

STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

Case No. 2013-000762

Richard Stogsdill,.....Petitioner,
v.
South Carolina Department of
Health and Human
Services,.....Respondent.

MOTION TO VACATE ORDER
AND TO SUPPLEMENT THE RECORD

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SC SUPREME COURT

Petitioner respectfully requests that this Court consider vacating its judgment dated January 20, 2016, pursuant to S.C. Rule 60(b)(3), for the reasons set forth in this motion, and requests that the Court grant Petitioner's motion to supplement the record, pursuant to Rule 212(b). Alternatively, Petitioner requests a rehearing pursuant to Rule 221(a), with the record supplemented as requested and such other relief as this Court shall determine to be just and proper.

Rule 60(b)(3) of the South Carolina Appellate Court Rules authorizes this Court to relieve a party or his legal representative from a judgment upon

such terms as are just, upon a showing of fraud, misrepresentation, or other misconduct of an adverse party. In support of this motion, Petitioner submits the affidavit of Nancy Stogsdill showing that Respondent obtained the judgment dismissing his appeal in this Court through fraud, misrepresentation or other misconduct. Supplemental Appendix at 1-7. See also Record (Referring to Record on Appeal in this Court) at 154-157.

History of Petitioner's Appeals

Richard filed an administrative appeal in 2009, asking the DHHS hearing officer to require DDSN to promulgate regulations, as required by the South Carolina Administrative Procedures Act whenever an agency enforces “binding norms,” and to establish “reasonable standards” (a requirement of 42 U.S.C. 1396a(a)(17) of the Medicaid Act). Supplemental Appendix at 8. Petitioner also complained in his February, 2009 appeal that DHHS violated the reasonable promptness mandate of the Medicaid Act by failing to promptly provide medically necessary services that were ordered by his physician. In *Doe v. Kidd I*, the United States Court of Appeals for the Fourth Circuit ruled that eligibility determinations must be completed within ninety days.¹ 501 F.3d

¹ The Fourth Circuit ruled in *Doe v. Kidd I* that “Section 1396a(a)(8) of the Act requires that state ‘medical assistance . . . be furnished with reasonable promptness to all eligible individuals.’” *Id.* at 354. That Court instructed DHHS that federal regulations “direct state agencies to determine an applicant's eligibility

348, 354 (4th Cir. 2007).

The hearing officer remanded Richard's administrative appeal to DDSN in November, 2009 on other grounds, ordering DDSN to assess Richard's need for personal care and other services. It is undisputed that this order was issued more than 90 days after Richard filed his request for a "Fair Hearing." *Doe v. Kidd I* at 354. But here, more than 2,500 days have passed since Richard sought services and other relief through the administrative process. He still has not been provided with the services he needs, due to no fault of his own and has now actually been further punished for following the clear directives of DHHS that forced him to spend months seeking an assessment through his DDSN service coordinator.

Richard joined other Medicaid participants in December, 2009, in filing a Petition asking this Court, in its original jurisdiction, to enforce the American Recovery and Reinvestment Act, the Americans with Disabilities Act and

for Medicaid within ninety days of the date of application and to '[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures.' 42 C.F.R. §§ 435.911, 435.930 (2002)." *Id.* at 354. Petitioner prays that this Court will listen to oral arguments held in that Court in *Doe v. Kidd III* on January 27, 2016, where private counsel for DHHS and DDSN argued to two authors of that opinion (Judges King and Gregory) that their decision in *Doe I* meant "nothing." Oral arguments are located at <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments> (January 27, 2016). At oral argument in that Court just last week, Judge Gregory disagreed, referring to the private right to enforce the reasonable promptness mandate in *Doe I* as a "seismic victory."

certain provisions of the Medicaid Act under 42 U.S.C. 1983. *Karen W. v. Sanford*. Record at 410. (“Record” refers to the Record on Appeal in the administrative appeal.) That Petition was denied.

Richard filed another request for a fair hearing when Respondent attempted to impose caps on services in 2010 that placed him at risk of institutionalization, prior to resolution and the issuance of an appealable order in his first administrative appeal. (The November, 2009 remand order of the DHHS hearing officer was not final nor was it appealable.) DHHS failed to conduct the assessment its own hearing officer had ordered in November, 2009.

