THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court Of Common Pleas

J. Michael Baxley, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017 - 000681

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

v.

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

REPLY BRIEF OF PETITIONER

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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 on appeal and affirmed. Moreover, they are not disputed in PDHC's Brief.[1] The central issue before the Court is when, and perhaps how often, the Estate should have moved for sanctions.

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[1] PDHC's Brief does suggest (page 3) that the Court of Appeals never determined the merits of Mr. Megna's disqualification. While the consolidated Court of Appeals opinion of July 3, 2013 did find PDHC's appeal on the disqualification issue untimely, it nevertheless also found the disqualification appeal "fails on the merits as well." Pee Dee Health Care, P.A. v. Thompson, Unpublished Opinion No. 2013-UP-311 pages 4-5 (S.C. App. 2013). As PDHC's counsel argued to the trial court, "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 line 21 – p.186 line 18.

Moreover, the disqualification was a central part of the first sanctions appeal *in this case* where the Court of Appeals pronounced, "As to the merits, we find the preponderance of the evidence supports the circuit court's findings of fact." Ex parte: Tony R. Megna, Appellant, and Desa Ballard, Respondent, Unpublished Opinion No. 2015-UP-067 (February 11, 2015). See Estate's Brief, page 7 footnote 9. Again, matters affirmed by an appellate court in the same case cannot be re-litigated. Huggins v. Winn Dixie Greenville, Inc., 252 S.C. 353, 166 S.E.2d 297 (1969); Ackerman v. McMillan, 324 S.C. 440, 477 S.E. 2d 267 (Ct. App. 1996).

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).

PDHC's Brief *also* continues its artificial effort to play the victim of some unknown credentialing issue (using the term "unbeknownst", Brief page 2) when both federal and state adjudications have held that a medical employer has a non-delegable duty to know.

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

PDHC suggests (Brief at 2, 5-6) that the Estate has improperly raised a new issue by making a reference to SCRCP 54 and its recognition of a post-judgment jurisdictional window. PDHC's protest is a red herring.

The Estate has not raised any issue for the first time – the issue of the Sanction's Motion timeliness was raised by PDHC in the trial court with its Motion to Strike – and this has been the central issue throughout this appeal. The Estate's current reference to SCRCP 54 is only one additional example of a post-judgment jurisdictional window.[2] The Estate has consistently suggested the existence of such a window beginning with its trial court response to the Motion to Strike. R.pp. 875-878.

PDHC does not address the century of case-law jurisprudence from this Court recognizing a limited window of jurisdiction in the trial court following remittitur. Neither does PDHC address the clarity and applicability of SCRCP 1 and its codified principle of "just, speedy, and inexpensive determination" of issues.

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[2] As noted by PDHC, Rule 54 seems to differentiate between parties who prevail for the first time on appeal and those that prevail in the trial court. With the latter, the motion for costs "may" be filed within 10 days of the receipt of notice of the entry of judgment – and may be delayed by the clerk with an appeal. Notably, the Rule uses the permissive "may" for all parties and situations. The Estate suggests that Rule 54 essentially recognizes the jurisdiction-triggering reality of post-appeal re-entry of judgment *via* remittitur. Admittedly, the Rule 54 reference and analogy alone is of limited assistance here.

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

1) FCPSA

As noted in the Estate's initial Brief (page 14 footnote 26) and focused upon by PDHC' Brief in response (page 8), the Court of Appeals found Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722, (2006), 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. Of course, SCACR 217 allows Briefs to argue against precedent and the Estate will seek leave under SCACR 240, *if necessary*, to argue against precedent to bring clarity to that precedent.

The Estate believes Russell (and Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002)) arose from distinguishable circumstances rendering those holdings not directly prohibitive here (as repeatedly argued in the Court of Appeals and Briefings to this Court). Thus, the Estate does not directly challenge those precedents.

a. A Finality-Based Triggering Event

PDHC's Brief does not dispute the finality-based triggering event found in the FCPSA (*after* "the conclusion") and PDHC's Brief does not address the similar events addressed in the post-remittitur cases of Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993) (*after* a party has "prevailed") and McDowell v. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) (*after* the "final disposition"). These finality based triggers all serve to avoid the interlocutory piece-meal approach of filing multiple requests for sanctions during on-going litigation – this is also what the Estate sought to avoid.

