

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas  
DeAndrea G. Benjamin, Circuit Court Judge

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Case No. 2014-CP-28-940  
Appellate Case No. 2019-000867

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**RECEIVED**  
JUN 21 2019  
S.C. SUPREME COURT

Jean P. Derrick,

Respondent,

v.

Lisa C. Moore,

Petitioner

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondent submits the following counter-statement of the questions presented:

1. Did the circuit court and the Court of Appeals correctly reject Petitioner's contention that a client cannot consent to jurisdiction of the Resolution of Fee Disputes Board in an attorney-client fee agreement?
2. Is Petitioner's argument based on the requirement of an application substantively without merit?
3. Is Petitioner's argument based on the requirement of an application procedurally barred because not raised in the court below?

## STATEMENT OF THE CASE

Respondent, Jean P. Derrick (hereafter, "Attorney"), filed this action on October 8, 2014, in the Kershaw County Court of Common Pleas, seeking judgment against Petitioner, Lisa C. Moore (hereafter, "Client"), for outstanding attorney's fees and costs incurred in Attorney's representation of Client in family court litigation. App. pp. 58-70. Client filed an answer and counterclaim, asserting, among other allegations, that the fees charged were unreasonable and that the fees included charges for work that was not actually performed. App. pp. 71-77. Attorney filed a reply to the counterclaim. App. pp. 79-80. Because Client's pleadings raised the issue whether the attorney's fees were fair and proper, Attorney also filed a motion to compel submission of the fee dispute to the Resolution of Fee Disputes Board (hereafter, "the Board"), in keeping with the terms of the fee agreement entered into by Attorney and Client at the outset of the representation. App. pp. 127-31.

Judge DeAndrea G. Benjamin held a hearing on the motion to compel on July 14, 2015. App. p. 82. On December 14, 2015, Judge Benjamin issued an order granting the motion to compel resolution of the fee dispute through the Board. App. p. 55. Client filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. App. pp. 134-36. Judge Benjamin held a hearing on the reconsideration motion on January 27, 2016. App. p. 99. On March 16, 2016, Judge Benjamin issued an order denying the motion for reconsideration. App. p. 57.

Client appealed, and the Court of Appeals affirmed Judge Benjamin's decision to compel resolution of the fee dispute through the Board. Both parties sought rehearing. App. pp. 152-56. The Court of Appeals denied Client's petition for rehearing by order dated April 24, 2019. App. p. 157. The Court granted Attorney's petition for rehearing, making a correction requested by Attorney in one sentence of its written opinion, and refiled the opinion on April 24, 2019. App. pp. 143-50.

#### CONSIDERATIONS GOVERNING CERTIORARI REVIEW

Rule 242(b) of the South Carolina Appellate Court Rules instructs that a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where special and important reasons are present. No special or important reasons for further review exist in this case. This case does not fall within any of the specific reasons for certiorari review outlined in Rule 242(b), and there is no basis for issuance of a writ of certiorari in this case.

#### ARGUMENT

Rule 416 of the South Carolina Appellate Court Rules created the Resolution of Fee Disputes Board of the South Carolina Bar ("the Board"), established the jurisdiction

of the Board, and established procedures for the resolution of fee disputes between attorneys and clients. *See* Rule 416, SCACR, Rules 1-22. Rule 9 of Rule 416 vests exclusive jurisdiction in the Board where the client has consented to be bound by the final decision of the Board. *See* Rule 416, SCACR, Rule 9(c).

In this case, Attorney and Client entered into a written fee agreement in 2011 with respect to Attorney's representation of Client in a matter in the Kershaw County Family Court. That agreement, signed by Client on April 19, 2011, contained two separate provisions setting forth that any dispute as to fees would be submitted by the dissatisfied party to the Board for resolution. App. pp. 130-31, ¶¶ 7, 8. Attorney's representation of Client in this case proceeded from April 2011 through April 2014, and the outcome of the family court action was favorable to Client.

In the family court's unappealed final order, the family court judge ordered the opposing party to pay a portion of Client's attorney's fees directly to Client. App. p. 51, ¶ P. The court found Attorney had "obtained beneficial results across the board" for Client. App. p. 45, ¶ 37. The family court further found the litigation was "relatively complex," involving full discovery, including depositions, and a two-day trial, even after the primary issue of custody was settled pre-trial. App. p. 46, ¶ 38. The court found Attorney's expenditure of 64 hours working on the case to be reasonable and found Attorney's professional standing to be excellent. *Id.* The court found Attorney has been a member of the South Carolina Bar for over 36 years. *Id.* The court found the case was well prepared and well tried. *Id.* The court found the beneficial results obtained by Attorney for Client were good. *Id.* The court found Attorney's hourly rate of \$300 was

“customary in this community for legal services, and even on the low side for an attorney of her stature and experience.” App. pp. 46-47, ¶ 38.

