THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Opinion No. 5451 (S.C. Ct. App. Filed November 2, 2016)

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

v.

Estate of Hugh S. Thompson .....Petitioner.

APPENDIX

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INDEX

The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2014-001275

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Young J.

J.

J.

Columbia, South Carolina

cc:
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FILED
February 21, 2017

The Honorable Paul M. Burch
The Honorable J. Michael Baxley, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2014-001275

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5451
Submitted March 24, 2016 – Filed November 2, 2016

VACATED IN PART, AFFIRMED IN PART

James M. Griffin, of Griffin & Davis, LLC, and Ariail King, of Lewis Babcock LLP, both of Columbia, for Appellant-Respondent.

J. René Josey, of Turner Padget Graham & Laney, P.A., of Florence, and John Jay James, II, of Darlington, for Respondent-Appellant.

WILLIAMS, J.: In this civil matter, Pee Dee Health Care, P.A. (PDHC) appeals the circuit court's award of sanctions to the estate of Hugh S. Thompson, III (the Estate) pursuant to Rule 11, SCRCP. PDHC argues the court erred in failing to dismiss the Estate's motion for sanctions as untimely, granting Rule 11 sanctions when PDHC's filings and arguments to the court were not frivolous, awarding sanctions for the thirty hours the Estate's counsel spent responding to discovery

requests served upon third parties, not reducing the award for the time the Estate's counsel spent preparing the sanctions motion, and ignoring the Estate's inequitable conduct when deciding to grant sanctions. The Estate cross-appeals, arguing the court erred in concluding its claim for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act[1] (the FCPSA) was untimely and not awarding additional sanctions. We vacate in part and affirm in part.

FACTS/PROCEDURAL HISTORY

Although this case has a long procedural history, the instant appeal arises out of a sanctions order the circuit court entered against PDHC after this court issued a remittitur in the case. PDHC, a professional medical association doing business in Darlington, South Carolina, formerly employed Thompson as a medical doctor in its clinic from late 1998 to 2000. In exchange for his salary, Dr. Thompson assigned PDHC the rights to his Medicare payments, and PDHC billed Medicare for his services.

Several years before Dr. Thompson began working for PDHC, the South Carolina Board of Medical Examiners (the Board) suspended his medical license and, as a regulatory requirement, he was excluded from the Medicare program by the Medicare Office of the Inspector General (OIG). Although the Board later reinstated Dr. Thompson's medical license in 1998, he failed to seek removal of his name from OIG's list of excluded providers until 2002. In 2007, the Centers for Medicare and Medicaid demanded that PDHC return over $200,000 in benefits it collected while Dr. Thompson was on the excluded provider list.

Following an unsuccessful federal administrative appeal, PDHC filed an action in probate court against the Estate in 2010, seeking reimbursement for the money it was required to pay back to Medicare. The Estate disallowed the claim, and PDHC removed the action to circuit court. Subsequently, the Estate sought to disqualify PDHC's attorney, Tony R. Megna, on the ground that—as PDHC's chief executive officer—he was a necessary fact witness in the case. The court agreed and disqualified Megna in an order dated April 15, 2011. PDHC filed a motion to alter or amend the disqualification order on May 2, 2011.

The Estate and PDHC then filed cross-motions for summary judgment. To avoid any potential prejudice to PDHC, the circuit court allowed Megna to appear for the

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[1] S.C. Code Ann. §§ 15-36-10 through -100 (2005 & Supp. 2015).

limited purpose of arguing the pending summary judgment motions at the July 19, 2011 hearing before it ruled upon PDHC's motion to alter or amend the disqualification order. The court subsequently denied PDHC's motion to alter or amend its disqualification order on August 15, 2011. In its order, the court quashed all motions, subpoenas, and filings made subsequent to June 17, 2011, that contained only Megna's signature.

On September 1, 2011, the circuit court issued an order granting summary judgment in favor of the Estate, finding PDHC's fault for not satisfying its nondelegable duty to ensure the proper credentialing of its employee was dispositive as to all causes of action. The court later dismissed PDHC's motion to alter or amend the summary judgment order as void ab initio because Megna's signature was the only one to appear on the motion in violation of the court's disqualification order.

PDHC filed various appeals with this court regarding the circuit court's summary judgment order, disqualification order, and order dismissing PDHC's appeal from the probate court. This court consolidated the appeals and issued an unpublished opinion on July 3, 2013, in which it dismissed PDHC's appeal of the summary judgment order as untimely, found the disqualification issue was moot, and affirmed the circuit court's dismissal of PDHC's appeal of the probate court's order. *See Pee Dee Health Care, P.A. v. Thompson*, 2013-UP-311 (S.C. Ct. App. filed July 3, 2013). This court denied PDHC's petition for rehearing, and our supreme court later denied its petition for a writ of certiorari. The court of appeals issued a remittitur in the case on January 7, 2014.