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

PDHC's Brief essentially argues that the trial court's ruling on summary judgment can be the only triggering event and opens the only window of jurisdiction – even when the merits of that ruling are appealed. PDHC points out in its Brief (pages 8-9) that the decisions in Russell and Rutland v. Holler, Dennis, et.al., 371 S.C. 91, 637 S.E.2d 316 (2006) do not affirmatively recognize a post-appeal remittitur as a triggering event – of course, they did not need to consider that possibility given their distinguishable circumstances. For the same reason (no need to consider), neither did these cases directly prohibit a post-appeal remittitur as a triggering event and neither does the totality of post-appeal jurisdictional jurisprudence. And as discussed below in a Rule 11 context, both federal and North Carolina cases also embrace an appellate ruling as a triggering event.

2) Rule 11

PDHC's Brief (pages 9-11) fails to directly reference footnote 11 of the Russell opinion but the Brief does not deny the potential for a possibly different and possibly longer jurisdictional window for motions made pursuant to SCRCP 11. Instead, PDHC seeks to dismiss the federal cases discussed below and erroneously puts reliance on a North Carolina case mentioned by the Court of Appeals below.

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

In this section of its Brief, the Estate referenced the United States Supreme Court decision in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), and the United States Court of Appeals for the Fourth Circuit decision in Hicks vs. Southern Maryland Health Systems Agency, 805 F. 2d 1165 (4th Cir. 1987). These cases stand in contrast to the Court of Appeals conclusion that it was "unable to find any authority to support the

proposition that a party can wait until the entire case has finished." [3] ***Both specifically allowed for sanctions after the finality of an appeal.***

Responding to these cases, PDHC notes (Brief page 10, footnote 9) that NASCO involves an award of sanctions pursuant to the inherent power of the Court – a basis for sanctions which was admittedly not taken up by this Court in granting *Certiorari*. The Estate acknowledged as much in its Brief (page 14, footnote 27); however, NASCO still addressed the timeliness of a sanctions motion after appeal. Moreover, timeliness and efficiency are proper considerations regardless of the basis for sanctions.

Responding to Hicks, PDHC summarily dismisses its relevance because it "is not controlling and involves the interpretation of federal case law and a federal rule...." (PDHC Brief, page 10). Then, however, PDHC seems to embrace the Fourth Circuit's consideration of "promptness" and deference to the trial court on the motion's timing and "whether it was better pressed earlier than later." (PDHC Brief, page 10). The Estate agrees with that Hicks embrace.

The Estate has never suggested that a window for sanctions lasts "in perpetuity" as our Court of Appeals cautioned (Apprendix at p. 11) and the Estate has never suggested promptness not be considered. Like the Hicks court, the Estate believes that the trial court is best positioned to evaluate the subjective behavioral contexts presented by such motions, and that promptness should be considered in the context of the entirety of the matter, including historically recognized periods of post-remittitur jurisdiction.

While not a federal precedent or a South Carolina precedent, PDHC's Brief (page 11) cites to the North Carolina Court of Appeals case of Griffin v. Sweet, 136 N.C. App.

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[3] Appendix page 12.

762, 525 S.E.2d 504 (N.C. App. 2000), which was also cited by our Court of Appeals in the decision below. As suggested, Griffin does impose a "reasonable" time limit on Rule 11 motions – again, the Estate has *never* suggested an unlimited period exists. PDHC's Brief suggests that the Estate's proposed motion window "ignores the logic and holding" of Griffin. *To the contrary*, the logic and holding of Griffin support the Estate's position.

