate), Mr. Matthews goes on to describe the decedent's conduct as "intentionally deceptive" and a "betrayal of [PDHC] trust" from a "friend and colleague of many years" employed by PDHC at a time "when no others would" employ decedent.

[16] The Trial Court further found in its Summary Judgment Order that PDHC presented no evidence of any affirmative statements by Dr. Thompson. R p. 22.

[17] To the contrary, both the federal administrative court and the trial court here found that PDHC's awareness of Dr. Thompson prior disciplinary issues heightened – not erased -- the employer's need to be vigilant in checking credentials.

B) THE TRIAL COURT ERRED IN CONCLUDING THAT THE PROBATE APPEAL HAD "GOOD GROUND TO SUPPORT IT" AFTER HOLDING THAT THE APPEAL FAILED TO COMPLY WITH CLEAR STATUTORY REQUIREMENTS.

Whatever merit PDHC's appeal of the Probate Court Order had initially,[18] it lost all merit when PDHC missed the filing deadline for filing its grounds of appeal by seven (7) days. The statute is clear as to when and where[19] the grounds of appeal must be filed, and the case law is equally clear that the consequence of filing late is dismissal.

Despite the clarity of the statute and the guidance of case law[20], Mr. Megna and his client proceeded to require a hearing before the Circuit Court and the filing of legal memoranda. The argument advanced to the Court by Mr. Megna in oral argument, was that he had not filed late. R.pp. 493-496.

When confronted by the trial court and estate's counsel with the fact that he was out of time, Mr. Megna confessed that he believed otherwise "although I have not verified that." R.p. 500 lines 18-19. This is precisely what Rule 11 is aimed at and requires--that counsel verify facts and not make patently false claims to the Court.[21]

---

[18] The estate submits that it had none because the Probate Court Order completely protected PDHC.

[19] PDHC also filed its grounds in the wrong court.

[20] See South Carolina Code §62-1-308(a); In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005); Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002); Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996).

[21] Interestingly, in the appeal to this Court, PDHC continued to argue that it had filed its grounds of appeal timely.

The only way PDHC's argument cannot be frivolous is if it, in fact, filed its grounds of appeal on time. To argue, in writing and orally before the Court, to the contrary, as it did, makes the probate appeal frivolous and violates Rule 11 further by the making of untrue statements.

Not only did the Plaintiff fail to comply with the clear statutory requirements, the Plaintiff actually ignored the facts and asserted to the trial court several times that the appeal *was timely* and that the only issue related to the consequences of filing in the wrong place. R. p. 493 lines 9-11 and page 495 lines 1-3 (Transcript of Hearing January 18, 2011). Despite repeatedly asserting that the appeal was timely, Plaintiff's CEO and General Counsel Mr. Megna ultimately confessed that this was his position although "I have not verified that." R. p. 500 lines 12-22. Such verification is precisely what Rule 11 and the Frivolous Civil Proceedings Act require. Among other goals, this motion seeks to discourage such resource-wasting factual mischaracterizations in the future.

C) THE TRIAL COURT ERRED IN CONCLUDING THAT PDHC'S INITIAL OPPOSITION TO COUNSEL'S DISQUALIFICATION HAD "GOOD GROUND TO SUPPORT IT" AFTER PDHC'S NEW COUNSEL CONCEDED THAT IT DID NOT.

As PDHC's counsel (for sanctions) argued to the trial court, "From the get-go Mr. Megna knew he was going to be a witness....he shouldn't have been in from the get-go and your Honor correctly ruled he was going to be a witness." R. p. 185 line 21 – p. 186 line 18. The estate's counsel also recognized this from the "get-go" and warned Mr. Megna. R. pp. 616-617. PDHC should now be judicially estopped from taking a contrary position. 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'.").

As PDHC's counsel also noted, Mr. Matthews signed the Complaint and many other litigation documents in the first few months of the litigation. As soon as Mr. Megna started signing documents as counsel (e.g. the Plaintiff's Motion for Summary Judgment), the estate moved for his disqualification. The motion was based on his being a necessary witness, with his disqualification as trial counsel mandated by Rule of Professional Conduct, 3.7, SCACR 407.

