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STATEMENT OF THE CASE

The present appeal arises from an order sanctioning Appellant Dr. Cynthia Holmes, M.D. ("Appellant" or Holmes") pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, codified at section 15-36-10 of the South Carolina Code (the "FCPSA"). **Supp.R.pp.3-20.**

Respondent East Cooper Community Hospital, Inc., a subsidiary of Tenet

HealthSystem Medical, Inc., owns, operates and does business as East Cooper Medical Center ("Hospital"), a private, for-profit hospital in Mount Pleasant, South Carolina. **R.pp.2, 5.** Holmes, a medical doctor, was previously a member of the consulting medical staff of the Hospital and practices ophthalmology in Sullivan's Island, South Carolina. **R.p.10, ¶4.** She is also a licensed member of the South Carolina Bar.

On April 26, 2010, Holmes filed a lawsuit against Respondents East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc. (collectively "Respondents") seeking judicial review of (1) the Hospital's 2006 decision to deny her application for advancement in medical staff category and privileges to perform surgery on the eye and (2) the Hospital's 2008 decision to reject a similar application as incomplete. **R.pp.10-14.** Holmes alleged that the Hospital's decision with respect to these applications breached a contract or a covenant of good faith and fair dealing between the Hospital and Holmes. **R.pp.10-14.**

On September 17, 2010, Respondents answered Holmes' Complaint and counterclaimed against her for abuse of process and malicious prosecution. **R.pp.15-31.** Respondents also incorporated a Motion for Sanctions under the FCPSA into their Answer. **R.p.31, ¶¶66-67.** While Holmes alleges in her appellate brief that Respondents filed an Amended Answer in this case **(App.'s Initial Brief, p.1)**, she is confusing the present lawsuit with the almost identical one she filed against the Respondents in 2005. Respondents never filed an Amended Answer in the present case.

On September 24, 2010, Respondents moved for judgment on the pleadings. **R.pp.635-36.** The Honorable R. Markley Dennis, Jr., held a hearing and orally denied the motion solely on the basis that the motion would be more appropriately considered

and reviewed on appeal at the summary judgment stage. **R.pp.592:23-593:1.** Respondents moved to reconsider **(R.pp.658-61)**, and Judge Dennis denied this motion through a "form" Order filed on March 9, 2011 **(R.p.1).**

On June 6, 2011, Respondents moved for summary judgment on several grounds, including the Circuit Court's lack of subject matter jurisdiction to review the medical staff privileging decisions of a private, for-profit hospital. **R.pp.663-65.** On July 29, 2011, the Honorable Kristi Lea Harrington entered an Order granting summary judgment to Respondents, recognizing that the Circuit Court lacked subject matter jurisdiction to review the Hospital's privileging decisions with respect to Holmes. **R.pp.2-9.**

On August 8, 2011, Respondents served and filed a Motion for Sanctions under the FCPSA. **Supp.R.pp.22-23.** Among other things, Respondents contended that Holmes should be sanctioned for "seeking adjudication of claims over which this Court does not have jurisdiction" and "raising issues which have been previously adjudicated against the [Appellant] and in the [Respondents'] favor." **Supp.R.pp.22-23.** On August 24, 2011, Holmes appealed the Circuit Court's Order granting summary judgment to the Respondents. **R.p.1436.**

In the meantime, Holmes responded to the Motion for Sanctions by contending, in her written brief, that (1) the Court cannot grant sanctions when a Motion to Dismiss has previously been denied by the Court; (2) Appellant's attorney competently represented her; and (3) Respondents' motion is premature because of Appellant's pending appeal of the Order granting summary judgment to Respondents. **2nd Supp.R.pp.25-36.** Holmes did not raise any constitutional arguments in her written brief

in opposition to Respondents' Motion for Sanctions. **2nd Supp.R.pp.25-36.**

On November 22, 2011, Judge Harrington held a hearing on Respondents' Motion for Sanctions. **2nd Supp.R.p.4.** During oral arguments, Appellant argued, without citation to any authority, that the FCPSA unconstitutionally holds *pro se* litigants to a reasonable attorney standard and, again without citation to any authority, that the FCPSA deprives litigants of due process by requiring the Circuit Court to report a violation of the FCPSA directly to the Supreme Court of South Carolina. **2nd Supp.R.p.21:17-25; p.22:1-9.** No other constitutional issues were raised by Appellant during this hearing or otherwise prior to Judge Harrington's Order Awarding Sanctions, filed on February 1, 2012. **Supp.R.pp.3-20.**

In the Order Awarding Sanctions, Judge Harrington held that Holmes violated the FCPSA by "initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against the [Appellant] that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations." **Supp.R.pp.7-8.** While Holmes failed to address the issue in her initial appellate brief, Judge Harrington also held that Holmes violated the FCPSA by initiating and continuing "the present action despite the [Respondents'] compliance with the plain language of the [Hospital's] Bylaws." **Supp.R.p.11.** Judge Harrington did not address any constitutional arguments in the Order Awarding Sanctions. **Supp.R.pp.3-20.**

As a sanction, Judge Harrington awarded Respondents their attorneys' fees and other litigation expenses in this action and enjoined Holmes from filing suit against Respondents in the future without posting a bond to pay Respondents' attorneys' fees

and costs in the event Respondents prevail in the litigation and show that they are entitled to such fees and costs. **Supp.R.p.3.** Judge Harrington elaborated on the reasoning behind this sanction: "This Court has carefully considered this relief in an attempt to issue an injunction which is no more comprehensive than required by the facts of this case and the long history of the Plaintiff's litigation activities." **Supp.R.p.18.**

On February 21, 2012, Holmes moved to reconsider the Order Awarding Sanctions. **2nd Supp.R.pp.84-92.** Holmes did not seek a ruling on her oral argument that the "reasonable attorney" standard in the FCPSA violates due process; however, Holmes contended, for the first time in her Motion to Reconsider, that the FCPSA inhibits free speech. **2nd Supp.R.pp.84-92.**

