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

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

v.

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

REPLY BRIEF OF APPELLANT-RESPONDENT

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I. The significant delay in filing the motion for sanctions results in in it being untimely.

Despite assertions to the contrary, Thompson's motion for sanctions was untimely. Thompson first argues that Pee Dee has claimed the summary judgment was improper because the lower court had lost jurisdiction, implying that Thompson somehow was barred from seeking sanctions at that time.[1] However, regardless of the position asserted by Pee Dee, Thompson should have filed any sanctions motions to protect his rights and to be considered timely. Thompson chose not to protect his rights at that time.

Thompson next points to a footnote in *Russell v. Wachovia, NA*. 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) in which the court found that the Frivolous Proceedings Sanction Act and Rule 11 did not have the same time limitation. While Pee Dee acknowledges Thompson's point, the court in that case did not state what would be a timely sanctions motion. In fact, the court refused to opine as to the appropriate time frame under Rule 11. The motion here was made years after the disqualification and summary judgment motions and the other complained-of conduct. Thompson also relies on *Ex Parte Beard,* 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004). for support, arguing that Thompson's delay does not mean the motion is untimely because that case allowed a sanctions motions after 363 days, Thompson's motion must also be considered timely. The Thompson's motion was not filed for almost three years -- the Circuit Court's order granting summary judgment was filed September 1, 2011. However, the Motion for Sanctions was not filed until January 16, 2014.

[1] As noted in Pee Dee's Initial Brief, the filing and service of a notice of appeal before a party files a timely post-trial motion does not deprive the lower court of jurisdiction to consider the motion. *Hudson v. Hudson* 290 S.C. 215, 349 S.E.2d 341 (1986).

Finally, Thompson claims that Pee Dee is estopped from arguing that a motion for sanctions is not timely if filed within ten days of remittitur due to a position taken in the *Anasti* case (Tracking No. 2013-001461). Judicial estoppel does not apply here. The *Anasti* case was in a different procedural posture, in that in that a motion for sanctions had previously been filed in trial court before any appeals. Truslow filed an amended motion within ten days of remittitur. Here, there was no motion filed in the lower court at any time prior to the first appeal of this case.

II. The record shows that Pee Dee acted in good faith, and thus Rule 11 sanctions should not apply.

Thompson asserts that the record support the lower court's decision to award sanctions. Thompson attempts to use a statement by counsel at summary judgment as a "concession" that Pee Dee acknowledged the wrongness of its actions. However, counsel's statement was merely made in light of the recent appellate court rulings, and not an indication that any of the underlying actions of Pee Dee were taken in bad faith in 2011. Rule 11, SCRCP can only be sanctions where the attorney acted in "bad faith." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Here, Pee Dee acted under the reasonable belief that the appeal stayed the disqualification under Rule 241, SCACR, thus providing Pee Dee's trial counsel the ability to sign the subpoenas and other documents.

Finally, Thompson completely ignores the fact that the record also shows evidence of their own bad conduct and failed to respond to Pee Dee's argument on this point. As detailed in Pee Dee's opening brief, Thompson's counsel (Mr. Josey) or his law firm was previously paid approximately $20,000 for representing Pee Dee in a workers compensation case, but also undertook representation of Thompson – a party directly adverse to Pee Dee. Mr. Josey's firm continued to represent both Pee Dee and Thompson in this action, until Pee Dee complaint and the

firm unilaterally withdrew its representation of Pee Dee. The failure of Thompson's counsel to act equitably should bar their claim for sanctions.

III. The affidavits of Thompson's attorneys are insufficient.

Thompson argues that his counsel submitted detailed affidavits that support the lower's courts amount of sanctions. However, the affidavits do not provide sufficient information for which the lower court to determine that the amount of time claim was reasonable and necessary. *See, Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, LLC*, 397 S.C. 379, 725 S.E.2d 495 (Ct. App. 2012) (in appeal, attorney's fees will be affirmed if there is sufficient evidence in the record as to time and other factors).

None of the affidavits submitted by Thompson's attorneys attached billing records or detailed how the time was spent. For example, the Supplemental Affidavit separate the fees into the separate categories. For "Time Related to *Initial* Motion to Disqualify," the affidavit merely states that it involved "47.55 hours of our time" with 12.65 of those for Mr. James and 34.9 for Mr. Josey. For "Time Related to Reconsideration of Disqualification," the affidavit claims that time records "demonstrate that 26.8 hours of our time" were expended (11.3 hours for Mr. James and 15.5 for Mr. Josey). Again, there is no breakdown of the hours were expended or any time records attached. Thus, the affidavits are insufficient to determine whether the time spent was reasonable or necessary.

CONCLUSION

As set forth in Pee Dee's opening Brief and herein, the lower court should not have awarded any sanctions to Thompson and the order should be reversed. Alternatively, the amount of sanctions was improper and must be reduced.

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March 19, 2015

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Appellant-Respondent complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

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March 11, 2015

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PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A. do hereby certify that I have served a copy of Appellant-Respondent's Final Reply Brief on March 11, 2015, by causing a copy of same to be deposited in the U.S. Mail, proper postage prepaid addressed as follows:

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This 11th day of March, 2015.