

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

In the Courts of Common Pleas of Beaufort and Florence Counties  
Trial Court Case Nos. 2016-ES-07-00302, 2016-CP-21-01435, and 2015-ES-21-00778

The Honorable Kenneth E. Fulp, Jr. and  
The Honorable Roger L. Couch

Appellate Case No. 2017-002290

Deborah B. Harwell ..... Respondent/Appellant

**RECEIVED**

v.

AUG 06 2018

Robert Bryan Harwell, individually and as the Personal  
Representative of the Estate of David W. Harwell; and the South  
Carolina Department of Health and Environmental Control,  
Division of Vital Records ..... Defendants

**SC Court of Appeals**

Of whom Robert Bryan Harwell, individually and as the Personal  
Representative of the Estate of David W. Harwell is the ..... Respondent/Appellant

And the South Carolina Department of Health and Environmental  
Control, Division of Vital Records is the ..... Respondent

v.

Law Office of Deirdre W. Edmonds, P.A. and Deirdre W.  
Edmonds, individually ..... Appellants/Respondents

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**COUNTERSTATEMENT OF ISSUES ON APPEAL**

- I. Did the trial judge properly decline to impose punitive sanctions on Attorney Edmonds under the Act?**
- II. Did the trial judge properly decline to impose punitive sanctions on Attorney Edmonds with regard to the surviving spouse petitions, where Attorney Edmonds' investigations revealed evidence suggesting that Bryan Harwell intentionally provided false information for inclusion in the Death Certification?**
- III. Did the trial judge properly decline to impose punitive sanctions on Attorney Edmonds with regard to the surviving spouse petitions, where Attorney Edmonds did not act with malice, ill will or bad faith toward Bryan Harwell or anyone else?**
- IV. Did the trial judge properly decline to impose punitive sanctions on Attorney Edmonds with regard to the prenuptial agreement claim, where Attorney Edmonds' investigations revealed evidence suggesting that Bryan Harwell may have intentionally provided false information for inclusion in the Death Certification?**
- V. Did the trial judge properly decline to impose punitive sanctions on Attorney Edmonds with regard to the prenuptial agreement claim, where Attorney Edmonds did not act with malice, ill will or bad faith toward Bryan Harwell or anyone else?**
- VI. Was Attorney Edmonds entitled to immunity from suit by a non-client where she was acting, at all time, as attorney for her client?**

## **COUNTERSTATEMENT OF THE CASE**

Of relevance to this appeal, this matter began as an action styled: (*Estate of David W. Harwell*) *Deborah B. Harwell v. Robert Bryan Harwell, individually and as Personal Representative of the Estate of David W. Harwell, and South Carolina Department of Health and Environmental Control Division of Vital Records*, No. 2015-ES-21-00778 (In the Probate Court of Florence County, South Carolina) ("Florence Probate Action"). On June 10, 2016, the Honorable Kenneth E. Fulp, Jr. entered an Order of Removal to Florence County Circuit Court, transferring the Florence Probate Action (and an action in Beaufort County, docket number 2016-ES-07-00302) to the Circuit Court of Florence County, South Carolina. (See June 10, 2016 Order of Rem. to Florence Cty. Cir. Ct.). In that Order, Judge Fulp stated that "all pending formal proceedings in this estate are hereby removed to the Florence County Circuit Court." (See *id.*, at p.2). That action is now styled *Deborah B. Harwell v. Robert Bryan Harwell, individually and as Personal Representative of the Estate of David W. Harwell, and South Carolina Department of Health and Environmental Control Division of Vital Records*, No. 2016-CP-21-01435.

The instant appeal involves a request for sanctions from Appellants/Respondents Law Office of Deirdre W. Edmonds, P.A. and Deirdre W. Edmonds (collectively "Attorney Edmonds"), who represented Deborah D. Harwell ("Client") during part of the Florence Probate Action. Specifically, this appeal stems from certain claims that Attorney Edmonds asserted on behalf of her Client against Robert Bryan Harwell ("Bryan Harwell"), Personal Representative of the Estate of David W. Harwell, deceased ("Estate"). For the reasons set forth herein, this Court should affirm the trial judge's refusal to impose certain sanctions on Attorney Edmonds.

### **A. "Prenuptial Agreement" Claim**

Client was married to David W. Harwell ("Husband"). Husband and Client were engaged in marital litigation captioned *David W. Harwell v. Deborah B. Harwell*, No. 2015-DR-26-691 (Horry Cty. Family Ct.). Judge James A. Spruill entered in that action, on or about July 21, 2015, a Final Decree (Ending Action). (See April 1, 2016 Answers and Counterclaims and

Third-Party Claims Ex. A). That Final Decree found that Husband was entitled to live separate from Client. (*See id.* ¶ 7). The Family Court further approved, adopted and incorporated a July 17, 2015 Mediation Agreement. (*See id.*, at p.5 ¶ 2). Additionally, the Final Decree "reserves jurisdiction to issue any subsequent Orders necessary to accomplish the above division of property, including any Qualified Domestic Relations Orders." (*See id.*, at p.5 ¶ 3).

The Mediation Agreement recited that it was intended to resolve the issues in Client's and Husband's marriage:

The parties executed a Prenuptial Agreement prior to the date of their marriage. The parties have settled all of the issues arising out of their marriage and of the Prenuptial Agreement by this Mediation Agreement and request the Family Court approve and incorporate this Mediation Agreement into an order of the Court.

(*See* April 1, 2016 Answers and Counterclaims and Third-Party Claims Ex. B ¶ 2). Under the Mediation Agreement, Client was to receive, *inter alia*, the Seven Devils house in North Carolina, the sum of \$75,000 in lump sum alimony, the continued status as an irrevocable beneficiary on Husband's General Assembly Retirement and insurance coverage on the state health insurance plan. (*See id.* ¶¶ 3-5). The Mediation Agreement further provides for the disposition of numerous other assets (*see id.* ¶¶ 6-8) and states that "[b]oth parties waive any and all rights they may have in the estate of the other or to make any claim upon or against the estate of the other." (*See id.* ¶ 12).

After Husband's death, Client "began receiving information that suggested David had assets about which I never knew. I wanted to know whether the potential nondisclosure of assets may entitle me to some relief from the settlement agreement in family court. . . ." (*See* Jan. 31, 2017 Affid. of Deborah Harwell ¶ 26). She stated that "[i]t was nearly impossible to find a family court lawyer to help me, as several lawyers initially indicated they would help but backed out immediately." (*See id.* ¶ 27). On January 13, 2016, Client filed a *pro se* Statement of Creditor's Claim in the Florence Probate Action in the amount of \$3,100,000, with a basis of claim listed as "PRENUPTIAL AGREEMENT." (*See* January 13, 2016 Statement of Creditor's Claim). On February 8, 2016, Client contacted Attorney Edmonds and informed her that she had

filed claims against the Estate. (See July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds ¶ 19, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sanctions.). In a later telephone conversation, Client stated "that she had received some correspondence and documents from R. Bryan Harwell's probate attorney, Gina Ervin, related to the claims and them being disallowed." (See *id.*). Attorney Edmonds informed Client that in order to preserve that claim, a petition or other formal proceeding had to be commenced within 30 days of disallowance, or it would be barred. (See *id.* ¶ 20). On March 3, 2016, Attorney Edmonds received documents from Client regarding the disallowance of her claim and learned that the deadline for filing a formal petition was March 12, 2016. (See *id.* ¶ 21). "Due to the exigency of filing a petition" and the risk of Client's "claims being forever barred," Attorney Edmonds filed two formal petitions on March 9, 2016 on behalf of Client. (See *id.*). Of relevance to this appeal, on March 9, 2016, Attorney Edmonds (on behalf of Client) filed in the Florence Probate Action a Summons and Petition for Allowance of Creditor's Claim in the amount of \$3,100,000 with the note "Prenuptial Agreement." (See March 9, 2016 Summons and Petition for Allowance of Creditor's Claim).