While there may be latitude as far as participation in pre-trial matters, there is none as to his participation as trial counsel. Despite his knowledge "from the get-go" that "he was going to be a witness", Mr. Megna resisted the motion for his disqualification not just as to pre-trial matter but also as to trial matters. He raised frivolous and disingenuous reasons, which he argued would prevent his testimony at trial, such as the Dead Man's Statute[22], the work product doctrine, and attorney-client privilege.[23] The trial court and this Court summarily rejected all of these arguments.[24]

Mr. Megna further argued against his disqualification as trial counsel by asserting that nothing in the record showed that he had any contact with the decedent. While his value as a

[22] S.C. Code Ann. §19-11-20. As a person with interests adverse to the estate, Mr. Megna would have no basis to assert the protections of the Dead Man's Statute.

[23] Mr. Megna even argued that the work product doctrine and attorney-client privilege precluded his testimony as to alleged communications with the decedent which constituted in part the basis for PDHC's suit.

[24] Contrary to the implication found on Page 3 of PDHC's brief, this Court did state its opinion with respect to the merits of PDHC's disqualification order. R.p. 522 ("... we find the circuit court did not err in disqualifying Mr. Megna as counsel for PDHC. ... we find the circuit court did not err is disqualifying M. Megna as a necessary witness. ... we agree with the circuit court that PDHC's assertion that the attorney-client privilege, the work product doctrine, and the Dead Man's Statute would bar [Megna's] testimony is without merit.").

witness would not be limited to communications with the decedent, the Complaint alleged very incriminatory (to the estate) communications between decedent and Mr. Megna. To argue as he did, Mr. Megna violated the obligations of conduct and truthfulness required of advocates by Rule 11 and caused the estate to incur enormous expenses when Mr. Megna knew "from the get-go" that he was a witness.

There may be latitude in what participation a witness-counsel may have in pre-trial matters.[25] Both the trial court and this Court correctly noted, however, that total disqualification of Mr. Megna did not prejudice PDHC because of the involvement of Mr. Matthews in the litigation from the inception. The main thrust of the arguments advanced by Mr. Megna (and defended by the estate) was that he should not be disqualified as trial counsel.

In addition to arguing strenuously, repeatedly, and without merit, that he should not be disqualified as trial counsel (although as above noted, he knew from the "get-go" he would be a witness), Mr. Megna, in his Response to the Motion to Disqualify, attacked the ethics and professionalism of the estate's attorneys,[26] the family of an un-named Florence County judge and

---

[25] There is clear authority to bar his participation in depositions which can be used at trial. Droste v. Julien, 477 F. 3d 1030 (8th Cir. 2007); World Youth Day, Inc. v. Famous Artist Merc. Exchange, Inc., 866 F .Supp. 1297 (D. Colo. 1994).

[26] For example, in a July 27, 2011 letter of Mr. Megna to the trial court sent by e-mail with copy to Defendant's counsel, R. pp. 775-778, Mr. Megna offers the following (emphasis added):

> At this point, both Mr. James as well as Mr. Josey are likely necessary witnesses, if not Defendants, in adverse litigation that involves the Plaintiff..... Moreover, their silence concerning their knowledge of and involvement in the 'Lake City litigation' matters is of grave concern to the Plaintiff with far-reaching implications. I fail to understand how it is not reasonable to conclude their silence has been intended to misdirect or deceive both the Plaintiff and the Court. ..... the Plaintiff has had very little time to evaluate and organize matters and documents to provide the Court a more complete picture of the extent of the legal and ethical concerns.

members of a prominent statewide law firm, and a Pee Dee law firm. He accused all of being involved in a conspiracy against PDHC.[27] He further impugned the trial court by suggesting the need for recusal without offering a motion with supporting grounds.[28]

> However, the seriousness of the matter required your immediate notification.