On March 1, 2012, Holmes appealed the Order Awarding Sanctions. **2nd Supp.R.p.94**. On March 7, 2012, Judge Harrington denied Holmes' Motion to Reconsider. **2nd Supp.R.p.1.** On March 19, 2012, Holmes filed an Amended Notice of Appeal challenging both the Order Awarding Sanctions and the Order denying her Motion to Reconsider. **2nd Supp.R.p.101.** On May 24, 2012, this Court consolidated the current appeal with Holmes' previous appeal of the Order granting summary judgment to Respondents and transferred both appeals from the South Carolina Court of Appeals to this Court. **2nd Supp.R.p.3.**

FACTS

As previously discussed, the present lawsuit seeks to overturn the Hospital's 2006 and 2008 decisions with respect to Holmes' applications for advancement in medical staff category and for the privilege to perform surgery on the eye. **R.pp.10-14.** Holmes' present lawsuit challenges these decisions under the guise of a breach of

contact/breach of covenant of good faith and fair dealing action. **R.pp.10-14.**

This is the fourth lawsuit filed by Holmes against Respondents alleging that Respondents breached a contract or breached a covenant of good faith and fair dealing through the handling of her medical staff privileging applications. **R.pp.10-14; R.pp.73-74, ¶¶54-62; R.pp.123-124, ¶¶50-58; R.pp.243-46.** These lawsuits originated with the filing of an action in federal court by Holmes in 1999. **R.pp.60-79.** These lawsuits also spawned two legal malpractice actions filed by Holmes against the attorneys who represented her in her first and second lawsuits against Respondents, respectively. **R.pp.164-177; R.pp.179-195.** Holmes has been warned or sanctioned multiple times by multiple trial and appellate courts in her various lawsuits. **R.pp.197-235.**

In 2002, Holmes and Respondents settled Holmes' second lawsuit against Respondents pursuant to a settlement agreement (the "Settlement Agreement") which provided, in pertinent part: "Dr. Holmes shall have the right to apply for a change in status in accordance with the Bylaws." **R.pp.53-54.** The Settlement Agreement was executed in 2003. **R.pp.56-57.**

In 2005, Holmes filed her third lawsuit against Respondents alleging, among other things, that Respondents breached the Settlement Agreement or breached a covenant of good faith and fair dealing in reviewing Holmes' applications for medical staff privileges in 2002 and 2004. **R.pp.243-46; R.pp.251-52.** Holmes asserts the exact same legal position in this case, arguing that Respondents breached the Settlement Agreement or a covenant of good faith and fair dealing in reviewing Holmes' applications for medical staff privileges in 2006 and 2008. **R.pp.10-14.** In fact, the allegations relating to these causes of action in the 2005 lawsuit are almost identical to

the allegations supporting her present lawsuit:

2005 Lawsuit	2010 Lawsuit
The Plaintiff and Defendant [sic] were and are parties to a contractual agreement, the terms of which are set forth in the Medical Staff Bylaws, Rules, Regulations, and related documents. **R.p.240, ¶19; R.pp.241-42, ¶ 30(1); R.pp.243-44, ¶31(2)**[1]	The Plaintiff and Defendant [sic] were and are parties to a contractual arrangement, the terms of which are set forth as part of a settlement agreement. **R.p.12, ¶12**
As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing. **R.p.244, ¶32(2)**	As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing. **R.p.12, ¶13**
That the Defendant [sic] breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges by claiming, fraudulently, that Plaintiff's application for privileges was incomplete, when it was not. **R.p.244, ¶33(2)**	That the Defendant [sic] breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws. **R.p.12, ¶14**
In 2002 and 2004 (in each of the two years), Plaintiff submitted an application for advancement in staff privileges, which was complete on its face. **R.p.244, ¶34(2)**	In 2006-2007 and 2008-2009 (in each of two years), Plaintiff submitted an application for advancement in staff privileges, which was complete on its face. **R.p.12, ¶15**
The Credentials Committee then denied the Plaintiff's application, an act which should have given Plaintiff the right to pursue an appeal, under the Contract. **R.p.244, ¶36(2)**	The Credentials Committee then denied the Plaintiff's application, an act which should have given the Plaintiff the right to pursue an appeal, under the applicable bylaws. **R.p.12, ¶16**

With respect to Holmes' allegation in the 2005 lawsuit that she and Respondents were parties to a contractual agreement "the terms of which are set forth in the Medical Staff Bylaws, Rules and Regulations, *and related documents*" **(R.p.240, ¶19; R.pp.241-42, ¶ 30(1); R.pp.243-44, ¶31(2))**, Holmes later confirmed in the 2005 lawsuit that these

[1] The Amended Complaint in the 2005 lawsuit includes two separate paragraphs labeled 30, 31, 32, 34, and 36. The parenthetical next to the referenced paragraph indicates whether the citation is to the first such paragraph (1) or the second (2).

"related documents" included the Settlement Agreement—the same contract she alleges was breached in the present case:

> The defendant [sic] claims that *a settlement agreement executed by the parties which required that the Plaintiff be reappointed to the consulting staff in 2002* precludes Plaintiff from suing in this case because she was, actually, reappointed to the consulting staff in 2002. The Defendant [sic] misinterprets the complaint, which should be clear on its face. *Plaintiff was given two rights under the former agreement.* One was to be reappointed to the consulting staff in 2002 for two years. *The other, as Defendant [sic] explains in its own brief, was that the Plaintiff would have the right to apply for a change in status pursuant to the by-laws. It is the denial of the Plaintiffs right to apply for a change in status pursuant to the by-laws which is the basis of her claims in this case*.

R.p.251 (double emphasis added).

