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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 (Probate Claim)
CASE NO. 2010-CP-16-0333 (Probate Court Appeal)

Tracking Number: 2014-001275

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

v.

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

APPELLANT'S REPLY BRIEF *OF THE RESPONDENT-APPELLANT*

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REPLY ARGUMENTS

I. REPLY ARGUMENTS IN SUPPORT OF ADDITIONAL SANCTIONS.

A) Reply Regarding The Scope of Review.

In this cross-appeal, the Respondent-Appellant Thompson Estate seeks an additional award of trial court sanctions – or a remand to the Circuit Court for the purpose of imposing such additional sanctions. In a somewhat rushed effort to reach a compromised result, the trial court here made unsupported factual findings in its order for sanctions that were wholly inconsistent with the law of the case and its own prior factual findings.[1] These compromise findings of "good

[1] The trial court's simple 3 page order, issued on the Judge's final day of public service, selected somewhat random categories of defensive time to compensate through his award of sanctions (R.p. 54 (Circuit Court sanctions order); ultimately, he awarded sanctions for *only* 121.6 hours (or about 26%) of the total 472 hours spent by Estate counsel on Circuit Court matters. This appeal seeks remand for sanctions equal to 100% of counsel's time and related fees.

By the time the Circuit Court motion was filed, over 370 hours of counsel's time had been spent on Circuit Court work for which the Estate owed $96,580. In addition to the 370 hours reported at that time, 45 more hours through January 14, 2014 were spent exclusively in the preparation of the Circuit Court motion for sanctions and the extensive record review and analysis needed to summarize years of conduct. R. p. 278 (Motion for Sanctions). A subsequent Court ordered supplemental fee affidavit further added to the total time and fees and differentiated time spent on various matters. Despite that differentiation, Counsel asked that all of these hours be compensated as part of the requested sanctions in this case.

By the date of the Circuit Court hearing, a grand total of 453.9 hours combined had been spent by Estate counsel on this matter related to Circuit Court proceedings alone. (For periods mixed in dealing with both appellate court matters and trial court matters, counsel only included half so as to avoid any duplicate recovery.)

By the time of the Court ordered supplemental affidavit, the Circuit Court total exceeded 472 hours. R.p. 973 (supplemental fee affidavit) (Notably, Mr. James did not record much of his time to minimize billing to the Defendant for possible duplicative participation – and those unrecorded hours are not part of the 472 hours. Finally, theses hours and fees did not include time spent by counsel dealing with the workers compensation conflict issue and responding to the ODC complaint filed by the PDHC Vice-President of Operations. Those complaints were dismissed but not without considerable time invested by Estate counsel.). R. pp. 309-311. (Motion for Sanctions).

grounds to support" the underlying PDHC claim, the PDHC probate appeal, and the PDHC opposition to counsel disqualification – are without support and as such cannot support the trial court's otherwise discretionary determination of sanctions. Moreover, variance from the law of the case is an error of law itself. In addition, consideration of the conduct here, such as knowingly misrepresenting the fatal underlying administrative determination while refusing to produce the same federal adjudication pursuant to some non-existent privilege, under a subjective standard, only highlights the need for additional sanctions.[2]

B) PDHC Indemnification Theory *Never* Had Merit.

In its Brief in Response (pages 2-3), PDHC suggests that because the Federal Administrative Law Judge did not directly address the issue of indemnification between PDHC and the Estate (the latter not even being a party to the administrative proceedings), that issue was still colorable for presentation to the Circuit Court in the instant litigation. PDHC again ignores, however, what the Federal Administrative Law Judge *did directly address* – the finding that PDHC was *at fault* as the employer with its own non-delegable duty to confirm employee credentials *before* accepting Medicare payments for the employee's services. R. pp. 15-16 (Summary Judgment Order). Thus, this final determination was the law of the case in the Federal Administrative Law Court before the underlying claim here was asserted. PDHC *knew*

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[2] Accordingly, under the scope of review applicable to this matter, as described in PDHC's Brief (page 1) (citing Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 713 S.E.2d 624 (2011) and Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 713 S.E.2d 650(Ct. App. 2011)), those portions of the trial court order should be reversed and the matter remanded for additional sanctions.

the issue of fault had been litigated to finality in the federal forum in 2008 before it sought, in this 2010 action, to shift that fault to the unsuspecting Estate of the muted[3] decedent.[4]

C) There Is *Ample Case Law* On The Preclusive Effect of Administrative Rulings.