Specifically, a closer reading of Griffin and its preceding jurisprudence clearly suggests that a prompt filing after remittitur would be timely in North Carolina. Griffin involved a motion for sanctions by a party who, like the Estate, had received summary judgment. And like the matter here, the party losing summary judgment appealed to the Court of Appeals and lost, petitioned for rehearing at the Court of Appeals and lost, and then petitioned the North Carolina Supreme Court for discretionary review and lost. In Griffin, the Rule 11 motion was filed *13 months* after the North Carolina Supreme Court had denied discretionary review; *here, the motion was filed less than 10 days after remittitur.*

The Griffin court expressly stated "we are not suggesting that plaintiff's motion for Rule 11 sanctions should have been filed at the summary judgment stage." 525 S.E.2d at 508. Moreover, the Griffin court also stated that the affirmed summary judgment "only reinforced [the moving party's] position" of finality. Id.

In the earlier North Carolina opinion of Taylor v. Collins, 128 N.C. App. 46, 493 S.E.2d 475 (1997), a sanctions motion was approved "five months after our Supreme Court denied discretionary review and two months after our Supreme Court dismissed the plaintiff's motion for reconsideration of the petition for discretionary review." Griffin,

525 S.E.2d at 507(citing Taylor).[4] Thus, Taylor also contrast with the Court of Appeals conclusion, despite its reference to Griffin, that it was "unable to find any authority to support the proposition that a party can wait until the entire case has finished."

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

PDHC offered no response to this argument.

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

1) The Circumstances of PDHC's Conduct

This law of the case is not disputed by PDHC's Brief.

2) A Similar Case Provides Guidance

The Estate suggested the case of Holmes v. Haynsworth, Sinkler & Boyd, 408 S.C. 620 , 760 S.E. 2d 399 (2014), provided guidance – not because it was procedurally on point (no appeal(s) involved in Holmes) – but because of the equally litigious conduct and the focus on finality (after seven years) for efficiency. While PDHC's Brief (page 13) concludes that Holmes "provides no support for Petitioner's position" because of its procedural differences, ***PDHC's Brief (page 12) acknowledges that "[t]he only way to determine whether ... a filing or argument was frivolous or supported by good grounds is after a court ruling...."*** In Holmes, there was no summary judgment granted so the aggrieved party endured seven years of offending conduct until a directed verdict at trial triggered finality.

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[4] In contrast, the earlier North Carolina opinion of Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999), disapproved of a seven month delay following a jury determined judgment. Griffin, 525 S.E.2d at 507(citing Rice).

As noted in the Estate's Brief (page 23), the summary judgment ruling here did *not* signal finality because it fell amid already pending appeals and because summary judgment itself was appealed "thereby delaying the real finality of that underlying decision and any related conclusion of frivolity."

As the Fourth Circuit stated in Hicks,

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

805 F.2d at 1167 (emphasis added).

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

While PDHC does not directly dispute that the Estate was consistently trying to bring this matter to conclusion, its Brief does footnote (page 11, footnote 12) the Court of Appeals' conclusion that filing earlier and more often would have been more efficient and might have avoided the review of "yet another issue in this contentious case in a separate appeal...." Appendix at 13.

Just as the Court of Appeals "respectfully" disagreed with counsel's efficiency calculation, the Estate respectfully disagrees with the Court of Appeals. The best predictor of future conduct is past conduct -- and the law of the case here is that

> (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.**

R.pp. 40-41.

Can there be any doubt that the Estate wanted the matter to be done? 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. Moreover, the Estate's position supporting a ten-day post-remittitur window of limited jurisdiction allows for timely flexibility in trying to address problem conduct.

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

It is within this context of efficiency that the Estate cited (Brief page 24) to the case of White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982), which provided:

> 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). PDHC's Brief (page 10, footnote 9) objects to White's consideration because it does "not even mention a motion for sanctions or Rule 11." Of course, the Estate did not use this case in its Rule 11 argument as PDHC suggests -- it was only in the context of an efficiency analysis.

And as noted by the Estate's Brief (page 24), the efficiency analysis found in White for § 1988 fee claims was transposed and used by the United States Court of Appeals for the Fourth Circuit in its Hicks decision upholding Rule 11 sanctions in the trial court *after remittitur*. In fact, summarizing White, the Hicks case stated, "**The Supreme Court seems to have held in White that the district court has jurisdiction to consider and grant a motion for the allowance of fees, though made several months after the conclusion of all appellate proceedings.**" 805 F.2d at 1167 (emphasis added).