Nine days after the remittitur was issued, on January 16, 2014, the Estate filed a motion in circuit court for sanctions—pursuant to Rule 11, SCRCP, and the FCPSA—against PDHC, Megna, Benjamin R. Matthews, and Matthews & Megna, LLC. In its motion, the Estate claimed it expended at least $96,580 in attorney's fees defending against PDHC's allegedly meritless lawsuit as well as Megna's violation of the circuit court's disqualification order. PDHC filed a motion to strike the Estate's motion for sanctions under the FCPSA, arguing the circuit court no longer had subject matter jurisdiction over the matter because the motion was untimely.

At the conclusion of a hearing on the motions, the circuit court announced it would award sanctions. The court, however, directed the Estate to submit a supplemental fee affidavit segregating the amount of time spent addressing Megna's violations of

the disqualification order and filing the motion for sanctions. After the Estate submitted a fee affidavit listing $60,300 for these expenses, the court awarded it $34,150 in sanctions against PDHC, Megna, and his law firm pursuant to Rule 11. Nevertheless, the court declined to award sanctions pursuant to the FCPSA. PDHC filed a motion to alter or amend the award of sanctions, and the court denied its motion. This cross-appeal followed.

STANDARD OF REVIEW

The decision of whether to award attorney's fees pursuant to Rule 11 or the FCPSA is treated as one in equity. *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). "In an action in equity tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). When the appellate court agrees with the circuit court's factual findings, it reviews the award of sanctions under an abuse of discretion standard. *Atl. Coast Builders*, 394 S.C. at 104, 713 S.E.2d at 654. "Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual contentions." *Id.*; *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) ("An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support." (quoting *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996))).

LAW/ANALYSIS

I. PDHC's Appeal

PDHC contends the circuit court erred in failing to dismiss the Estate's motion for sanctions pursuant to Rule 11, SCRCP, because the motion was untimely and, therefore, the court lacked jurisdiction to consider it. We agree.

The circuit court generally "loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (footnote omitted). "Jurisdiction refers to the [circuit] court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction." *Id.* at 20

n.10, 633 S.E.2d at 730 n.10; *see also In re Beard*, 359 S.C. at 358, 597 S.E.2d at 838 (explaining the ten-day rule limiting the time within which a party may file a post-trial motion is a rule of limitation on the circuit court's ability to retain the case, not the power of the court to hear cases of that nature).

Our appellate courts have held that a circuit court cannot entertain a motion for sanctions made pursuant to the FCPSA if it is filed more than ten days after judgment. *See Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (providing "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. at 357, 597 S.E.2d at 838 (noting this court has held "a [circuit] court cannot entertain a motion for sanctions under the FCPSA whe[n] that motion was filed more than ten days after the judgment"); *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002) (finding the circuit court no longer had jurisdiction over the case to award sanctions under the FCPSA two months after granting summary judgment and noting that, "because a [circuit court] retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment").

In the instant case, however, the circuit court only granted the Estate's motion for sanctions pursuant to Rule 11, SCRCP. Rule 11(a), SCRCP, in pertinent part, provides the following:

> The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> . . .
>
> If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may

> include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Pursuant to Rule 11, "an attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Burns v. Universal Health Servs., Inc.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (Ct. App. 2000). "The attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it." *Id.*

> The sanction may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith.

Runyon, 322 S.C. at 19, 471 S.E.2d at 162.

In *Burns*, this court noted Rule 11 "provides little guidance as to the procedural guidelines to be followed prior to the imposition of sanctions under the rule. The rule merely provides that whe[n] a violation occurs, the court, upon motion or its own initiative, may impose appropriate sanctions." 340 S.C. at 513, 532 S.E.2d at 9. Notwithstanding the lack of guidance, this court held "a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11." *Id.* at 514, 532 S.E.2d at 9. In another case, this court indicated that "[t]he criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA]." *Father v. S.C. Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001). Nevertheless, our supreme court has distinguished between sanctions under Rule 11 and the FCPSA, stating no requirement exists "that a motion for sanctions made pursuant to Rule 11 be made

within ten days from notice of entry of judgment." *Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11. In *Russell*, our supreme court expressly declined to determine what time limit for Rule 11 sanctions would be proper because the issue was not before the court. *See id.* Accordingly, the issue is one of first impression for this court.

Our supreme court has emphasized that "[t]he [South Carolina] Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) (quoting Rule 1, SCRCP). "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). "Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (alteration in original) (quoting *Green*, 314 S.C. at 304, 443 S.E.2d at 907). "When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Id.*

> Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule. In construing a rule, language in the rule must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Ex parte Wilson, 367 S.C. at 15, 625 S.E.2d at 209 (internal citation omitted).