In its Brief in Response (page 3), PDHC erroneously states that "no other case seemed to apply collateral estoppel to an administrative hearing..." (Brief page 3). While the case of Crosby v. Prysmian Communications Cables and Systems USA, LLC, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012), may not have been decided until after the instant litigation began, there was ample case law on the preclusive effect of administrative rulings already established. See Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) ("under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action."); see also Carolina Renewal, Inc. v. S.C. Dept. of Transportation, 385 S.C.550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Accordingly, PDHC and its counsel knew, or reasonably should have known, before even signing and filing the complaint that the federal holdings could be used against them through the doctrine of non-mutual collateral estoppel – but they brought this action anyway.

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[3] As noted in the trial court's order of summary judgment, this claim was not raised until after Dr. Thompson's death – at a time when he was unavailable to personally refute unsupported claims of misrepresentation.

[4] Because this litigation *never* had merit, and *PDHC knew it had been found at fault*, the Estate's motion for Circuit Court Sanctions sought an award for all of the Estate's attorney's fees.

D) There Is *No Evidence* of Thompson Misrepresentations to PDHC.

PDHC's Brief (page 3) continues to baselessly assert that some misrepresentation was made by Dr. Thompson – without any direct supporting evidence and *contrary to the law of this case*. The trial court, in granting summary judgment, rejected PDHC's mischaracterizations and noted that the instant case lacked "any affirmative misstatements" made by Thompson. R. p. 22 (Summary Judgment Order at page 11). And again, *it was preclusively established before this litigation began, that PDHC had no right to rely on any representation by Dr. Thompson, if made, anyway*; thus, this case did not and could not have ever had any merit.[5]

E) Rule 11 *Does Apply* To Circuit Court Argument of Probate Appeal Timeliness.

Contrary to PDHC's Brief claim that "Thompson is seeking sanctions for Pee Dee's motion seeking a surety bond in the probate court and appeal of that denial" (page 4), the Estate's motion for sanctions in the Circuit Court never sought to address conduct in the Probate Court and expressly stated as much. Rather, the Circuit Court sanctions request was directed to the conduct in Circuit Court where PDHC frivolously and falsely asserted, contrary to statutory and case law provisions, that its appeal was timely. As an aside, the Estate also disagrees with the assertion of PDHC that "Rule 11 does not apply to matters that occurred in the probate court." To the contrary, both Rule 1 and Rule 81 of the SCRCP confirm the applicability of that set of Rules to all civil proceedings "in all South Carolina Courts."

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[5] PDHC's Brief (page 3) even claims Dr. Thompson made misrepresentations to another employer (FirstChoice Health Care)—a claim for which there is no support in the record or elsewhere. This assertion is not in the complaint or anywhere else in the Record.

F) The Clear Statutory Untimeliness of PDHC's "Grounds of Appeal" From Probate Court Is *Not Cured* By The Timeliness of The Initial Notice of Appeal.

The appeal to the Circuit Court taken from the Probate Court was procedurally flawed and was dismissed as such. The Court of Appeals' affirming opinion likewise found that the Plaintiff failed to satisfy the statutory requirements of S.C. Code § 62-1-308(a) in two respects and these failures – particularly the failure to meet the 45 day deadline[6] – warranted the trial court dismissal. These procedural requirements were not new and were not hidden. They are clearly spelled out for any litigant and any attorney in the statute. Moreover, South Carolina case law relied upon by the Circuit Court has previously confirmed the dispositive nature of failing to satisfy the statutory requirements.[7]

In response to the clarity of the statute and the guidance provided by existing precedents, PDHC's Brief suggests (page 5), *without any authority and contrary to the existing authority*, that the timely filing of the Notice of Appeal alone made the appeal presented to the Circuit Court colorable; again, this is contrary to the case law that existed before the Circuit Court's resources were wasted by this appeal.[8] Moreover, PDHC's Brief in response is silent with regard to the total needlessness of the appeal given that the Probate Court order fully protected PDHC to the extent it could recover from the Estate.

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[6] The other failure was the filing of the grounds of appeal in the wrong court.

[7] In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005); Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002); Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996).

[8] Also notable, this argument was not presented by PDHC to the trial court.

G) *Judicial Estoppel* Prohibits PDHC From First Conceding The Clarity Of Disqualification At The "Get-Go" And *Now* Claim It Was *Not So Clear* Until Later.

