THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Case Nos. 2016-ES-01-00302, 2016-CP-21-1435, 2015-ES-21-00778
Appellate Case No. 2017-002290

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

v.

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,

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 Deidre W. Edmunds, P.A. and Deidre W. Edmunds, Individually, .. Appellants/Respondents.

REPLY BRIEF OF R. BRYAN HARWELL

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ARGUMENTS

First, no reasonable lawyer would have alleged Bryan Harwell was guilty of a felony and willfully provided false information in the preparation of David Harwell's death certificate. The allegation was gratuitous and absurd, yet it was made and repeated.

Second, most sensible people would view Debbie Harwell's omission from David's obituary as reasonable and appropriate. And no responsible personal representative would have consented to amending David's death certificate while Debbie was bringing claims against David's estate in probate court. DHEC had not indicated there was anything wrong.

Third, the $3.1 million "prenuptial agreement" claim is nonsensical on its face, and although nobody likes challenging someone else's motives or veracity, it is difficult to reconcile the after-the-fact justifications offered for this claim with the objective facts.

Finally, the argument that sanctions may not be awarded because this case was not litigated on the merits is difficult to reconcile with a court rule and a statute. The argument that "immunity" applies would mean *every decision* sanctioning a lawyer for frivolous litigation has been wrongly decided.

It would be different if a lawyer had phoned the PR at the outset to say Debbie would be filing probate claims against the estate and trying to set the family court order aside because Debbie believed David had not fully-disclosed his assets. Nothing like that approach happened here. Instead, the estate and the PR were left to blindly speculate why the estate kept receiving claims that were barred by an explicit waiver in a court order. The circuit court correctly found this litigation was abusive, but it did not go far enough. It should have sanctioned the lawyer for the felony accusation and for the $3.1 million "prenuptial" claim.

A. No reasonable lawyer would have gratuitously and continuously alleged Bryan Harwell knowingly and willfully provided false information in the preparation of David Harwell's death certificate.

Edmonds signed two pleadings alleging Bryan Harwell "stated the surviving spouse's name as 'NA' despite having full and complete knowledge" that Debbie Harwell was David Harwell's surviving spouse. (R.pp.136-137 & p.246). The pleadings also alleged Bryan "individually, knowingly and willfully supplied false information in the preparation of [David's] Death Certificate" and affirmatively stated Bryan was guilty of a felony. *Id.*

There was no reason whatsoever to make this allegation. Debbie's original suit had two causes of action. The first sought an adjudication that Debbie was David's surviving spouse (even though she was not a surviving spouse for purposes of the probate code). The second sought amendment of David's death certificate to reflect Debbie as the surviving spouse. If someone truly thought Bryan committed a crime they should have called the police or reported him for misconduct. There was no legitimate reason to accuse anyone of a felony as part of a civil suit over whether David's death certificate should be amended.

In her first affidavit, Edmonds described investigating the death certificate claim before filing it and how she found it odd that the "death certificate worksheet" attached to the funeral director's affidavit did not match the separate "death certificates" she received from DHEC and from the certifying physician. (R.pp.296-297, ¶¶11-16).

This is fair, but only to a point, and it does not support Edmonds' decision to accuse Bryan of a felony. While it would seem odd to anyone that the original death certificate worksheet showed David's status as "married" and gave Debbie's name while the death

certificate itself showed "married but separated" and omitted Debbie's name, the fact remains that the original death certificate, on its face, openly advertised David was "married but separated" when he died. The discrepancy between the worksheet and the certificate would be explained in the contempt hearing in family court when the funeral director said a corrected "death certificate worksheet" had been faxed to DHEC the same day the original worksheet was submitted, but again, it is hard to understand the argument that these differences justified accusing the PR of deliberately making a false statement to someone.

The other ground Edmonds used to justify the allegation—that Bryan completed a probate form incorrectly—is objectively wrong. The form asks for "intestate heirs who are not devisees (persons who inherit if Decedent left no Will)." Debbie was not an heir under the law; there was an order terminating all marital rights between her and David. S.C. Code Ann. § 62-2-802(b)(3) (Supp. 2017). Bryan noted the family court case on the probate form, writing "see mediation/separation agreement" as well as the filing date and case number. Had he included Debbie's name, she would surely have used it to support her creditor claims.

Thus, it is extremely difficult to understand the argument that Bryan "willfully and knowingly" made "false" statements in light of the other information he indisputably *did* disclose. It is also very difficult to follow the argument in light of the fact that Debbie is indisputably not David's surviving spouse for probate purposes.

The felony allegation was not an accident. Someone took the time to think through naming Bryan individually as well as in his capacity as PR. Someone took the time to write this claim into the initial pleading even though accusing Bryan of committing a felony would have no affect on the suit's success or failure. This was done on purpose.