On April 1, 2016, Bryan Harwell as Personal Representative of the Estate filed his Answers, Counterclaims and Third-Party Claims in the Florence Probate Action. (See *generally* April 1, 2016 Answers, Counterclaims and Third-Party Cls.). In that pleading, Bryan Harwell denied Client's \$3.1 million claim and alleged that it was "invalid." (See *id.* ¶ 3). Bryan Harwell further asserted counterclaims (against Client) and third-party claims (against Attorney Edmonds) alleging violations of the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), S.C. Code §§ 15-36-10, *et seq.*, civil conspiracy, slander of title (against Attorney Edmonds), and abuse of process (against Attorney Edmonds). (See *generally id.*). *Inter alia*, Bryan Harwell alleged that Attorney Edmonds acted in bad faith and did not have a basis for asserting the \$3.1 million claim on behalf of the Client.

On April 1, 2016, Bryan Harwell also filed his Motion to Dismiss Both Claims for Lack of Subject Matter Jurisdiction, or Alternatively, Motion to Dismiss Both Claims for Failure to

State a Claim, or Alternatively, Motion for Judgment on the Pleadings as to Both Claims, and Motion for Rule 11 Sanction ("Money Claim Motion for Sanctions). (*See generally* April 1, 2016 Money Cl. Mot. for Sanctions). In this Motion for Sanctions, Bryan Harwell sought, *inter alia*, sanctions from Attorney Edmonds on the ground that the Final Decree (Ending Action) barred the \$3.1 million claim against the Estate.

Client, represented by new counsel, Desa Ballard, Esq., ultimately dismissed her prenuptial agreement claim without prejudice, on or about August 29, 2016. (*See* Aug. 29, 2016 Partial Stipulation of Dismissal Pursuant to Rule 41(a)(1), SCRCF). This claim has never been adjudicated on its merits.

**B. Surviving Spouse Petitions**

As set forth above, under the Mediation Agreement, Client and Husband were only separated, not divorced. The Final Decree in the Horry County Family Court action stated that the Mediation Agreement was the product of the parties' "desire to resolve all of the issues involved in the marriage, *save and except the divorce itself*." (*See* April 1, 2016 Answers and Counterclaims and Third-Party Claims Ex. A ¶ 8 (emphasis added)). Among the items that Client obtained in the Mediation Agreement was the right to benefits under Husband's General Assembly Retirement. (*See* April 1, 2016 Answers and Counterclaims and Third-Party Claims Ex. B ¶¶ 5). As a result, it was very important that, following Husband's death, Client be able to establish unambiguously that she was his surviving spouse.

Husband died on September 30, 2015. Following his death, a formal Death Certification followed, which listed the "INFORMANT" as Bryan Harwell. (*See* March 1, 2016 Petition Ex. B). The Death Certification listed Husband's marital status as "MARRIED BUT SEPARATED," but listed his surviving spouse's name as "N/A." (*See id.*). Client testified by affidavit that, after Husband passed away, she needed a formal Death Certification to apply for Husband's General Assembly retirement. (*See* Jan. 31, 2017 Affid. of Deborah Harwell ¶ 21). She went to the Probate Court and learned that her name was not listed as surviving spouse on the Death Certification, with it instead listing the surviving spouse as "NA." (*See id.*). DHEC

refused to give Client a copy of the Death Certification. (*See id.*). An employee at DHEC informed Client that she was not listed on the Death Certification and (after consulting her computer) that "R. Bryan Harwell" had left her off of the Death Certification. (*See* Jan. 31, 2017 Affid. of Deborah Harwell ¶ 22). She stated that "Deirdre's investigation, including contact with DHEC and with Kevin Barth, led us to believe that Bryan had intentionally omitted my name off the death certificate information he provided." (*See* Jan. 31, 2017 Affid. of Deborah Harwell ¶ 24).

On March 1, 2016, Attorney Edmonds filed a Petition on behalf of client in the Florence Probate Action, against the Estate and the South Carolina Department of Health and Environmental Control Division of Vital Records. (*See* March 1, 2016 Petition). In this Petition, Client sought an adjudication that she was the surviving spouse of decedent David W. Harwell ("Decedent"). In her Petition, she alleged that, although she and Decedent were separated, they were never divorced. (*See id.* ¶ 7). She further alleged that:

A Final Order granting the Decedent and Mrs. Harwell separate maintenance and support was entered by the Hon. James A. Spruill on July 21, 2015; however, such Final Order did not terminate the status of the Decedent and Mrs. Harwell as husband and wife. Thus, pursuant to S.C. Code Section 62-2-802, the decree of separate maintenance was not a divorce for purposes of said section.

(*See id.* ¶ 8). On May 2, 2016, Attorney Edmonds filed a Summons and Amended Petition on behalf of Client regarding the Death Certification's failure to list client as the surviving spouse. (*See* May 2, 2016 Summons and Amended Petition). The only substantive change from the original Petition was the addition of a claim for attorneys' fees under S.C. Code § 62-1-111. (*See id.* ¶¶ 23-24).

On April 1, 2016, Bryan Harwell filed in the Florence Probate Action a Motion to Dismiss Both Claims for Lack of Subject Matter Jurisdiction, or Alternatively, Motion to Dismiss Both Claims for Failure to State a Claim, or Alternatively, Motion for Judgment on the Pleadings as to Both Claims, and Motion for Rule 11 Sanction ("Surviving Spouse Motion for Sanctions"). (*See generally* April 1, 2016 Surviving Spouse Mot. for Sanctions). On May 16,

2016, Bryan Harwell filed his Answers and Counterclaims to Amended Petition and Third-Party Claims. (*See generally* May 16, 2016 Ans. and Counterclaims to Amended Petit. and Third-Party Cls.). In that filing, Bryan Harwell asserted counterclaims (against Client) and third-party claims (against Attorney Edmonds) alleging violations of the Act, S.C. Code §§ 15-36-10, *et seq.*, civil conspiracy, abuse of process (against Attorney Edmonds), defamation, outrage, and attorneys' fees. (*See generally id.*).

Ultimately, the Death Certification was corrected (with Bryan Harwell's eventual consent) to name Client as Husband's surviving spouse, which she indisputably was: "Deborah B. Harwell's petition and claim for amendment of death certificate and to be declared the surviving spouse for purposes of the DHEC death certificate is dismissed with prejudice and as moot, as DHEC has now already amended the death certificate to reflect her as the surviving spouse for vital records purposes with Bryan Harwell's consent." (*See* Oct. 19, 2016 Stipulations ¶ 3). However, having actual knowledge in October of 2015 of the erroneous information in the Death Certificate, Bryan Harwell refused for five months to take any steps to correct the blatant error in the Death Certificate and, in fact, refused to amend the Death Certificate even after Attorney Edmonds filed the Petition. (*See* Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants ¶ 11(5) and Ex. E thereto).

It is apparent that the omission of Client as Husband's surviving spouse was not a mere oversight and was intended to upset and harm Client. The original obituary for Husband published by his estate (represented by Bryan Harwell) identified as Husband's survivors his children, his grandchildren, his sister, his sisters-in-law, and numerous nieces and nephews. It even makes mention of Husband's black Labrador retriever dog. However, this obituary makes no specific mention of Client, who was indisputably Husband's surviving spouse. (*See* <https://www.legacy.com/obituaries/thestate/obituary.aspx?n=david-walkerharwell&pid=175994265> (visited July 27, 2018)). This undercuts any suggestion that Bryan Harwell's refusal to recognize Client as Husband's surviving spouse was some harmless, inadvertent error.