It is undisputed that when Respondent attempted to impose the 2010 caps on Richard’s services, they also failed to provide a written notice meeting the requirements of 42 C.F.R. 431.210, containing the reasons for the adverse actions and the statutes or regulations Respondent relied upon. This is a recurring violation of fundamental due process rights that continues to this day, as DHHS did not provide Richard with the “reasons” for denying his physician’s order for 56 hours a week of nursing services or the statute or regulation the agency relied upon to have a DDSN nurse override the order of Richard’s treating physician. Supplemental Appendix at 86, see also 14-16, 202-287, 387-487.

Instead of conducting the assessment, as had been ordered by the DHHS hearing officer in 2009, taking into consideration the order of Richard's physician, DDSN also retaliated by sending Richard's providers notices of termination of his personal care services based on the totally false grounds that Richard moved out of state.² Supplemental Appendix at 10. In addition to attempting to terminate Richard's critical personal care services after he filed that lawsuit, DHHS also attempted to terminate the certification of Lennie Mullis, the DDSN psychological services provider who had provided a sworn affidavit in support of Richard's need for the requested services in 2009. Record at 917.

Nearly three years after Richard filed his first administrative appeal, with his state appeal still pending in the Executive Branch, in January, 2012, he filed a lawsuit in the federal district court alleging violation of the Americans with Disabilities Act and the Medicaid Act. The district court granted Respondent's motion to dismiss Richard's federal lawsuit, finding that those claims were "inextricably intertwined" with his state administrative appeal.³ *Stogsdill v.*

² In Richard's appeal filed on February 13, 2009, he requested protection from retaliatory acts. Supplemental Appendix at 9. No court has ever addressed his claims of retaliation.

³ Richard has appealed that decision to the United States Court of Appeals for the Fourth Circuit. *Stogsdill v. DHHS*.

Keck, Case No. 3:12-cv-0007 (D.S.C. November 10, 2014). Respondents have argued in every federal lawsuit that the only remedy available to DDSN waiver participants lies in the state administrative hearing process. But, the record in this and other “fair hearing” appeals demonstrates that, instead of providing relief, that process entangles waiver participants in a maze of never-ending state administrative appeals. *Doe v. Kidd III*, pending in the Fourth Circuit, Supplemental Appendix at 520, Record at 159, 164, 203, 398 and 424. See also cases listed at Supplemental Appendix page 519. (Administrative appeal in *Doe v. DHHS* filed in 2005, administrative appeal in *Brown v. DHHS* filed in 2005, administrative appeal in *Myers v. DHHS* filed in 2010, administrative appeal in *Brook Waddle v. DHHS* filed in 2007 and Richard’s administrative appeal first filed in 2009). The director of DHHS was unaware of these cases when he was deposed, except that he had recently (in 2014) heard of the name of Stogsdill just before he was deposed. Supplemental Appendix at 517-519. Since Respondents have ignored CMS “reasonable promptness” requirements with impunity, it is important that they be required to promulgate regulations, where the public can have input and review by the Legislative Branch.

The South Carolina Court of Appeals ruled on September 10, 2014 that Respondent violated the integration mandate of the Americans with Disabilities

Act by imposing caps on Richard's services, because he was at risk of institutionalization. *Stogsdill v. DHHS*, 410 S.C. 273, 763 S.E.2d 638 (S.C. App. 2014). Although the Court of Appeals found that the caps established a binding norm, it ruled that Respondent was not required to promulgate regulations because CMS had approved the changes. *Id.*

This Court granted certiorari on the important issue of whether DHHS and DDSN were required by the South Carolina Administrative Law Court to promulgate regulations for the operation of DDSN waiver programs.

The parties fully briefed the issues and an amici brief was filed by disability advocacy organizations, but, at oral argument, Respondent's counsel falsely informed this Court that DHHS had not assessed Richard because he failed to follow procedures necessary to allow DHHS to assess his needs. Respondent then submitted documents that were not contained in the record (on the request of the Court), but then refused to consent to allow Petitioner to supplement the record with records documenting his attempts to comply with DDSN policy requiring assessments to be performed by service coordinators.

In the meantime, absent the promulgation of regulations, Respondent and its agent, DDSN, continue to impose caps on Medicaid waiver participants, in total disregard for the order of the Court of Appeals. DHHS filed an amended

waiver application with CMS in 2015, but this waiver application does not contain standards to determine how medical necessity for services is determined (except to say that assessments are performed by service coordinators, or case managers) or how exceptions resulting from the 2014 *Stogsdill v. DHHS* decision will be processed going forward.⁴ See <https://www.scdhhs.gov/sites/default/files/SC.0237.R05.00%20IDRD%20PROPOSAL%20DRAFT%20August%203%2C%202015.pdf>.

