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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2017 - 000681

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

v.

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

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

When Pee Dee Health Care, P.A. ("PDHC") medical clinic had to return Medicare overpayments triggered by the clinic's failure to fully credential its former employee, it brought this claim in Probate Court seeking recovery from the estate of that employee, physician Hugh S. Thompson, Jr. (the "Estate"). PDHC's fault in not satisfying the non-delegable duty to properly credential its employee (Thompson) has now been litigated in federal and state forums with the same adverse result to PDHC. In fact, the federal fault adjudication was concluded *before* PDHC filed its Summons and Complaint in the Probate Court.[1]

After filing the Complaint, PDHC petitioned for removal of the Probate Court action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). The Estate filed its Answer on June 17, 2010.

The Estate filed a motion for summary judgment on May 20, 2011. This successful motion was based upon the PDHC's previously adjudicated fault and the dispositive nature of that federal fault adjudication with regard to *all* of PDHC's causes of action. This motion was heard on July 19, 2011 without objection.

Before the July 2011 hearing, the trial court had disqualified one of PDHC's two trial attorneys (Mr. Megna – not Mr. Matthews) because of his status as a central witness

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[1] In fact, the adjudication was concluded, R.pp.15-16 ¶ 6 (appeal decision on October 6, 2008), before Dr. Thompson's death, R.p.14 ¶ 1 (date of death November 5, 2009), with PDHC waiting until after the death of this central witness to file its claim. R.p.14 ¶ 2 (claim filed April 14, 2010).

As the trial court summarized in its Order of Summary Judgment, "Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, *who would have been a pivotal witness as to what representations passed between the parties* as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court." R.p.16 ¶ 7 in the case. This disqualification was first announced from the bench on March 16, 2011, and then put in a written order of April 15, 2011.

The trial court announced its summary judgment decision by letter to the parties dated August 12, 2011 and mailed to the parties that same day.[2] This letter called for the preparation of a more detailed order but the letter itself expressed the general basis for the decision. On the same date of this letter, the trial court issued a formal order denying the reconsideration of attorney Megna's disqualification.[3]

On August 15, 2011 (the next business day), PDHC filed a notice of appeal from the August 12th reaffirmed disqualification order (Court of Appeals Tracking Number 2011197671) and immediately asserted that the trial court no longer had jurisdiction (because of the appeal) and therefore could not issue its planned order of summary judgment.[4]

Despite the invalid assertion that it lacked jurisdiction, the trial court issued a formal order of summary judgment against PDHC on August 29, 2011 (filed September 1, 2011). The trial court's order specifically found that the trial court did have

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2 R.pp. 779-780 (Judge Baxley Letter of August 12, 2011 Announcing Summary Judgment – Copied to Clerk of Court for file).

3 R. pp.10-11 (August 12, 2011 Order).

4 Even before its August 15, 2011 interlocutory appeal of counsel's disqualification, PDHC had filed an interlocutory appeal to the Court of Appeals (Tracking Number 2011185767) that related to the Probate Court's failure to require the Estate to post a bond (the Estate had instead proposed to freeze most of its assets pending the litigation). This Probate Court decision was affirmed in the Circuit Court when that Court determined PDHC's appeal was procedurally flawed. The Circuit Court determination was then appealed to the Court of Appeals. That first interlocutory appeal of the bond decision (again, Tracking Number 2011185767) was pending with the Court of Appeals when the disqualification appeal (Court of Appeals Tracking Number 2011197671) was added to the appellate docket.

jurisdiction to issue its formal order under Rules 205 and 241(a) of the SCACR (again, an order that formalized the summary judgment decision already announced by letter). A notice of appeal from the summary judgment order was filed by PDHC with the Court of Appeals on November 7, 2011. (Tracking Number 2011203391). This was the *third* appeal made by PDHC in this litigation.

These three appeals were addressed by the Court of Appeals in a consolidated opinion dated July 3, 2013 which: (1) affirmed the trial court's decision that the Probate Court bond appeal was untimely, (2) dismissed the summary judgment appeal as untimely because the Rule 59(e) motion which was signed by disqualified counsel did not toll the time for appeal, and (3) determined that the appeal from the disqualification of counsel was technically moot (although also finding the disqualification appeal "fails on the merits as well."). Subsequent PDHC petitions for rehearing and for *certiorari* were denied.

Remittitur was issued by the Court of Appeals on January 7, 2014. Nine days later, on January 16, 2014, the Estate filed its Motion for Trial Court Sanctions (R.pp. 278-318) based upon SCRCP Rule 11, the South Carolina Frivolous Civil Proceedings Sanctions Act (the "FCPSA"),[5] and the inherent power of the court. In support of that motion, the Estate filed an extensive set of documents (Exhibits A through Exhibit NN, R.pp. 319-863).

In response to the Estate's Motion for Trial Court Sanctions, PDHC filed a March 11, 2014 Motion to Strike the claim to FCPSA sanctions[6] as outside of the Court's

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[5] See S.C. Code § 15-36-10 *et. Seq*.