In the 2005 lawsuit, as in the present lawsuit, the Circuit Court granted summary judgment to Respondents. **R.pp.316-22.** In addressing the allegations set forth above relating to Holmes' 2004 application, which are almost identical to the claims set forth in the current case relating to the her 2006 and 2008 applications, Judge Dennis, the Presiding Circuit Court Judge, held, in pertinent part:

> *The Plaintiff's Amended Complaint seeks judicial determination of whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws*. Specifically, she requests the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. *The Plaintiff's claims all arise out of the peer review process at East Cooper Hospital and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and the Plaintiff has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are*

not subject to judicial review.

R.p.319 (double emphasis added). Holmes appealed this order to the South Carolina Court of Appeals three separate times, and the Court of Appeals dismissed and remitted the appeal each time.

Judge Dennis re-emphasized his ruling in a subsequent Order sanctioning Holmes under the FCPSA in the 2005 case:

> *Despite clear case law to the contrary, the Plaintiff filed this action seeking judicial determination of whether the decisions regarding her credentialing and privileges were reasonable and in compliance with the Hospital's Bylaws*. Specifically, she sought the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The Plaintiff's claims all arose out of the peer review process and, under South Carolina law, are not subject to judicial review, and the Plaintiff presented no evidence or reason to persuade the Court to depart from this long-standing principle.

R.p.211 (double-emphasis added). This Order was also appealed by Holmes. The Court of Appeals dismissed and remitted her appeal.

When Appellant filed her present lawsuit alleging that Respondents breached the Settlement Agreement and breached a covenant of good faith and fair dealing in reviewing Holmes' 2006 and 2008 medical staff privileging applications, Respondents filed an extensive Answer incorporating the record from past lawsuits and, shortly thereafter, filed a Motion for Judgment on the Pleadings. **R.pp.15-572; R.pp.635-36.** Based on the pleadings, Respondents contended that the Circuit Court lacked jurisdiction to consider the Appellant's claims. **R.p.643.**

Judge Dennis held a hearing on Respondents' motion. Contrary to Appellant's

unsupported assertions in her brief, Judge Dennis did not rule on the merits of Respondents' motion during this hearing, nor did he adjudicate Appellant's counsel as competent, nor did he encourage Appellant's counsel to proceed with the lawsuit. Judge Dennis stated, in pertinent part:

> I think the safest for everybody, for review purposes is to have this matter resolved not on a Motion on the pleadings but on a Motion for summary judgment. I just am not—I understand the jurisdictional issue. There are matters, though, that I—I really would have to rely on certain things outside of the context of the pleadings.

R.p.591:15-22.

Judge Dennis continued by warning Appellant's counsel *against continuing with the case* based on his view of the pleadings:

> I don't quarrel with anything you've [addressing Respondents' counsel] said. I would remind everybody—I don't have to, we have very competent lawyers involved in this, but *if this is another effort that really is nothing more than—could be considered frivolous, though I am not making that finding now, and I would not hesitate, nor am I sure any other judge would hesitate to impose sanctions.*
>
> So I—just remind everybody what we're doing here because I think it has to be looked at in a real sense. I think that the there are things, Mr. Johnson,—no disrespect to you, sir, but—I understand what you say sounds like that might be creative lawyering, too, by using semantics—and *I don't think that it is there. That's not for me to judge today.*
>
> I agree with you that it would be a mistake to grant this on the basis of the pleadings. So that's the reason that I am denying it—*not anything about the merits.*

R.pp.592:5-593:1 (emphasis added). Respondents filed a Motion to Reconsider this ruling **(R.pp.658-61)**, which Judge Dennis denied in a form Order **(R.p.1).** Judge Dennis never ruled on the merits of the issue, again contrary to Appellant's unsupported assertions.

After Judge Harrington granted summary judgment to Respondents, reviewing all the evidence at the summary judgment stage and finding that the Circuit Court lacked subject matter jurisdiction to consider Appellant's claims **(R.pp.2-9)**, Respondents moved for sanctions under the FCPSA **(Supp.R.pp.22-23)**. This is exactly what Judge Dennis warned Appellant's counsel could happen if he continued with the case during the hearing on Respondents' Motion for Judgment on the Pleadings. **R.pp.592:5-593:1.** It is also exactly what happened after the disposition on summary judgment of the 2005 lawsuit. After a hearing **(2nd Supp.R.pp.4-24)**, Judge Harrington granted the motion, finding that the present case is simply a re-hash of past lawsuits **(Supp.R.pp3-20)**: "With the Plaintiff being sanctioned in 2005 for making the argument, no reasonable attorney could contend that the argument is not frivolous in this action." **Supp.R.p.9.**

In fact, Appellant's attorney, Chalmers C. Johnson, who also represented Holmes in the 2005 lawsuit, concedes that the present lawsuit impermissibly seeks to overturn Judge Dennis's decision in the 2005 lawsuit. Specifically, Judge Dennis held in the Order granting summary judgment to Respondents in the 2005 lawsuit:

> The Plaintiff argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital,* 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt the Plaintiff's interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. *Lee* at 10. Here the Plaintiff asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that *Strauss, Gowen,* and *Wood* decisions sought to prevent.

R.p.319.