Standard of Review

It is well established that the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. *Chewning v. Ford Motor Co.*, 354 S.C. 72, 82, 579 S.E.2d 605 (S.C. 2003). Perjury by a witness or a party's failure to disclose requested materials, constitutes intrinsic fraud. *Id.* But, where an attorney, who is “an officer of the court” suborns perjury or intentionally conceals documents,” he “effectively precludes the opposing party from having his day

⁴ DDSN finally revised its definition of “mental retardation” (now referred to as “intellectual disabilities”) in 2015, and DHHS did not amend its waiver document to comply with this Court’s order. DHHS comments state that “Upon CMS approval” DHHS will implement this change (that was ordered four years ago by this Court.) See <https://www.scdhhs.gov/sites/default/files/IDRD%20Waiver%20Public%20Summary%2012.15%203.pdf> at page 2.

in court.”⁵ Id. Legal argument that is based on a knowingly false representation of law (such as the claim that only CMS can enforce the Medicaid Act or the waiver) constitutes dishonesty toward the tribunal. Comment 3 to Rule 3.3. Comment 5 of that Rule requires a lawyer to refuse to offer evidence that the lawyer knows to be false. This duty is “premised on the lawyer’s obligation as an officer of the court” to prevent the court from being misled by false evidence. A lawyer must take remedial measures when a client intends to engage in fraudulent conduct related to the proceeding. Comment 13.

Pursuant to DDSN and DHHS policies, it is the responsibility of DDSN service coordinators to assess needs and Richard complied with Respondent’s policies

The waiver application contains criteria to determine eligibility for the ID/RD Medicaid waiver program (level of care) at page 42, but it does not

⁵ The statement signed by Dr. Platt and Ms. Jacques was not sworn, but DHHS counsel knew of its falsity when he presented it to the Court. As an officer of the Court, counsel was required to not knowingly make a false statement to the court and had a duty to correct any false statement of material fact, sworn or unsworn. Rule 3.3(a)(1) of the South Carolina Rules of Professional Conduct. “Candor Toward the Tribunal.” Rule 3.3(a)(3) prohibits an attorney from offering evidence that the lawyer knows to be false and the lawyer must take remedial steps to disclose any false statement made to a court. Rule 3.3(a)(3)(b) requires a lawyer who knows a client intends to engage in fraudulent conduct to disclose that conduct to the tribunal.

contain standards to determine medical necessity for services.⁶ See <https://www.scdhhs.gov/POSAL%20DRAFT%20August%203%2C%202015.pdf>, which, to counsel's knowledge, has not yet been approved by CMS. On page 52, the waiver application that DHHS filed with CMS states that eligibility for personal care services is determined based on "SCDDSN assessed need." DHHS informed CMS in that application that case managers (called "service coordinators" or "targeted case managers") are:

...responsible for conducting assessments and service plans as specified in waiver policy. This includes the ongoing monitoring for the provision of services included in the participant's service plan. Waiver case managers are responsible for the ongoing monitoring of the participant's health and welfare, as specified in waiver policy.

⁶ This Court ruled in 2011 that S.C. Code §44-20-30(12) requires Respondent and DDSH to apply an age 22 "age of onset" criteria to determine eligibility under the diagnosis of "mental retardation" (now called "intellectual disability"). But, an audit issued by the South Carolina Legislative Audit Council in 2014 reported that DDSN illegally continued to apply the age 18 requirement in determining eligibility for services, in violation of this Court's order. See http://lac.sc.gov/LAC_Reports/2014/Documents/DDSN.pdf at page 61. According to this LAC report, it was not until November 2013, that the S.C. Department of Health and Human Services directed DDSN to continue the eligibility process for Doe, applying the age 22 standard, and to issue a new notice of approval or denial. The agency eligibility directive was updated in October 2013, retaining the age 18 criteria. The LAC report states on page 61:

In its opinion, the Supreme Court majority noted that DDSN's commission has the authority to promulgate regulations that define ID in the context of waiver services, but it has not. DDSN is currently involved in litigation regarding whether it must promulgate regulations related to eligibility. While we do not assert that it must promulgate regulations, the commission has statutory authority to promulgate regulations, should it wish to further clarify agency operations.