Additionally, the Application for Informal Probate of Will and Appointment originally listed Client as Husband's surviving spouse, but was whited out to erase her from that document. (See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants ¶ 11(4) and Ex. D thereto). Although Bryan Harwell contends that he did this because Client's separation agreement with Husband terminated her rights to an inheritance, this issue would normally be corrected, not in this fashion (completely omitting any reference to the surviving spouse), but by noting the judicial decree on the form, as Bryan Harwell did in any event. (See Feb. 1, 2017 Amended and Suppl. Mem. of Deirdre W. Edmonds in Opp. to Mot. for Sancts., at 7 n.3).

**C. Ruling on Sanctions**

On February 2, 2017, the Honorable Roger L. Couch conducted a hearing on Respondent's request for sanctions. On or about April 2, 2017, Judge Couch entered an Order granting in part and denying in part the Estate's request for sanctions against Attorney Edmonds. (See generally Apr. 2, 2017 Order). Of relevance to this appeal, Judge Couch ruled that Bryan Harwell and the Estate were not entitled to sanctions regarding the filing of the "prenuptial agreement" claim:

As to the filings by Edmonds (sic) concerning the creditor's claims based on "the prenuptial agreement" I find them to have been justified on Edmonds (sic) part. She has consistently taken the position that she was not a Family Court Practitioner. As such she claimed no knowledge of the facts or the issues involved in those proceedings. Clearly, at the time she was faced with the questions surrounding those claims she perceived herself to be in a time constraint. The time was fast approaching that the claims would be lost if not sued upon in the Probate Court. She had been told by her client that she intended to take action in that court to seek relief from the Settlement Order by way of a Rule 60 Motion for Relief. In fact Mrs. Harwell did file such a motion, pro se, when she was unable to get an attorney to take the case. . . . I agree with Ms. Edmonds (sic) experts that she took the actions necessary to preserve her client's opportunity to have her claims litigated.

(See Apr. 2, 2017 Order, at p.13).

Judge Couch also denied Bryan Harwell's request for sanctions with regard to the surviving spouse petition:

Concerning the Petition seeking the Amendment of the Death Certificate advanced by Mrs. Harwell and Ms. Edmonds[,] I find that the relief sought in that action was justified and that the action was necessary. While it is clear that some of the allegations contained in that petition concerning the alleged actions of the personal representation were false and ultimately found to be without justification, it is my finding that these allegations were the result of what appears to be an almost paranoid belief on the part of the parties to these actions concerning the evaluation of the motives of the other side. . . . While some of her allegation were not later proven to be true and were perhaps over zealous when made, it did result in obtaining the relief her client needed in that situation. . . . I find that the investigation related by Ms. Edmonds (sic) and the information supplied by the client would have allowed Edmonds (sic) enough justification in filing the death certificate claim in question.

(See Apr. 2, 2017 Order, at pp.11-12).

For the reasons that follow, this Court should affirm the trial judge's refusal to impose sanctions upon Attorney Edmonds with regard to the surviving spouse and monetary petitions.

## ARGUMENTS

### **I. STANDARD OF REVIEW**

The standard of review governing an appeal from a trial judge's ruling on a motion for the imposition of sanctions on Attorney Edmonds is well-settled:

The determination of whether attorney's fees should be awarded under Rule 11 or under the [Frivolous Civil Proceedings Sanctions] Act is treated as one in equity. *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (applying an equitable standard of review of factual findings in action for sanctions under Rule 11 and the Act). In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Id.* “However, the abuse of discretion standard plays a role in the appellate review of a sanctions award.” *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). Where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions under an abuse of discretion standard. *Id.* Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Id.*

*See Southeastern Site Prep, LLC v. Atlantic Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653–54 (Ct. App. 2011). For the reasons discussed below, the trial judge properly refused to impose sanctions on Attorney Edmonds with regard to the surviving spouse and monetary petitions.

### **II. GOVERNING LAW UNDER RULE 11 AND THE FRIVOLOUS CIVIL PROCEEDINGS SANCTION ACT**

Bryan Harwell contends that the trial judge should have imposed sanctions on Attorney Edmonds under Rule 11 and/or the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code §§ 15-36-10, *et seq.*

#### **A. Rule 11**

Rule 11(a) of the South Carolina Rules of Civil Procedure requires every pleading to be signed with the signature constituting a certificate by the signor that he has read the pleading and “that to best of his knowledge, information and belief there is good ground to support it.” This Court has discussed the policies underlying Rule 11, relying upon case law decided under the similar federal counterpart:

Although the current version of Rule 11 of the Federal Rules of Civil Procedure, unlike our state rule, contains a safe harbor provision, we find the U.S. Court of Appeals for the Fourth Circuit's explanation of the purposes behind the rule instructive. *Cf. Renner v. Hawk*, 125 N.C. App. 483, 481 S.E.2d 370, 374 (1997) (stating decisions pertaining to the federal version of Rule 11 are "pertinent to [the] analysis" of the state rule). "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (quoting *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990)). The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction. *In re Kunstler*, 914 F.2d at 522. "[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." [Citation omitted.]

*See Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 567, 795 S.E.2d 40, 45-46 (Ct. App. 2016), reh'g denied (Feb. 21, 2017).

Bryan Harwell argues that "[p]recedent explains Rule 11 allows the court to impose sanctions for making frivolous arguments and for acting with an improper motive, regardless of whether there is good grounds for the underlying suit." (See Bryan Harwell's Appellant's Br., at 8-9 (citing *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citing *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996))). However, Bryan Harwell misstates this standard. The *Gregory* case actually requires bad faith, not merely "improper motive": "The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper *in bad faith* whether or not there is good ground to support it." *See Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 (emphasis added); accord *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162 (authorizing Rule 11 sanctions for filings made in "bad faith (*i.e.*, to cause unnecessary delay)"). As discussed herein, Bryan Harwell has not presented any evidence that Attorney Edmonds acted with improper motive or that she engaged in any "bad faith" conduct in filing either the surviving spouse petitions or the prenuptial agreement petition.

**B. The South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code §§ 15-36-10, et seq.**

Under the Act, “An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

- (a) filing a frivolous pleading, motion, or document if:
  - (i) the person has not read the frivolous pleading, motion, or document;
  - (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
  - (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
  - (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;
- (b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
- (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.”

*See* S.C. Code § 15-36-10(A)(4)(a). The Act “provides that any person who takes part in the procurement, initiation, and continuation of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney fees and court costs of the other party if . . . the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.”

*Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 50-51 (2008).

**III. BRYAN HARWELL IS NOT ENTITLED TO ANY RELIEF UNDER THE ACT**

First, Bryan Harwell is not entitled to relief under the Act, because there has been no disposition on the merits of any of the challenged claims. 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." See S.C. Code § 15-36-10(C)(1) (emphasis added). "Motions made pursuant to the [Act] are post-trial motions." Holmes v. East Cooper Comm. Hosp., Inc., 408 S.C. 138, 160, 758 S.E.2d 483, 495 (2014) (emphasis added). None of the claims at issue in this appeal were finally decided on the merits against Client at trial or even on summary judgment. In fact, there has been no definitive ruling on the merits of any of Client's claims. Therefore, there can be no determination of frivolousness under the Act and no sanctions would be proper under the Act.*

#### **IV. THE TRIAL JUDGE PROPERLY DENIED SANCTIONS AS TO ANY ALLEGATION THAT BRYAN HARWELL COMMITTED A FELONY**

Bryan Harwell argues that Client's "surviving spouse petition specifically alleged Bryan was guilty of a felony and of willfully giving DHEC false information in connection with David's death certificate. This allegation is stated as though it is an indisputable fact. Paragraphs 17 and 18 reference the relevant statute." (See Bryan Harwell's Appellant's Br., at 9). For the reasons that follow, the trial judge properly refused to impose sanctions on Attorney Edmonds concerning her allegations that Bryan Harwell had provided false information for inclusion in Husband's Death Certificate, which is in fact a felony under the relevant statute.