Rule 11, of course, is silent as to when a party must file a motion for sanctions for it to be considered timely. Thus, we find it necessary to analyze the purposes behind the rule. Our "state rule is based upon the language of the pre-1983 version of Federal Rule 11." *Burns*, 340 S.C. at 513, 532 S.E.2d at 9. Although the current version of Rule 11 of the Federal Rules of Civil Procedure, unlike our state rule, contains a safe harbor provision, we find the U.S. Court of Appeals for the Fourth Circuit's explanation of the purposes behind the rule instructive. *Cf. Renner v. Hawk*, 481 S.E.2d 370, 374 (N.C. Ct. App. 1997) (stating decisions pertaining to the federal version of Rule 11 are "pertinent to [the] analysis" of the state rule). "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" *Hunter v.*

Earthgrains Co. Bakery, 281 F.3d 144, 151 (4th Cir. 2002) (quoting *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990)). The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction. *In re Kunstler*, 914 F.2d at 522. "[O]ther purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets[,] and facilitating court management." *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724, 736 (E.D. Va. 2005) (quoting *In re Kunstler*, 914 F.2d at 522).

Regarding the federal rule, scholars have made the following observations:

> Although a motion for sanctions may not be filed or presented to the district court until twenty-one days have elapsed after service of the motion on the parties, the cases under both the 1983 and 1993 versions of the rule make clear that Rule 11 proceedings should be initiated promptly after the challenged conduct takes place. The Advisory Committee Note to the 1993 amendment explains that "[o]rdinarily, the motion should be served promptly after the inappropriate paper is filed, and if delayed too long, may be viewed as untimely." If the alleged misconduct occurs during the discovery process or another part of the pretrial phase, the matter usually should be resolved at once . . . to avoid prejudicing the resolution of the litigation's substantive issues on their merits and to discourage the possibility of further abuses. If the challenged conduct is the institution of the action itself or occurs during a hearing or at trial, however, the question whether there has been a Rule 11 violation generally is not decided until after litigation has completed . . . to avoid delaying the disposition of the merits of the case.

5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1337.1, at 713–15 (3d. ed. 2004) (alteration in original) (footnotes omitted).

Although the decision of whether to award Rule 11 sanctions is a collateral issue, and does not constitute a ruling upon the merits of the case, we do not believe a

circuit court retains the ability to award sanctions in perpetuity without any limitation. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) ("Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated."); *id.* at 406 (finding the respondents' interpretation of Rule 11 to cover any expenses incurred "because of the filing" overly broad because it "would lead to the conclusion that expenses incurred 'because of' a baseless filing extend indefinitely"). Indeed, as the U.S. Court of Appeals for the Federal Circuit has noted, the "[c]ourts that have discussed the matter have endorsed the application of time limits on Rule 11 motions." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 875 (Fed. Cir. 2010).

Jurisdictions are split regarding the timeliness standards used for sanctions motions. Some jurisdictions, for example, impose their own local rules. *See, e.g.*, *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 100 (3d Cir. 1988) ("To carry out the objectives of expeditious disposition, we adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment. Whe[n] appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation."). Others require a party seeking sanctions against an opponent to file the motion within a reasonable time after discovering the inappropriate conduct. *See, e.g.*, *Griffin v. Sweet*, 525 S.E.2d 504, 506 (N.C. Ct. App. 2000) ("Although Rule 11 does not specify a time limit for filing a sanctions motion, . . . 'a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety.'" (quoting *Rice v. Danas, Inc.*, 514 S.E.2d 97, 100 (N.C. Ct. App. 1999); *Renner v. Hawk*, 481 S.E.2d 370, 374 (N.C. Ct. App. 1997)); *Kaplan v. Zenner*, 956 F.2d 149, 152 (7th Cir. 1992) (stating "[p]rompt filings of motions for sanctions after discovery of an abuse best serve both the systemic and case-specific deterrent functions of Rule 11," and "reasonableness must serve as the guide" in determining whether a Rule 11 motion was promptly filed).

In our view, the North Carolina Court of Appeals' treatment of the timeliness issue is persuasive. In *Griffin*, our sister court held "that[,] by waiting over thirteen months after [the North Carolina] Supreme Court denied defendants' petition for discretionary review, plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety." 525 S.E.2d at 508.

According to the *Griffin* court, the "plaintiff was put on notice of any alleged sanctionable conduct when defendants filed an answer to the supplemental complaint . . . and again when the trial court granted summary judgment." *Id.* Although the court explained it was "not suggesting that plaintiff's motion for Rule 11 sanctions should have been filed at the summary judgment stage," the court—applying an objective, de novo standard of review—nevertheless concluded the plaintiffs failed to file the motion within a reasonable time. *Id.*

Some courts recognize the ability of a party to file a motion for sanctions at the end of litigation or after a judgment, but we are unable to find any authority to support the proposition that a party can wait until the entire case has finished. The U.S. Court of Appeals for the Third Circuit's discussion of the negative consequences of allowing such a delay in filing a Rule 11 motion is instructive:

> Promptness in filing valid motions will serve not only to foster efficiency, but in many instances will deter further violations of Rule 11 which might otherwise occur during the remainder of the litigation. If a party's action is "abusive" as contemplated by Rule 11, [then] the adversary should be able to realize immediately that an offense has occurred. Seldom should it be necessary to wait for the district court or the court of appeals to rule on the merits of an underlying question of law. If there is doubt how the district court will rule on the challenged pleading or motion, [then] the filing of the paper is unlikely to have violated Rule 11. . . . [M]ere failure to prevail does not trigger a Rule 11 sanction order.