[6] While focusing on FCPSA, at the trial court hearing, PDHC took the position that all bases for sanctions were untimely. R.pp. 176 line 17- 177 line 19.

jurisdiction. PDHC also submitted a March 25, 2014 Memorandum opposing sanctions. The Estate filed a March 24, 2014 Response to the Motion to Strike. Both the Motion for Sanctions and the Motion to Strike were heard by the Circuit Court on March 27, 2014.

At the hearing on March 27, 2014, the Circuit Court announced that some sanctions would be awarded. The Court directed that the Estate segregate accounting for different elements of counsel's time so that specific sanctions related to the attorney time spent on certain issues could be awarded. A formal written order was anticipated after the accounting directed by the Court. The Estate filed its supplemental affidavit segregating attorney time as directed on April 1, 2014. PDHC filed a memorandum responding to this supplemental affidavit dated April 4, 2014.

On April 15, 2014, his last day on the bench prior to retirement, the Circuit Court signed a written order granting some sanctions but denying additional requested sanctions.[7] PDHC submitted a Motion to Alter or Amend the April 15, 2014 order and that motion was denied without hearing by the Chief Administrative Judge for the Circuit on May 12, 2014. PDHC filed an appeal (its fifth in the case[8]) to the South Carolina

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[7] The sanctions order relied only upon Rule 11, SCRCP, and not the FCPSA. While without explanation, the Court stated that it was "in essence, ruling in favor of [PDHC] on its Motion to Strike as that motion only addressed [the Estate's] request for sanctions under the FCPSA." R.p. 57.

The order further restricted the amount of sanctions to the Estate – *not based upon any timeliness distinction*, but corresponding to the amount of time spent by Estate counsel in three categories: 1) relating to Mr. Megna's continuing failure, at the Circuit Court level, to accept his court-ordered disqualification ($6,910); 2) responding to various subpoenas sent to uninvolved attorneys across the state by Mr. Megna ($9,070); and 3) relating to the motion for sanctions itself ($18,170 which did not include an additional $11,700 responding to the Motion to Stike any FCPSA claim as untimely). R. pp. 56-58.

[8] PDHC filed a fourth appeal from a separate 2013 order of sanctions awarded to a non-party. This order is discussed in the argument section of this brief. This appeal was

Court of Appeals on June 12, 2014 (Tracking number 2014-001275) and the Estate then filed a Notice of Cross-Appeal on June 13, 2014. PDHC sought to overturn the award of sanctions and the Estate sought the additional sanctions not awarded by the trial court.

The Opinion of the Court of Appeals in this fifth appeal (Opinion 5451) was filed November 2, 2016. Described by the Court of Appeals as a matter of first impression, the decision found the Petitioner's Motion for Trial Sanctions to have been untimely under *both* Rule 11 and the FCPSA. Therefore, the Court of Appeals vacated the trial court's limited award of sanctions to the Estate and did not address the trial court's denial of additional sanctions sought by the Estate.

The Estate petitioned the Court of Appeals for rehearing and suggested the matter be reheard *en banc* (pursuant to Rules 221 and 219(b), SCACR). The Petition for Rehearing was denied by the South Carolina Court of Appeals on February 21, 2017.

On March 20, 2017, Petitioner Estate filed its petition for writ of *certiorari* seeking this Court's review of Opinion 5451. Respondent filed its response to this petition on May 11, 2017, and Petitioners filed their reply in support of the petition for a writ of *certiorari* on May 22, 2017. By its order of December 20, 2017, this court granted partial review of the Court of Appeals and this briefing followed.

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unsuccessful.

STATEMENT OF THE FACTS

This has been no ordinary litigation. The Trial Court, in its *first* order for sanctions against PDHC attorney Tony R. Megna in this case,[9] aptly characterized counsel's constant litigation behaviors as follows:

(i) **Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process through both this case and the Richland case and he is in willful violation of this Court's orders, including the order disqualifying him as counsel for plaintiff.**

(ii) **Perhaps 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. This Court would be faced with an entirely different scenario if Megna had admitted his misconduct and shown remorse in any degree, or had he apologized for his continuous affronts upon the Courts and his colleagues.**

(iii) **The lack of respect Megna has shown this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court.**

(iv) **Megna's conduct is ill-conceived, vitriolic, and abusive.**

R.pp. 40-41. These findings *are* the law of the case[10] as they were subsequently

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[9] This sanctions order, dated February 11, 2013, arose from the discovery efforts, under the caption of this case, by disqualified Mr. Megna against a non-party attorney not involved in this litigation. This subpoena for records was served on that non-party attorney after cross-motions for summary judgment had been argued in this case and the decision taken under advisement.

This subpoena "sought to discover if any evidence existed of [that attorney's] communications with a list of attorneys whom Megna apparently believed to be his adversaries in this or other cases. *The subpoena sought nothing relevant to this case.*" R.p. 37 (¶ 12)(emphasis added). This abusive conduct is one reason cited by the trial court in its limited award of sanctions. <u>See</u> footnote 6, *supra*.

