

RECEIVED
DEC 18 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE 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-21-000778

The Honorable Roger L. Couch

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

CORRECTED FINAL APPELLANTS' BRIEF OF APPELLANTS/RESPONDENTS LAW
OFFICE OF DEIRDRE W. EDMONDS, P.A. AND DEIRDRE W. EDMONDS,
INDIVIDUALLY

M. Dawes Cooke, Jr., Esq.
Barbara J. Wagner, Esq.
Barnwell, Whaley, Patterson & Helms, LLC
288 Meeting Street, Suite 200 (29401)
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
bwagner@barnwell-whaley.com
Attorneys for Appellant

Other Counsel of Record:

Kevin M. Barth, Esq.
Ballenger, Barth, Hoefler and Lewis, L.L.P.
P.O. Box 107
Florence, SC 29503
*Attorney for Respondent/Appellant Robert Bryan
Harwell, individually and as the Personal
Representative of the Estate of David W. Harwell*

Gena Phillips Ervin, Esq.
Orr Elmore & Ervin, LLC
PO Box 2527
504 S. Colt Street
Florence, SC 29503
*Attorney for Respondent/Appellant Robert Bryan
Harwell, individually and as the Personal
Representative of the Estate of David W. Harwell*

Blake A. Hewitt, Esq.
Bluestein Thompson Sullivan, LLC
PO Box 7965
Columbia, SC 29202
*Attorney for Respondent/Appellant Robert Bryan
Harwell, individually and as the Personal
Representative of the Estate of David W. Harwell*

Deborah B. Harwell, *Pro Se*
1459 River Highway
 Mooresville, NC 28117
Respondent/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIESiv

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE2

ARGUMENT6

 I. STANDARD OF REVIEW6

 II. THE TRIAL JUDGE SHOULD NOT HAVE IMPOSED SANCTIONS
 OF \$5000.00 ON ATTORNEY EDMONDS7

 A. The Trial Judge Erred in Imposing Sanctions, as There Was Never
 A Judicial Determination on the Obituary Claim Filed by Attorney
 Edmonds, and Respondent Has Not Carried his Burden of Proving
 That the Claim was Frivolous When Filed.....7

 B. The Amount of Sanctions Imposed On Attorney Edmonds Was
 Excessive and Disproportionate to the Expense Incurred or Amount
 at Stake.....13

CONCLUSION14

TABLE OF AUTHORITIES

CASES

In re Beard,
359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004).....6, 7

Father v. S. Carolina Dep't of Soc. Servs.,
345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001).....12

Fox v. Vice,
563 U. S. 826, 836 (2011).....13

Goodyear Tire & Rubber Co. v. Haeger,
No. 15-1406, 2017 WL 1377379, at *5 (U.S. April 18, 2017).....13

Ex parte Gregory,
378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008).....6, 8

Hanahan v. Simpson,
326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997).....14

Holmes v. East Cooper Comm. Hosp., Inc.,
408 S.C. 138, 160, 758 S.E.2d 483, 495 (2014).....8

Jackson v. Speed,
326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).....13

Paroline v. United States,
134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).....13

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).....6

STATUTES

S.C. Code § 15-36-103, 7, 8, 10

S.C. Code § 15-36-2014

OTHER

SCRCP, R. 116, 7

SCACR, R. 407, SCRPC, R. 1.312

SCACR, R. 407, SCRPC, R. 1.514

STATEMENT OF ISSUES ON APPEAL

- I. **Did the trial judge err in imposing monetary sanctions under Rule 11 and under the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code §§ 15-36-10, *et seq.*, where there was never a determination on the merits of the underlying obituary claim and where Respondent did not present any evidence that the underlying obituary claim was frivolously asserted?**

- II. **Did the trial judge err in imposing monetary sanctions in the amount of \$5,000.00 where the underlying claim was only in the amount of approximately \$1,400 and where there was no evidence showing that the amount of sanctions was appropriate and proportionate?**

STATEMENT 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) ("778 Florence Action"). As discussed below, the '778 Florence Action was ultimately transferred to the Florence County Circuit Court. The instant appeal involves sanctions imposed on Appellant Law Office of Deirdre W. Edmonds, P.A. and Deirdre W. Edmonds (collectively "Attorney Edmonds"), who represented Deborah D. Harwell ("Client") at one point in the '778 Florence Action. Specifically, this appeal stems from a claim that Attorney Edmonds asserted against Robert Bryan Harwell, as Personal Representative of the Estate of David W. Harwell, deceased, for the payment of approximately \$1,400.00 that Client, Justice Harwell's widow, spent for the publication of an obituary.