PDHC's Brief (page 7) now asserts that "Mr. Megna was without such knowledge [of the need for recusal] at the time of the original motion for disqualification." This assertion is in complete contrast with the representation of PDHC at the sanctions' hearing where counsel confirmed that "From the get-go Mr. Megna knew he was going to be a witness....he shouldn't have been in from the get-go and your Honor correctly ruled he was going to be a witness." R. p. 185 lines 21-22, and R.p. 186 lines 16-18.[9]

The Estate argues that PDHC should now be judicially estopped from taking the position on page 7 of its Brief (that "Mr. Megna was without such knowledge [of the need for recusal] at the time of the original motion for disqualification.").[10] See e.g., Hayne Federal Credit Union v.

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[9] The non-awarded fees associated with the Estate's initial effort to disqualify Mr. Megna, when he failed to act on his own, total $13,000 (12.65 hours for Mr. James and 34.9 hours for Mr. Josey). R. p. 973 (Court-ordered supplemental fee affidavit).

[10] It is hard to imagine a more clear case of disqualification, so it is not surprising that there is a dearth of similar case law – but contrary to that rendering this a legitimate question of first impression, it speaks to the wisdom of most bar members who don't fight their own *obvious* disqualification. The Findings Of Fact from the trial court's disqualification order (R.pp. 1-3), undisturbed on direct appeal, *are overwhelming* (repeated here in part without the footnotes):

> (1) Counsel Tony R. Megna has identified himself as the Chief Executive Officer ("CEO") of Plaintiff Pee Dee Health Care, P.A. ("PDHC"). In addition to such identification made to the Court at the March 16th hearing, the response of PDHC to the pending motion to disqualify states that Mr. Megna "has been the CEO and General Counsel to the Plaintiff since 1995." Plaintiff's Return, footnote 1.
>
> (2) Mr. Megna's admitted position as the CEO for PDHC confirms his focal point as a witness in this matter. By his signature in Section 15 of a "Medicare Enrollment Application" submitted to the Centers for Medicare and Medicaid Services (CMS) within the United States

Department of Health and Human Services (Exhibit B to the Motion), "completed for" PDHC, Mr. Megna "binds this provider to the laws, regulations, and program instructions of the Medicare program." Accordingly, Mr. Megna is positioned to be a person with knowledge at PDHC about the efforts of that organization to comply with Medicare "laws, regulations, and program instructions." PDHC's adjudicated non-compliance led to the adverse Medicare decision at the heart of this case. Thus, Mr. Megna is a witness to matters raised in this case.

(3) PDHC has answered interrogatories propounded pursuant to Rule 33 of the South Carolina Rules of Civil Procedure (responses dated July 28, 2010 attached as Exhibit C to the Motion). In response to interrogatory 1, which calls for the identification of witnesses, PDHC lists Tony R. Megna. In addition, the response to Interrogatory 8 identifies Tony Megna as the only person, known to PDHC, with whom Hugh S. Thompson (the "decedent") communicated about the adverse Medicare determination for recoupment. While the motion response of PDHC now seeks to minimize the Megna's communications with Dr. Thompson, the communications described in these initial interrogatory answers and in the complaint make Mr. Megna a witness to relevant issues in this matter.

(4) The appeal of the adverse PDHC Medicare determination is relevant in this matter. While PDHC asserts that the Defendant should be estopped, even by the decedent's alleged silence, from denying liability for the indemnification of Plaintiff's Medicare overpayment, there would have been no liability to Medicare at all if the PDHC appeal had been successful like the appeal of the other employer of the decedent (FirstChoice Healthcare). The claim to equitable indemnification, referenced by PDHC in argument at this motion hearing, requires a finding that the proposed indemnitee (PDHC) was without fault or liability for the damages. See Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010). Thus, PDHC's fault is at issue in this case and the decision of federal Administrative Law Judge Metry (Exhibit A to the Motion) speaks to that issue directly and decisively. The appeal of Judge Metry's order, if any, would be relevant in this matter on the preclusive finding that PDHC was at fault (and therefore could not be indemnified).

Bailey, 327 S.C. 242,489 S.E.2d 472 (1997) (doctrine of judicial estoppel prohibits a party that has assumed a particular position in a judicial proceeding from adopting an inconsistent posture in subsequent proceedings); Quinn v. Quinn, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (As Judge Ralph King Anderson concurrence put it, "a litigant cannot 'blow both hot and cold'.").

In response, PDHC's Brief (page 7) claims "Pee Dee has not taken contrary positions" -- and yet, it clearly has. The Record speaks for itself and the Estate has not "mischaracterized" PDHC's position or taken anything "out of context" – contrary to that erroneous suggestion. (PDHC's Brief at p. 6).

H) Despite Denials *Now*, Mr. Megna *Knew* From The "Get-Go" Of His Disqualification And *Wasted The Court's And Estate's Resources* From The "Get-Go" Fighting The Issue.