Id. at 61. Neither the waiver document itself nor DDSN policies or directives contain standards requiring a waiver applicant to submit to an examination by a DDSN physician demanding access to the waiver participant's home, nor do they establish what weight must be given to the opinions of treating physicians. Counsel is not aware of any case where a waiver participant has been required to submit to an examination by a DDSN physician.

At oral argument, DHHS' counsel intentionally misled this Court by stating that Petitioner or his counsel obstructed its efforts to assess Stogsdill. That was not true. Subsequently, in response to a request from the Court, DHHS provided a document titled "Stogsdill Assessment" that was prepared by a DDSN physician and a social worker nine months after the Court of Appeals' decision was issued, blaming Richard and his counsel for its failure to comply with that Court's order. That assessment and the correspondence between Mr. Hepfer and Petitioner's counsel provided to this Court by DHHS counsel were not contained in the record below. Supplemental Appendix at 40-53. Those records were presented with the intent of misleading the Court.

After these documents were provided to this Court, pursuant to Rule 212(b), Petitioner's counsel asked counsel for DHHS to consent to Richard supplementing the record, but DHHS refused to allow Petitioner to supplement

the record.

The DDSN Service Coordination Manual provides that assessments to determine need for services must be performed by DDSN service coordinators. Supplemental Appendix at 372. There is no DDSN or DHHS directive or policy requiring a waiver participant to allow a DDSN physician into his home or to examine him. If DHHS wishes to establish such a binding norm, it can only do so by promulgating regulations in compliance with the South Carolina Administrative Procedures Act.

When Harrison contacted DHHS's counsel in 2013 in the federal litigation, seeking an assessment and additional hours for Richard, she was admonished by that attorney and instructed that Richard must utilize "established procedures that have been put into place to address requests for services, to include a request for additional care hours of any type." Supplemental Appendix at 12. According to this letter, these "established procedures" required Richard to go through his service coordinator in order to obtain additional hours. Id. DHHS counsel even threatened in that letter to file a motion for a protective order if Harrison attempted to obtain additional services without going through Richard's service coordinator to do so. Id. This Court's dismissal of Richard's appeal effectively punishes him for following

DHHS' orders, which were accompanied by a threat to file an action against his counsel if those procedures were not followed.

At oral argument and in the response Mr. Hepfer subsequently provided to this Court, DHHS intentionally failed to mention that Petitioner carefully followed these "established procedures," by seeking an assessment from Richard's DDSN service coordinator for eight months after the Court of Appeals decision. Supplemental Appendix at 1-7, 202-287 and 387-487. Counsel failed to inform this Court that Richard provided all requested information and supporting medical records, as instructed, to his service coordinator, in compliance with DDSN policies and procedures. This was done in compliance with the March 4, 2013 letter from DHHS counsel and in accordance with the process set forth in testimony by DDSN and DHHS officials for obtaining an assessment - which must be completed by the service coordinator.

Supplemental Appendix at 380-386 and 488 to 496 contains the sworn testimony of Kara Lewis and Janet Priest stating that service coordinators are the persons who authorize services and determine what weight, if any, to give to physicians' opinions. According to Ms. Lewis' testimony, physicians' orders may be overruled by service coordinators, because the DDSN waivers are not

based on a “medical model” Id. at 488-493.

Yet, Respondent established a new binding norm - requiring a physical examination and personal visit by DDSN’s physician to the waiver participant’s home. If this is a “reasonable standard,” it must be promulgated by the General Assembly after giving the public an opportunity to comment. That is the law established by the General Assembly in the South Carolina Administrative Procedures Act and neither the waiver document nor CMS regulations contain any conflicting federal requirement. Indeed, the federal Medicaid Act requires that States must establish “reasonable standards,” leaving it up to each state how those standards will be established according to applicable state law.

**Respondents intentionally misled this Court about the role of CMS
in enforcing federal law**

Respondent also willfully and intentionally misled this Court with its oral argument that CMS can force DHHS to change the DDSN waivers “on a dime.” As discussed at length in the amici brief filed in the United States Supreme Court by former federal officials in *Armstrong v. Exceptional Children* at Supplemental Appendix 326-364, the only “stick” the federal agency has in its arsenal to enforce the Medicaid Act is to withhold federal funds, thereby punishing “the very people the Medicaid Act is intended to benefit,” rather than

punishing the State. Id. at 350. Respondent in this case is well aware that once CMS initiates a compliance action, the Secretary “has no choice by to withhold” federal funds. Id. at 351. But he failed to so advise this Court of the limited enforcement powers of CMS. As former officials of the United States Department of Health and Human Services discussed in their amici brief, the federal agency has “historically understood and accepted that the Medicaid Act is privately enforceable” and that “exclusive enforcement conflicts with the agency’s regulatory priorities.”⁷ Id. at 339.

