THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2017-000681

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.

RETURN TO PETITION FOR CERTIORARI

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Statement of the Case

This matter was initiated in 2010 in Darlington County. Respondent Pee Dee Health Care ("Pee Dee"), Tony R. Megna ("Megna) and Matthews & Megna, LLC ("Law Firm")[1] previously appealed certain rulings to the Court of Appeals.[2] While that appeal was pending, Petitioner Estate of Thompson ("Thompson") moved for costs and attorney's fees, which were granted by the Court of Appeal's Order dated March 28, 2014, and for sanctions, which were denied by separate order on the same date.

After remand to the Circuit Court, Thompson filed another Motion for Sanctions against Pee Dee's prior counsel, Tony R. Megna and Benjamin R. Matthews, and their law firm. A hearing was held on March 27, 2014 (the day before the Court of Appeals granted certain fees to Respondent). On April 15, 2014, the Honorable J. Michael Baxley issued an Order Granting Rule 11 Sanctions Against Pee Dee, Megna and Law Firm, and any Successors or Assigns. Judge Baxley rejected as untimely Thompson's motion for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA). Pee Dee, Megna and Law Firm moved to alter or amend the order. By Order dated May 12, 2014, the Honorable Paul M. Burch[3] denied the motion and this appeal follows.

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[1] The lower court's order was directed to Pee Dee, and its counsel Tony Megna, and Matthews & Megna, and all of these entities or individuals filed the Notice of Appeal. However, the Court of Appeals provided the case caption, which directed that only Pee Dee appear in the caption and referred to Pee Dee as a singular Appellant-Respondent.

[2] The two appeals that have some relevance to this case were given Tracking Nos. 2011103391 and 2011197671. Some references to those cases may be made herein, and this Court can take judicial notice "of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

[3] After the issuance of the order granting sanctions, Judge Baxley retired. Judge Burch, as the Chief Administrative Judge for the Fourth Judicial Circuit thus undertook review of the motion.

On November 2, 2016, the Court of Appeals, in a unanimous published opinion authored by the Honorable Bruce Williams, vacated the Circuit Court's Rule 11 sanctions order, concluding that Thompson's delay of more than thirty-three (33) months before filing the Rule 11 sanctions motion was unreasonable and therefore the motion was untimely. The Court of Appeals affirmed the Circuit Court's ruling that Thompson's FCPSA motion for sanctions was untimely.

Thompson petitioned the Court of Appeals for a re-hearing, *en banc* suggestion, and on February 21, 2017, the Court of Appeals denied the petition.

Statement of Facts

This case has a long history, having originally been filed in 2010, and having already had certain issues appealed. Pee Dee sued an employee, Dr. Thompson (R. 62-81). Pee Dee paid Dr. Thompson to treat patients and in exchange, Dr. Thompson assigned to Pee Dee his Medicare payments for treating patients. (Id.) Pee Dee billed Medicare for those services pursuant to its assignment with Dr. Thompson. However, unbeknownst to Pee Dee, Dr. Thompson was not approved by Medicare to receive payment for treating patients and in 2007, the Centers for Medicare and Medicaid demanded that Pee Dee repay over $200,000. Pee Dee sought reimbursement from Dr. Thompson (or his estate). Id.

During the litigation, Thompson sought to disqualify Pee Dee's attorney, Megna. By order of April 19, 2011, Megna was disqualified, and he appealed this order (R. 1-9). While the appeal on disqualification was pending, the Circuit Court issued an order granting Thompson summary judgment. (R. 12-27). Pee Dee's Rule 59(e) motion, requesting reconsideration, was denied and Pee Dee appealed that order. (R. 10-11).

By unpublished decision filed July 3, 2011, the Court of Appeals issued an opinion of the disqualification and summary judgment orders. The Court did not determine the merits of the

disqualification, finding it was mooted by the dismissal of the summary judgment appeal. Pee Dee filed a Petition for Rehearing, which was denied on August 8, 2013. Pee Dee filed a Petition for Writ of Certiorari which was declined.

While the matter was pending on appeal, Thompson filed motions for attorney's fees and for sanctions in the Court of Appeals. In addition, Thompson filed a motion for sanctions under the South Carolina Frivolous Proceedings Act and Rule 11 of the South Carolina Rules of Civil Procedure in Circuit Court. At the March 27, 2014 hearing held in Circuit Court, counsel for Thompson informed the court that a motion for sanctions was pending before the Court of Appeals for the same essential reasons as set forth in the Motion for Sanctions before the Circuit Court (R. 169-170). By order dated March 28, 2014, the Court of Appeals denied Thompson's Motion for Sanctions against Pee Dee and its counsel.[4]

The Circuit Court granted the Motion for Sanctions under Rule 11 only, but it limited compensation to time spent by Thompson's attorneys in three areas, that it categorized as follows:

1) Mr. Megna's continuing failure to accept the court's ruling on disqualification;

2) Responding to various subpoenas; and

3) Pursuing the motion for sanctions.

Order, p. 2. The lower court requested that Thompson's counsel submit an amended fee affidavit for those areas only. Id. Thompson submitted an affidavit in the amount of $60,300, to which Pee Dee objected. The lower court ultimately awarded $6,910 on the disqualification issue; $9,070.00 for discovery requests issued by Mr. Megna; and $18,170.00 for time spent on the sanctions

[4] Respondent then requested this Court determine the matter *en banc,* but this request was denied. (R. 52-53). The Defendant did not request review by the Supreme Court.

motion. Id. The Circuit Court, however, denied Thompson's motion for sanctions under the FCPSA, concluding that the motion was untimely.