Even without the judicial estoppel demanded by PDHC's flip-flop, the record of Mr. Megna's knowledge of the need for disqualification is clear as fully briefed by the Estate in its initial Brief including: communications prior to the filing of any claim wherein counsel for the Estate had advised Mr. Megna that he (Mr. Megna) was a witness -- acknowledged by reply email; and the incorporation of alleged communications between Dr. Thompson and Mr. Megna -- *in the Complaint itself.* See footnote 10 of this Brief. In response, PDHC's Brief (page 7) suggest that the possibility of pre-trial participation was a question of first impression and therefore a valid basis to oppose disqualification.

Mr. Megna is identified in PDHC's answer to interrogatory 9 as the person involved with the defense of the adverse Medicare determination. He has first-hand knowledge about the status and results of any administrative appeals.

This suggestion is flawed in two respects: first, while perhaps an issue of first impression in South Carolina, simple research into the national application of Rule 3.7 of the Rules of Professional Conduct finds cases such as Droste v. Julien, 477 F.3d 1030 (8th Circuit 2007), and World Youth Day, Inc., vs. Famous Artists Merch. Exchange, Inc., 866 F. Supp. 1297 (D. Colo.1994), and General Mills Supply Company, et al vs. SCA Services, Inc., 697 F.2d 704, 716 (6th Cir. 1982), (affirming the disqualification of counsel from pretrial discovery as well as from trial advocacy, opining "the ultimate 'trial' is connected as a seamless web to the ascertainment of issues at the pretrial proceedings, and particularly to the discovery depositions. Not even the possible confusion of the jury would be averted by exclusion from the 'trial' only."). Secondly, PDHC's counsel did not seek to limit his role to pre-trial matters when he argued the disqualification motion to the trial court; rather, he insisted that the entire suggestion of his disqualification was itself manufactured and ridiculous.[11]

[11] Specifically, Mr. Megna asserted with great assurance that "*I cannot be examined as a matter of law*" (R. p. 111 line 4) (emphasis added) (asserting protection of the Dead Man Statute) and he insisted that the Estate had "*no discernible defense*" therefore had asserted his status as a witness without "*one piece of evidence*" because "*there is none*." R. p. 112 lines 11-18; Disqualification Hearing Transcript (emphasis added). Continuing with his argument, counsel expounded with sanctimony "*I apologize if I sound a little outraged, because I am. Because you better believe this is an issue of character [assassination]. This is an issue of honor. And yes, sir, you had better believe the Lake City litigation plays into it....*" R. p. 112 lines 22-25, and page 113 line 1. (The Estate will not repeat here the bizarre claim of a vast conspiracy related to "Lake City litigation" but it is described briefly on pages 11-12 of the Estate's Brief in this appeal.). Counsel continued to argue at the disqualification hearing suggesting that the trial court needed "*to view this issue [disqualification] with great suspicion because it is a litigation tactic, and an inappropriate litigation tactic.*" R. p. 114 lines 4-6 (emphasis added). And again, "*the truth of the matter is, they don't have a defense. ... He didn't tell the truth.*" R. p. 114 lines 20-23 (emphasis added). And finally, "*again, I apologize, because I am inflamed about this. And I do feel attacked. And I hope that this court at least understands why I would feel attacked.*" R. p. 116 lines 14-16 (emphasis added).

Of course, counsel *now* has acknowledged (after a lack of success in earlier appeals) that Mr. Megna "shouldn't have been in from the getgo and [the trial court] correctly ruled that he was

II. REPLY ARGUMENT IN SUPPORT OF TIMELY FCPSA ALTERNATIVE.

In this case, the trial court determined to award sanctions pursuant to Rule 11 *only* and not the FCPSA – thereby providing the rationale for an additional compromise down from the full measure of sanctions sought by the Estate. Specifically, the court in conclusory fashion found that PDHC had "in essence" prevailed on its Motion to Strike [FCPSA sanctions as untimely]. Thus, this determination allowed the trial court to avoid an additional $11,170.00 in its limited award of fees.

While the Estate contends that a full measure of *all* attorney's fees could have been awarded under Rule 11 or the inherent power of the court, regardless of FCPSA timeliness, the Estate also contends that the motion for sanctions under the FCPSA was timely – and appropriately made within 10 days of the true conclusion of the matter – rather than made repeatedly after each piece-meal appeal unsuccessfully pursued by PDHC. The Estate's Brief (pages 23-27) analyzes the case law supporting the trial court's period of general jurisdiction both before and after any potential appeal. In response, PDHC's Brief (pages 8-9) merely suggests that the absence of sanctions case law following a remittitur necessarily means the trial court could not have made an error of law. While that absence may mean the trial court ruled in good faith, as the Estate believes, it is incorrect to further conclude that the trial court could not have made an error of law. When an appellate court pronounces and applies the applicable law to a set of facts, it certainly can find that the trial court was erroneous in its ruling whether there was previous clarity in the law or not.[12]

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gonna be a witness" R.p. 186 lines 16-18; thus, Megna could be "examined as a matter of law" and this was no "inappropriate litigation tactic."