During the hearing on Respondents' Motion for Sanctions in the present case, Johnson articulated the purpose of the 2010 lawsuit as follows:

> Your order was issued on your interpretation [in the present lawsuit] and Judge Dennis's interpretation [in the 2005 lawsuit] of the Lee case. And while I fully respect that the Court has the authority to interpret these cases and issue an order, the only other order in existence that supports Your Honor's order is Judge Dennis's [in the 2005 lawsuit], which is a circuit court order and not an appellate opinion. And we're in the Court of Appeals now for me to challenge that order[2], which is the proper way to do it.
>
> . . . .
>
> In fact, attorneys are allowed to even go against existing appellate opinion if they have a good-faith argument against it. In this case I wasn't going against appellate law. *I felt that Judge Dennis was incorrect, and you felt that I was incorrect, and now we are in the Court of Appeals.* That's the way the system is supposed to work. It's not a frivolous lawsuit.
>
> . . . .
>
> The second sanctions order [issued by Judge Dennis in the 2005 case] I'm very well aware of. And I was aware of that when I took this case which is why I did the research, I talked to other lawyers in the community to see what they thought.
>
> *And the question was, was Judge Dennis right about Lee versus Chesterfield.* The consensus that I got was that he wasn't right about Lee versus Chesterfield. I don't think he was right about Lee versus Chesterfield.
>
> And it does me no good to say that to anybody except to you and then to the Appellate Court, which is exactly where I'm going. *The case was very specifically tailored for that purpose . . . was either I'm going to convince a judge this time that I'm right about Lee versus Chesterfield, or I'm*

[2] Holmes' three appeals in the 2005 lawsuit had all been dismissed and remitted well before the November 22, 2011 hearing on Respondents' Motion for Sanctions in the present lawsuit. Upon information and belief, Appellant's counsel was referring to the pending appeal of Judge Harrington's Order granting summary judgment to Respondents in the present lawsuit, which incorporated much of Judge Dennis's reasoning in his Order granting summary judgment to Respondents in the 2005 lawsuit.

> *going to convince an appellate panel on the Supreme Court that I'm right about Lee versus Chesterfield, or I'm just dead wrong and everybody is going to tell me so all the way up.*

2nd Supp.R.p.17:14-22; p.18:3-10; p.20:3-20 (emphasis added).

Notably, on November 10, 2009, the South Carolina Court of Appeals warned Holmes against continuing to challenge Judge Dennis's May 23, 2007, Order granting summary judgment to Respondents in the 2005 lawsuit:

> Moreover, we also note that Appellant has filed two separate appeals in this Court challenging identical orders of Judge Dennis dated November 29, 2006 and May 23, 2007. One is the above-captioned appeal, which was remitted in July of 2008. The other appeal was dismissed in March of 2009. During the pendency of Appellant's appeals, Respondents' have repeatedly moved for sanctions, which this Court has denied. However, Appellant is hereby cautioned and is put on notice that any more filings or motions in this matter will result in sanctions.

R.p.229. Holmes ignored this Order, which resulted in a second warning from the Court of Appeals not to continue to appeal Judge Dennis's final ruling from May 23, 2007:

> We also take the opportunity to clarify that the only orders properly being challenged on appeal are the orders dated August 6, 2009 and the form order dated June 25, 2009. The other orders listed in Appellant's amended notice of appeal have been the subject of previous appeals to this Court. Appellant has attempted to appeal those previous orders several times. If Appellant again attempts to pursue appeals of those orders she will be sanctioned.

R.p.230.

As Appellant's counsel concedes, the present lawsuit is clearly another misguided and impermissible attempt to overrule Judge Dennis in the 2005 lawsuit. As Judge Harrington recognized in her Order Awarding Sanctions:

> While the Plaintiff contends that this previous circuit court order is not binding precedent and that Judge Dennis's

> decision in this instance was incorrect, the Plaintiff ignores that "[u]nder the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Plaintiff failed to offer any argument as to why Judge Dennis's decision does not collaterally estop her in this action. Moreover, *the Plaintiff's argument on this point emphasizes her willingness to re-litigate the case she lost in 2005.*

Suppl.R.p.11 (emphasis added).

As explained further below, Judge Harrington was well within her discretion when she sanctioned Holmes under the FCPSA for continuing to appeal Judge Dennis's final orders in the 2005 lawsuit; for continuing to raise the issue of subject matter jurisdiction she was sanctioned for raising in 2005; and for arguing that Respondents' conduct failed to conform to the Hospital's bylaws in the face of uncontradicted evidence to the contrary. Judge Harrington's decision should therefore be AFFIRMED.

STANDARD OF REVIEW

"Since the decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law." Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). "Pursuant to the South Carolina Constitution, an appellate court reviews findings of fact in an equity matter taking its own view of the evidence." Id. "*[D]e novo* review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the [trial] court." Lewis v. Lewis, 392 S.C. 381, 389, 709 S.E.2d 650, 654 (2011). "The presence of *de novo* review and a willingness, after review, to defer to the fact finder should not be viewed as

contradictory positions." Id.

"The 'abuse of discretion' standard [also] play a role in the appellate review of a sanctions award." Father, 353 S.C. at 261, 578 S.E.2d at 14. "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." Id. "For example, where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." Id.

LAW/ANALYSIS

I. The Circuit Court acted within its discretion by hearing Respondents' Motion for Sanctions after Appellant filed her notice of appeal of the Circuit Court's Order granting summary judgment to the Respondents.

Appellant contends that the FCPSA contradicts the South Carolina Appellate Court Rules or the South Carolina Rules of Civil Procedure by permitting a Motion for Sanctions to be heard prior to the final appellate disposition of an Order granting summary judgment to Defendants. This argument is not preserved and fails on its merits.

A. Appellant failed to raise this issue to the Circuit Court.

As a preliminary matter, Appellant never contended before the Circuit Court that the FCPSA conflicts with the South Carolina Appellate Court Rules or the South Carolina Rules of Civil Procedure. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Appellant did not raise this purported conflict in his written brief opposing sanctions, at oral arguments, in his proposed order, or in his Rule 59(e),SCRCP, motion. The issue is

therefore unpreserved.

B. Appellant also loses on the merits. The applicable rules require an appeal to be dismissed or stayed until all issues in the case are final and further provide that a post-trial motion stays the time to appeal.

