

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

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

v.

Estate of Hugh S. Thompson Respondent-Appellant.

APPELLANT-RESPONDENT'S RETURN TO
THE PETITION FOR REHEARING AND SUGGESTION THAT THE
MATTER BE REHEARD EN BANC

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ATTORNEYS FOR APPELLANT-RESPONDENT

In its Petition for Rehearing, Respondent-Appellants merely attempt to get a second bite at the apple by re-arguing its case.¹ Contrary to Respondents-Appellants' claim, there is no basis for a rehearing of this Court's properly reasoned (and unanimous) decision as more fully set forth herein.

Respondent-Appellant argues that the motion should be considered timely filed because it was filed within ten days of remittitur. However, as this Court found, in determining whether a Rule 11 motion was timely, the court must consider whether it was filed "within a reasonable time after discovering the inappropriate conduct." (Shearouse Adv. Sheet, p. 70). Respondent-Appellant attempts to invoke *Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165 (4th Cir. 1987), for the proposition that judicial efficiency favors the filing of a Rule 11 motion after the appeal is concluded. However, *Hicks* is not controlling and in fact, the court in *Hicks* was ambivalent about whether a motion should be filed before or during an appeal of the merits, or after the appeal's conclusion, stating: "It is not for us, however, to speculate whether it was better pressed earlier than later." *Hicks* at 1167. This Court, however, determined that promptness was key in filing a motion for sanctions.

Furthermore, despite Respondent-Appellant's claim, this Court properly applied the logic and holding of *Griffin v. Sweet*, 525 S.E.2d 504 (N.C. App. 2000). While Respondent-Appellant argues that the plaintiff there did not file the motion until 13 months after the

¹ Respondent-Appellant claims that this was a matter involved an issue of first impression. That fact does not provide any basis for reconsideration. Considering matters of first impression is what appellate courts do. See, e.g., *Greenspan v. Bros. Prop. Corp.*, 103 F. Supp. 3d 734, 742-43 (D.S.C. 2015) ("The Court also considers the fact that the claim... raises issues of first impression under state law...South Carolina has a strong interest in resolving this issue of first impression"); *O'Neill v. Smith*, 388 S.C. 246, 695 S.E.2d 531 (2010)(state Supreme Court answered a certified question raising a novel question of law based on its assessment of the law, public policy and its sense of law, justice and right).

appellate decision, Respondent-Appellant ignores the fact that the crucial point is the reasonableness of the time period after discovering the conduct that forms the basis for the motion:

Although Rule 11 does not specify a time limit for filing a sanctions motion, this Court has held that “a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety.”

Griffin at 506. In *Griffin*, the North Carolina court noted that the plaintiff had been put on notice of the allegedly sanctionable conduct at both the answer and summary judgment stage. Thus, the time frame for the reasonableness of the motion for sanctions began at that time, as it should here. Instead, Respondents-Appellants filed thirty-three months after it had notice of the allegedly sanctionable conduct. (Shearouse Adv. Sheet, p. 72).

In arguing that a post-appellate motion² was appropriate and timely on the facts of this matter, Respondent-Appellant rehashes old arguments and restates various instances of conduct that this Court has already considered and found unpersuasive in light of the delay in filing the sanctions motion. Moreover, by Respondent-Appellant’s own admission, it became aware the conduct which it claims warrant sanctions in early 2011, demonstrating the Respondent-Appellant’s inappropriate delay in filing the Rule 11 motion almost three years later.³

Finally, Respondent-Appellant’s reliance on *Holmes v. Haynsworth, Sinkler & Boyd*, P.A., 408 S.C. 620, 760 S.E.2d 399 (2014) is misplaced. In that case, the court did not consider the timeliness of a Rule 11 motion. The trial court in that case assessed sanctions

² Respondent-Appellant refers to the motion as “post-judgment” but it is more appropriately categorized as “post-appellate.”


³ Respondent-Appellate argues that this Court’s opinion failed to apply the appropriate deference under that abuse of discretion standard in finding that the motion was untimely. However, the Court clearly applied the standard and held that the lower court’s conclusion that Respondent-Appellant’s 28 to 33 month delay in filing the motion was not untimely constituted an abuse of discretion.

under the Frivolous Civil Proceedings Sanctions Act ("the Act"), S.C. Code § 15-36-1, et seq. The issue on appeal was whether the trial court applied the proper version of the Act (the 2005 version versus the pre-2005 version) and whether sanctions could be applied when the party seeking sanctions had not prevailed on summary judgment.⁴ The Supreme Court determined that regardless of which version of the Act applied, the trial court did not abuse its discretion in awarding sanctions. The Supreme Court noted even if it accepted the appellant's argument that sanctions were inappropriate under the Act, Rule 11 sanctions were also appropriate. However, the issue of the timeliness of the motion for sanctions was not raised and therefore not considered by the Supreme Court.⁵ Therefore, *Holmes* offers no basis for Respondent-Appellant's motion for rehearing.

Because this Court made the ruling that the Rule 11 motion was untimely, it did not need to reach the merits of Respondent-Appellant's cross appeal. Appellant-Respondent reasserts and reincorporates all arguments it made against the cross appeal in the briefing previously submitted to this Court.

CONCLUSION

For the reasons set forth herein, Respondent-Appellant Pee Dee Health Care, P.A. respectfully requests that this Court deny the Petition for Rehearing.


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⁴ The trial court had denied a motion for summary judgment made on the eve of trial. At trial, the moving party prevailed on a motion for directed verdict.

⁵ "[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181-82, 325 S.E.2d 550, 561 (Ct. App. 1984), opinion quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)

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November 28, 2016

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PROOF OF SERVICE

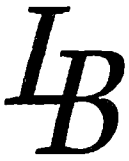
I, Kathy A. Collins, the undersigned employee of Lewis Babcock L.L.P, attorney for the Appellant-Respondent, do hereby certify that I have served a copy of the foregoing Appellant-Respondent's Return to the Petition for Rehearing and Suggestion That the Matter Be Reheard En Banc in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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Columbia, South Carolina
November 28, 2016.



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November 28, 2016

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
John C. Calhoun Building
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Columbia, South Carolina 29201

**Re: Pee Dee Health Care, P.A. v. Estate of Hugh Thompson
Appellate Case No. 2014-001275**

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Appellant-Respondent's Return to the Petition For Rehearing and Suggestion That the Matter Be Reheard En Banc. An Additional copy is enclosed to be clocked and returned via our courier.

By copy of this letter, I am hereby serving a copy of the same to counsel of record.

Thank you for your assistance in this matter.

Very truly yours,

Kathy A. Collins
Legal Assistant to Ariail E. King

/kc

Enclosures

cc: John James, Esquire (Via U.S. Mail)
Renee Josey, Esquire (Via U.S. Mail)