While professing to be "astounded" by Mr. James' participation in a "dishonorable" and "inappropriate and demeaning litigation strategy", Mr. Megna accuses both Josey and James of "false and unprincipled personal accusations." R.pp. 565-568. These accusations were followed by Mr. Megna's e-mail of July 26, 2011 advising "you and Jay are likely witnesses, if not possible Defendants... for multiple reasons including but not limited to aiding and abetting and breach of fiduciary duties to an existing client." R.pp. 771-772. In contrast, an e-mail of January 17, 2013 thanks Mr. James for his always helpful communications but still notes his objection to "obvious" ethical violations. R.pp. 773-774.

[27] In his March 11, 2011 accusation of "defamatory litigation [sic] strategy," Mr. Megna also rants of a supposed Pee Dee area conspiracy of legal and medical professionals. He states, *inter alia*:

> The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. ... The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy", etc. ... Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to remedy the wrong that has occurred in the case at bar - as well as in the Lake City matters.
>
> The undersigned has no qualms in informing this Court that *the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others.*

> ... In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters. ....
>
> Additional litigation against those involved ... is forthcoming. ....Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. *The Motion to Disqualify crosses the line from advocacy to obstructionism.* See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.

R. pp. 565-567.

[28] Actually, the suggestion of recusal is found in several places in the record. In one reference, the reason offered for recusal was that the trial judge might someday hold court in neighboring Florence County. R. p. 688. In other suggestions, the reasoning is far more sinister but equally without merit. In his March 11, 2011 response to the Motion to Disqualify him (R.pp. 548-595), Mr. Megna accused Defendant and its counsel of "defamatory litagation [sic] strategy." This bizarre response contains the first unsupported bald assertion of this Court's need to recuse itself. Specifically, Mr. Megna alleged, inter alia:

> The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against the undersigned have placed this Court in the unfair and unenviable position of determining whether or not Mr. James and Mr. Josey's accusations [implied and explicit] have prejudiced these proceedings to the extent this Court should *sua sponte* recuse itself .... Mr. James' and Mr. Josey's unprincipled attacks on the undersigned and the Plaintiff have placed this Court in a similar position considering the distasteful circumstances we collectively find ourselves discussing.

Plaintiff also suggested that the trial judge recuse himself in a subsequent letter filed July 8, 2011. R.pp. 680-690. Suggestions of recusal are also found in other trial court Pleadings including the Motion to Reconsider Disqualification filed May 2, 2011 (R. pp. 737-738 item 3), and the March 2011 Return to Defendant's Motion to Disqualify. R.p. 567. Of course, Plaintiff also implied to this Court previously that the trial court should have recused itself. R.p. 769. (Motion to Stay, Vacate & Disqualify, filed with the Court of Appeals August 24, 2011, footnote 10 and related text). Despite these repeated suggestions, which threaten to harm the perception of the trial court's integrity, Mr. Megna advised the trial court at the July 19, 2011 hearing that he did not intend to pursue disqualification of the trial judge. R.p. 676 line 21- page 678 line 9.

Clearly the arguments advanced to resist disqualification, the repetition and belaboring of these arguments and the wild charges against numerous others—whether involved in this case or not—show how desperate and just how frivolous Mr. Megna's position was, and sadly, he knew from the "get-go" that his position was wrong.

D) THE TRIAL COURT ERRED IN CONCLUDING THAT THE CLAIM TO SANCTIONS UNDER THE FCPSA WAS UNTIMELY THEREBY DENYING THE CORRESPONDING AWARD OF FEES FOR TIME SPENT IN RESPONSE TO PDHC'S MOTION TO STRIKE

Without any real explanation, the trial court here chose to limit "the award of sanctions to Rule 11 sanctions, in essence, ruling in favor of [PDHC] on its Motion to Strike...." R.p. 57 (Sanctions Order at page 2). At the hearing held on sanctions, the trial court simply concluded "your motion is timely under Rule 11 and, thus, your remedy is ordered under Rule 11." R.p. 195 lines 5-7. Because he ruled in favor of PDHC on the Motion to Strike (which focused on the alleged untimeliness of FCPSA sanctions), the trial court then denied the Estate's Motion for Sanctions (Fees) with regard to any time spent responding to the Motion to Strike ($11,170.00 per the supplemental affidavit)[29]. As outlined above, the Estate contends the entirety of the matter was sanctionable from the onset – but in response to the Court's ruling on the Motion to Strike, the Estate makes the following argument.