Lingle, 847 F.2d at 99. The Third Circuit further noted that "timely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter." *Id.* Moreover, the court stated that "concurrent resolution of the challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions." *Id.* According to the court, "[t]he fragmented appeals" in that case "graphically illustrate[d] the inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal." *Id.*

Because Rule 11, SCRCP, is silent regarding when a motion sought thereunder would be considered timely, we decline to read any specific time limits into the rule. We do, however, hold that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule. Turning to the instant case, the Estate filed its motion for sanctions nine days after this court issued a remittitur.[2] In other words, the Estate waited over twenty-eight months after the circuit court granted summary judgment in its favor, and some thirty-three months after the court disqualified Megna, to file a motion for sanctions against PDHC and its counsel. In light of our thorough review of the record, as well as the various authorities addressing this issue, we find the Estate's delay in filing the motion for sanctions until final resolution of the merits appeal failed to come in line with the underlying purposes of Rule 11.

While the Estate argues that waiting until the conclusion of the case was more efficient, we respectfully disagree. The fact that this court is reviewing yet another issue in this contentious case in a separate appeal only further demonstrates the point that it was inefficient for the Estate to delay in bringing the motion for sanctions. We agree that Megna's behavior was concerning, particularly given that the law regarding his recusal was so clear. *See* Rule 3.7(a), RPC, Rule 407, SCACR ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."). The main purpose of Rule 11, however, is to defer future litigation abuse, not compensate the opposing party. By waiting until the case has been fully litigated and decided by the appellate courts on the merits, the Estate failed to challenge or prevent any litigation abuse from occurring in this case. Instead, the Estate made the tactical decision of waiting until the conclusion of the case to recover attorney's fees for all of the abuses that took place over a three-year period. In our view, the Estate's delay in bringing the motion for sanctions failed to serve the deterrence and efficiency purposes of Rule 11 and, therefore, was unreasonable.

Notwithstanding the fact that sanctions may have been warranted in this case, we hold the Estate failed to file its motion within a reasonable time of discovering

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[2] As our supreme court has explained, once the remittitur is sent down from an appellate court, the circuit court acquires jurisdiction over the case to enforce the judgment and take any action consistent with the appellate court's ruling. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414–15, 438 S.E.2d 248, 250 (1993).

PDHC's alleged improprieties. Given that the motion was untimely, we are constrained to find the circuit court abused its discretion in awarding sanctions because the award was controlled by an error of law. Accordingly, we vacate the court's award of Rule 11 sanctions.[3]

II. The Estate's Cross-Appeal

On cross-appeal, the Estate argues the circuit court erred in concluding the Estate's claim to sanctions under the FCPSA was untimely and denying the corresponding award of fees for time spent in response to PDHC's motion to strike. We disagree.

The FCPSA, in pertinent part, provides the following:

> 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) (Supp. 2015).

As discussed in Part I, *supra*, our case law is quite clear regarding the time frame within which a party must file a motion for sanctions pursuant to the FCPSA. *See Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (providing "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. at 357, 597 S.E.2d at 838 (noting this court has held "a [circuit] court cannot entertain a motion for sanctions under the FCPSA whe[n] that motion was filed more than ten days after the judgment"); *Pitman*, 351 S.C. at 432, 570 S.E.2d at 189 (finding the circuit court no longer had jurisdiction over the case to award sanctions under the FCPSA two months after granting summary judgment and noting that, "because a [circuit court] retains jurisdiction pursuant to Rule 59(e),

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[3] In light of our finding that the Estate's motion for Rule 11 sanctions was untimely, we decline to address PDHC's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment").

Nevertheless, the Estate—mounting, in essence, a direct challenge to our precedent—asks us to extend the meaning of "at the conclusion of the trial" to the period following the remittitur of a case from an appellate court. We decline the Estate's invitation to adopt such an unduly expansive reading of the FCPSA. If the General Assembly wished to extend the time window to ten days following the remittitur, as opposed to ten days following judgment, then it would have included that in the list found in subsection 15-36-10(C)(1).

Accordingly, because the circuit court correctly found the Estate did not prevail on the FCPSA issue in its motion for sanctions, we affirm its denial of the corresponding award of fees for time spent in response to PDHC's motion to strike.[4]

CONCLUSION

Based on the foregoing analysis, we **VACATE** the award of Rule 11 sanctions and **AFFIRM** the circuit court's decision not to award sanctions pursuant to the FCPSA.[5]

HUFF and THOMAS, JJ., concur.

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[4] Because our resolution of the prior issues is dispositive in this appeal, we decline to address the Estate's remaining issue. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (holding the appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

[5] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

(Tracking number 2014-001275)

Court of Appeals Opinion No. 5451

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

v.