##### **A. Attorney Edmonds Had a Reasonable Basis to Allege that Bryan Harwell Had Submitted False Information for the Death Certificate**

In Claimant's original Petition and Amended Petition, she requested "that this Honorable Court order the South Carolina Department of Health and Environmental Control Division of Vital Records to correct the Decedent's Death Certificate to include Mrs. Harwell as the Decedent's surviving spouse on said Death Certificate." (See March 1, 2016 Petition ¶ 22; May 2, 2016 Amended Petition ¶ 22). Bryan Harwell claims that, in those petitions, Attorney Edmonds, on behalf of client, wrongfully accused him of committing a crime.

Specifically, Bryan Harwell's argument is based upon the following paragraphs of Client's Amended Petition:

15. In providing information required on the Death Certificate as to the Decedent's marital status, Respondent Harwell stated that the Decedent was "married but separated". (See Exhibit "B" attached hereto).

16. In providing information required on the Death Certificate as to the surviving spouse's name, Respondent Harwell stated the surviving spouse's name as "NA" despite having full and complete knowledge of the identity of Mrs. Harwell as the Decedent's surviving spouse and despite having full and complete knowledge that the surviving spouse's name was not "NA". (See Exhibit "B" attached hereto).

17. S.C. Code Section 44-63-161(A)(2) provides that "it is unlawful for a person ... to wilfully make a false statement in a certificate, record or report required to be filed ... or to wilfully supply false information intending that the information be used in the preparation ... of a certificate . ... " SC Code §44-63-161(A)(2).

18. Further, S.C. Code Section 44-63-161(B) provides that "a person who violates ... item [44-63-161(A)] (2) ... is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both." SC Code §44-63-161(B).

19. Respondent Harwell, individually, knowingly and wilfully supplied false information in the preparation of the Decedent's Death Certificate in violation of S.C. Code Section 44-63-161(A)(2).

(See March 1, 2016 Petition ¶¶ 15-19; May 2, 2016 Amended Petition ¶¶ 15-19). The facts giving rise to the surviving spouse petitions demonstrate that the allegations of those petitions were proper. Client testified by affidavit that, after Husband passed away, she was asked for a formal Death Certification to apply for Husband's General Assembly retirement. (See Jan. 31, 2017 Affid. of Deborah Harwell ¶ 21). She went to the Probate Court and learned that her name was not listed as surviving spouse on the Death Certification, with the surviving spouse listed instead "N/A." (See *id.*). DHEC refused to give Client a copy of the Death Certification. (See *id.*). An employee at DHEC informed Client that she was not listed on the Death Certification and (after consulting her computer) that "R. Bryan Harwell" had left her off of the Death Certification. (See *id.* ¶ 22). Client stated that "Deirdre's investigation, including contact with

DHEC and with Kevin Barth, led us to believe that Bryan had intentionally omitted my name off the death certificate information he provided." (*See id.* ¶ 24).

Husband's Death Certification identifies his marital status as "MARRIED, BUT SEPARATED," but identifies his surviving spouse's name as "NA." (*See* Ex. A to July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). The Death Certification lists the "INFORMANT'S NAME" as "BRYAN HARWELL." (*See id.*). Nowhere in this case, including in his Brief of Appellant, does Bryan Harwell contest that he provided information for the Death Certification. In his Brief, he says, "Debbie's own petition acknowledges this information came from Bryan." (*See* Bryan Harwell's Appellant's Br., at 10).

When Attorney Edmonds prepared the surviving spouse petitions, "The facts certified as being on file by the Division of Vital Records are that (i) the decedent's marital status is 'married but separated' (ii) the surviving spouse's name is 'NA', and (iii) the informant's name is 'Bryan Harwell.'" (*See* July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds ¶ 7, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). Attorney Edmonds testified by affidavit that the allegations against Mr. Harwell were based on the following facts:

- That the "Informant" was the person who would provide the information for the Death Certification;
- That Bryan Harwell was the Informant in this case and was aware that Client was Husband's surviving spouse;
- DHEC refused to provide Client the Death Certification because she was not listed as surviving spouse and informed Client that Bryan Harwell was the person who left her off;
- Bryan Harwell filed a sworn Application for Probate and Appointment with the Florence County Probate Court in which he initially listed Client as Husband's surviving spouse, though her name was later whited out;

- Bryan Harwell actually knew in October 2015 that Client's name had been omitted from death certificate, despite the lapse of five months since its issuance; and
- DHEC refused to amend the Death Certification, and advised Attorney Edmonds that it could only be amended by an affidavit from Informant (Bryan Harwell) or a court order.

(See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on Behalf of Third-Party Defendants ¶ 11). This information provided Attorney Edmonds with a "good faith belief that Bryan Harwell willfully and knowingly failed to include Deborah Harwell as the decedent's surviving spouse." (See *id.* ¶ 12).

Attorney Edmonds' expert confirmed that she had a reasonable basis to bring the surviving spouse petitions and that they were not frivolous:

The facts in this case show that Ms. Harwell is the Surviving Spouse of David Harwell; and that Mr. Harwell's Death Certificate did not reflect that fact. Consequently, Ms. Harwell is clearly entitled to the remedy she seeks in this Petition. . . . Petitioner absolutely has a good faith argument that she is entitled to the remedy sought in the Petition. The fact that she may not ultimately be able to prove all the allegations in the Petition does not make the action frivolous. In fact that is the case in many actions.

(See Jan. 31, 2017 (filed Feb. 2, 2017) Affid. of Mitchell C. Payne, at 3-4). Additionally, the January 31, 2017 Expert Witness Report of Burnele Venable Powell states, in relevant part:

[A]s regards the Adjudication of the Surviving Spouse and Correction of the Death Certificate, the facts surrounding why the personal representative of David W. Harwell's estate failed to achieve designation of Deborah Harwell as the surviving spouse on her husband's death certificate are, without further investigation, unknown and perhaps unknowable. Notwithstanding the charges levied in conclusory rhetorical flourishes that are all too common to advocacy in the family courts, Attorney Edmonds' pleas for relief on behalf of her client were reasonable and therefore permitted in the context of the broad latitude that is to be afforded counsel in litigation pleadings. . . .

6. It was manifestly reasonable in the instant case, therefore, for Attorney Edmonds to assert responsibility on the part of the Respondent, when she came to that conclusion based on years of personal practice in the Probate Court and continued her assessment of the procedural process by interviewing one of DHEC's responsible staff members. It was reasonable to allege, subject to discovery, that the informant had submitted false information for the death certificate. And her case was only strengthened when that same DHEC staffer

stated later in an affidavit that when the space for the name of the surviving spouse is left blank at the time of filing, the designation "NA" is automatically printed on the death certificate. That confirmed that neither the funeral home nor DHEC had an interest in the substantive content of the death certificate-only its processing.

7. Accordingly, whether one agrees with Edmonds' litigation strategy or not, sanctions under either Rule 11 of the South Carolina Rules of Civil Procedure or the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 are not warranted. On these facts it is impossible to meet Judge Wilkins' test and say as a matter of law "a reasonable attorney in like circumstances could not have believed his [or her] actions to be legally justified." And remember, too, that not only was there a factual basis for the claim at the time the Complaint was filed, but that her assertiveness eventually allowed her to prevail on the issues she raised. Respondent inexplicably consented to the remedy she had sought, designating her client the surviving spouse and amending the death certificate.

(See Jan. 31, 2017 Expert Witness Report of Burnele Venable Powell, at 3 & 8-9 ¶¶ 6-7).