[10] Matters affirmed by an appellate court in the same case cannot be re-litigated. <u>Huggins v. Winn Dixie Greenville, Inc.</u>, 252 S.C. 353, 166 S.E.2d 297 (1969); <u>Ackerman v. McMillan</u>, 324 S.C. 440, 477 S.E. 2d 267 (Ct. App. 1996).

affirmed by an unpublished[11] *per curiam* opinion of the Court of Appeals.[12]

The retiring Circuit Judge made similar observations in the second order for sanctions in this case *(on appeal here)* – issued on his last day of service on the bench. The trial judge observed,

> This Court does not take the imposition of sanctions under Rule 11 lightly, but finds it appropriate here due to Mr. Megna's conduct in this case – specifically, his refusal to accept this Court's Order disqualifying him as counsel and his unwarranted and meritless attempts to entangle uninvolved third-party attorneys in this case through inappropriate discovery requests. ... ***Mr. Megna's conduct has caused [the Estate] to incur substantial and unnecessary legal bills, which have diminished the size of the estate, not to mention the inordinate delay in closing the estate.*** This conduct has also required the Court to spend significant time addressing these matters through hearings and phone conferences.[13]

While the trial court narrowed its focus to a few categories of time in its final order, the extended history and scope of *affirmed* offending conduct went much further than Mr. Megna's continuing failure to accept his court-ordered disqualification and his issuance of subpoenas to uninvolved attorneys across the state. Other offensive conduct was not the basis for additional sanctions but should have been.

Everything about this litigation, from its unwarranted initiation to its alleged role in an imagined conspiracy – and all behaviors in between, warranted

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[11] The Estate is mindful of the rule against referencing unpublished opinions, SCACR 268(d)(2), "except in proceedings in which they are directly involved." The reference here falls within that exception and is made to confirm the *affirmed* facts of this case.

[12] Unpublished Opinion No. 2015-UP-067 (February 11, 2015) ("As to the merits, we find the preponderance of the evidence supports the circuit court's findings of fact.").

[13] R. pp. 56-58 (emphasis added).

a *full* measure of sanctions – and those sanctions are supported by the law of the case already established in multiple prior appeals.[14] This additional conduct falls into seven general categories: the initiation of an estate claim barred at the onset by collateral estoppel from the federal adjudication,[15] misrepresentations to estate counsel (misrepresenting the Medicare administrative record and claiming an inability to produce that record),[16] misrepresentations to courts (that probate appeal grounds were filed in 45 days),[17] unwarranted effort to avoid the disqualification of counsel,[18] unwarranted attacks/threats against estate counsel,[19]

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[14] Having concluded that any sanctions effort by the Estate was untimely, the Court of Appeals did not address the Estate's appeal arguments in support of additional sanctions. Appendix at 15 footnote 4. These arguments were Briefed in the Estate's cross-appeal (Appellant's Brief of the Respondent-Appellant and Reply Brief of the Respondent-Appellant) and thus this issue is ripe for disposition in this Court or upon remand. Disposition by this Court is requested to avoid further delay and added litigation costs. The Estate hopes to avoid another appeal in this matter.

[15] See affirmed Order of Summary Judgment. R.pp. 12-27. At the trial court hearing on the Estate's motion for sanctions, the trial court opined that generalized fee-shifting was inconsistent with our jurisprudence; however, a frequent and compensatory measure of sanctions is the fee burden incurred by the moving party – and both Rule 11 and the FCPSA in essence authorize such fee shifting via sanctions under sanctionable circumstances – like the law of the case here.

Perhaps because of his inapplicable, but expressed, concerns with generalized fee shifting, the trial court chose to limit its award of sanctions. Against both the existing law of the case *now* and the law of the case *at the time*, the trial court explained his denial of additional Rule 11 sanctions stating that there were "good grounds" to support issues – although previously affirmed as meritless (such as preclusive effect of the pre-filing federal adjudication and such as the needless/untimely probate bond appeal).

[16] R. p. 437 and pp. 287-288.

[17] R.p.493 lines 9-11 and page 495 lines 1-3.

[18] R.p 58 ("refusal to accept this Court's Order disqualifying him") and R.p. 40 ¶ ¶ 22-25 (describing conduct in contradiction of disqualification Order).

[19] R.pp. 565-568, 771-772, 775-778.

unwarranted conspiracy claims and threats of litigation,[20] and unwarranted questioning of the trial judge's integrity.[21]

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[20] R.pp. 565-567.

[21] R.pp. 548-595, 680-690, 737-738, 769.

ARGUMENT

THIS COURT SHOULD CLARIFY AND RECOGNIZE A 10-DAY PERIOD OF LIMITED AUTHORITY AFTER REMITTITUR FOR MAKING A TRIAL COURT MOTION FOR SANCTIONS IN AN APPEALED MATTER.

The issue before this Court is not whether Mr. Megna engaged in unacceptable behaviors – those behaviors have been reviewed and affirmed. The issue before the Court is when, and perhaps how often, the Estate should have moved for sanctions. As the voluminous record exposes, PDHC and Mr. Megna contested everything, conceded nothing, and acted throughout the proceedings with a complete lack of respect for the trial court, the legal process, and their colleagues.