Specifically, on or about December 3, 2015, Client, acting *pro se*, filed a Statement of Creditor's Claim in the '778 Florence Action for \$1,457.25 for the obituary. (*See R. p. 108*). On March 9, 2016, Attorney Edmonds filed a Summons and Petition for Allowance of Creditor's Claim in the '778 Florence Action on behalf of the Client. (*See R. pp. 147-52*). Therein, Client claimed \$1,457.25 from the Estate of David W. Harwell for an "[o]bituary published in newspapers, The Sun News and the State." (*See id.*). This obituary correctly identified Client as Justice Harwell's widow, whereas the obituaries published by Justice Harwell's children had failed to do so. Additionally, Attorney Edmonds filed a \$3.1 million claim against the estate for unrelated reasons; that claim is not at issue in this appeal (but is the subject of another appeal).

On April 1, 2016, Respondent Robert Bryan Harwell, as Personal Representative of the Estate of David W. Harwell,¹ filed Answers and Counterclaims and Third-Party Claims in the

¹ See FN 1. Robert Bryan Harwell, as Personal Representative of the Estate of David W. Harwell, is referred to as Respondent in this Brief.

'778 Florence County Action. (*See R. pp. 153-232*). In that filing, Respondent denied the claim for the obituary as an expense of the estate:

2. As to the \$1,457.25 claim concerning an obituary, that claim is denied in whole and is invalid. . . .

4. As to the \$1,457.25 claim concerning the obituary, that expense was not a debt incurred by the Decedent David W. Harwell or by his Estate, was not authorized by the Personal Representative ("P.R."), and was incurred solely by the Petitioner as referenced by the billing documents attached to the Petitioner's claim. The \$1,457.25 expense is solely the responsibility of the Petitioner.

(*See R. pp.155-56 ¶¶ 2, 4*). Additionally, the Estate of David W. Harwell asserted claims against Attorney Edmonds for: (a) remedies under the South Carolina Frivolous Proceedings Sanctions Act, S.C. Code §§ 15-36-10, *et seq.*; (b) civil conspiracy; (c) slander of title; and (d) abuse of process. (*See generally R. pp. 158-85*).

On that same date, Respondent filed, in the '778 Florence Action, a Motion to Dismiss Both Claims for Lack of Subject Matter Jurisdiction or, Alternatively, a 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 Sanctions and Memorandum in Support thereof ("Motion for Sanctions"). (*See R. pp. 237-30*). Respondent averred in the Motion for Sanctions, in relevant part:

[R]egarding the motion to dismiss for failure to state a claim and the motion for judgment on the pleadings as to the \$1,457.25 concerning the obituary, the Court can again take judicial notice of the above referenced Family Court orders and filings and should dismiss Petitioner's claims based on those orders. Further, regarding the Petitioner's pleading, she attached as an integral part of that pleading the unauthorized obituary and her bills, which indicated the Petitioner as the customer, *i.e.*, the party responsible for paying the bill.

Further, the Respondent seeks sanctions pursuant to Rule 11, SCRPC, based on the filing of frivolous pleadings or other papers and for making frivolous arguments. These sanctions should include, but not be limited to, any and all reasonable expenses, costs, and attorney's fees.

(*See R. p. 240*).

On June 10, 2016, the Honorable Kenneth E. Fulp, Jr. entered an Order of Removal to Florence County Circuit Court, transferring the '778 Florence Action (and an action in Beaufort County, docket number 2016-ES-07-00302) to the Circuit Court of Florence County, South Carolina. (See R. pp. 7-9). In that Order, Judge Fulp stated that "all pending formal proceedings in this estate are hereby removed to the Florence County Circuit Court." (See R. p. 8). 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.

On July 5, 2016, Attorney Edmonds filed a Notice of Motion and Motion to Dismiss in the Florence County Circuit Court. (See R. pp. 284-86). On July 19, 2016, Attorney Edmonds filed her Memorandum in Support of Motion to Dismiss, arguing, *inter alia*, that Respondent had failed to satisfy its burden of proof concerning its claims. (See R. pp. 287-315).

On the same date, Attorney Edmonds also filed a Memorandum in Opposition to Motion for Sanctions. (See R. pp. 316-338). Attached as Exhibit 1 to that Memorandum was an Affidavit of Third-Party Defendant Deirdre W. Edmonds. (See R. pp. 293-313). In that Affidavit, Attorney Edmonds affirmed that:

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 R. p. 298 ¶¶ 19-21).