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

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

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The Estate of Hugh S. Thompson, III ("Thompson estate"), Respondent – Appellant, hereby petitions the Court for rehearing pursuant to South Carolina Appellate Rule 221. The Opinion of the Court (Opinion 5451) was filed November 2, 2016. That Opinion vacated the trial court's award of sanctions to Respondent – Appellant and also affirmed the trial court's denial of additional sanctions sought by the Thompson estate. Because the timing issue addressed in this appeal is one of first impression, the Thompson Estate would further suggest that any rehearing of the matter be held *en banc* pursuant to South Carolina Appellate Court Rule 219(b).

ARGUMENT

An Issue of First Impression.

This Court acknowledged (page 7 of the Opinion) that the principal issue of the case is one of first impression. That principal issue is, of course, the appropriate time limit for making a Rule 11 sanctions motion. Despite this acknowledged lack of controlling precedent and an acknowledged concern with the sanctioned conduct (page 11 of the Opinion), this Court, nevertheless, held that the Thompson estate "failed to file its motion within a reasonable time of discovering PDHC's alleged improprieties".[1] Opinion pages 11-12. While the Estate agrees with the Court that the ability of the trial court to award sanctions does not last "in perpetuity" (Opinion page 9), the Thompson estate respectfully disagrees with the Court's conclusion of unreasonable delay here.

[1] The appropriateness of *appellate* sanctions in this litigation was presented to the Court almost two years ago – immediately following this Court's dismissal of multiple consolidated appeals pursued by Appellant-Respondent. This Court held that motion in abeyance pending the outcome of the Appellant-Respondent's petition for certiorari to the South Carolina Supreme Court. Following the denial of certiorari, this Court denied any appellate sanctions by short order of March 28, 2014.

Notably, and appropriately, the Court declined to read any specific time limits into Rule 11.[2] In this case, where the Estate's every procedural move precipitated multiple meritless counter-moves, the motion was filed within the 10 day jurisdictional window after the remittitur to the trial court following a final appeal addressing the merits of the underlying case.

Authority Does Exist Allowing Post-Judgment Rule 11 Motions.

What is a reasonable time is a fact specific determination and can and will vary from case to case. As our Supreme Court has noted in Russell v. Wachovia Bank, N. A., 370 S.C. 5, 633 S.E.2d 722 (2006), a Rule 11 sanctions motion does *not* have to be made within ten days from notice of entry of judgment.[3] Except where individual federal courts have adopted local rules, the federal Rule 11 also has no firm deadline. White v. New Hampshire Department of Employment Security, 455 U.S.445 (1982) ; see also Mary Ann Pensiero, Inc. v. Lingle, 847 F. 2d 90 (3rd Cir. 1988) (where the Third Circuit adopted *prospectively* a supervisory rule for courts in that Circuit requiring Rule 11 sanctions motions be filed in the district court *before* entry of a final judgment).

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[2] The Estate suggests that the timeliness of any Rule 11 motion should be governed by reasonableness in light of the totality of circumstances presented by the history of conduct in the case. Any case where sanctions have been appropriately awarded by the trial court will inherently involve extraordinary conduct or positions unique to that particular sanctioned litigant's and/or attorney's approach. Illustrative is Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 760 S.E.2d 399 (2014), discussed below in this argument.

[3] While similar, seeking sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act does invoke different precedent than seeking sanctions pursuant to Rule 11. Sanctions pursuant to the statute apparently must be sought within ten days of entry of judgement under Russell – although the Estate argued that a second ten-day window could be opened, consistent with Russell and other precedent. Here sanctions were sought pursuant to the Act and Rule 11 – as well as the inherent power of the courts. These alternative authorities are not abandoned although this petition will focus on Rule 11 as did the Court's opinion. If the Rule 11 motion was timely as the Estate asserts, then the entirety of sanctions sought by the Estate could be awarded based upon that Rule alone – *making the victim's here financially whole, if not emotionally and chronologically.*

The Court's Opinion (page 10) suggests an absence of authority allowing a Rule 11 motion following the conclusion of appellate proceedings. ***Such authority does exist.*** In Hicks vs. Southern Maryland Health Systems Agency, 805 F. 2d 1165 (4th Cir. 1987), our own federal circuit upheld sanctions awarded pursuant to a motion brought after the judgment of the appeals court. Thus, unlike the Third Circuit Lingle decision referenced by the Court's Opinion (pages 9-10) where a local rule controls, in the Fourth Circuit a Rule 11 sanctions motion is not necessarily untimely if brought following the conclusion of appellate proceedings.

While Hicks noted efficiency concerns and the possibility of piecemeal appeals, the court also noted countervailing considerations that were also considered by the Estate here:

> Moreover, there are countervailing considerations. One who happens to be the prevailing party at the conclusion of the proceedings in the district court may not remain the prevailing party after the appellate procedures have run their course. Even where, as here, the defendants characterize the plaintiffs' claim as entirely baseless, the appropriateness of the characterization is unsettled as long as there is a pending appeal in which the plaintiffs, with apparent earnestness, assert that there are real issues of disputed fact foreclosing the entry of summary judgment against them. There is some reason to think that such uncertainty should be clarified before counsel and the district judge should be called upon to consider the appropriateness of a fee award and assess the amount. However an independent and collateral issue, such as a fee award, is handled, there is some risk of squandered judicial effort.