By order dated March 6, 2014, the family court awarded \$12,000 in attorney’s fees and ordered the opposing party to pay \$6,000 of the fee award directly to Client within 90 days from the date of the order (by June 4, 2014), and another \$6,000 of the fee award directly to Client within 120 days from the date of the order (by July 4, 2014). App. p. 51, ¶ P. Although Client received this fee award of \$12,000 from the opposing party, she did not pay any of this money over to Attorney. In fact, her last payment to Attorney was made in May 2014, leaving an outstanding balance for attorney’s fees and costs of \$10,484.40. App. pp. 61-70. In October 2014, Attorney brought this action seeking a judgment for the unpaid amount. *Id.*

Prior to the filing of Client’s answer and counterclaim, she had never before disputed the reasonableness or propriety of Attorney’s fee and therefore no fee dispute existed. Under Rule 416, a fee dispute exists “when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee.” *See* Rule 416, SCACR, Rule 2. However, “[a] dispute does not exist solely because of the failure of the client to pay a fee.” *Id.* Thus, Attorney’s only recourse for Client’s non-payment of her outstanding fees was an action for breach of the fee agreement.

After Client filed her responsive pleading challenging the reasonableness and propriety of the fees charged by Attorney, Attorney invoked the provision of the fee agreement by which Client consented to resolution of any fee dispute through the Board. Attorney’s motion to compel was based on the clear and unambiguous language of the

fee agreement, which Client freely and voluntarily entered into in April 2011, and by which Client consented to resolution of any fee dispute by the Board. Client accepted the benefits of this fee agreement throughout the three years of her contentious family court litigation, and she accepted the beneficial results obtained for her by her Attorney.

In its order, the circuit court relied upon the plain language of the fee agreement to order that the fee dispute be resolved through the Board. The court stated:

In the fee agreement signed by Defendant, the agreement directly states that “any dispute concerning the fee due pursuant to this agreement shall be submitted by the dissatisfied party for a full, final resolution to the Resolution Fee Dispute Board of the South Carolina Bar, pursuant to Rule 416 of the South Carolina Appellate Court Rules.” Because the Defendant disputes the fee for numerous alleged reasons, this Court finds that it is proper to take these matters up with the Resolution Fee Dispute Board pursuant to the signed contract. The other counterclaims and potential legal malpractice claim may remain under the Circuit Court jurisdiction. The Plaintiff’s motion to compel resolution through the Fee Dispute Board is granted.

App. p. 55, *quoting* App. p. 33, ¶ 7.

The court’s conclusion was correct, and the Court of Appeals’ affirmance of that conclusion was also correct. Client freely and voluntarily entered into the fee agreement and accepted its benefits. She consented in that agreement to submit any fee dispute to the Board. Because of that consent, the Board had exclusive jurisdiction of the dispute. *See* Rule 416, SCACR, Rule 9(c); *cf. Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 327 (1994) (noting exclusive jurisdiction of Board under Rule 9). The court properly enforced the plain language of the unambiguous fee agreement and properly granted the motion to compel resolution through the mechanism provided by the contract, reserving all of Client’s counterclaims for further proceedings in the trial court. None of the

arguments of Client in her petition for writ of certiorari, addressed below, undermines the correctness of the court's ruling.

I. THE CIRCUIT COURT AND COURT OF APPEALS CORRECTLY REJECTED CLIENT'S ARGUMENT THAT HER CONSENT COULD NOT BE GIVEN IN THE FEE AGREEMENT.