As Petitioner stated to the trial court,

> The Defendant could have filed a motion for sanctions after this Court's decision (appealed) to dismiss the Probate Court Appeal (C/A No. 10-CP-16-0633), then filed a second motion for sanctions after this Court's decision (appealed) to disqualify counsel, and then filed a third motion for sanctions within 10 days of this Court's summary judgment decision (also appealed but jurisdictionally challenged in [trial] Court first) – but ***defense counsel regrets having to file a single motion for sanctions – and certainly did not want to file three such motions further confusing the situation and taxing judicial resources.*** . . . such a piecemeal approach is not required by the Rules and jurisdiction exists for this Court's comprehensive consideration of sanctions in light of the totality of conduct demonstrated in this Court.

R.p. 871-872 (Response in support of Sanctions and Opposing Motion to Strike) (emphasis added).

The Estate agrees with the Court of Appeals that the ability of the trial court to award sanctions does not last "in perpetuity" (Apprendix at p. 11), but the Estate strongly disagrees with the conclusion of unreasonable delay here. For reasons that are sound and enumerated below, the Estate waited until the consolidated appeals had concluded unfavorably to PDHC, and then *promptly* moved for sanctions in accordance with the trial court's limited, but established, window of remittitur jurisdiction.

Despite stating "we decline to read any specific time limits into [Rule 11]", the Court of Appeals implicitly held that a sanctions motion after appeal – even within 10 days of remittitur – could never be timely. ***Petitioner suggests that any bright-line deadline needs to include the 10 day window following the finality of an appealed matter after remittitur.*** The Estate makes this suggestion because it is supported by our jurisprudence and because the Estate shares the Court of Appeals' concerns of judicial efficiency.[22]

A. Limited Jurisdictional Window After Remittitur: Consistent With Court Rules (SCRCP 1 & SCRCP 54) And Remittitur Precedents

For decades – *indeed, for over a century* – this Court has recognized a period of trial court limited-scope jurisdiction/authority following an appellate court remittitur. This includes decisions both before[23] and after[24] the adoption of the Rules of Civil Procedure.

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22 The Estate agrees that there may be circumstances where a more immediate or more frequent sanctions effort would be the more efficient option, but not here. The Estate's position offers appropriate flexibility within established jurisdictional limits.

23 State v. Wise, 33 S.C. 582, 12 S.E. 556 (1891); Brooks v. Brooks, 16 S.C. 621 (1881)).

24 Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999)(This Court recognized that original trial judge may exercise jurisdiction following an appeal – in a manner consistent with the appellate decision – even if that original judge is not a resident of or then assigned to the circuit where the case arose); Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)(*"Once the remittitur is sent down from this Court, the Circuit Court acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court ruling."*)(emphasis added)(citing Hamm v. Southern Bell, 305 S.C. 1, 406 S.E.2d 157 (1991)(In Hamm, this Court also made it clear that no specific remand instructions were required to re-establish the trial court's jurisdiction upon remittitur. This Court stated, "Further, although we did

Of course, one fundamental purpose of those Rules is to assure a "just, speedy, and inexpensive determination" of issues. See Rule 1, South Carolina Rules of Civil Procedure; see also Ex parte Wilson, 367 S.C.7, 625 S.E.2d 205 (2009). Indeed, SCRCP Rule 54 provides for a delay when seeking costs in an appealed case; the Rule provides that trial costs may be sought in the 10 day window following "written notice of the entry of the final judgment *after* appeal." (emphasis added).

The same post-appeal window of authority that has been recognized for over a century was relied upon by the Estate in this matter to avoid "further confusing the situation and taxing judicial resources."[25] This Court need only reaffirm that well-established but limited authority in this consistent procedural context.

B. Limited Jurisdictional Window After Remittitur: Consistent With Rule 11 And FCPSA

The case of Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722, (2006), is presumably the elephant in the room. Russell held that "a [FCPSA] motion for sanctions must be filed within ten days of the notice of the entry of judgment." 370 S.C. at 20, 633 S.E.2d at 730 (2006). In reaching this conclusion, Russell relied upon Ex parte

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not expressly "remand" the case, no such instruction was necessary under the facts of this case. Section 18-9-270 provides that "the Supreme Court may reverse, affirm or modify the judgment decree or order appealed from in whole or in part and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to the law." McDowell v. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989)

[25] See Response in support of Sanctions and Opposing Motion to Strike, quoted on page 11 of this Brief.

Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) for the general proposition that a trial court loses authority over a matter once the time to file post-trial motions has expired. Russell also relied upon Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), as authority specifically recognizing such a limit on authority in the context of a FCPSA motion filed two months after an un-appealed order of summary judgment.[26] Russell also noted that a Rule 11 sanctions motion does *not* have to be made within ten days from notice of entry of judgment. Russell at footnote 11.

The Estate argues that the Russell decision, together with Rule 54, SCRCP (recognizing reality of post-appeal re-entry of judgment *via* remittitur) and other precedents, allows for a renewed 10-day window of trial court jurisdiction/authority after an appellate remittitur for any kind of sanctions motion –under the FCPSA or Rule 11.[27] The consistency of this limited post-remittitur window with the FCPSA, Rule 11, and the Russell and Pitman decisions is discussed below.