Respondent is well aware that Richard named CMS as a defendant in his federal lawsuit brought against DHHS and its former Director Keck. Supplemental Appendix at 288-325. But, the district court dismissed the federal defendants after CMS took the position that their decision not to terminate a state’s funding “does not constitute CMS’s agreement with, or approval of, the state’s program or policy.” Supplemental Appendix at 288. DHHS counsel was well aware of the brief filed by the federal government in Richard’s case when it argued to this Court that CMS approval of the waiver constituted federal

⁷ In *Armstrong*, the United States Supreme Court reversed the Ninth Circuit, holding that a provider may not enforce the “equal access” provision (42 U.S.C. 1396a(a)(30)) through a Supremacy Clause lawsuit. But, that case is clearly distinguished from cases brought by individual participants under other subsections of the Medicaid Act through fair hearings or § 1983 actions. *J.E. v. Wong*, Case No. 14-00399 HG-BMK ((D.Hawaii August 27, 2015)

approval of its violations.

The DOJ attorney informed Petitioner's counsel that CMS recognizes that private parties "have an important role to play in vindicating federal law in cases of alleged state non-compliance, notwithstanding the ability of the federal government to withhold funds from states." Supplemental Appendix at 288.

"Obviously" the DOJ attorney went on, "this would make no sense if the Secretary's inaction implied a finding that the State complied with the statute."

Id.

According to the amici brief in *Armstrong*, the legislative history of the Medicaid Act demonstrates Congress' intention that the Act be privately enforced. Id. at 342. These officials informed the United States Supreme Court that CMS enforcement of the Act is "logistically unfeasible." Id. at 347. This is because HHS has fewer than 500 employees to enforce a \$300 billion program and, "out of necessity," its employees are "tasked with bookkeeping and routine management of Medicaid funds at the state level." Id. at 348. The federal officials informed that Court that "HHS cannot afford to be the exclusive enforcer of the equal access mandate." Id. The federal government's review of state applications for Medicaid programs is "cursory at best...limited to whether the 'documentation submitted by a State Medicaid Agency complies with

procedural requirements.” Id. at 349-350.

In the federal government’s motion to dismiss Stogsdill’s federal lawsuit, the United States Department of Justice attorney informed the district court that the administrative scheme “is not the only mechanism for ensuring state compliance with the Medicaid statute.” Supplemental Appendix at 294.

Respondent’s counsel knew and wilfully failed to inform this Court that CMS’ only enforcement mechanism is to terminate a waiver if it finds that the state is not meeting federal requirements. Id. at page 294-295. Importantly, CMS informed the district court that the State’s obligations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act “are neither ‘defined by’ nor ‘limited to the scope or requirements of the Medicaid program.’” Id. at 296.

CMS informed the federal court that Richard may sue the State and that “the State is responsible for its own compliance with federal law.” Id. at 310.

Having caused the federal court to dismiss Richard’s federal ADA lawsuit by assuring that court that his remedy lay in the state administrative proceedings was intentionally misleading, at best.

Contrary to the arguments Respondent’s counsel made to this Court, CMS argued in its motion to dismiss Richard’s claims against the federal defendants that when the State places waiver participants at risk of

institutionalization, it is a “violation by the State, not Federal Defendants” and that it is not the job of CMS to enforce the State’s compliance with the ADA. Id. at 313. CMS emphasized that it “cannot compel a state to alter its policies to ensure compliance...but can only reduce or terminate federal payments...” Id. at 314. Respondent’s counsel was well aware of this fact he informed this Court that CMS has the authority to order DHHS to change the terms of the waiver document. DHHS continues to be a party in Richard’s federal lawsuit, now on appeal to the United States Court of Appeals for the Fourth Circuit - an appeal necessitated by Respondent convincing the federal district judge that Richard’s only remedy is in the state administrative appeals process.