Under South Carolina law, it is unlawful to "wilfully supply false information intending that the information be used in the preparation or amendment of the certificate, record, or report." See S.C. Code § 44-63-161(A)(2). Furthermore, the funeral director is required to prepare the certificate, with personal information provided by "the next of kin or the best qualified person or source available." See S.C. Code § 44-63-74(A)(2)(a). Attorney Edmonds had more than adequate information to make the challenged allegations concerning potential statutory violations in the surviving spouse petitions.

Specifically, Attorney Edmonds had reason to believe that Bryan Harwell actually knew Client was Husband's surviving spouse and did not provide that information for the Death Certification. She knew that a bitter dispute existed between Client and Husband's children, and they considered her to have been estranged from Husband at the time of his death. That is more than sufficient reason for her to be able to allege that Bryan Harwell "knowingly" provided information that was not true for inclusion in Husband's Death Certificate. Attorney Edmonds' filing of the petitions was not frivolous and was supported by a reasonable basis. Attorney Edmonds had probable cause to believe that the allegations of the petitions might ultimately be proven. Irrespective of the actual merits of those claims, they could not support the imposition

of sanctions on Attorney Edmonds. Perhaps most tellingly, Client was ultimately successful in obtaining the relief she requested in her Petition and Amended Petition: Husband's Death Certificate was corrected to identify her as his surviving spouse. In other words, the information that Bryan Harwell (as the "Informant") provided for the Death Certification about Husband's surviving spouse was, in fact, inaccurate.

Attorney Edmonds' belief that Bryan Harwell's actions with regard to the surviving spouse issue were intentional and knowing is also supported by evidence of Bryan Harwell's actions relating to a probate filing:

8. Additional information provided to me in February 2016 by Deborah B. Harwell included a clocked copy of the sworn Application for Probate and Appointment filed with the Florence County Probate Court on October 12, 2015 by R. Bryan Harwell. A review of the clocked copy of the verified Application filed by R. Bryan Harwell reveals that initially the surviving spouse's name was inserted under Item 4(b) on page two of the Application but was later whited out. (Attachment B).

9. Based upon my knowledge and training as the former Probate Judge for Horry County for twelve years, it is generally accepted protocol to include all heirs not devisees under a decedent's Last Will in the Application under Item 4(b) and, if there are particular facts that bear on the heir's inheritance rights, a notation as to the particular facts would be included in Item 4(b). Such a notation was included on R. Bryan Harwell's verified Application but the surviving spouse's name was whited out nevertheless as if she did not even exist at all.

(See July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds ¶¶ 8-9, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). This document further supports that Bryan Harwell was well-aware of Client's status as the surviving spouse and was resentful of her (and wanted to deny her of that status). This lends even further support to Attorney Edmonds' actions on behalf of her Client.

It was also apparent to Client and Attorney Edmonds that Bryan Harwell's refusal to acknowledge Client as the surviving spouse from the original obituary published by Husband's Estate (represented by Bryan Harwell). Husband's original obituary identified as survivors his children, his grandchildren, his sister, his sisters-in-law, and even numerous nieces and nephews.

It even goes so far as to mention Husband's black Labrador retriever dog. However, the obituary does not even mention Client, who was indisputably Husband's surviving spouse. (See <https://www.legacy.com/obituaries/thestate/obituary.aspx?n=david-walkerharwell&pid=175994265> (visited July 27, 2018)). This obituary further supports Attorney Edmonds' and Client's belief that Bryan Harwell's refusal to recognize Client as Husband's surviving spouse was intentional and intended to harm Client. Additionally, the Application for Informal Probate of Will and Appointment originally listed Client as Husband's surviving spouse, but was whited out to delete her. (See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants ¶ 11(4) and Ex. D thereto). Although Bryan Harwell contends that he did this because Client's separation agreement with Husband terminated her rights to an inheritance, this issue would normally be corrected, not in this fashion (completely omitting any reference to the surviving spouse), but by noting the judicial decree on the form, as Bryan Harwell did in any event. (See Feb. 1, 2017 Amended and Suppl. Mem. of Deirdre W. Edmonds in Opp. to Mot. for Sancts., at 7 n.3).

In his Brief, Bryan Harwell argues that the trial judge should have sanctioned Attorney Edmonds because — 10 days after she filed the original Petition — his attorney ("Attorney Barth") provided her with information that he believes contradicted the allegations of the original Petition. Specifically, Bryan Harwell relies on an Affidavit of Sandy Dowling (the funeral director), who stated that the forms he completed all contain the surviving spouse's name as "Deborah Boggs." (See Affid. of Sandy Dowling, which is attached as Ex. C to July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). Mr. Dowling attached to his Affidavit the forms he claims he completed upon Husband's death and stated that "[t]he information was given to me by his son, R. Bryan Harwell." (See *id.* ¶ 3). He further stated that "I, as the author of this document, have nothing to do with the actual completion of the Certified Certificate of Death and the issuance of same. That task is accomplished by an employee at DHEC." (See *id.* ¶ 5). Bryan Harwell contends that this information made Attorney Edmonds' allegations about

him sanctionable under South Carolina law, because there was no evidence that he willfully provided untrue information for the Death Certification. Indeed, subsequent investigation revealed that Mr. Dowling's affidavit was false. He says that "Attached to this Affidavit is the form I completed in conjunction with the death of Judge Harwell. The information was given to me by his son, [Respondent]." (*See id.* ¶ 3). The Certificate of Death form attached (C-3 to his Affidavit) bears his initials in the margin. In Box 9 of this form, Marital Status is indicated as "Married." The Surviving Spouse in Box 10 is shown as "Deborah Boggs" (Client). However, contrary to Mr. Dowling's Affidavit, this was not the final form submitted to DHEC. He would later testify in Family Court that Bryan Harwell "signed off on" — and he (Dowling) submitted — an amended Death Certificate form correcting Box 9 to indicate "Married, but Separated" rather than "Married." (*See Hrg. Transcr.*, at 23:1-17 (June 16, 2016)).

No Death Certificate form has ever been produced reflecting both Married but Separated and Deborah Boggs as the Surviving Spouse. Bryan Harwell has produced a "Work Sheet" purportedly dated September 30, 2015, the same day that Husband died, but this is not what was submitted to DHEC. Ms. Edmonds obtained by subpoena from DHEC the Death Certificate form — (*See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants Ex. G thereto*) — that Ms. Saleeby informed her "included all of the information keyed into DHEC's computerized system from the funeral home." (*See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants ¶ 14*). This form was, as Mr. Dowling testified in Family Court, "corrected" in Box 9 from the initial form to reflect that the Decedent was "Married, but Separated." However, Box 10, "Surviving Spouse", on DHEC's copy of the form is blank. (*See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on behalf of Third-Party Defendants ¶ 14 and Ex. G thereto*).

Attorney Edmonds also sent a subpoena to Dr. Naso, the physician who had signed the Death Certificate. Dr. Naso produced a Death Certificate form that is identical to the form that DHEC provided. (*See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds*

on behalf of Third-Party Defendants ¶ 14 and Ex. I thereto). Box 9 says “Married, but Separated”, and Box 10, “Surviving Spouse,” is left blank. The funeral home supplied that form to Dr. Naso, who completed the physician’s portion before it was submitted to DHEC. Contrary to Bryan Harwell's contention and Mr. Dowling’s averment, the final Death Certificate form that the funeral home submitted to DHEC evidently did not list Client as the surviving spouse. S.C. Code § 44-63-74 provides that the funeral director “shall obtain the personal data of the decedent from the next of kin or best qualified person or source available.” That source was Bryan Harwell.