1) FCPSA

Because of the uncertain applicability of the Russell opinion to this procedural posture, the deadline under FCPSA seems to be the most genuine issue raised in the context of otherwise disingenuous litigation. The Court of Appeals denied the existence

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[26] The Court of Appeals found Russell prohibitive of the Estate's position and suggested that Petitioner was "mounting, in essence, a direct challenge" to precedent and seeking an "expansive" reading of the FCPSA. The Estate disagrees as it believes Russell (and Pitman) arose from distinguishable circumstances rendering those holdings not directly prohibitive here (as argued in the Court of Appeals and this Brief). Nevertheless, the Estate will seek leave under SCACR 240 to argue against precedent, *if necessary*, to bring clarity to that precedent.

[27] The Estate also raised the inherent power of the Court, but it was never addressed and appears to now be outside this Court's chosen scope of review.

of any 10-day jurisdictional window with regard to the FCPSA after an appellate remittitur. The Estate argues this denial is not required by the sound reasoning of Russell and Pitman and is in conflict with this Court's remittitur precedents.

a. A Finality-Based Triggering Event

The FCPSA expressly provides for a finality-based triggering event to open a window of opportunity. The Act provides that "*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 § 15-36-10(C)(1)(emphasis added). Once the triggering event has occurred, however, the FCPSA itself *does not* contain language to limit the duration of time in which a petition must be brought.[28]

The triggering event for the FCPSA (*after* "the conclusion") is much the same as the triggering language for the mechanics-lien fee provision in Muller (*after* a party has "prevailed"[29]) and the triggering language for the state-action fee provision in McDowell

[28] In contrast, South Carolina Code § 15-77-310 (fee shifting provision for unsuccessful state initiated actions) provides *both* a triggering event ("final disposition") *and* a duration of available time after that event ("thirty days"). Specifically, the statute provides, "The party shall petition for the attorney's fees within thirty days following final disposition of the case."

[29] South Carolina Code § 29-5-10 provides in pertinent part: "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. The fee must be determined by the court in which the action is brought but the fee and the court costs may not exceed the amount of the lien."

In Muller, this Court found that following remittitur, the Circuit Court was vested with jurisdiction to award statutory attorney's fees in a mechanic's lien foreclosure. The procedural history recited in the opinion confirms a delay of at least 26 days. Specifically, the prevailing party failed to file his petition for appellate fees and costs (*after* the "final disposition"[30]). These finality based triggers all serve to avoid the interlocutory piece-meal approach of filing multiple requests during on-going trial litigation – this is also what the Estate sought to avoid.[31] Thus, the Estate suggests that the distinctions among these statutory triggers are without differences.

Regardless of the triggering language, in this case, the "final disposition" or case "conclusion" or ultimate "prevailing" did not occur until after all the consolidated appellate decisions and remittitur. The Estate motion promptly followed true finality here.

b. Remittitur Is Also A Finality-Based Triggering Event.

In Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), the Court of Appeals interpreted the FCPSA's triggering phrase "at the conclusion of the trial" for the first time.[32] The court aptly noted as a preliminary matter

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(under SCRAP 222) on time as the remittitur had been sent to the trial court 26 days earlier. The prevailing party *then*, after that late Rule 222 petition, petitioned for both trial and appellate fees and costs *in the Circuit Court*. The trial court held that it was without jurisdiction. On appeal, this Court reversed and stated "The holding of Circuit Court that it was without jurisdiction to adjudicate the issue of attorney's fees was erroneous."

[30] In McDowell, the Court of Appeals allowed that statutory time within which to petition for attorney's fees in an appealed case began to run *following remittitur* – the "final disposition." The Estate position here is analogous.

[31] Again, see Response in support of Sanctions and Opposing Motion to Strike, quoted on page 11 of this Brief.

[32] The present version of the FCPSA has been amended since Pitman but the "at the conclusion of a trial" language, however, was repeated in the new provisions. The FCPSA amendments were discussed in Rutland v. Holler, Dennis, et.al., 371 S.C. 91, 637 S.E.2d 316 (2006)(noting that the original statutes that made up the FCPSA were repealed in 2005 and completely revised with new provisions).

Rutland also involved a timeliness challenge to the trial court's jurisdiction to impose sanctions. Rutland involved a history of *multiple* related lawsuits by a client (Rutland) that use of the term "trial" as part of the triggering phrase was incongruous since any case surviving to trial is presumptively *not* frivolous. The Pitman Court determined that it was *not* going to vary from the "established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." [33]

In Pitman, the party seeking sanctions waited some two months after an order of summary judgment *that was not appealed* at all, much less appealed whilst two other appeals in the same matter were pending. Obviously, the facts and circumstances presented by this four-time[34] appealed case are different from Pitman and have not been considered by previous appellate decisions of our courts.

Notably, the appellate courts have not addressed a request for sanctions under FCPSA after the successful defense of multi-staged appeals. Here, the very merits of the matter, bearing on the requests for sanctions were under appellate review.

Neither Pitman nor Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct.

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against his former counsel (Corbett). In the third of such failed lawsuits, Corbett filed a motion for attorney's fees and costs under the FCPSA, apparently limited to the fees and costs of the third action.