The credibility of Dr. Platt is suspect and his statement appears to contain perjury procured by an officer of this Court for purposes of defeating Richard’s access to judicial relief

At oral argument, DHHS counsel informed this Court that Petitioner’s counsel prevented the agency from conducting an assessment of Richard’s needs. Agency counsel presented a statement signed by a DDSN physician, Dr. Tan Platt, along with a previously unidentified social worker, described as the “assessment ‘team.’”⁸ Supplemental Appendix at 40. This procedure is in direct

⁸ On June 15, 2015, Respondent had not even provided Petitioner’s counsel with the name of the physician who wanted to talk with his physician, Dr. Munn, without counsel being present. Supplemental Appendix at 18. Respondent also did not provide the identity, nor the credentials of the “service coordinator” who

conflict with the procedure DHHS counsel required Richard to follow.

Supplemental Appendix at 12, 380-386 and 488-496.

The “assessment” presented to this Court states that “available to the team were the transcripts of the two evidentiary hearings.” Supplemental Appendix at 40. Yet, it is undisputed that no transcript was ever prepared of the 2009 hearing and that file had long before been sent to DHHS archives. Supplemental Appendix at 21-22. It took a long time for DHHS to locate the file when Petitioner’s counsel requested it (delayed by a tape player that began smoking when the audio file was recorded) after receiving the “assessment.” Id. at 34.

The records reviewed by this “team” are contained at Supplemental Appendix 54-201. The records reviewed by the “team” did not even include the extensive medical records Nancy Stogsdill procured and provided to the service coordinator at the request of the service coordinator. Supplemental Appendix at 203-287. Yet the assessment “team” blamed Petitioner’s counsel for having “limited information available...” Supplemental Appendix at 40-42. The “team” claimed it had not been provided with Petitioner’s “drug regimen.” But, that was

wanted to talk with Richard’s service coordinator. Neither Petitioner, nor his counsel ever prevented anyone at DHHS or DDSN from communicating with Richard’s service coordinator. Counsel simply requested copies of those communications that are allowed by HIPAA. Supplemental Appendix at 203-209, 387-484.

not true. These records are contained in the physicians' notes, hospital and emergency room records Mrs. Stogsdill provided to the service coordinator. Supplemental Appendix at 210-287.

Dr. Platt either ignored, or Respondent's counsel did not provide these records showing that Richard's "drug regimen" included IV morphine for severe pain, which could not be administered by a family member, but that was not mentioned in the "assessment." Supplemental Appendix at 238-287. See also explanation by Dr. Munn at Supplemental Appendix 86-87. "As a result of the repeated high dosage of narcotics required in a hospital setting and the delay in getting treatment for his pain, Richard has experienced severe mental and emotional decompensation that has been accompanied by uncharacteristic aggressive behavior." Id. At 86. According to Dr. Munn, if Respondent had provided the nursing services she had ordered, the need for hospitalization likely would have been avoided "because a registered nurse could have administered a lower dose of narcotic pain medications by injection at home immediately upon the onset of symptoms." Id.

DHHS intentionally misrepresented to this Court that Petitioner's counsel prevented DDSN from having access to Richard's home and "general living situation." Id. at 40-42. But, agency counsel failed to inform this Court that the

service coordinator had unfettered access to visit Richard in his home, and had done so in conducting her “comprehensive assessment,” as required by the Service Coordinator’s Manual. Supplemental Appendix at 372.

Dr. Platt served as the Medical Director of the Babcock Center, as well as providing direct care to its residents. Supplemental Appendix at 562. He signed a sworn statement filed in a disciplinary action Respondent’s agent caused to be filed against Petitioner’s counsel, informing this Court that he had never seen counsel’s relative in a wheelchair and that his review of records in his practice’s possession documented that this patient was never observed by any physicians in his group using or requiring the use of a wheelchair. *Id.* at 563. Yet, he signed two Department of Public Safety applications certifying that this patient required the use of a wheelchair due to arthritis, blindness and mental retardation. Supplemental Appendix at 585-587. The medical records Dr. Platt claimed to have reviewed contained multiple references to this patient falling out of his wheelchair and coming into his office in a wheelchair. Supplemental Appendix at 568. Many of these records are signed by Dr. Platt and all were reviewed by him, according to his sworn affidavit.