The record is clear that Attorney Edmonds undertook diligent efforts to investigate the information that Attorney Barth had provided to her and found significant contradictory evidence. She had evidence – and would have more evidence via her subpoenas to DHEC and Dr. Naso – that Bryan Harwell did not, in fact, identify Client as the surviving spouse on the “corrected” Death Certificate form that the funeral home submitted to DHEC. Attorney Edmonds had reason to believe that Bryan Harwell and the funeral home “corrected” the Death Certificate form to indicate that the Husband was “married, but separated” rather than simply “married” and to delete Deborah Boggs (Client) as the surviving spouse

As stated, Attorney Edmonds' investigation disclosed information from the South Carolina Department of Health and Environmental Control, which directly contradicted Mr. Dowling's affidavit:

13. At this point, I contacted Ms. Saleeby at DHEC again, and was told that the information they received from the funeral home did not list anyone as the surviving spouse. I then shared with Ms. Saleeby the documents that I had been provided from the funeral home. Ms. Saleeby then advised me that the information I had been provided from the funeral home did not reflect what the funeral home had submitted to DHEC through their computerized death certificate system. Later, Ms. Saleeby confirmed with me that their computerized system automatically enters "NA" in the surviving spouse field on the death certificate if that field is left blank.

14. I subpoenaed the DHEC records on March 14, 2016 and received two (2) forms, one of which was a computer generated form entitled "South Carolina Department of Health and Environmental Control Certificate of Death." I was

subsequently advised by Angie Saleeby that this form included all of the information keyed into DHEC's computerized system by the funeral home. This form shows a blank in the surviving spouse field. (Attachment E). The second form provided by DHEC is a form entitled "Death Certification", which includes "NA" in the field provided for the surviving spouse's name and is the same form filed in the Probate Court. (Attachment F)

15. Shortly thereafter, I subpoenaed the records of physician, Dr. Naso, who had completed the medical certification information on the "South Carolina Department of Health and Environmental Control Certificate of Death" form. Based upon information and belief, it is my understanding that that form had been delivered to the physician's office by the funeral home after the funeral home completed their portion of the form. The form I received from Dr. Naso (Attachment G) also shows a blank in the surviving spouse field and does not match the form purported to have been submitted by the funeral home to DHEC. (Attachment C)

16. The form I received from DHEC (Attachment E) and the form I received from Dr. Naso (Attachment G) are the same but they both differ from the form submitted with the Affidavit of Sandy Dowling, the funeral home director (Attachment C). The form from DHEC and Dr. Naso both have blanks in the surviving spouse field, while the form submitted by Affidavit from Sandy Dowling has "Deborah Boggs" listed in the surviving spouse field.

(See July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds ¶¶ 13-16, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). In a later affidavit, Attorney Edmonds further detailed why she could not rely upon the Affidavit of Sandy Dowling:

[S]hortly after I was provided with the information he alludes to, *i.e.*, the Affidavit of Sandy Dowling, I was also advised by the Director of the Division of Vital Records that the information that had been submitted by sworn affidavit was not true and that, in fact, the surviving spouse's name had not been included on the death certificate. This information from DHEC directly contradicted the sworn affidavit of Sandy Dowling, the associate funeral home director. . . . To say the least, this threw up red flags. I had been presented a sworn affidavit by the associate director of the funeral home that I was told contained false information. Therefore, I immediately subpoenaed the records from DHEC and was provided with DHEC's certified records, which did not support the sworn affidavit I had been provided by the associate director of the funeral home. I received two forms from DHEC, one of which was a computer generated form entitled "South Carolina Department of Health and Environmental Control Certificate of Death". Third-Party Defendants' Supp. Memo. Opp. Mtn Sanctions, Exh. E, filed July 19, 2016 and Exhibit G. I was subsequently advised by Angelia Saleeby that this form included all of the information keyed into DHEC's computerized system by the funeral home. This form shows a blank in the surviving spouse field. The second form provided by DHEC is a form entitled

"Death Certification", which includes "NA" in the field provided for the surviving spouse's name and is the same form filed in the Probate Court. . . . The certifying physician's records matched DHEC's records and neither included the surviving spouse's name in the appropriate field. At this juncture, we knew the affidavit contained false information and, thus, we could not rely on any of the information in the affidavit as being true.

(See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on Behalf of Third-Party Defendants ¶ 14).

Angelia Saleeby of DHEC further confirmed Attorney Edmonds' affidavit and made clear that Bryan Harwell did *not* identify Client as Husband's surviving spouse:

4. In the event of a death, an Informant [here, Bryan Harwell] provides information required on the death record for filing purposes. The South Carolina Certificate of Death Worksheet is not filed with DHEC.

5. The funeral home or person acting as such, is responsible for filing the death record either electronically by entering the demographic information through the state's electronic vital records system or by submitting it on paper. A physician or coroner is responsible for completing the medical portion by entering it electronically or on paper.

6. One of the fields on the death record is "surviving spouse's name".

7. If nothing is entered in the "surviving spouse's name" field at the time of filing, the electronic vital records system fills in the blank with "NA" at the time of issuance.

8. In the case of decedent David Walker Harwell, the death record was filed by Stoudenmire-Dowling Funeral Home. The record filed with DHEC, a copy of which is attached, shows the space for the name of the surviving spouse was left blank at the time of filing. As a default in the electronic vital records system, because this field was left blank, "NA" was automatically printed on the death certificate at the time of issuance.

(See Feb. 2, 2017 filed Affid. of Angelia Saleeby ¶¶ 4-8).

Moreover, Horry County Coroner Robert Edge testified as to what occurred when he went with Client to obtain a copy of the death certificate from DHEC:

I introduced her to the lady in charge at the DHEC Vital Statics office, who was seated at a window computer. She told Mrs. Harwell that her name had been left off the Death Certificate and she couldn't give her a Death Certificate. That shocked me as that is the first time I have ever heard of a wife not being able to get a certified copy of her husband's death certificate. Mrs. Harwell asked her

how that could happen with her being the wife. The DHEC employee told her that she knew how it happened and she told her that she knew who did it. *Mrs. Harwell asked her who and she said that R. Bryan Harwell did it.* Mrs. Harwell asked her why she would think that. The DHEC employee held up a worksheet and pointed her finger to a line that said Informant R. Bryan Harwell[] She said that he was the Informant and the Informant either had to physically fill out the worksheet or tell the person at the Funeral Home the information to put on the Death Certificate. *She said that Death Certificates were automated there was no way that DHEC could have let off Mrs. Harwell's name.* She also said that N/A was filled in when a homeless person died and no relatives were known. I believe that it is also the case when the line is left blank. *The DHEC employee said that the funeral home should also be held responsible because they knew what they were doing when they left the name off.*

(See January 31, 2017 Affid. of Horry County Coroner Robert Edge ¶ 6 (emphasis added)).

Therefore, notwithstanding the information that Attorney Barth provided, Attorney Edmonds had more than sufficient information to allege (and maintain) that Bryan Harwell had knowingly provided false information for inclusion in Husband's Death Certification in the original Petition and Amended Petition. At the very least, there was a serious question of fact as to whether Bryan Harwell knowingly provided inaccurate information for the creation of the Death Certification. As Attorney Edmonds testified by affidavit, she had a "good faith belief that Bryan Harwell willfully and knowingly failed to include Deborah Harwell as the decedent's surviving spouse on the death certificate." (See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre Edmonds ¶ 12).

For the foregoing reasons, this Court should affirm the trial judge's denial of sanctions as to the allegations of the surviving spouse petitions that Attorney Edmonds filed on behalf of her client.

**B. Bryan Harwell Cannot Show That Attorney Edmonds Acted in Bad Faith With Regard to the Allegations of the Surviving Spouse Petitions**

Bryan Harwell further contends that, even if Attorney Edmonds had a factual basis for making the allegations of the surviving spouse petitions (which she did), the trial judge should have sanctioned her because she acted in bad faith or for an improper purpose. For the following reasons, the record does not support this argument.