Pee Dee moved to alter or amend the lower court's order, and on May 12, 2014, the court denied the motion. This appeal followed.

The Court of Appeals vacated the Circuit Court's Rule 11 sanctions order, concluding that Thompson's delay of more than thirty-three (33) months from the date of the order of disqualification before filing the Rule 11 sanctions motion was unreasonable and therefore the motion was untimely. The Court of Appeals also affirmed the Circuit Court's ruling that Thompson's motion for sanctions under the FCPSA was untimely.

Argument

I. The Court of Appeals Correctly Ruled that Petitioner's Thirty-Three (33) Month Delay Before Filing the Rule 11 Sanctions Motion was Unreasonable.

There is nothing novel or even remarkable about the Court of Appeals' decision that Thompson's thirty-three (33) month delay before filing the Rule 11 sanctions motion was unreasonable and therefore the motion was untimely. Thompson argued before the Court of Appeals that Rule 11 sanctions motions are not governed by the same ten (10) day deadline as motions under the FCPSA. The Court of Appeals agreed.

Rather, after carefully reviewing this Court's precedent, the South Carolina Rules of Civil Procedure and the law interpreting the federal Rule 11, the Court of Appeals concluded that Rule 11 motions for sanctions must be filed "within a reasonable time after discovering the alleged improprieties." Even Thompson acknowledges the existence of time constraints under Rule 11. Petition, p. 7. Thus, Petitioner does not appear to challenge the Court of Appeal's interpretation of Rule 11.

Instead, Petitioner's disagrees with the Court of Appeals factual determination that thirty-

three (33) months is an unreasonable delay.[5] This type of fact intensive inquiry does not merit the issuance of a writ of certiorari from this Court.

II. The Court of Appeals, and the Circuit Court, Correctly Concluded that Petitioner's Motion Under the FCPSA was Untimely.

There is nothing novel about the Court of Appeals' ruling that Thompson's motion under the FCPSA made more than ten (10) days after the entry of the lower court's summary judgment order was untimely. This Court in *Pittman v. Republic Leasing Co., Inc.* 351 S.C. 429, 570 S.E.2d 187 (2002), ruled that a party must file a motion under the FCPSA within the ten (10) day time limit applicable to post-trial motions under Rule 59. Furthermore, if the party does not file the motion within the ten (10) days as provided under Rule 59, the trial judge loses jurisdiction to hear the matter. Specifically, this Court explained:

> Because a trial judge 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. Here, however, Republic Leasing waited until almost two months after the grant of summary judgment to move for sanctions under the Act. At that time, the trial judge no longer had jurisdiction over the case...Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment.
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> 351 S.C. at 432-433, 570 S.E.2d at 189-190.

Two years later in *In re: Beard*, 359 S.C. 351, 597 S.E.2d 835 (2004), this Court re-affirmed this ruling stating "[t]he established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Id.* at 358; 597 S.E.2d at 838.

Thompson argues that because there was an appeal from the summary judgment order, this

[5] To be clear, the Petitioner asserts that if there is to be a "bright line test," the test should come from this Court. However, the Court of Appeals did not impose such a bright line test. Instead, Petitioner seeks a ruling that Rule 11 sanctions could never be untimely if filed within ten (10) days after a case is remanded. Petition, p. 8.

ten (10) day window is expanded. Thompson also claims that since the motion was filed within ten days of remittitur from the Court of Appeals, it should have been found to be timely. The Court of Appeals correctly concluded that Thompson is "mounting, in essence, a direct challenge to" this Court's precedent. The Court of Appeals concluded, "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 remitter, as opposed to ten days following judgment, then it would have included that in the list found in subsection 15-36-10(C)(1)." Opinion, p. 13.

III. The Court of Appeals Unanimous Decision Does Not Conflict With Any Prior Decision of this Court, Does Not Directly Involve Substantial Constitutional Issues, Nor Are There Federal Questions Included.

In addition to the novelty of the legal issue involved, Rule 242(b), S.C. App. Rules, identifies a number of other reasons for which certiorari will be considered, such as: when there is a dissent or the decision conflicts with prior Supreme Court decisions; where there are substantial constitutional issues directly involved; and when a federal question is included, the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. None of these additional factors apply.

The ruling from the Court of Appeals was unanimous; there was not any dissent. The decision of the Court of Appeals does not conflict with any prior decision of this Court. There are no constitutional issues directly involved; rather the ruling involves an interpretation of the South Carolina Rules of Civil Procedure and the application of the courts' equitable authority. Lastly, there are not any federal issues involved. Although the Court of Appeals looks to the federal court's interpretation of Federal Rule 11 for guidance, the decision strictly involves the interpretation and application of South Carolina Rule 11.

Conclusion

The Court of Appeals carefully and thoughtfully analyzed this Court's precedent, the South Carolina Rules of Civil Procedure, and court rulings interpreting Federal Rule 11. The Court's conclusion that a motion under Rule 11 must be filed within a reasonable time after discovery of the alleged misconduct is certainly not novel. The Court of Appeals factual determination that a thirty-three (33) month delay before filing a Rule 11 sanctions motion was unreasonable in this case is fully supported by the record.

In addition, the Court of Appeals' affirmance of the lower court's finding that Petitioner's FCPSA motion was untimely likewise results from the proper application of this Court's precedent. Therefore, Respondents respectfully request that the writ be denied.

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May 9, 2017

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CERTIFICATE OF SERVICE

I, Jaime Harmon, the undersigned employee of Griffin Davis LLC, attorneys for the Respondent do hereby certified that I have served a copy of the foregoing **Return to Petition of Certiorari**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on May 11, 2017:

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May 11, 2017