The 10 Days Of Pitman: For The FCPSA In A Non-Appealed Case

In Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), this Court addressed the timing question with regard to sanctions sought under the South Carolina Frivolous Civil Proceedings Sanctions Act (hereinafter "FCPSA") where the statute provides "*At the conclusion* of a trial and after a verdict for or a verdict against damages has been

[29] R.p. 975 (Supplemental Affidavit ¶ 6).

rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous." S.C. Code § 15-36-10(C)(1)(emphasis added).[30] In Pitman, the Court of Appeals (then Judge Hearn) noted that it was interpreting the statutory phrase "at the conclusion of the trial" for the first time and further noted that the term "trial" was itself a misnomer since any case surviving to trial is presumptively *not* frivolous. The Pitman Court determined that it was *not* going to vary from the "established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."

In Pitman, the party seeking sanctions waited some two months after an order of summary judgment that was not appealed. Obviously, the facts and circumstances presented by this thrice-appealed case are different from Pitman and appear not to have been considered by previous appellate decisions of our courts. Specifically, the appellate courts have not addressed

---

[30] This is the present version of the statute which has been amended since Pitman. In Rutland v. Holler, Dennis, et.al., 371 S.C. 91, 637 S.E.2d 316 (2006), Justice Beatty (then on the Court of Appeals) noted that the original statutes that made up the FCPSA were repealed in 2005 and completely revised with new provisions. The "at the conclusion of a trial" language, however, was repeated in the new provisions.

Rutland is somewhat similar to the case at bar in that it too involved multiple lawsuits. The Rutland Court found this request timely and then approved the trial court's entry of a sanction's order some 9 ½ months after entry of the final formal order of summary judgment.

The pattern of duplicative litigation seen here is also like Hammer v. Hammer , R.p. 899 (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).

Both the Rutland opinion and the Hammer Circuit Court order, like the Estate's position here, support the trial court's ability to consider sanctions during any period of the Court's general jurisdiction.

a request for sanctions under FCPSA after the successful defense of multi-staged appeals. In addition, the very merits of the matter, which directly bear on these requests for sanctions – at least in part, were under appellate review.[31]

The Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006), case confirms that even the 10 day window of the FCPSA runs from the more final "entry of judgment" and not merely the date that a summary judgment order is signed and filed. This clarified trigger date for the 10 days of FCPSA jurisdiction is consistent with the Estate's position that the motion was timely under FCPSA since it was filed within 10 days of remittitur.

Remittitur Reopens A Window Of Trial Court Jurisdiction Compatible with FCPSA

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

[31] Also, in Pitman there is no mention of Rule 11 as an alternative basis for sanctions. In the Estate's motion here, both the FCPSA and Rule 11 are asserted as co-equal grounds for the imposition of sanctions by this Court – in addition to the Court's inherent general power to impose sanctions as needed to protect the legal system from manipulation. In support of these general powers, the Defendants cited to an article by the Hon. G. Ross Anderson, Jr., Discovery Sanctions, 6 S.C. Lawyer 14 (1995), as well as to the case of United States v. Shaffer Equip. Co., 11 F.3d 450, 458-461 (4th Cir. 1993) (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.")("Due to the very nature of the court as an institution, it must and does have an inherent power 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.")("Any abusive litigation practice is sanctionable against a lawyer or client.").

(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 added)[32]; 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.

Because Pitman and Beard do not address (and did not need to address) the established precedent of a trial court's reacquisition of jurisdictional authority following an appeal, their holdings of a 10 day window for FCPSA petitions in non-appealed cases are not inconsistent with or prohibitive of another window of FCPSA jurisdiction following an appeal. The Estate does not suggest that the window of opportunity is without any limitation, such as that imposed by the equitable doctrine of laches.

[32] 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).

While Muller is unlike Pitman because Pitman involved no appeal of the merits, they are similar in that the FCPSA also does not limit the duration of time in which a petition must be brought – instead the FCPSA merely directs that such petition be "at the conclusion of the trial" – presumably the same as after a party has "prevailed" (the trigger language in the mechanics lien statute interpreted in Muller) -- to avoid the interlocutory piece-meal approach of filing multiple sanctions requests during on-going trial litigation – this is also what Defendant here sought to avoid. In this case, the "final disposition" or "conclusion" or ultimate "prevailing"[33] did not occur until after the appellate decisions and remittitur.