A motion for sanctions under the FCPSA is a post-trial motion: "At the conclusion of a trial and after a verdict for or a verdict against damages has been 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 Ann. § 15-36-10(C)(1); see also In re Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (describing motions under the FCPSA as "post-trial motions for sanctions"); Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 431-32, 570 S.E.2d 187, 189 (Ct. App. 2002) (treating post-trial motion for sanctions as a Rule 59(e), SCRCP, motion); Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) (motion for sanctions timely under standard applicable to Rule 59(e) motions).

In Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986), the Supreme Court of South Carolina held that a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion. See also Toal, Jean Hoefer, et al. Appellate Practice in South Carolina p.120 (2nd Ed. 2002) ("In the event timely post-trial motions are filed under Rule 59, SCRCP, simultaneously with or subsequent to the filing of a notice of appeal, the appellant should notify the clerk of the appellate court in writing. Upon receipt of such notice, the appeal will be dismissed without prejudice.").

The FCPSA does not conflict with the South Carolina Appellate Court Rules or the South Carolina Rules of Civil Procedure. As with any post-trial motion, a motion under the FCPSA should be heard by the Circuit Court *before*, not after, an appeal of the underlying order. Under these circumstances, the Circuit Court acted well within its discretion by moving forward with the sanctions hearing after Appellant filed her Notice of Appeal.

II. Appellant failed to preserve her argument that the FCPSA is constitutionally flawed. In addition, Appellant's novel and conclusory arguments that the FCPSA violates Appellant's right to a jury trial, deprives Appellant of due process, subjects the Appellant to double jeopardy, and denies Appellant a right to redress or the freedom of speech are meritless.

Appellant contends that the FCPSA is "constitutionally flawed," using an "everything but the kitchen sink" approach to attempt to manufacture a Circuit Court error. Appellant did not preserve any of these arguments, which Appellant failed to raise to the Circuit Court or failed to raise in a timely manner to the Circuit Court or failed to obtain a ruling on from the Circuit Court.

Moreover, Appellant's conclusory arguments fail to show any constitutional violation.

A. Appellant's constitutional arguments are not preserved.

As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to and ruled upon by the court below to be preserved for appellate review." Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 704 (Ct. App. 2001). Moreover, "[i]t is well settled that an issue may not be raised for the first time in a post-trial motion." S.C. Dep't of Transp. v. First Carolina Corp., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "Further, it is a litigant's duty to bring to the court's attention

any perceived error, and the failure to do so amounts to a waiver of the alleged error." Id. "When an issue or argument has been raised to but not ruled upon by the circuit court, a party must file a Rule 59(e) motion in order to preserve it for appellate review." Rodriguez v. Gutierrez, 391 S.C. 323, 330, 705 S.E.2d 94, 98 (Ct. App. 2011).

Appellant never argued to the Circuit Court that the FCPSA is redundant to a claim for abuse of process or a request for sanctions under Rule 11, SCRCP **(App.'s Br. pp.8-9, §III.A)**. Likewise, Appellant never contended that the FCPSA deprived Appellant of a right to a jury trial **(App.'s Br. pp.8-9, §III.A)** or a speedy remedy **(App.'s Br. p.11, §III.D)**, or violates double jeopardy **(App.'s Br. pp.10-11, §III.C)**.

With respect to Appellant's due process claim regarding the "reasonable attorney" standard **(App. Br. pp.9-10, §III.B)**, Appellant raised the issue to the Circuit Court, but failed to obtain a ruling thereon and failed to request such a ruling in her Motion to Reconsider.

Finally, the Appellant's argument that the FCPSA unconstitutionally inhibits free speech was raised for the first time in her Motion to Reconsider. It was therefore untimely raised.

B. There is no constitutional right to a jury trial where, as here, the action is equitable.

"The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005). "The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the

Constitution." Id. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997).

"The determination of whether statutory attorney fees should be awarded is treated as one in equity." Kilcawley v. Kilcawley, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994). Likewise, "[t]he determination of whether attorney's fees should be awarded under the Frivolous Proceedings Act is treated as one in equity." Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). "Actions for injunctive relief are equitable in nature." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). Since Respondents' Motion for Sanctions sought the recovery of statutory attorneys' fees and injunctive relief, there is no constitutional right to a jury trial.

Appellant also contends that the FCPSA is redundant to an action for abuse of process or a motion for sanctions under Rule 11, SCRCP; however, Appellant fails to explain how this purported redundancy impacts a constitutional right to a jury trial.

Moreover, the FCPSA, which establishes liability for the filing or continuation of objectively frivolous pleadings, motions, or lawsuits, contains completely different elements from a cause of action for abuse of process, which requires an improper motive, or Rule 11, SCRCP, which applies a subjective good faith standard. See Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) ("The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding."); Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 108, 713 S.E.2d 650, 656 (Ct. App. 2011) (recognizing FCPSA contained similar standards to Rule 11 only *prior* to the recent

revisions to the FCPSA applicable to the present case). There is no redundancy.

C. The FCPSA provides constitutionally adequate procedural due process.

Appellant contends that the FCPSA denies citizens procedural due process because it holds "the pro se litigant or non-attorney party is held to a standard of expertise which the layperson and affected party do not possess." **App.'s Br. p.10.**

Initially, Appellant is neither *pro se* nor a "non-attorney" party. She is a licensed attorney, and she is represented by a licensed attorney. Therefore, Appellant lacks standing to raise this argument. See U.S. v. Raines, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); see also Smith v. Educ. People, Inc., 233 F.R.D. 137, 142 (S.D.N.Y. 2005) ("Such sanctions may be particularly appropriate when the offending party, although proceeding *pro se,* has demonstrated (and, in this case, affirmatively asserted) competence in finding and understanding the applicable law.").[3]

Moreover, Appellant does not point to a single case anywhere that supports this position. By revising the FCPSA to incorporate the "reasonable attorney" standard, the General Assembly has recognized that neither a *pro se* party nor a non-attorney litigant should escape sanctions for filing or continuing a frivolous lawsuit by simply stating that he or she "didn't know any better."