On February 2, 2017, Attorney Edmonds filed her Amended and Supplemental Memorandum on Law in Opposition to Motion for Sanctions. (See R. pp. 520-532). Attached to that Amended and Supplemental Memorandum was a Rebuttal Affidavit of Attorney Edmonds. (See R. pp. 442-82). On that same date, a hearing was conducted on Respondent's request for sanctions before the Honorable Roger L. Couch.

On or about April 12, 2017, Judge Couch entered an Order granting in part and denying in part Respondent's request for sanctions. (See generally R. pp. 58-74). Judge Couch denied most of the claims for sanctions, finding that Attorney Edmonds acted properly in filing the actions to preserve Client's claims against the Estate. However, of relevance to Attorney Edmonds' instant appeal, Judge Couch found that Attorney Edmonds "was not justified in filing or pursuing the claim for the reimbursement of the obituary publications" and imposed sanctions on her in the amount of \$5,000.00. (See R. pp. 72-73).

On April 27, 2017, Attorney Edmonds filed a Motion and Memorandum in Support of Motion for Reconsideration ("Motion for Reconsideration"), arguing that there was no evidence that the claim for the obituary expense was frivolous and that the amount of sanctions imposed on Attorney Edmonds was excessive. (See R. pp. 564-68). On July 19, 2017, a hearing was conducted on, *inter alia*, Attorney Edmonds' Motion for Reconsideration. On October 2, 2017, Judge Couch entered an order, *inter alia*, denying Attorney Edmonds' Motion for Reconsideration. (See R. pp. 78-79).

On November 1, 2017, Attorney Edmonds filed a timely appeal from Judge Couch's imposition of sanctions upon her with regard to the filing of the obituary claim. (See Not. of Appeal). This Court should reverse the trial judge's imposition of sanctions upon Attorney Edmonds for two reasons. First, there was no basis upon which to adjudge the claim for the publication of the obituary frivolous. That matter was filed in the Probate Court. The obituary

that the Estate published mentioned all of Justice Harwell’s relatives, and even his dog – but not his widow. Mrs. Harwell had every right to ask the Probate Court to require the Estate to reimburse her for the cost of publishing a corrected obituary. The Probate Court could have approved the claim or denied it, but Mrs. Harwell’s decision to withdraw the claim without having it adjudicated does not make it frivolous ab initio. Second, even if the claim was frivolous, there is no evidence that the Respondent incurred any fees whatsoever in defending the claim. Indeed, Respondent’s defense to the claim – that Mrs. Harwell had waived the claim in her family court settlement with Justice Harwell – was itself spurious, since the claim obviously did not even exist when that settlement occurred.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of the trial judge's 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 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's imposition of sanctions on Attorney Edmonds was in error and this Court should reverse and vacate that determination.

II. THE TRIAL JUDGE SHOULD NOT HAVE IMPOSED SANCTIONS OF \$5,000.00 ON ATTORNEY EDMONDS

The trial judge imposed sanctions on Attorney Edmonds under Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), S.C. Code § 15-36-10. There was never a finding that Client's claim for reimbursement of the cost of publishing her husband's correct obituary should not be granted, let alone that it was frivolous. In fact, the claim was facially plausible. The Estate published an obituary for Justice Harwell that acknowledged all of his relatives, and even his dog, but failed to mention his widow. Client, the widow, had every right to ask the Estate to pay the cost of publishing a corrected obituary. The Probate Court could have approved the claim or denied it, but the claim was hardly frivolous on its face. For the reasons that follow, the imposition of sanctions against Attorney Edmonds was in error, and this Court should reverse and vacate the imposition of sanctions.

A. The Trial Judge Erred in Imposing Sanctions, as There Was Never a Judicial Determination on the Obituary Claim Filed by Attorney Edmonds, and Respondent Has Not Carried his Burden of Proving That the Claim was Frivolous When Filed.

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." "[T]he 'criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [Act].'" *See In re Beard*, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (*quoting Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001)).

Under the Act, "[a]n attorney or pro se litigant participating *in a civil or administrative* action or defense may be sanctioned for . . . filing a frivolous pleading, motion, or document." *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). The Act further provides that "[a]t 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). Moreover, the Act requires that:

A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.