Petitioner requests that this Court will inquire into these allegations that Respondent’s counsel and/or agency officials intentionally misled, and may

have intentionally suborned false testimony (although, Petitioner acknowledges that Dr. Platt's statement is unsworn). This Court defined fraud on the court in connection with setting aside a final judgment in *Chewning* at 77-78.³ In *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct.App.1988), the Court of Appeals noted that "fraud upon the court" is "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." (citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 408 (2nd ed.1985)). Respondent, through its legal counsel has perpetrated a fraud upon this Court that has subverted the integrity of the Court itself, preventing the "judicial machinery" from performing its task impartially because of the false and misleading information presented at oral argument and subsequently, while refusing to consent to allowing Petitioner to supplement the record. Petitioner respectfully requests an order allowing the taking of depositions of agency officials, Dr. Platt and Ms. Jacques and others involved in this scheme, and the opportunity to be heard on this motion.

Respondent has violated the reasonable promptness mandate and the record shows that decisions have been made by legal counsel without informing agency officials of the facts, or even the existence of Richard's case

In *Doe v. Kidd*, the Fourth Circuit instructed DDSN and DHHS and their officials that eligibility for services (in that case, residential habilitation) must be determined within 90 days. *Supra* at 354. But, nine months after the Court of Appeals ordered DDSN to reassess Richard, without regard to the caps, Respondent applied previously unidentified binding norms requiring Richard to submit to an interview and examination by Dr. Platt and a social worker, whose credentials were not provided in the “assessment” presented to this Court. No federal or state law or regulation requires a Medicaid participant to submit to such violations of their right to privacy. More than 2,500 days have passed since Richard requested services to replace the hours previously provided by the school system, thereby shifting the burden for providing those services to his aging parents. *Moore ex rel. Moore v. Cook*, No. 1:07-CV-631-TWT, 2012 WL 1380220, at *10 (N.D. Ga. Apr. 20, 2012). More than 400 days have passed since the Court of Appeals ordered DDSN to reassess Richard’s needs.⁹

The State Director of DHHS, Anthony Keck, was unaware that DHHS was named as a defendant in six cases pending in the South Carolina Court of

⁹ Deputy Director of DHHS, Elizabeth Hutto, suggested that Richard’s remedy was to “try to talk to their political leaders in this state” and to “go to the Wall Street Journal or The State newspaper...” Supplemental Appendix at 498.

Appeals. Supplemental Appendix at 519. He was not aware of the case of Brook Waddle, filed in 2007, where Ms. Hutto ordered nursing and personal care services in 2013 that still have not been provided. Supplemental Appendix at 500 and 520. That decision, where Waddle's appeal of DHHS' refusal to comply with the order of its own hearing officer, glaringly documents the need for regulations and reasonable standards and the lack thereof. Record at 164. Instead of providing the services Ms. Hutto determined that Brook needs, DHHS filed a motion to dismiss her appeal in the Administrative Law Court more than a year ago, but no final administrative order has been issued by the Executive Branch nine years after her treating physician ordered nursing and personal care attendant services that have not been provided in the amount, duration and scope ordered by her physician. *Moore v. Cook, supra*.

Rule 1.4(a) of the South Carolina Rules of Professional Conduct require a lawyer to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent ...is required." Mr. Keck testified that he is the official who makes the decision to appeal or not appeal.¹⁰

¹⁰ "Well, the legal department —the legal department needs an answer from me about should we continue to appeal, should we settle, its me, but this case has not, that I know of, been brought to me." (Referring to *Waddle v. DHHS*.) Keck Deposition at Supplemental Appendix page 504. Mr. Keck expected agency legal counsel to bring to his attention the decision not to comply with a hearing officer's order. *Id.* at 506.

Supplemental Appendix at 504. But the Director of DHHS was totally ignorant of administrative appeals pending in appellate courts and was not even aware of the Fourth Circuit's ruling that DHHS had abdicated its obligations in *Doe v. Kidd* to provide services with reasonable promptness. *Id.* at 515-516. Oral arguments in *Doe v. Kidd II* were heard on January 27, 2016 in the Fourth Circuit and are available on its website. Mr. Keck was not aware of the "fair hearing" (in *Doe v. DHHS*) that had then been pending in the state appeals process for eight years. *Id.* at 511. According to his testimony, hearing officers reported to the Chief Financial Officer of DHHS. *Id.* at 513.

Although Richard filed his administrative appeal in 2009 and his federal lawsuit in 2014 (naming Mr. Keck as an individual defendant, but he was dismissed by the federal district court), but all he knew about Richard's case was "very little, except for the name."