Bryan Harwell presents no evidence that Attorney Edmonds made any allegation of the surviving spouse petitions in bad faith or with any desire to unduly delay any matter. Bad faith has been defined as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 106, 777 S.E.2d 208, 211 (2015) (quoting *State v. Griffin*, 100 S.C. 331, 84 S.E. 876, 877 (1915) (internal quotations and citation omitted)). There is not a scintilla of evidence suggesting any bad faith on the part of Attorney Edmonds. To the contrary, the record is clear that she undertook a diligent investigation before filing (and maintaining) the surviving spouse petitions and had good cause for filing them. There is no evidence suggesting that Attorney Edmonds had any malicious intent in including any specific allegations in the surviving spouse petitions.

There is no evidence that Attorney Edmonds had any personal disputes with Bryan Harwell. There is no evidence that she disliked Bryan Harwell or personally wished to cause him any harm. There is no evidence that she made the allegations of the surviving spouse petition for any improper reason or with some sinister motive. To the contrary, the evidence discussed above demonstrates that she had a factual basis for her allegations and that it was vitally important for her client to be named on the Death Certification as the surviving spouse.

Therefore, because there is no evidence of bad faith, the trial judge properly declined to sanction Attorney Edmonds for the allegations of the surviving spouse petitions.

**V. THE TRIAL JUDGE PROPERLY DECLINED TO SANCTION ATTORNEY EDMONDS WITH REGARD TO THE \$3.1 MILLION "PRENUPTIAL AGREEMENT" CLAIM**

Bryan Harwell next argues that the trial judge erred in refusing to impose sanctions on Attorney Edmonds for asserting a \$3.1 million claim on behalf of Client against the Estate. For the reasons that follow, the trial judge properly declined to sanction Attorney Edmonds for her filing of this claim for her client.

On or about January 13, 2016, Client filed a *pro se* Statement of Creditor's Claim in the amount of \$3.1 million based on a prenuptial agreement. (See Jan. 13, 2016 *Pro Se Stmt. of Cred.'s Cls.*). On March 9, 2016, Attorney Edmonds signed and filed on behalf of Client a Summons and Petition for Allowance of Creditor's claim in the Florence Probate Action. (See March 9, 2017 Summons and Pet. for Allowance of Cred.'s Claim). The amount of this claim was \$3.1 million, and it references "Prenuptial Agreement." (See *id.*).

This claim stems from Client's belief that misrepresentations had been made to her concerning assets and that she might be entitled to relief from the Final Decree (Ending Action):

After David's death, I began receiving information that suggested David had assets about which I never knew. I wanted to know whether the potential nondisclosure of assets may entitle me to some relief from the settlement agreement in family court, especially since David had always assured me they meant nothing and were being done solely to keep Bryan happy.

(See Jan. 31, 2017 Affid. of Deborah Harwell ¶ 26).

Attorney Edmonds affirmed in the trial court that she filed the prenuptial agreement claim in order to protect her Client's interest, as the time for filing such a claim was nearly expired:

19. On or around February 8th, 2016, Deborah B. Harwell contacted me and told me she had filed certain claims against the Estate of David W. Harwell, her deceased husband, and she provided me with copies of her filed claims. Thereafter, she mentioned to me during a telephone conversation that she had received some correspondence and documents from R. Bryan Harwell's probate attorney, Gina Ervin, related to the claims and them being disallowed.

20. In order to preserve a claim that had been disallowed by a personal representative, a petition or other formal proceeding must be commenced by a creditor within thirty (30) days of the mailing of a notice of the disallowance or the disallowed claim is barred under the South Carolina Probate Code. I advised Mrs. Harwell of this and urged her to send me the letter and documents from Ms. Ervin at her earliest convenience.

21. Mrs. Harwell sent the correspondence and documents to me and I received them on or about March 3, 2016 and, based upon my review of same, determined that the filing deadline was March 12, 2016. Due to the exigency of filing a petition with regards to the Personal Representative's disallowances of Mrs. Harwell's claims or the claims being forever barred, I had filed two (2) separate

Petitions for allowance of creditor claims on Mrs. Harwell's behalf on March 9, 2016.

(See July 15, 2016 Affid. of Third Party Def. Deirdre W. Edmonds ¶¶ 19-21, which is attached as Ex. 1 to Attorney Edmonds' July 19, 2016 Mem. Opp. Mot. For Sancts.). Attorney Edmonds further stated that "Deborah Harwell initially filed her creditor claims pro se in the Probate Court before I was retained. Subsequently, I filed the Petitions for Allowance of Claims to preserve any right that Mrs. Harwell might have with regards to such creditor claims." (See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on Behalf of Third-Party Defendants ¶ 7). "If Mrs. Harwell had failed to file her creditor claims within the statutory filing deadline for the filing of creditor claims after a decedent's death, she would have been precluded from recovering on her claims." (See *id.* ¶ 8). Attorney Edmonds "reasonably believed that there was a good faith basis for preserving her creditor claims and, thus, filed the Petitions for Allowance of Claims on her behalf." (See *id.*). She further stated that the prenuptial agreement claim was "filed in good faith based upon a reasonable belief that Mrs. Harwell had claims" and was "not filed for harassment, delay or to simply injure the estate." (See *id.* ¶ 9).

Attorney Edmonds further stated that during her initial meeting with Client, "she advised me that she had received a great deal of information after the Order and Agreement that lead her to believe that Mr. Harwell had not fully disclosed his assets to her during their mediation conference and she testified to this information at the Family Court hearing." (See Jan. 30, 2017 (filed Fed. 1, 2017) Rebuttal Affid. of Deirdre W. Edmonds on Behalf of Third-Party Defendants ¶ 5). When presented with this information from Client, Attorney Edmonds initially thought that Client could proceed in the probate court to assert claims of misrepresentation regarding the Mediation Agreement, she ultimately decided that Client needed to retain a family court attorney to undo, pursuant to SCRCF, Rule 60, the Final Decree (Ending Action). (See *id.* ¶ 6). Client unsuccessfully sought family court counsel, and ultimately filed a *pro se* Rule 60 motion. (See *id.*). If Attorney Edmonds did not file the Petition for Allowance of Creditors' Claim when she did, Client's "creditor claims would have been barred by statute regardless of whether she was

successful in setting aside the Family Court Order and Mediated Settlement in her Rule 60(b) Motion." (*See id.* ¶ 7).

Attorney Edmonds' expert witness, Mitchell Payne, confirmed that Attorney Edmonds was justified in relying on what the Client told her and filing the prenuptial agreement claim to protect Client's interests:

As Ms. Edmonds sets forth in her rebuttal affidavit, Ms. Harwell, had advised Ms. Edmonds she intended to bring an action to have the Family Court Order overturned. Ms. Edmonds advised Ms. Harwell that she would need to engage other counsel for that action.

An attorney has the right to rely on representations by his client. In the case at hand, Ms. Harwell advised Ms. Edmonds that she had a good faith basis for seeking to have the aforementioned Family Court Order overturned. Ms. Edmonds was justified in relying on that assertion. . . .

In this case, the deadline to respond to Respondent's Notice of Disallowance of Claim, was approaching. Had the deadline passed, Ms. Harwell, would have lost any rights she had to assert a claim against David Harwell's estate; including the possibility of overturning the aforementioned Family Court Order. Under the circumstances, I believe Ms. Edmonds acted prudently in taking action to preserve Ms. Harwell's rights. . . . Ms. Harwell's rights would most likely have been lost had Ms. Edmonds not acted to preserve them.