See S.C. Code § 15-36-10(D). "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). In this matter, there was never a determination, after an evidentiary hearing on the merits, of the merits of the obituary claim that Attorney Edmonds filed on behalf of her Client. As a result, the imposition of any sanctions on Attorney Edmonds was premature, as there could be no determination that the claims were without merit in the first instance. A determination that the obituary claim lacked merit is a necessary precedent to Respondent's assertion of claims for sanctions under either Rule 11 or the Act. Therefore, this Court should reverse the imposition of sanctions in this case.

Moreover, Respondent has utterly failed to carry his burden of showing that Attorney Edmonds acted in a frivolous manner or in violation of the law. The trial court properly recognized in its "Statement of Facts" that Attorney Edmonds had filed the obituary claims in order to protect her Client's interests and to avoid the potential loss of her Client's rights to the lapse of time:

By March 3, 2016, Edmonds had received sufficient information to determine that the *pro se* claims had been denied by the Personal Representative and that unless

an action was begun in the Probate Court to enforce the claims they would be barred by statute and lost. An action on the claims would have to be brought in the Probate Court by March 12, 2016 in order to preserve the possibility of a Rule 60 claim. The action to enforce the pro se claims was filed by Edmonds on March 9, 2016. She states that this was done to protect Mrs. Harwell's right to pursue a Rule 60 reopening of the Family Court Order approving the property settlement agreement. . . .

(See R. p. 63). The Client's *pro se* claims/petitions referenced are both the \$3.1 million creditor claim based on a prenuptial agreement and the \$1,457.25 creditor claim based on the obituary publication, which is the subject of this Appeal. The trial judge found under "Conclusions and Rulings" that Edmonds' filing concerning the creditor's claim based on the prenuptial agreement was justified, that "[t]he time was fast approaching that the claims would be lost if not sued upon," and agreed "that she took the actions necessary to preserve her client's opportunity to have her claims litigated." (See R. p. 72). The trial court properly recognized that there was no way that Attorney Edmonds could have known whether her Client might prevail on her as-yet unadjudicated claims, let alone known that they were frivolous. The same rationale applies to the Petition filed to preserve the obituary claim, with even more force since neither the prenuptial agreement nor the family court settlement would have been a defense to the obituary claim.

In her Affidavit submitted to the trial judge, Attorney Edmonds confirmed that she filed the obituary claim in an effort to protect her Client's interests from the passage of time:

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 R. pp. 298-99 ¶¶ 19-21).

Respondent cannot dispute that the party moving for sanctions bears the burden of showing that the claims were frivolous. As discussed above, a motion for sanctions is normally made following a trial on the merits or a ruling on a dispositive motion.² In such cases, the evidence has been fully developed and the trial judge is in a position to assess whether the claim or defense was frivolously maintained. Such is not the case here. The trial court heard no evidence concerning the merits of the obituary claim. The record is replete with Motions, Memoranda, Affidavits, and live testimony regarding the issues before this Court. However, there is almost no mention of the creditor claim for obituary publication, no argument or evidence that it is without merit, and certainly no arguments made that this claim was actually frivolous.

In his Answers and Counterclaims and Third-Party Claims, filed April 1, 2016, Respondent alleges:

4. As to the \$1457.25 claim concerning the obituary, that expense was not a debt incurred by the Decedent David W. Harwell or by his Estate, was not authorized by the PR and was incurred solely by the Petitioner as referenced by the billing documents attached to the Petitioner's claim. The \$1457.25 expense is solely the responsibility of the Petitioner. ...

6. The creditor's claim for \$1475.25 concerning an obituary fails to allege facts sufficient to state a claim and must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure ("SCRCP").

² The Frivolous Civil Proceedings Act provides, at section 15-36-10(C)(1): "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 R. pp. 156-57 ¶¶ 4 & 6). The closest “argument” related to this claim was at the February 2, 2017 hearing regarding Respondent’s Motion for Sanctions, and even that is more just a statement:

She filed a second claim, Your Honor, asking for some money for an obituary she ran herself subsequent to the one run by the personal representative but basically they’re both asking for money from the Estate. *Our position*, at the time, was she waived that in Family Court. They shouldn’t be allowed to go forward.

(See R. p. 874:4-9).

There is no evidence in the record that the obituary claim was unmeritorious, let alone frivolous. It is not uncommon for estates to bear the expense of publishing an obituary. The original obituary that the Estate published was patently in error. It identified as Justice Harwell’s survivors his children, his grandchildren, his sister, his sisters-in-law, and numerous nieces and nephews. It even makes mention of Justice Harwell’s black Labrador dog. However, it makes no mention of his surviving spouse, Attorney Edmonds’ Client.³ The obituary that Mrs. Harwell published was correct, since it identified her as the widow, whereas the obituary that Respondent Bryan Harwell had published did not mention Justice Harwell’s surviving spouse. The Probate Court could well have approved that claim if Client had not withdrawn it.