In this respect, courts in other jurisdictions permit sanctions to be imposed on *pro*

[3] In Holmes v. Becker, Case No. 2007-CP-10-01444, Holmes complains in her appeal to this Court that the trial judge excluded her as an expert on the standard of care for a trial attorney. **Br. of App. pp.16-17.**

se litigants under the same reasonableness standard applicable to attorneys. See Anderson v. Steers, Sullivan, McNamar & Rogers, 998 F.2d 495, 496 (7th Cir. 1993) ("He is, it is true; unrepresented, but a litigant does not acquire an entitlement to file a frivolous appeal by dispensing with counsel . . . especially when he does not claim to be unable to afford counsel."); McNeil v. United States, 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."); Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986) ("That his filings are *pro se* offers Farguson no impenetrable shield, for one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets."); Wiideman v. McKay, 132 F.R.D. 62, 65 (D. Nev. 1990) ("A pro se litigant is under the same obligation as an attorney to make a reasonable inquiry into the facts of a matter prior to filing an action."). No case anywhere finds a violation of due process when the same standard for finding "frivolous" conduct is applied to *pro se* parties and attorneys.

There is also no basis for finding a violation of procedural due process under the traditional analysis employed in South Carolina. "Procedural due process requirements are not technical; no particular form of procedure is necessary." In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). "The United States Supreme Court has held, however, that at a minimum certain elements must be present." Id. "These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Id.

In this respect, section 15-36-10(D) of the South Carolina Code, which Appellant

ignores in her appellate brief, provides:

> A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.

In this case, Respondents filed their Motion for Sanctions on August 8, 2011. **Supp.R.pp.22-23.** Appellant failed to file any response within thirty (30) days of this filing, instead waiting until October 21, 2011 to file a responsive pleading. While Appellant proffered certain evidence in support of her position, she failed to proffer any testimony or request any cross-examination. The Circuit Court did not exclude any evidence submitted by Appellant in opposition to Respondents' Motion for Sanctions. A hearing was held on November 22, 2011, during which Appellant's counsel affirmatively represented he was ready to proceed:

> THE COURT: If you are not prepared to go forward you need to tell me now.
> MR. JOHNSON: I'm prepared to go forward.

2nd Supp.R.pp.5:20-6:4. Under these circumstances, Appellant received constitutionally adequate procedural due process.

D. The FCPSA does not violate double jeopardy.

Appellant contends the FCPSA violates double jeopardy because it would "preclude a Judge from refraining from issuing the same sanction to an attorney who violated this act which he had received in a Rule 11 Order on the basis that the sanction

had already been imposed." **App. Br. pp.10-11.**

Section 15-36-10(K) of the South Carolina Code, the provision of the FCPSA which Appellant relies on to support this argument, provides: "The provisions of this section apply in addition to all other remedies available at law or in equity." Contrary to Appellant's unsubstantiated arguments, nothing in the plain language of this provision purports to "preclude" a trial judge from doing anything. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

In addition, there is no double jeopardy concern where, as here, the nature of the sanction is civil, not criminal. See Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."); Poston v. Poston, 331 S.C. 106, 112, 502 S.E.2d 86, 89 (1998) ("If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order.").

Furthermore, none of the protections associated with the double-jeopardy clause are implicated in this case, which does not seek to prosecute Appellant for the same offense after she has been acquitted or convicted, and which also does not inflict multiple punishments upon the Appellant for the same offense. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969) overruled on other grounds by Alabama v. Smith, 490

U.S. 794 (1989) (explaining that double jeopardy clause protects against a second prosecution for the same offense after acquittal; against a second prosecution for the same offense after conviction; and against multiple punishments for the same offense).

E. The FCPSA does not unconstitutionally interfere with free speech.

"The court has the discretion and the power to restrict a litigant who abuses the judicial system, and has authority to enjoin persons engaged in a manifest abuse of judicial process." 43A C.J.S. Injunctions § 96. "A court has both the duty and the power to protect the courts, citizens, and opposing parties from the abuse of a party who uses the judicial process not to vindicate his or her rights, but to harass and intimidate his or her adversaries by repeatedly filing groundless and vexatious claims against them." Id. "In order to preserve court resources, courts may place reasonable limits on the filings of litigants who abuse the judicial system, although such a sanction should be drawn narrowly." Id.

"A court's equity jurisdiction may properly be invoked to enjoin a multiplicity of successive suits at law by the same plaintiffs." 43A C.J.S. Injunctions § 99. "A party litigant who brings successive law suits involving the same issues against the same parties that are vexatious in nature may be enjoined from continuing such actions." Id.

Appellant cites to no decisions in any jurisdiction analyzing whether any legislation similar to the FCPSA inhibits free speech. Instead, Appellant relies on inapplicable cases involving an ordinance prohibiting door-to-door or on-street solicitation of contributions by certain charitable organizations, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); a state law restriction on attorney advertising, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); the federal regulation of

sexually-explicit broadcasting, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000); Virginia statutes restricting the ability of the NAACP to assist civil rights litigants, Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 419 (1963); and a city ordinance prohibiting expressive conduct, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992). None of these cases are on point here.

Based on the foregoing, the FCPSA does not inhibit free speech.

III. The Circuit Court's ruling on Respondents' Motion for Judgment on the Pleadings did not preclude sanctions under the FCPSA.

Appellant contends that the Circuit Court's ruling on Respondents' Motion for Judgment on the Pleadings precludes an award under the FCPSA. Initially, Appellant's counsel conceded in oral argument that Judge Dennis denied Respondents' motion based on the procedural posture of the case, not the merits: "I agree with Ms. Smith-Yancey that Judge Dennis, in the denial of the initial motion to dismiss, found that these issues were better taken up later in the case rather than issuing an actual denial." **R.p.626:8-12.**

Nevertheless, Appellant contends on appeal that, after Respondents filed a Motion to Reconsider, Judge Dennis orally indicated he was granting the Motion to Reconsider and denying Respondents' request that the case be dismissed for a lack of subject matter jurisdiction on its merits.