(*See Jan. 31, 2017 (filed Feb. 2, 2017) Affid. of Mitchell Payne, at 4-5*). Similarly, the Expert Witness Report of Burnele Venable Powell stated:

[W]ith respect to the Creditor's Claim Petitions, consideration of the litigation context is, again, required. As counsel, Attorney Edmonds could reasonably rely on the factual input of her client, her own due diligence, and her years of experience with probate matters to arrive at working conclusions about the facts of a case. Exigencies may require, in other words, that pleading decisions be made under constraints, but a reasonable decision about the facts of a case--even if later proven to be factually inaccurate in some respect is still a necessarily protected decision under our adversarial system. . . . Attorney Edmonds advised me that based on discussions with her client about possibly undisclosed assets, she had a good faith belief that another look at David W. Harwell's financial holdings was possible. In addition, as Attorney Edmonds has previously stated, she believed in good faith that the time constraints under which she was representing Mrs. Harwell required her, to assert some claims in order to preserve the record even though doing so was counter to the Mediation Agreement.

(*See Jan. 31, 2017 Expert Report of Burnele Venable Powell, at 3 & 10 ¶ 12*).

The law is clear that, in fact, if Client had a potential claim, she needed to promptly file it or risk losing it forever. "[N]o proceeding for enforcement or allowance of a claim or collection of a debt may be commenced more than thirty days after the personal representative has mailed a notice of disallowance or partial disallowance of the claim in accordance with the provisions of Section 62-3-806." *See* S.C. Code § 62-3-804(5). As a result, Attorney Edmonds acted — based on information the Client provided her — in an effort to protect her Client's interests. She had a reasonable basis for asserting that claim, and the trial court properly elected not to impose sanctions upon her.

Bryan Harwell can certainly not present any evidence of bad faith with regard to the filing of the prenuptial agreement claim. The undisputed evidence shows that Attorney Edmonds filed that action solely in an effort to protect the interests of Client. There is no evidence that malice or ill will motivated Attorney Edmonds with regard to the assertion of this claim. To the contrary, she was acting in the best of faith to protect her Client's interests.

Bryan Harwell cites *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006), for the proposition that Attorney Edmonds should be sanctioned under the Act because she "continued" the prenuptial agreement claims after she should have known that they lacked merit. In *Russell*, a child challenging a will was sanctioned for maintaining her claims despite clear evidence that they lacked merit:

The affidavit from Testator's attorney made it clear that the estate plan represented Testator's wishes. Other affidavits confirmed that Testator was fully capable of thinking for himself and executing his testamentary documents as he desired. Mim's argument that she continued the litigation on the advice of counsel is without merit because subsequent discovery revealed that she was not entirely honest with her attorneys. Therefore, we hold that the trial court properly imposed sanctions pursuant to the FCPSA.

*See id.*, 370 S.C. at 18, 633 S.E.2d at 729. In this case, there was no evidence presented showing that the prenuptial claims were without merit. To the contrary, Attorney Edmonds believed that there was a legitimate challenge to the very basis for Bryan Harwell's sanctions request, the Final Decree (Ending Action). Bryan Harwell has not shown that the evidence was so clear that

Attorney Harwell needed to stop believing her Client. Moreover, there is no evidence that Attorney Edmonds did anything to "continue" the prenuptial agreement claim. There is no evidence that she conducted discovery or caused Bryan Harwell to incur any expense on them. Rather, she simply filed the claim to protect her Client's interest. In fact, as it turned out, Client withdrew those claims only a few months after they were filed.

Therefore, for the foregoing reasons, the trial judge properly held that sanctions should not be imposed on Attorney Edmonds with regard to the "prenuptial agreement claim."

**VI. THE TRIAL JUDGE PROPERLY REFUSED TO IMPOSE THE SANCTIONS AT ISSUE IN THIS APPEAL, BECAUSE ATTORNEY EDMONDS WAS IMMUNE FROM LIABILITY**

In addition to the foregoing, Attorney Edmonds is immune from suit under the Act and Rule 11. Case law is clear that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). "[A]n attorney owes no duty to a non-client unless he 'breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.'" *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (citing *Stiles v. Onorato*, 318 S.C. 297 (1995)).

The record is devoid of any evidence that Attorney Edmonds in any instance acted outside the scope of representation of her Client. Bryan Harwell only makes a mere declaratory statement, without evidentiary support, in his Answer, Counterclaim and Third-Party Complaint that "third-party defendant acted in her own personal interest and motivation outside the scope of her representation of the Petitioner." Bryan Harwell does not attempt to show how Attorney Edmonds acted beyond the scope of her representation. "Even if the attorney who initiates civil proceedings for his client has no probable cause to do so, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of the client's claim."

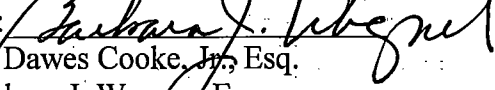
*Gaar*, 287 S.C. at 529, 339 S.E.2d at 889 (*citing* Restatement (Second) of Torts, § 674 cmt. d (1975)). Therefore, this Court should affirm the trial judge's refusal to impose requested sanctions on Attorney Edmonds.

**CONCLUSION**

For the reasons set forth above, this Court should affirm the trial judge's refusal to impose sanctions on Attorney Edmonds with regard to the surviving spouse and prenuptial claims in this matter.

August <sup>2<sup>nd</sup></sup>, 2018

BARNWELL WHALEY PATTERSON &  
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August 2, 2018 **RECEIVED**

AUG 06 2018

SC Court of Appeals

59.026

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Deborah B. Harwell v. Robert Bryan Harwell, individually and as Personal Representative of the Estate of David W. Harwell, and South Carolina Department of Health and Environmental Control Division of Vital Records, and Law Office of Deirdre W. Edmonds, PA; and Deirdre W. Edmonds, individually  
Appellate Case No.: 2017-002290  
Case No.: 2016-CP-21-1435

Dear Ms. Kitchings:

Please find enclosed an original and one (1) of Law Office of Deirdre W. Edmonds, P.A. and Deirdre W. Edmonds' **Respondents' Initial Brief and Designation of Matter and Proof of Service** in the above-referenced appeal. Please file the originals and copies, and please return a filed stamped copy of the Initial Brief and Designation of Matter and Proof of Service to us in the self-addressed stamped envelope provided herein.

By copy of this letter, we are serving copies of the enclosures upon all counsel of record and upon the *Pro Se* Defendant, Deborah Harwell, at her new mailing address, via Certified Mail.

If you have any questions, please do not hesitate to contact me at (843) 577-7700. Thank you for your assistance in this matter. With kind regards, I am

Sincerely,

Barbara J. Wagner

BJW/cl

Enclosures

[www.barnwell-whaley.com](http://www.barnwell-whaley.com)

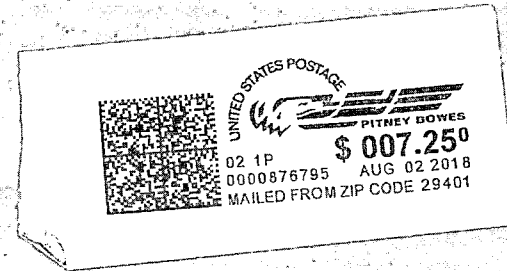
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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Re: Deborah B. Harwell v. Robert Bryan Harwell, individually and as Personal Representative of the Estate of David W. Harwell, and South Carolina Department of Health and Environmental Control Division of Vital Records, and Law Office of Deirdre W. Edmonds, PA; and Deirdre W. Edmonds, individually  
Appellate Case No.: 2017-002290  
Case No.: 2016-CP-21-1435

cc w/enc.: Kevin M. Barth, Esquire- (with enclosures)  
Gena Phillips Ervin, Esquire- (with enclosures)  
Blake A. Hewitt, Esquire- (with enclosures)  
Deborah B. Harwell, 1459 River Highway, Mooresville, NC 28117 – (with enclosures)  
Deirdre W. Edmonds, Esquire – (with enclosures)



**RECEIVED**  
AUG 06 2018  
SC Court of Appeals

**BARNWELL**  
**WHALEY**  
PATTERSON & HELMS LLC  
59.026

P.O. Drawer H  
Charleston, SC 29402

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
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