Respondent’s objection to reimbursing Attorney Edmonds’ Client for the cost of publishing the correct obituary is that “she waived that in Family Court.” Specifically, Respondent urges that this claim was waived in a Mediation Agreement attached to a Final Decree (Ending Action) filed in Client’s Divorce Action, in which Attorney Edmonds did not appear in any way, styled *David W. Harwell v. Deborah B. Harwell*, No. 2015-DR-26-691 (Horry County Family Court). (See R. pp. 167-78). In particular, Respondent relies on a provision in the Mediation Agreement stating that: “Both parties waive any and all rights they

³ See, e.g., the October 2, 2015 obituary published in The State Newspaper at <http://www.legacy.com/obituaries/thestate/obituary.aspx?n=david-walker-harwell&pid=175994265>. Client believed the omission of reference to her as surviving spouse was intentional, of course. In fact, the lower court denied sanctions for the petition to correct the Death Certificate to identify Client as surviving spouse, finding that claim “justified” and “necessary” (See R. pp. 70-72).

may have in the estate of the other or to make any claim upon or against the estate of the other. Each party's estate shall be bound by the terms of this agreement." (*See* R. p. 177 ¶ 12). However, the obituary claim did not even exist and could not have been contemplated when Attorney Edmonds' Client made her agreement in Family Court.

Simply put, Respondent has made no showing that Attorney Edmonds' filings of the obituary claim was so devoid of merit that it was sanctionable. To the contrary, the only evidence shows that Attorney Edmonds acted in the best interests of her Client to protect her interests from potential forfeiture to time. *See, e.g., Father v. S. Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001) (Rule 11 sanctions not warranted against DSS, even though court determined case against father for alleged abuse of sons was unfounded, since DSS decision to investigate was not unreasonable or improperly motivated). Attorney Edmonds acted reasonably in filing the Petition for Allowance of her Client's creditor claim against the Estate. Time was of the essence for the Client to file this Petition when she came to Attorney Edmonds for help. Attorney Edmonds was informed of disallowance of certain claims shortly before the thirty-day statutory limitation for filing an appeal with the Probate Court (Petition) ran. It was imperative that the filings be done before the thirty days ran, or the claims would permanently expire. *See* R. 1.3 "Diligence", SCRPC, Comment 3 ("Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness...."). Attorney Edmonds acted quickly to ensure her client's interests were protected and made the filings with the Probate Court. The trial judge should have rejected Respondent's request for sanctions — even if the Client's claims regarding the obituary were ultimately rejected — because Attorney Edmonds had to act without delay in order to protect her client's interests.

For the foregoing reasons, the trial judge plainly erred in imposing sanctions on Attorney Edmonds for her reasonable actions in protecting her client's interests.

B. The Amount of Sanctions Imposed On Attorney Edmonds Was Excessive and Disproportionate to the Expense Incurred or Amount at Stake

The trial judge sanctioned Attorney Edmonds and awarded Respondent \$5,000.00 in legal fees related to the above-referenced creditor claim for the obituary publication. The claim itself was for only \$1,457.25. Respondent offered no evidence of what, if any, legal expense he actually incurred specifically because of the obituary claim. Indeed, it appears that he did nothing more to defend that claim than to deny it and move to dismiss it (along with another much larger claim). Client voluntarily dismissed the claim without any action being required by the Probate Court. The Supreme Court of the United States recently held in *Goodyear Tire & Rubber Co. v. Haeger*:

as we have previously noted, a sanction counts is compensatory only if it is ‘calibrate[d] to [the] damages caused by’ the bad-faith acts on which it is based. . . . A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. . . . That kind of causal connection, as this Court explained in another attorney’s fees case, is appropriately framed as a but-for test: The complaining party (here, the Haegers) may recover ‘only the portion of his fees that he would not have paid but for’ the misconduct. *Fox v. Vice*, 563 U. S. 826, 836 (2011); see *Paroline v. United States*, 572 U. S. ___, ___, 134 S.Ct. 1710, 1722, 188 L.Ed.2d 714 (2014).

137 S. Ct. 1178, 1186 (2017). Respondent has not made — and cannot make — a showing of what legal expenses, if any, he would have avoided but for the filing of the Petition to preserve the claim for the obituary publication. He has failed to prove what damages he sustained because of that claim.