805 F. 2d at 1167. In the case at bar, the Estate ultimately prevailed on its assertion of offensive collateral estoppel – but PDHC certainly opposed application of that theory. Although there is always some risk of "squandered judicial effort" when dealing with troublesome conduct, that risk should not fall on the same victims whose right to a "just, speedy, and inexpensive determination"[4] has already been thwarted by that same troublesome conduct. Here, there are

[4] This laudable goal found in SCRCP 1 and recognized by our Supreme Court in Ex parte Wilson, 367 S.C.7, 625 S.E.2d 205 (2009) was mentioned in this Court's Opinion, page 7. The Court's Opinion, however, misapprehends any effort to achieve that goal by the Estate under the pattern of facts and conduct created by Appellant-Respondent and its counsel in this case.

numerous examples of tactical conduct seeking to frustrate the Estate's defense (a partial list of such examples is repeated below).

North Carolina Case Misapprehended By The Court.

In the instant Opinion (pages 9-10), this Court found persuasive the North Carolina case of Griffin v. Sweet, 136 N.C. App. 762, 525 S.E. 2d 504 (2000). In Griffin the plaintiff waited over thirteen months *after* the final appellate decision of the North Carolina Supreme Court to bring its sanctions motion (*In contrast, the Estate filed in less than 10 days*).

In finding the Rule 11 motion to be untimely, the North Carolina Court of Appeals in Griffin found the plaintiff was put on notice of any alleged sanctionable conduct at three different times: (1) when the defendant filed an answer on December 7, 1993; (2) when the trial court granted summary judgment on January 28, 1994; and (3) when the Supreme Court affirmed the trial court on September 5, 1995. Unlike Griffin, where sanctions related to positions on the underlying merits exposed on these three noted occasions, many of the sanctions here related to the many collateral examples of wasteful and inappropriate conduct (discussed in greater detail below and fully briefed previously). *Thus, the Griffin outcome is dependent upon very different facts than those presented here.*

Moreover, the Griffin Court was careful to point out "***we are not suggesting that plaintiff's motion for Rule 11 sanctions should have been filed at the summary judgment stage.***" 525 S.E. 2d at 508 (emphasis added). Thus, *the Griffin Court may well have accepted a motion filed within 10 days of the appellate affirmation* but found a thirteen month delay to be unreasonable. Indeed, filing motions for sanctions early and often is not always most efficient and, respectfully, may not be the protocol our courts want to encourage.

With This Pattern of Conduct, Efficiency & Deterrence Best Served By Post-Judgment Motion And Must Be Balanced With Other Purposes for Sanctions

The Thompson Estate is mindful of the Court's concerns about judicial efficiency and deterrence. Of course, those are not the only concerns and goals recognized in the sanctions' jurisprudence cited by this Court's opinion as discussed below. They are also not necessarily the most important. Nevertheless, even as considering those concerns and goals, it is necessary to consider the details of the conduct in this case. Indeed, the details of the pattern of conduct suggest the difficulty with making a litigant/counsel committed to delay and obstruction respond to deterrence efforts or make any approach to sanctions efficient. The following list is not necessarily exhaustive.

Conduct in This Case.

1. PDHC Counsel Misrepresentations to Estate Counsel. Counsel initially misrepresented the Medicare administrative record to counsel for the Estate. PDHC counsel also claimed an inability to produce that record.
2. Counsel Misrepresentations To Courts and First Interlocutory Appeal. In February, 2011, there was an appeal of a trial court order dismissing an appeal from the Probate Court for clear failure to file Grounds of Appeal within a forty five day statutorily prescribed time. Mr. Megna argued as fact to the trial court (*and this court*) that he had filed within forty five days when clearly he had not (he had filed after 50 days).
3. Counsel Disqualification, Second Interlocutory Appeal, And Effort To Block Summary Judgment. In April, 2011, the trial court disqualified Mr. Megna as trial counsel because of his status as a necessary witness. A motion for reconsideration was made in May 2011 and rejected by the trial court on August 15, 2011. Mr.

Megna filed an immediate appeal of his disqualification and sought to block the trial court from preparing and issuing a formal order of summary judgment as the Court had also announced on August 15, 2011. This appeal was also interlocutory – albeit appropriately so *if the appeal weren't wholly without merit.* (In its present Opinion, page 11, this Court noted that "the law regarding his recusal was so clear"). Mr. Megna's clear intent was to continue tying up the Estate with expensive and protracted litigation (contrary to the express purpose stated in SCRCP 1).