Mr. Keck testified that "sometimes" DHHS uses published guidelines as a guide to determine medical necessity, but DHHS has no published guidelines requiring a waiver participant to submit to examination by a DDSN physician. *Id.* at 507.

Request for rehearing under Rule 221 and supplementation of record

Alternatively, Richard moves for a rehearing pursuant to Rule 221.

Counsel recognizes that this Rule does not allow for a rehearing on an order denying a petition for a writ of certiorari under Rule 242, but it is silent on whether such a motion may be filed when the writ is granted, then dismissed after oral argument. Under the extraordinary circumstances of this case, Richard respectfully prays that justice requires that he be provided a fair opportunity to respond to the misleading claims made by DHHS counsel that were not based on evidence in the record and to provide the documents DHHS omitted that contain critical information showing that Richard, in good faith, followed DDSN instructions to obtain relief through an assessment by his service coordinator.

Pursuant to Rule 212(b), Richard moves to supplement the record to include evidence of this attempts to obtain an assessment and medically necessary services after the record was closed in 2010.

Argument and Conclusion

Richard has provided evidence of extrinsic fraud, misrepresentation and misconduct by officers of the court, thereby effectively precluding him "from having his day in court." *Chewning* at 82. Fraud upon the court is a "serious allegation ... involving `corruption of the judicial process itself.'" *Chewning* at 79, citing *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, *supra* 827 F.2d at 986 quoting *In re Whitney-Forbes*, 770 F.2d 692, 698 (7th Cir.1985).

... '[F]raud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud—before relief from a final judgment is appropriate.... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself sufficient basis for setting aside a judgment for 'fraud on the court.'

Chewning at 78-79, quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir.2002) quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir.1995).

Petitioner has shown that Respondent acted with intent to deceive and defraud the Court by knowingly referring at oral argument to, then submitting an "assessment" containing false and misleading information. After supplementing the record with hand-picked, incomplete, perhaps perjured documentation of Stogsdill's efforts to require the State to comply with the order of the Court of Appeals, Respondent then refused to consent to allow Petitioner to put before this Court the "rest of the story." Justice will not be served if Richard is penalized for attempting to obtain an assessment through the procedures established by Respondents.

The actions taken by Respondents, DDSN and opposing counsel were intended to improperly place blame on Richard and his counsel, when the

records in the Supplemental Appendix show that he followed precisely the directives of Respondent and opposing counsel established by working with the service coordinator to obtain an honest assessment by qualified professionals. It would be a travesty of justice for Richard to have waited this long, with Respondent relentlessly working to thwart every effort to require DHHS and DDSN to apply reasonable standards to determine his immediate need for services.

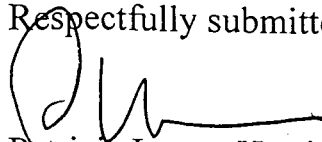
This is a matter of great public importance, because DDSN and DHHS routinely ignore orders of treating physicians and the 90 day standard of promptness, causing great harm and pain to the most vulnerable citizens in South Carolina. Years of administrative appeals thoroughly exhaust what scarce resources Medicaid waiver participants have. As the Court of Appeals for the Fourth Circuit recognized in *Doe v. Kidd I*, Respondent and DDSN are obligated to determine eligibility within 90 days and to provide services with reasonable promptness. As in *Doe v. Kidd II*, Respondent has once again abdicated its duty to provide services with reasonable promptness. 419 F.App'x 411 (4th Cir. 2011).

Richard has presented evidence that a fraud has been committed on this Court, evidence of misrepresentation and misconduct of an adverse party. He

and his aging mother have suffered the effects of Respondent and DDSN's shenanigans for more than seven years and they, like Petitioner's counsel, have both paid a high price resulting in the decline in their health status. The documentation in this Supplemental Appendix clearly demonstrates why Respondent and DDSN should be required by this Court to promulgate regulations and to provide the services Richard's physician has ordered until they do so. As is evident from the affidavit of Nancy Stogsdill and the Supplemental Appendix, DHHS and DDSN change the rules frequently and arbitrarily to avoid liability or accountability

Dismissing Petitioner's appeal based on intentionally false and misleading arguments and incomplete and self-serving records only encourages continued violation of federal law and the orders of state and federal courts, a waste of judicial resources, as well as taxpayer dollars.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'PLH', written over the typed name.

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February 3, 2016