Corbett's motion was filed (September 1, 2004) more than 10 days after the form order (August 9, 2004) granting summary judgment but before the anticipated follow-up formal order (December 7, 2004). Citing to Pitman and relying on the concept of retained jurisdiction, the Rutland Court found the trial court retained jurisdiction during the preparation of the follow-up formal order; thus, the Court found the request timely and then approved the trial court's entry of a sanction's order some 9 ½ months after entry of the final formal order of summary judgment. Thus, consistent with the Estate's position here, Rutland affirmed the trial court's ability to consider sanctions during any period of the Court's general jurisdiction.

[33] 351 S.C. at 433, 570 S.E.2d at 190.

[34] At the time of the Circuit Court's 2014 order of sanctions appealed here, the fourth appeal from the 2013 order of sanctions was pending. Of course, as noted above, the present appeal is the *fifth* appeal of this matter.

App. 2004)[35] addressed the *established* precedent of a trial court's *reacquisition* of jurisdictional authority following an appeal (these opinions did not need to address that issue since neither case involved an appeal before the FCPSA ruling). Russell did involve an earlier appeal before the FCPSA ruling *but* because the motions for sanctions were filed prior to that first appeal, and because the trial court had continuing jurisdiction of matters not concluded or addressed by the first appeal, the Russell court was also not asked to address the reacquisition of jurisdictional authority following that first remittitur.[36] Thus, these three decisions do not address and therefore did not directly

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[35] In Beard, the Court of Appeals reaffirmed that the 10 day limit for post-trial motions was applicable to a February 4, 2002 request for sanctions under the FCPSA – in a matter that was settled in August of 2001 and never appealed; therefore, the FCPSA claim was barred. Nevertheless, the trial court treated the sanctions request as timely under Rule 11 but found the request unsupported; the Court of Appeals affirmed.

[36] The 2006 Opinion in Russell actually represented the second time that matter had been before this Court. A 2003 Opinion had affirmed a decision of summary judgment granted against two children ("Scott" and "Mim") seeking to set aside their father's Will and trusts based upon a claim of undue influence. Russell v. Wachovia Bank, NA, 353 S.C. 208, 578 S.E.2d 329 (2003).

Following remittitur from this first appeal, the prevailing parties ("the Williams children") filed a motion for summary judgment (joined by the bank) seeking to disinherit Scott and Mim altogether for bringing the underlying actions. Apparently, Scott and Mim filed a cross motion for summary judgment – which was granted. Three orders were issued by the trial court: 1) granting Scott and Mim summary judgment and finding the no-contest clauses invalid and unenforceable (this was reversed); 2) ordering Mim to pay attorney's fees and costs to various other litigants for pursuing a frivolous lawsuit (affirmed under FCPSA) and filing a false affidavit (affirmed under Rule 11); and 3) denying sanctions against Scott and his counsel and denying Williams children requests for attorney's fees and costs as untimely (the denial of sanctions to the Williams children was reversed under both FCPSA and Rule 11 and remanded).

Although merits of the initial Scott and Mim complaints in Russell were appealed before an award of sanctions, the requests for sanctions were filed prior to that first appeal and apparently held in abeyance. While it is not clear from the opinions when the sanctions against Mim were sought by other parties, the Williams children filed their time challenged motion for sanctions on May 14, 2001 which was within 10 days of the "entry" of the initial summary judgment on May 8, 2001 although the order and judgment prohibit a 10 day window of a trial court's general authority to act consistent with an appellate decision -- including FCPSA jurisdiction.

While an artificially narrow reading of Pitman without consideration of its procedural context might suggest an absence of FCPSA jurisdiction upon remittitur, Pitman really stands for the proposition that trial court consideration of a FCPSA request requires a period of general authority at the finality of a matter. The Estate here simply asks the Court to confirm the proposition that a trial judge has general authority over a case during all the windows of time recognized by established case law and the SCRCP – both after an entry of judgment and upon remittitur thereby allowing for FCPSA jurisdiction parallel to that recognized in Pitman.

While the window of FCPSA jurisdiction opened by remittitur is not be limited to 10 days under the FCPSA language itself,[37] this Court could provide a bright-line limit of 10 days following remittitur in an appealed case. Indeed, the Estate assumed such a limit might apply when it filed its motion on the 9th day after the issuance of remittitur. Such a limit would be consistent with established law, and would give guidance to the members of the bar.

2) Rule 11

As noted in the Russell opinion, the jurisdictional window allowed for a sanctions motion under Rule 11 need not be the same as the window allowed for a FCPSA motion.

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sheet were file stamped on April 27, 2001 (slightly more than 10 days before the motion).

[37] This Court allowed more than double that in Muller where, like here, the statutory fee provision expressed no clear cap on the duration of statutory-triggered, reacquired jurisdiction.

The Russell opinion does not clarify, however, how much those windows differ – or why they need to differ at all.

Even if the window for a court's FCPSA authority does not reopen for at least10 days upon remittitur, the Russell opinion's footnote expressly declines to close any such window for a Rule 11 motion ("we decline to address what time limit is proper with regard to Rule 11"). And the trial court here allowed that the Estate's Motion for Sanctions *was timely* under Rule 11.