4. Counsel Ignores Disqualification by Court. Between July 19, 2011 (date of trial court hearing) and August 15, 2011, Mr. Megna and PDHC moved for sanctions against the attorneys for the Thompson estate and issued subpoenas to the Thompson estate attorneys and several non-involved attorneys throughout South Carolina seeking communications with attorney Doug Truslow, who was also involved in acrimonious litigation with Mr. Megna (for which he and Desa Ballard were ultimately awarded sanctions.) These motions were dismissed by the trial court as void ab initio due to Mr. Megna's previous disqualification. Likewise, after receiving the trial court's Order of Summary Judgment, Mr. Megna immediately filed a motion for reconsideration, which was dismissed by the trial court as void ab initio because of his prior disqualification (this led to the untimeliness of the summary judgment appeal).

5. Letters and Email Attacking Counsel. Just as an example, in a July 27, 2011 letter of Mr. Megna to the trial court sent by e-mail with copy to Defendant's counsel, R. pp. 775-778, Mr. Megna offers the following (emphasis added):

> At this point, both Mr. James as well as Mr. Josey are likely necessary witnesses, if not Defendants, in adverse litigation

> that involves the Plaintiff ..... Moreover, their silence concerning their knowledge of and involvement in the 'Lake City litigation' matters is of grave concern to the Plaintiff with far-reaching implications. I fail to understand how it is not reasonable to conclude their silence has been intended to misdirect or deceive both the Plaintiff and the Court. ..... the Plaintiff has had very little time to evaluate and organize matters and documents to provide the Court a more complete picture of the extent of the legal and ethical concerns. However, the seriousness of the matter required your immediate notification.

While professing to be "astounded" by Mr. James' participation in a "dishonorable" and "inappropriate and demeaning litigation strategy", Mr. Megna accuses both Josey and James of "false and unprincipled personal accusations." R. pp. 565-568. These accusations were followed by Mr. Megna's e-mail of July 26, 2011 advising "you and Jay are likely witnesses, if not possible Defendants... for multiple reasons including but not limited to aiding and abetting and breach of fiduciary duties to an existing client." R. pp. 771-772.

6. Claims of Regional Conspiracies and Threats of Additional Litigation.

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

> The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. ... The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy", etc. ... Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to

> remedy the wrong that has occurred in the case at bar - as well as in the Lake City matters.
>
> The undersigned has no qualms in informing this Court that the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others.
> ... In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters. ....
>
> Additional litigation against those involved ... is forthcoming. ....Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. The Motion to Disqualify crosses the line from advocacy to obstructionism. See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.

R. pp. 565-567.

7. Unwarranted Questions of Trial Judge's Integrity. The suggestion of the trial court's recusal is found in several places in the record. In one reference, the reason offered for recusal was that the trial judge might someday hold court in neighboring Florence County. R. p. 688. In other suggestions, the reasoning is far more sinister but equally without merit. In his March 11, 2011 response to the Motion to Disqualify him (R. pp. 548-595), Mr. Megna alleged, inter alia:

> The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against

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

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

An Unprecedented Totality of Circumstances.

The trial court here described counsel's conduct in this case as "ill-conceived, vitriolic, and abusive" and found that "[p]erhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless." ***The trial court further concluded "[t]he lack of respect Megna has shown for this Court, the legal process, and the purposes of these proceedings is unprecedented for this Court.***" (emphasis added). This language is found in the trial court's contempt order of February

11, 2013 (R. p34-46 ¶¶ 27-29). At the time, sanctions were sought by attorneys subjected to discovery subpoenas in this matter although they were non-participants in this matter.

Although the Estate could have also sought sanctions when the February 2013 order was issued -- under the early and often deterrent approach encouraged by this Court's November 2, 2016 Opinion -- the Estate knew the matter was not yet concluded and did not want to trigger further "vitriolic" responses by a litigant who most surely would have accused the Estate of seeking to misuse a sanctions effort to somehow prejudice the merits of pending matters.

Moreover, even the February 2013 order did not deter the continuing objectionable conduct. Months later, after the June 5, 2013 argument before this Court, where Mr. Megna argued the appeal and was directly and thoroughly questioned about his own disqualification, the next week his partner filed, in this Court, a "Motion to Vacate" the trial court's summary judgment. When the undersigned counsel for Respondent-Appellant responded by June 12, 2013 letter to the Clerk that this was duplicative of matters argued and under consideration by the Court, Mr. Megna's partner followed with a June 17, 2013 letter faxed this Court suggesting ethical violations by the undersigned counsel. This unending pattern confirms that seeking sanctions early and often would not have deterred these personalities – but only precipitated more procedural counterpunches. This pattern of conduct did not begin to change until after this Court's July 3, 2013 opinion affirming the rulings below – at which point PDHC engaged new litigation counsel.

***Delay Not Opportunistic* But Efficiency-Related Survival.**

This Court found that the Thompson estate made the "tactical decision of waiting until the end of litigation." While literally true, the Estate respectfully disagrees with any implication that the decision was opportunistic – to the contrary, it was defensive as was every Estate effort

in this matter. The Thompson estate, with limited resources,[5] was in survival mode and was doing everything it could to bring the litigation to an end, while PDHC was doing everything it could to make matters more expensive and time consuming.

Balancing of Purposes And Uniqueness of Triggering Conduct Suggest Need for Flexibility And Deference To The Trial Court.