In determining the reasonableness of legal fees, South Carolina courts typically focus on six factors from the case of *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997): (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. The factors for determining the

reasonableness of fees set forth in Rule 1.5 of the Rules of Professional Conduct, Rule 407, SCACR, include the same factors as those in *Jackson*.

Substantially all of Respondent's counsel's efforts, as evidenced by their Motions, Memoranda, Affidavit and live testimony, were spent arguing against the merits of a \$3.1 million creditor claim (for which sanctions were not imposed) and the amendment of the death certificate (the defense of which was itself spurious, inasmuch as Client was unarguably Justice Harwell's surviving spouse). (See R. pp. 153-207, 237-40, 339-52, 364-83, 384-441, 511-619, 855-74). As noted above, there is virtually no evidence in the record related to the obituary publication creditor claim, let alone arguing against its merits or that it was a frivolous claim.

Further, a \$5,000.00 award is grossly disproportionate for a \$1,457.25 claim. The Petitioner would have to have been uncommonly vindictive and contumacious to spend \$5,000 to defend a claim that small and that innocuous.

CONCLUSION

Although the amount of money involved in this appeal is relatively small, the implications to the legal profession are enormous. The Harwell name is rightly revered in South Carolina. No attorney would want to challenge the estate of Justice Harwell, yet Mrs. Harwell had a claim and needed legal representation. Attorney Edmonds has worked long and hard to earn her excellent reputation in the legal profession. Mrs. Harwell has had extreme difficulty in retaining counsel to represent her in these matters. The Rules of Professional Conduct and the Lawyer's Oath encourage lawyers to take on unpopular causes and to protect the helpless and oppressed. Attorney Edmonds should not be punished for her part in helping her Client preserve whatever claims she might have had against her husband's estate.⁴ This Court should be loath to uphold the imposition of sanctions against Attorney Edmonds even if all of the claims she

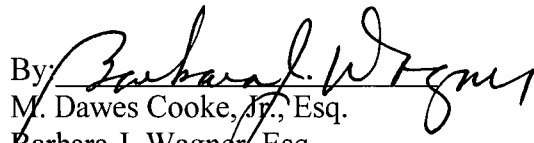
⁴ "Section 15-36-20 creates a presumption that a person taking part in the initiation or continuation of proceedings acted with a proper purpose 'if he reasonably believes in the existence of facts upon which his claim is based' and . . . reasonably believes under the facts that his claim may be valid under existing or developing law." *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997) (*quoting* S.C. Code Ann. § 15-36-20(1)(Supp. 1995)).

asserted proved to be unmeritorious. But the obituary claim was never found to be unmeritorious, let alone frivolous. No sanctions should have been imposed against Attorney Edmonds in this case.

For the reasons set forth above, this Court should reverse and vacate the trial judge's imposition of sanctions on Attorney Edmonds in this matter.

November 19, 2018

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 
M. Dawes Cooke, Jr., Esq.
Barbara J. Wagner, Esq.
Barnwell, Whaley, Patterson & Helms, LLC
288 Meeting Street, Suite 200 (29401)
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
mdc@barnwell-whaley.com
bwagner@barnwell-whaley.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 18 2018
SC 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. HarwellRespondent/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

Of Whom: Robert Bryan Harwell, individually and as the Personal
Representative of the Estate of David W. Harwell is theRespondent/Appellant

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

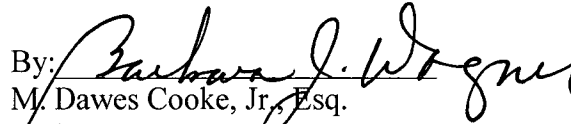
v.

Law Office of Deidre W. Edmunds, P.A. and Deidre W. Edmunds,
individuallyAppellants/Respondents

RULE 211 CERTIFICATE

I hereby certify that this Final Appellants' Brief of Appellants/Respondents complies with Rule 211(b), S.C.A.C.R.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.

Barbara J. Wagner, Esq.

Barnwell, Whaley, Patterson & Helms, LLC

288 Meeting Street, Suite 200 (29401)

Post Office Drawer H

Charleston, SC 29402

(843) 577-7700 Fax: (843) 577-7708

mdc@barnwell-whaley.com

bwagner@barnwell-whaley.com

*Attorneys for Appellants/Respondents Law
Office of Deidre W. Edmunds, P.A. and Deidre
W. Edmunds, individually*