There are several problems with this contention. First, Judge Dennis issued a "form" order *denying* Respondents' Motion to Reconsider after the hearing. **R.p.1.** "No order is final until it is written and entered." First Union Nat. Bank v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992). "Until written and entered, the trial judge retains discretion to change his mind

and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

Second, an order denying a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable and does not, as the Appellant apparently contends, bind the parties. See Deskins v. Boltin, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) ("The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable."); Woodard v. Westvaco Corp., 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) overruled on other grounds by Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) ("An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything.").

Third, the Appellant's reliance on Hanahan v. Simpson, 326 S.C. 140, 157, 485 S.E.2d 903, 912 (1997), is misplaced. The Court in Hanahan held the denial of a motion for summary judgment precludes an award of sanctions after trial. In this case, there was no denial of a motion for summary judgment, and there was no trial because Respondents were granted summary judgment. Further, the 2005 revisions to the FCPSA permit a motion for sanctions even after a trial on the merits. See S.C. Code Ann. §15-36-10(C)(1). Hanahan predates those revisions.

For each of these reasons, the Circuit Court was well within her discretion when she sanctioned Appellant and ruled that the prior rulings of Judge Dennis need not impact her decision.

IV. The Circuit Court acted within its discretion in finding that a reasonable attorney in the same circumstances would believe that under the facts, Appellant's claim was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.

Appellant contends that her "position on subject matter jurisdiction in this case is supported by existing law and therefore could not be considered to have been frivolously pursued." **App. Br. p.17.**

As a preliminary matter, Appellant failed to appeal all of the grounds supporting the Circuit Court's imposition of sanctions, and the unappealed grounds are the law of the case. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

Judge Harrington not only sanctioned Appellant for initiating and continuing this litigation despite the Court's lack of subject matter jurisdiction, but also because she filed and continued this lawsuit "despite a prior ruling against the Plaintiff that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations." **Supp.R.pp.7-8.** Judge Harrington also held, in pertinent part: "Defendants are entitled to sanctions under the Act because the Plaintiff initiated and continued the present action despite the Defendants' compliance with the plain language of the Bylaws." **Supp.R.p.11.** Appellant failed to appeal these other sustaining grounds for the Circuit Court's decision and, therefore, they are the law of the case.

Appellant contends that her argument for the Circuit Court's subject matter jurisdiction is based on a good faith or reasonable extension of the ruling in Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 9-10, 344 S.E.2d 379, 381 (Ct. App. 1986). To the contrary of Appellant's unsupported assertion, in Lee, the South Carolina Court

of Appeals expressly limited its ruling to civil conspiracy claims, recognizing that a private hospital is otherwise free "to decide the nature and extent of medical practice permitted to persons it grants staff privileges." Id. The Court continued: "Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review." Id.

Nevertheless, the Court held that "it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review" because "[t]he question to be decided is not whether the rules are valid or reasonable or medically sound, but whether the rules were imposed in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiffs." Id. There is no indication in Lee or any other case that the ruling in Lee could be extended further, and Appellant points to no contrary reasoning or authority for this proposition from any jurisdiction.

In this case, there is no civil conspiracy allegation, so Lee does not apply. Moreover, even if there were, Judge Dennis rejected the exact same argument in the 2005 case:

> The Plaintiff argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital,* 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt the Plaintiff's interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. *Lee* at 10. Here the Plaintiff asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that *Strauss, Gowen,* and *Wood* decisions sought to prevent.

R.p.319. In short, Appellant lost this argument in the 2005 case and Appellant provides

no basis why her argument is any different in this case, much less any grounds why the doctrines of res judicata and/or collateral estoppel would not prevent Appellant from re-litigating this issue.

V. Appellant failed to preserve her contention that she was competently represented by counsel. On the merits, there is no exception in the FCPSA for litigants who are competently represented by counsel, and the positions taken by Appellant and her counsel were frivolous as a matter of law.

Appellant failed to obtain a ruling on her argument that she was competently represented by counsel in the Order Awarding Sanctions, and her Motion to Reconsider also fails to raise the issue. Under these circumstances, the argument is unpreserved for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

Moreover, nothing in the FCPSA creates an exception for litigants who are competently represented by counsel. Section 15-36-20 of the South Carolina Code (Supp. 2005) previously provided that "[a]ny person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose . . . if he reasonably believes in the existence of the facts upon which his claim is based and . . . (2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action . . . ." There is no similar provision in the current FCPSA. See Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) ("It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing

law.").

Finally, the factual and legal positions advanced by Appellant were frivolous, regardless of whether her counsel was competent. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Rule 1.1, RPC, Rule 407, SCACR. Judge Harrington recognized: "Based on the ample case law on this issue [of subject matter jurisdiction], a reasonable attorney in the same circumstances would believe that under the facts herein, the Plaintiff's claim was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." **Supp.R.p.11.** As previously discussed, Appellant did not appeal many of the other bases of Judge Harrington's ruling, which are therefore the law of the case. Consequently, Appellant should be sanctioned for her frivolous filing and continuation of this litigation regardless of whether her counsel competently represented her.

VI. The Circuit Court acted within its discretion in applying the doctrines of res judicata and collateral estoppel to sanction Appellant under the FCPSA.

Appellant argues that Judge Harrington erred in applying the doctrines of res judicata and collateral estoppel to sanction Appellant under the FCPSA. Appellant essentially argues that her privileges were not terminated as a result of her applications in 2002 and 2004 and, therefore, the facts in this case are different than those in the 2005 lawsuit.