In this State and federal circuit, there is no hard and fast rule as to when a Rule 11 sanctions motion should be filed. Judicial efficiency and deterrence are important considerations. As this Court noted, so too is compensating the victims of unnecessary and mean-spirited litigation. Opinion at page 8 (citing Moore v. Southtrust Corp., 392 F. Supp. 2d 724, 736 (E.D. Va. 2005) (quoting In re Kunstler, 914 F.2d at 522)("[O]ther purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets[,] and facilitating court management."). While noted by this Court, the Estate respectfully submits that those considerations were not appropriately weighed by this Court.

Who, What, When, and Where of Trial Court Conduct.

The trial court, which was witness to all of the proceedings in this case, found that the sanctions motion was timely. The trial court, directly involved in this matter of a thousand cuts, was able to take into account all that happened (the many unnecessary motions, frivolous arguments, conspiracy theories, disqualification efforts, and inappropriate e-mails) and when things happened. The trial court appreciated the very issues that this court has focused upon and came to the conclusion that the Rule 11 motion *was* timely. While the decision is here is one of

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[5] As noted elsewhere in the record, the Estate had limited resources with which to "litigate for years" as had been promised by adverse counsel; thus, like the Court, the Estate was also motivated to dispose of the matter as efficiently as possible.

equity and therefore historically subject to broad factual review, the abuse of discretion standard plays a role in appellate review of sanctions – again noted by this Court – but not seemingly applied by this Court.[6]

Sound Familiar?

The sanctioned conduct here is strikingly similar to that observed in Holmes v. Haynsworth, Sinkler & Boyd, 408 S.C. 620 , 760 S.E. 2d 399 (2014). In the Holmes case, our Supreme Court found that the trial court's award of sanctions was "without a doubt" not an abuse of discretion. 408 S.C. at 645, 760 S.E. 2d at 412. The Motion for Sanctions in Holmes, however, was filed more than seven years after Dr. Holmes embarked on her scorched earth and litigious journey of multiple motions of a frivolous nature and multiple interlocutory appeals.[7]

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[6] Opinion at 4 (citing Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008)). Indeed, this Court stated that

> When the appellate court agrees with the circuit court's factual findings, it reviews the award of sanctions under an abuse of discretion standard. Atl. Coast Builders, 394 S.C. at 104, 713 S.E. 2d at 654. "Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual contentions." *Id.*; see also Russell v. Wachovia Bank, N.A., 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) ("An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support." (quoting Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996))).

Although not discussing the facts in detail, this Court implicitly found the trial courts factual conclusions regarding the sanctionable conduct to be supported. But this Court did not apply that same deference to the trial court's factual observations of how that conduct rendered the timing of the Rule 11 motion reasonable. Instead, this Court holds that the trial court committed an error of law (Opinion page 12) although that novel application of law is dependent upon the factual determination of reasonableness.

[7] The Holmes' motion was filed at the immediate conclusion of trial – but in that unique litigation, that trial conclusion occurred after the seven years of extraordinary conduct. In the unique behavior here, the trial court's summary judgment conclusion fell amid multiple interlocutory appeals and the Appellant-Respondent's own ongoing tactical movements.

Whether earlier efforts to sanction her would have had a deterrent effect or saved judicial resources is unknown to the Estate here – but was best evaluated by the trial court at the time.

While the court's Opinion did not, and cannot, tell the bar or the litigants in this case exactly when the Thompson estate's motion should have been made, presumably the court thinks it should have been made, and indeed could only have been made, soon after summary judgment was entered. The Fourth Circuit in Hicks and the North Carolina Court of Appeals in Griffin offer persuasive authority to the contrary. Mr. Megna could not be deterred and the Thompson estate respectfully asserts again that the Thompson estate followed the most cost efficient route for everyone under the facts and circumstances of this litigation. To deny compensation to the Estate, the victims of Mr. Megna's conduct, in this case of first impression is not equitable under these facts and circumstances.

The Estate's Cross-Appeal.

The Thompson estate's cross-appeal seeks additional sanctions to make the Estate financially whole, under Rule 11, the South Carolina Frivolous Civil Proceedings Sanctions Act, and the inherent authority of the courts. If this Court consents to re-hear this matter, the Thompson estate respectfully asks the court to find its efforts timely under the totality of "vitriolic" circumstances and remand the case to the trial court for a full award of additional sanctions under any or all of the three authorities allowing for such an award.

Moreover, the merits of that conclusion were also immediately appealed.

CONCLUSION

The Thompson estate respectfully submits that its motion for sanctions was timely. In light of the paucity of guidance under South Carolina law and in light of the guidance given by other courts (Hicks, for example), to hold otherwise is to reward the party which polluted the stream of justice and taxed judicial resources to their utmost. The effect of the Court's opinion is to pass some of those taxes unto the innocent young heirs of the Thompson estate and to leave them disillusioned and frustrated. For all of the reasons set forth herein, the Thompson estate respectfully submits that it is entitled to rehearing and reconsideration of the Court's opinion and it so moves.

November 15, 2016

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