PDHC does not respond to this Fourth Circuit efficiency analysis or the Fourth Circuit's concern with encouraging multiple motions prior to finality. The present Court of Appeals decision only encourages the filing of multiple sanctions motions.

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.

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. Citing this Court's recent case on e-mail notice, Wells Fargo Bank v. Fallon Props. S.C., LLC, Opinion No. 27773 (February 28, 2018), PDHC responds (Brief at pages 5 and 13) that any such bright-line should be prospectively applied as it would be unfair to apply in the case at bar.

To the contrary, the Estate is the party inequitably punished by the current application of a new erroneous rule in an acknowledged matter of first impression. The general, but limited, jurisdictional window after remittitur has been recognized for centuries – it would not be unfair to now confirm its existence in a sanctions context – a possibility clearly left open with regard to Rule 11 and the Estate also believes consistent with the FCPSA. It is the Court of Appeal's *new* window closing for anything after appeal that is unfair – and grossly unfair given the affirmed conduct that gave rise to the trial court's award of sanctions.

PDHC suggests that the award of additional sanctions would require a remand and is beyond the scope of the grant of certiorari. The Estate defers to the Court and recognized in its initial Brief (page 9, footnote 14) that the matter might be handled on remand. The Estate only suggests that the issue is fully briefed and might be disposed of in this Court avoiding added litigation costs and further appeal (it would be the *sixth*).

The additional sums sought by the Estate were briefed in the trial court and this issue was likewise preserved in the Estate's cross-appeal. See Estate Brief page 26, footnote 14. The matter is fully found in the Appendix on file in this Court. Of course, the availability of additional sums is inherently tied to the timeliness issue now before the Court on its discretionary review.

As a further Reply in support of this argument, the Estate again clarifies its careful and deliberate effort to avoid seeking the same sanctions-based compensation

twice or seeking any sanctions-based compensation in the wrong Court (segregating the staging particulars of the sanctionable conduct). In its Brief to this Court, PDHC again seems to confuse these matters perhaps suggesting an effort at double-recovery. For example, PDHC's Brief states (page 3) that the Estate sought sanctions in the trial court "for the same essential reasons" as it sought sanctions in the Court of Appeals and the Brief notes (page 1) that the Estate was awarded basic Rule 222 (SCACR) appellate costs including an appellate attorney fee after the three consolidated PDHC appeals were dismissed.

While the same type abhorrent conduct, which is now the law of the case (with regard to the trial court), triggered motions for sanctions in both the trial court and the Court of Appeals, the Estate has consistently taken great care to differentiate its claims to sanctions in each Court – a point the Estate has made and repeated – in the trial court (R.pp. 169 line 11-171 line 22; R.pp.279-318), in the Court of Appeals (*See, e.g.*, Respondent's Brief of the Respondent-Appellant, page 6, footnote 5), and *now* in this Court.

CONCLUSION

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 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.

March 16th, 2018

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PROOF OF SERVICE

I certify that I have served the **Reply 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 March 16, 2018, addressed to:

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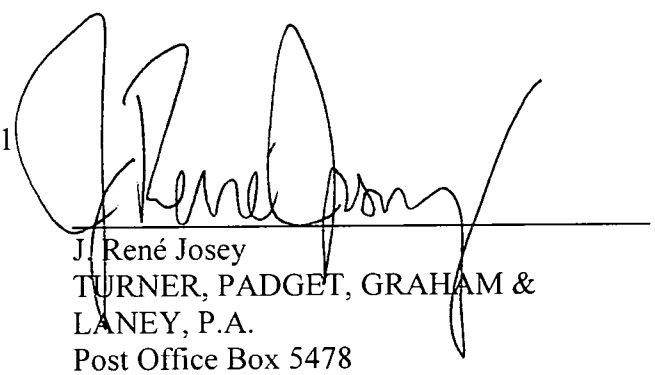

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