The reason this matters is because one of the two reasons the circuit court gave for declining to sanction Edmonds for the felony allegation was that Debbie was ultimately successful in having the death certificate amended. (R.pp.70-71). Respectfully, lawyers do not get a free pass to make unprovoked and unwarranted allegations of serious misconduct as long as the client ultimately achieves some sort of a favorable outcome. The Frivolous Civil Proceedings Sanctions Act explains that sanctions may be imposed for "frivolous arguments," see S.C. Code Ann. § 15-36-10(4)(b), and precedent similarly explains sanctions may be imposed for actions taken with an improper motive, regardless of whether there are grounds for the claim itself. *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)). That is precisely why sanctions should be imposed for the felony allegation. It had no conceivably proper purpose. The motivation could only have been improper.

B. Any reasonable person would view Debbie's omission from David's obituary as appropriate, and no reasonable PR would have consented to the death certificate's amendment while Debbie was making creditor's claims against the estate.

There have been repeated suggestions that Debbie's omission from David's obituary is some evidence that Debbie's name was deliberately omitted from David's death certificate as part of a plan to harm her.

Consider the following objective facts. Marital litigation between David and Debbie began in March of 2015. David filed a complaint and a motion for temporary relief requesting a restraining order enjoining Debbie from "harming or harassing" him. (R.p.84, ¶2). The family court's final order recited that David told the court there was *no chance* of

reconciling the marriage. (R.p.170). The parties' court-approved agreement gave Debbie 30 days to vacate the house in Cherry Grove and gave the parties 30 days to exchange various items of personal property. (R.p.176, ¶¶6 & 8). The agreement also included a "no contact" restriction—a mutual restraint prohibiting the parties from communicating with each other—and waivers of the right to make claims against each other's estate. (R.p.177, ¶¶10 & 12). This marriage was over.

It is difficult to imagine how or why a PR would include that slice of David's life in his obituary. Debbie was still David's wife, but only in the most formal and technical sense. Their marriage had not been completely dissolved—parties cannot immediately obtain a "no-fault" divorce in South Carolina—but Debbie could not inherit from David. She could not even contact him without violating a court-approved agreement. She could not make a claim for an elective share of his estate. In short, Debbie had waived all of her rights as David's wife. Her omission from David's obituary was perfectly sensible.

There have also been repeated suggestions that Bryan should have immediately consented to the death certificate's amendment given the fact that Debbie was technically David's spouse (even though she had waived all of her rights as David's spouse).

Here again, it is difficult to understand the argument. It is not as though the only claim Debbie made against the estate was her claim to be named as David's surviving spouse and for the death certificate's amendment. Three months *before* Debbie brought her "surviving spouse" claim she filed a $3.1 million claim against the estate. Two months *after* Debbie filed her surviving spouse claim, she filed a pro se claim for the statutory elective share as a "surviving spouse," seeking a third of David's estate. No prudent personal

representative would agree to recognize Debbie as David's surviving spouse given the monetary claims she was pressing against the estate. Doing so would have given Debbie ammunition to argue she was David's surviving spouse and entitled to the benefits usually due to a surviving spouse. Also, DHEC had not indicated the death certificate was wrong.

This matters because the second reason the circuit court declined sanctions for the felony allegation was that it believed Bryan could have acted sooner to resolve the death certificate issue. Again, no prudent PR would have acted any differently. Edmonds was assisting Debbie in making financial claims that were directly precluded by an unchallenged family court order. No prudent PR would have taken any action that could be construed as giving those claims oxygen to breath or legs to stand on.

C. The $3.1 million "prenuptial agreement" claim is nonsensical on its face, and although nobody likes challenging someone else's motives or veracity, it is difficult to reconcile the after-the-fact justifications offered for this claim with the objective facts.

As with Debbie's omission from David's obituary, it is important to begin by imagining how a reasonable person in the PR's position would understand Debbie's $3.1 million claim against the estate. The claim's only explanation was "prenuptial agreement."

Any reasonable PR would think this claim was gobbledegook. There was a court-approved agreement settling "all of the issues" arising out of David and Debbie's marriage *and* out of "the Prenuptial Agreement." (R.p.175, ¶2). Edmonds may have felt she had no time to evaluate this claim's merit given the impending deadline to preserve the claim, but that does not explain why Debbie's claim was stated in terms that do not make sense and that would obviously not make sense to any PR. The rules do not require pleading with precision,

but they do require a lucid claim for relief. This claim was gibberish. It reads like Debbie is claiming $3.1 million *based on* a prenuptial agreement.

Again, it would be different if the claim had been accompanied by a statement that Debbie intended to take parallel action in family court, but no such explanation was provided. The first mention of Debbie taking action in family court was not until Edmonds' second affidavit. Edmonds' first affidavit contained generic statements affirming she was representing Debbie "for good cause," was acting "in good faith," and had a "good faith belief that there were grounds to support [the] claims." (R.pp.294-295). Yet, Edmonds refused during the first day of contempt hearings in family court to explain the claim's alleged good faith basis, maintaining the information was privileged. (R.pp.639-640).