In contrast, the Court of Appeals here expressly held that the Estate's Rule 11 motion filed in that 10 day window was "untimely" and should have therefore been dismissed for *a lack of jurisdiction*. Appendix at 6. Thus, the Court of Appeals opinion closes the Rule 11 jurisdictional possibility despite provisions of the Rules of Civil Procedure and despite the century of general remittitur jurisdiction recognized in the precedents of this Court listed in this Brief (page 12). This Court of Appeals denial of jurisdiction should be reversed in favor of those provisions found in the Rules of Civil Procedure and the established case law holding that the issuance of the remittitur returns jurisdiction to the trial court for action consistent with the appellate court ruling.

C. Limited Jurisdictional Window After Remittitur: Consistent With The United States Supreme Court And Other Federal Precedents.

While the Court of Appeals in this case declared "we decline to read any specific time limits into [Rule 11]", it implicitly held that a sanctions motion after appeal – even within 10 days of remittitur – could never be timely. This implicit limitation is also in contrast with the United States Supreme Court and other federal precedent.

Although the Court of Appeals was "unable to find any authority to support the proposition that a party can wait until the entire case has finished,"[38] the United States Supreme Court decision in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), is such authority. NASCO was referenced in the Estate response to the Motion to Strike. In NASCO, the United States Supreme Court affirmed a trial court's award of common-law sanctions *after remittitur* from the United States Court of Appeals for the Fifth Circuit.

Likewise, the United States Court of Appeals for the Fourth Circuit has upheld Rule 11 sanctions awarded pursuant to a motion brought *after an earlier appellate remittitur.*[39] Hicks vs. Southern Maryland Health Systems Agency, 805 F. 2d 1165 (4th Cir. 1987). Thus, contrary to our Court of Appeals' holding here (that a sanctions motion *after appeal* is implicitly late), Hicks allowed that a sanctions motion is not necessarily untimely if brought *following* the conclusion of appellate proceedings.[40]

D. Limited Jurisdictional Window After Remittitur: Consistent With Counsel's Ethical Obligations.

Rule 3.2 of the Rules of Professional Conduct, found in SCACR 407, provides that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Counsel for the Estate has sought to do exactly that – and found over the course of this litigation that certain proactive steps were not in the best interests of the Estate because they only led to expensive countermoves by PDHC and its counsel – just as described in the affirmed law of the case.

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[38] Appendix page 12.

[39] Federal Rule 11 has been substantially changed in recent years but the version discussed by cases in this Brief were similar to the provisions of the South Carolina Rule.

[40] The Hicks decision was brought to the attention of the Court of Appeals below in the Estate's effort to secure a rehearing.

And just as counsel for the Estate reasonably concluded that it would be best to submit a consolidated post-remittitur motion for sanctions, the Ethics Advisory Committee has recently opined that delaying a report of professional misconduct, required by Rule 8.3 of the Rules of Professional Conduct, until the "conclusion of the litigation *or appeal*" is appropriate "if Lawyer A determines immediate reporting may hurt the client." S.C. Bar Ethics Advisory Opinion, 16-04 (emphasis added).

E. Jurisdictional Window After Remittitur Would Promote Judicial Efficiency in Circumstances Like These

1) The Circumstances of PDHC's Conduct

In addition to the description offered in the Statement of Facts above, the trial court here also concluded:

> *[T]his Court is concerned that the conduct of Attorney Megna reveals a* ***continuous pattern of violations of the civility and professionalism requirements of South Carolina's attorney oath with respect to members of the Bar, consistently uses language that is accusatory and demeaning directed at opposing counsel, includes inappropriate references to the judiciary, and contains unwarranted criticisms of other professionals, parties, and witnesses.***

R. p. 44 (emphasis added).

2) A Similar Case Provides Guidance

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, this 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, was filed more than seven years after Dr. Holmes embarked on her scorched earth and litigious journey of multiple frivolous motions and multiple interlocutory appeals. 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. Here, the trial court's summary judgment conclusion fell amid multiple *pending* interlocutory appeals. Moreover, the summary judgment order itself was also immediately appealed thereby delaying the real finality of that underlying decision and any related conclusion of frivolity.

3) The Estate's Consistent Efforts To Bring Matters To Conclusion

The Estate consistently sought to limit and end this litigation through well-timed and well-reasoned motions practice: first, a proposal to freeze estate assets, then a motion to dismiss the probate bond matter for failure to timely file the Grounds of Appeal; then a prompt motion for disqualification of witness Megna; and ultimately, a timely motion for summary judgement. The Trial Court seeing the ongoing abuses, acted swiftly and decisively to bring all contested issues to a just conclusion. Unfortunately, repetitive unsuccessful appeals added additional delay and expense to the real finality of the matter. The Estate waited for this real finality to seek sanctions rather than trigger more retaliation and reaction as would have resulted from earlier sanctions motion(s).