[12] It is quite common for our courts to apply a new rule or recognition prospectively <u>and</u> to the case at bar. <u>See, e.g.,</u> <u>Davenport v. Cotton Hope Plantation</u>, 333 S.C. 71, 508 S.E.2d 565 (1998)

CONCLUSION

Abusive Conduct Not Denied.

Notably, PDHC's Brief in Response does not deny some of the most egregious conduct that occurred in the trial court context including, but not limited to:

- writing on June 24, 2010 (Mr. Matthews) falsely representing the federal adjudication (not yet known to the Estate) while seeking to secure some favorable settlement – knowing that the actual federal adjudication would doom PDHC's claim;[13]
- frivolously objecting to the production of the administrative record asserting attorney-client privilege, the work product doctrine, and the Dead Man's statute (until the Estate made a Freedom of Information Act request for that record through Medicare);
- attacking the ethics and professionalism of the estate's attorneys, the family of an un-named Florence County judge, and members of a prominent statewide law firm, and Pee Dee law firm --accusing all of being involved in a conspiracy against PDHC;
- repeatedly suggesting the need for the trial judge's recusal without offering a motion with supporting grounds;

(applying concurrently revised view of assumption of the risk); Ludwick v. This Minute of Carolina, 287 S.C. 219, 337 S.E.2d 213(1985) (applying concurrently recognized new tort of wrongful discharge in violation of public policy); Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873(1977) (applying concurrently modified charitable immunity doctrine); McCormick v. England, 328 S.C.627, 494 S.E.2d 431 (Ct. App. 1997) (applying concurrently recognized new tort for physician's breach of confidentiality).

[13] Unlike PDHC's present focus, Mr. Matthews made no assertion of an indemnification theory in this misleading communication.

- executing and serving document subpoenas on numerous uninvolved attorneys and law firms after counsel's disqualification in this case – prompting the trial court to previously suggest incarceration for criminal contempt;

The *Need* For A *Full* Measure of Sanctions.

Abusive practices like those pursued by the PDHC and its lawyers in this Court are not only harmful to the other litigants in this case and the disposition of justice in this case – but to the public trust in the entire judicial system and the rule of law. Only sanctions will address these abuses and deter others inclined to employ such tactics. Only sanctions can help restore the Estate to an equitable position and only sanctions can restore the erosion of trust brought about in this case.

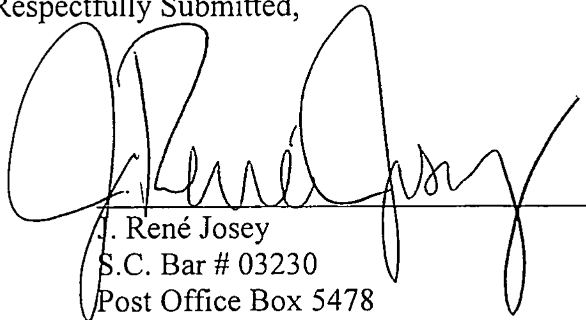
Through no fault of their own, and without any liability of their father's Estate, the heirs of the Estate have incurred substantial legal fees far beyond anything they anticipated or could afford. These heirs have already borne the emotional hardship of uncertainty and delay; they should not have to bear these costs as well.

The law of this case was settled over a year ago and the law of the case confirms that this probate claim was without merit, the probate appeal to circuit court was without merit, and any opposition to Mr. Megna's status as a witness was also without merit. By limiting his award of sanctions in the face of this law of the case, the trial court abused his discretion. Moreover, because his legal decision to grant the Motion to Strike the FCPSA claim as untimely was erroneous, the denial of sanctions based on that erroneous decision is also an abuse of discretion. This Court should award the Estate all the sanctions it seeks or remand the matter for an additional award by the trial court.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

March 5th, 2015



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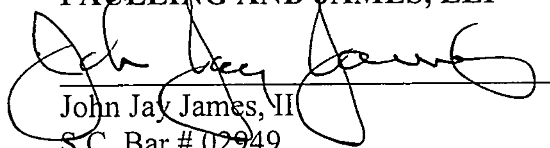

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