"In a subsequent suit between the same parties *on a different claim*, the former judgment is conclusive as to those issues actually determined in the prior action." Pye v. Aycock, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (emphasis added). "A

plea of *res judicata* applies to those matters actually adjudicated in the former action." Id. In the 2005 lawsuit, the issue of whether the Circuit Court had jurisdiction to review the Hospital's privileging decisions, whether as a breach of contract claim or otherwise, was adjudicated against Appellant. Appellant offers no reason why the same result should not occur in this proceeding.

"Under the doctrine of collateral estoppel, when an issue of fact *or law* is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same *or a different claim*." Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994) (emphasis added). Once again, the 2005 lawsuit adjudicated the issue of subject matter jurisdiction adversely to the Appellant. In this lawsuit, Appellant asked the Court to revisit this decision. This request is barred by the doctrine of collateral estoppel, as Judge Harrington correctly recognized.

Likewise, contrary to Appellant's unsupported assertion, the Circuit Court properly ruled that Appellant failed to rebut Respondents' argument that the 2005 lawsuit collaterally estopped Appellant from re-litigating the issue of subject matter jurisdiction in the present lawsuit. In the Order Awarding Sanctions, Judge Harrington ruled that Appellant "failed to offer any argument as to why Judge Dennis's decision does not collaterally estop her in this action." **Supp.R.p.11.**

In challenging this ruling, Appellant points only to purported arguments she made in opposing summary judgment, which are conclusory and concede that the subject matter jurisdiction issue had been previously decided against Appellant, in pertinent

part: "The orders dismissing the prior cases all find a lack of subject matter jurisdiction." **R.p.1245.** Appellant continued: "In his order of August 6, 2009, Judge Dennis awarded sanctions against Dr. Holmes based on a finding that the Court did not have jurisdiction to decide the prior cases." **R.p.1245.** Appellant never submitted any argument on collateral estoppel in opposing Respondents' Motion for Sanctions, and there is no substance to the purported arguments raised by Appellant in opposition to summary judgment. See Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1198 (7th Cir. 1987) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless."). Consequently, the Circuit Court properly concluded that Appellant offered no argument as to this issue.

VII. The Circuit Court acted within its discretion in characterizing its previous Order as granting summary judgment to the Respondents.

In her Order Awarding Sanctions, Judge Harrington properly characterized her July 29, 2011, Order as granting summary judgment to Respondents. The Order is entitled, "Summary Judgment Order." **R.p.3.** The Order was issued in response to Respondents' motion, entitled "Defendants' Notice of Motion and Motion for Summary Judgment." **R.p.3; R.pp.663-65.** In fact, the Court's "Summary Judgment Order" concludes: "For the foregoing reasons, there is no genuine issue of material fact as to the causes of action asserted by the Plaintiff and Defendants' Motion for Summary Judgment is GRANTED." **R.p.9.**

CONCLUSION

As in the 2005 lawsuit, this Court should affirm the Circuit Court's order sanctioning Holmes pursuant to the FCPSA. Holmes failed to appeal many of the substantive bases of the Circuit Court's Order Awarding Sanctions and raises many

issues for the first time on appeal. Other issues are unpreserved because Holmes failed to raise them in a timely manner or failed to request a ruling pursuant to a Motion to Alter or Amend.

At the heart of this matter, however, lies Holmes' continued frivolous conduct, which has resulted in more than a decade of more or less unabated litigation against the Hospital and others. Holmes has been sanctioned by multiple courts and warned by multiple others. She has numerous judgments against her, which remain unpaid. Nevertheless, she continues to file frivolous lawsuit after frivolous lawsuit.

The Circuit Court recognized the need for an end to this litigation and, appropriately, entered an order enjoining Holmes from filing future lawsuits without guaranteeing that Respondents will be reimbursed should these future lawsuits conclude in favor of Respondents under circumstances similar to this lawsuit and the 2005 lawsuit.

Based on the foregoing, this Court, which has already recognized the need for judicial intervention, should AFFIRM the Order Awarding Sanctions.

Respectfully Submitted,

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Charleston, South Carolina
October 29, 2012

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2010-CP-10-03410

Dr. Cynthia Holmes, M.D., Appellant,

v.

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

RESPONDENTS' CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully Submitted,

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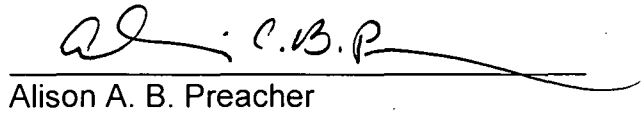
East Cooper Community Hospital, Inc.,
and Tenet HealthSystem Medical, Inc., Respondents.

PROOF OF SERVICE

I certify that I have served Respondents' Final Brief and Certification of Compliance with Rule 211(b) SCACR on Appellant Cynthia Holmes, M.D., by depositing a copy of it in the United States Mail, postage prepaid, on October 29, 2012, addressed to her attorney of record, Chalmers C. Johnson, 923 N. 13th Street, Apartment 1, Tacoma, WA 98403.



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October 29, 2012

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Holmes v. East Cooper Comm. Hosp., Inc., et al.
Case No. 2010-CP-10-03410

Dear Mr. Shearouse:

Please find enclosed an original unbound and fourteen (14) bound copies of Respondents' Final Brief, Certification of Compliance with Rule 211(b) SCACR, and Proof of Service.

By copy of this letter, I am serving counsel of record for the Appellant with the above. As always, your courtesies and assistance are greatly appreciated. Should you have any questions regarding this matter, please do not hesitate to contact our office.

With warmest regards, I am,

PRATT-THOMAS WALKER, P.A.

Daniel S. McQueeney, Jr.

DSM:aabp
Enclosures
cc (w/encl): Chalmers C. Johnson, Esquire