No explanation of the theory of recovery was provided for months even though the estate opened its response to the claim by directly referencing the family court order and Debbie's waiver of the right to make claims against David's estate. Edmonds' reply said nothing about undisclosed assets or about making a Rule 60 motion. (R.pp.287-291). It seems like a reply would begin with Rule 60 if a motion under that rule was indeed the plan.

It is one thing to bring a claim that is unsuccessful but made in good faith. It is different when a claim makes no sense on its face and when it looks like the justification given later was not the actual justification. Litigation is not a costless pastime. When an estate gets sued, it has to prepare for litigation. Nobody is clairvoyant. No prudent PR will deem a claim to be "obviously frivolous" and not worthy of the estate's attention.

That is precisely why the circuit court should have sanctioned the lawyer for this claim, in addition to the sanctions imposed on Debbie. Litigants are entitled to intelligible

notice of the claims or defenses being asserted against them. The estate was denied that here. That failure has to fall on the lawyer as well as the litigant making the claim.

D. An award of sanctions does not hinge on whether a case was litigated on the merits and there is no "immunity" protecting an attorney from sanctions for participating in frivolous litigation.

Sanctions do not hinge on whether claims were litigated on the merits. The Sanctions Act requires a trial court to consider whether a claim or defense was frivolous at the conclusion of a trial or after the grant of a dispositive motion, see § 15-36-10(C)(1), and the Act also explains sanctions may be imposed for filing frivolous pleadings, making frivolous arguments, and for making claims or defenses that are not warranted under current law or a good faith extension of the law. See § 15-36-10(A)(4). Forcing the trial court to address sanctions *when* the case is decided on the merits is different than forbidding the trial court from imposing sanctions *unless* the case is decided on the merits. The Act does the former, not the latter.

This interpretation of the Act honors precedents where sanctions were awarded even though claims were withdrawn. *Ex parte Gregory*, 378 S.C. 430, 663 S.E.2d 46 (2008); *Kilcawley v. Kilcawley*, 312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994). Under Edmonds' reading, these precedents have been overruled by the addition of language forcing trial courts to consider sanctions after a case is decided on the merits.

Edmonds also says she is immune from sanctions because she was acting on her client's behalf, not on her own behalf.

The estate has not been able to locate any authority supporting this argument. There are cases recognizing that an attorney is not liable to third parties for actions taken on a

client's behalf and in good faith, *Stiles v. Onorato*, 318 S.C. 297, 298, 457 S.E.2d 601, 602 (1995) (citing *Gaar v. North Myrtle Beach Realty Co.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986)), but tort immunity is different from a lawyer being immune from sanctions under Rule 11 and the Frivolous Civil Proceedings Sanctions Act. Lawyers are also ethically prohibited from participating in frivolous litigation. Rule 3.1, RPC, Rule 407, SCACR. It is difficult to see how Rule 11, the Sanctions Act, and the RPC have much practical effect if a lawyer is exempt when his or her participation in frivolous litigation falls within the scope of the client's direction.

This immunity argument is similar to the immunity argument the Supreme Court rejected in *Holmes v. East Cooper Community Hospital*. There, the litigant claimed immunity from sanctions because she had been represented by a lawyer rather than acting pro se. 408 S.C. 138, 163, 758 S.E.2d 483, 497 (2014). Here, the lawyer argues the reverse—that the lawyer cannot be sanctioned because the lawyer was doing the client's bidding. That argument does not appear to have any support in Rule 11, the Sanctions Act, or precedent. Carrying the argument to its logical conclusion would also mean every decision sanctioning a lawyer for frivolous litigation has been wrongly decided.

***

The circuit court sanctioned Edmonds $5,000 for the obituary claim, see (R.p.73), but she should have also been sanctioned for the baseless felony accusation against Bryan and for continuing Debbie's $3.1 million claim against the estate. As stated in the lead brief supporting this appeal, these additional violations may warrant a nonmonetary sanction designed to deter future baseless allegations. They may also warrant monetary sanctions if

the Court lets any of Debbie's $25,000 credit stand, though, as argued in the lead brief supporting this appeal, none of Debbie's $25,000 credit should stand. The family court and circuit court ultimately dealt with distinct types of misconduct.

Also, this Court should award the estate and the personal representative the costs of these appellate proceedings. *Ex parte Gregory* specifically holds the costs incurred in seeking sanctions are recoverable. 378 S.C. at 440, 663 S.E.2d at 52.

CONCLUSION

This Court should affirm the circuit court's decision in part, reverse the circuit court's decision in part as described here and in the lead brief supporting this cross-appeal, and order additional sanctions as outlined in the lead brief supporting this cross-appeal.

Respectfully submitted,

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/s/ Blake Hewitt

October 31, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant, Brief of Respondent, and Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

October 31, 2018

Respectfully submitted,

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