CONCLUSION

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

[33] The Estate suggests that the distinction among these statutory triggers is one without a real difference. To that end, Justice (then Judge) Hearn noted in Pitman that "trial" was an irrational misnomer. The Estate's position herein, that there is *at least* a renewed 10 day FCPSA window following the "final disposition" of remittitur, is consistent with all such triggers of finality and consistent with the trial court's general jurisdiction to act consistent with the appellate decision. Furthermore, this position of a limited renewed window of jurisdiction promotes sound public policy by encouraging more complete deliberative consideration of sanctions after completion of the appellate process.

afford. These heirs have already borne the emotional hardship of uncertainty and delay; they should not have to bear these costs as well.

The law of this case was settled over a year ago and the law of the case confirms that this probate claim was without merit, the probate appeal to circuit court was without merit, and any opposition to Mr. Megna's status as a witness was also without merit. By limiting his award of sanctions in the face of this law of the case, the trial court abused his discretion. Moreover, because his legal decision to grant the Motion to Strike the FCPSA claim as untimely was erroneous, the denial of sanctions based on that erroneous decision is also an abuse of discretion. This Court should award the Estate all the sanctions it seeks or remand the matter for an additional award by the trial court. Respectfully Submitted,

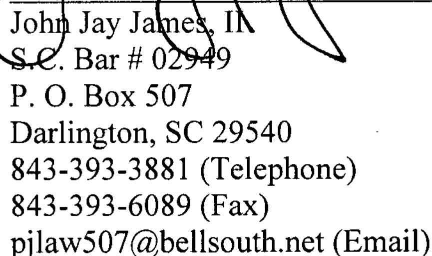
Florence, South Carolina

March 5, 2015

TURNER, PADGET, GRAHAM & LANEY, P. A.

J. René Josey
S.C. Bar # 03230
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

PAULLING AND JAMES, LLP



John Jay James, II
S.C. Bar # 02949
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

ATTORNEYS FOR RESPONDENT-APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
MAR 1 1 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

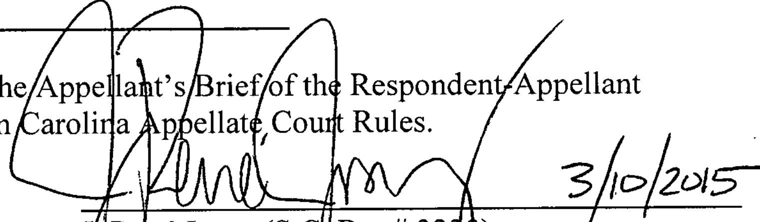
Pee Dee Health Care, P.A. ....Appellant-Respondent,

v.

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

CERTIFICATE OF COUNSEL

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



3/10/2015

J. René Josey (S.C. Bar # 3230)
Turner, Padget, Graham & Laney, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

PAULLING AND JAMES, LLP
John Jay James, II (S.C. Bar # 02949)
Post Office Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

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

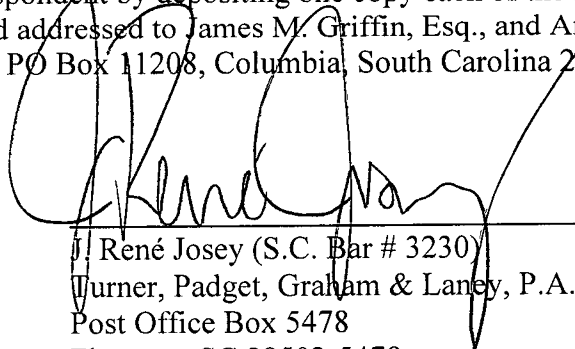
Pee Dee Health Care, P.A. ....Appellant-Respondent,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Appellant'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.



J. René Josey (S.C. Bar # 3230)
Turner, Padget, Graham & Laney, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENT-APPELLANT