4) A Consolidated And Efficient Look Back With The Totality Of Conduct & Rulings

The unending pattern of conduct in this case suggests that seeking sanctions early and often – as implicitly suggested by the opinion below --would *not* have deterred these personalities – but only precipitated more procedural counterpunches. Indeed, as described above (Page 11 herein -- reference to Response in support of Sanctions and Opposing Motion to Strike), this is why the Estate made the informed decision to consolidate its sanctions request at the conclusion of the matter. Nevertheless, sanctions here could still serve the purpose of deterring *others* and could definitely serve the equally important purpose of making the Estate whole after needless years of vexing litigation.

The Court of Appeals opinion essentially requires counsel to seek sanctions early and often – conceivably with every procedural step and interim ruling along the way (to true finality). This can hardly be efficient; as the Supreme Court stated under a similar timeliness analysis in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982):

> Cautious to protect their own interests, ***lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling.*** Yet encouragement of this practice would serve no useful purpose. Neither would litigation over the "finality" of various interim orders in connection with which fee requests were not filed within the 10-day period. .... [this] actually could generate increased litigation of fee questions—a result ironically at odds with the claim that it would promote judicial economy.

Id. at 453 (emphasis added)(deciding not to apply FRCP 59(e) 10-day limit to § 1988 fee claims). Notably, the White case was relied on by the Fourth Circuit in Hicks.

The resolution of issues in this case was not "speedy" and was not "inexpensive." The Estate's position of a limited, renewed window of remittitur authority promotes sound public policy by providing the option of a more complete deliberative consideration of sanctions after completion of the appellate process.

GIVEN THE LAW OF THE CASE REGARDING THE OFFENDING CONDUCT AND ITS IMPACT, AN ADDITIONAL AWARD OF SANCTIONS SHOULD BE MADE GIVEN THE ESTATE'S PROMPT AND TIMELY POST-REMITTITUR MOTION.

Compensating the victims of inappropriate conduct is a recognized purpose for an award of sanctions. While the Court of Appeals acknowledged this purpose,[41] its decision fails this purpose. While the ultimate dismissal of the PDHC's claims was correct, without the redress available through sanctions, the adjudication was not truly "just" and not in accordance with the ideals of our Court Rules.[42]

In addition, without sanctions, a pattern of conduct hijacking the expected adherence to constitutional norms of fairness will not be deterred. The "continuous pattern"[43] of conduct here, observed by the trial court – not just by the Petitioner or its counsel, is exactly why the Estate waited until the ultimate conclusion of the matter to seek sanctions. As for the impact of the conduct in this matter, the affirmed findings that control this case include: "***Attorney Megna's actions have resulted in the tremendous unnecessary consumption of attorney time, excessive and unnecessary costs to litigants, and the significant waste of judicial resources and public funds required to operate the Court system***." R. p. 44 (emphasis added).

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41 Appendix at page 10 (citing Moore v. Southtrust Corp., 392 F. Supp. 2d 724, 736 (E.D. Va. 2005) (quoting In re Kunstler, 914 F.2d 505 at 522 (4th Cir. 1990)("[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.").

42 See discussion of SCRCP 1 on page 13 of this Brief.

43 R. p. 44.

If the motion here was timely under either (or both) ground(s), as the Estate asserts, then *the entirety of sanctions sought by the Estate should be awarded in order to make the Thompson beneficiaries financially whole (though not emotionally and chronologically).*[44]

CONCLUSION

The Court has an opportunity to re-affirm the codified power and authority of the trial courts to issue sanctions to deter "ill-conceived, vitriolic, and abusive" conduct as necessary to provide constitutional adjudications – free from the lack of respect shown in this matter – one that truly is a "just, speedy, and inexpensive determination" of the matter. The Court also has the opportunity to provide a clear bright-line remittitur window of time consistent with established case law, the SCRCP, counsel's ethical obligations, and judicial efficiency.

The Thompson estate respectfully submits that its motion for sanctions was timely. In light of the novelty of issues under South Carolina law and in light of the guidance given by federal courts, to hold otherwise is to reward the party which polluted the stream of justice and taxed judicial resources to their utmost. To hold otherwise will also pass those excessive litigation costs on to the innocent heirs of the Thompson estate.

For all of the reasons set forth herein, the Thompson estate respectfully asks this Court to reverse the Court of Appeals determination of untimeliness, reinstate the trial court's limited award of sanctions and proceed to award additional sanctions as

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44 Again, the merits of the Estate cross-appeal seeking additional sanctions, based upon the law of the case, have not been addressed because the Court of Appeals concluded that the Estate's motion for any sanctions was untimely. The trial court denied the Estate $11,170 in sanctions corresponding to Estate counsel opposition to that Motion to Strike. Overall, the Estate sought an *additional* $96,580 in sanctions for Circuit Court related time *exclusive of* work on the Motions for Sanctions itself. R.pp. 314-315.

demonstrated in the trial court and supported by the law of this case and complete record (thereby preventing the potential for a needless sixth appeal) – or in the alternative, remand the matter to the trial court to reconsider those *additional* sanctions erroneously omitted by the trial court.

February 6th, 2018

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2017 - 000681

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

v.

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

PROOF OF SERVICE

I certify that I have served the **Brief of the Petitioner** and this **Proof of Service** on Pee Dee Health Care, P.A. by depositing one (1) copy of each in the United States Mail, postage prepaid, on February 6, 2018, addressed to:

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