Client argued in the lower court and on appeal that Rule 416 prohibits obtaining a client's consent to resolution of fee disputes by the Board in an attorney-client fee agreement, before a dispute arises. Client makes the sweeping assertion that Rule 416 confers jurisdiction only after a dispute arises, but there is no provision contained anywhere in Rule 416 that imposes such a restriction. Rather, Rule 9 of Rule 416 clearly provides that exclusive jurisdiction vests in the Board upon the client's giving consent to be bound by the Board's decision. *See* Rule 416, SCACR, Rule 9(b) & 9(c). Nothing in Rule 416 prohibits an attorney from obtaining that consent in the attorney-client fee agreement at the outset of the representation. Indeed, as the Court of Appeals held, "[t]he rule does not draw a distinction between a client who consents to jurisdiction prior to the representation and one who gives consent after a fee dispute arises." App. p. 148. The Court correctly analyzed the issue, stating,

Here, Client entered into a valid contract, the plain language of which contemplated that when a fee dispute arises it would be sent to the Board for a resolution. *See Jordan v. Sec. Grp. Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."). By signing the contract and agreeing to be bound by the terms of the fee agreement, the parties conferred exclusive jurisdiction to the Board over fee disputes. *See Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 327 (1997) (noting exclusive jurisdiction over a fee dispute vests in the Board upon a client's consent to be bound).

App. p. 148. As set forth above, *supra* 2-6, and in the Court of Appeals' decision, App. p. 148, the plain language of the fee agreement provided Client's consent to resolution of the fee dispute by the Board, and the circuit court acted within its authority to enforce the parties' contract and send the dispute to the Board.

## II. PETITIONER'S ARGUMENT BASED ON THE REQUIREMENT OF AN APPLICATION IS WITHOUT MERIT.

Client asserts that the effect of the decisions of the circuit court and Court of Appeals is to rewrite the procedures of Rule 416 and eliminate the requirement of "an application" to initiate a dispute resolution proceeding before the Board. On the merits, this assertion is unfounded. No such effect occurs.

This action began with Attorney's service and filing of a complaint seeking payment of Client's outstanding balance for attorney's fees. At the time the complaint was filed, Client had never before disputed the amount of Attorney's fees. Therefore, no dispute existed for Attorney to seek to have resolved by the Board. The dispute as to the reasonableness and propriety of Attorney's fees first arose with the filing of Client's answer and counterclaim. Thus, for the first time, a dispute existed as to which either party could seek resolution by the Board.

Prior to the filing of Client's responsive pleading, Attorney had no basis for seeking resolution of any dispute by the Board, because no dispute existed. Now, such a dispute does exist, and if the Court of Appeals' decision becomes final, a dispute resolution proceeding may be brought. Client complains the application requirement for commencing the process has been eliminated because no application has been filed in this case, but that is not what has occurred. Quite simply, no application has yet been filed because the issue first arose in this litigation. Until the lower court ruled on the motion to

compel, and until that ruling becomes final at the conclusion of the appeal process, no application could be filed. When, at the conclusion of this appeal, the lower court's order is affirmed, Attorney will file an application, accompanied by Client's written consent, thereby invoking the jurisdiction of the Board in accordance with Rule 9(b) of Rule 416. It is simply incorrect that the effect of the Court of Appeals' decision affirming the lower court's grant of the motion to compel is to alter the procedure for bringing the fee dispute before the Board. This claim of the petition for writ of certiorari is without merit.

III. PETITIONER'S ARGUMENT BASED ON THE REQUIREMENT OF AN APPLICATION IS PROCEDURALLY BARRED BECAUSE IT WAS NOT RAISED IN THE COURT BELOW.

Procedurally, the Court should not even consider Client's argument that the effect of the decisions of the circuit court and Court of Appeals is to rewrite the procedures of Rule 416 and eliminate the requirement of "an application" to commence such proceedings. This argument was not made in the court below, and it is not preserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Easterling v. Burger King Corp.*, 416 S.C. 437, 453, 786 S.E.2d 443, 451 (Ct.App. 2016). In the court below, Client argued (1) the consent must be given after the dispute arises, not in a fee agreement; (2) the procedure under Rule 416 is essentially an arbitration, the agreement was not in compliance with the Uniform Arbitration Act, and Rule 9 of Rule 416 has no provision allowing a court to compel this kind of arbitration; and (3) Attorney waived the right to proceed under Rule 416 by filing the court action for unpaid fees. App. p. 86, line 24 – p. 88, line 6; p. 88, line 11 – p. 89, line 15; p. 91, line 11 – p. 92, line 5. Client did not assert, as she now does, that compelling resolution of the fee dispute by the Board

would rewrite the rules and eliminate the requirement of “an application” to institute proceedings under Rule 9(b) of Rule 416.

In her motion for reconsideration and argument of that motion, Client again did not make the argument she now asserts. There, she asserted (1) resolution by the Board may not be compelled under Rule 10 of Rule 416; (2) consent may be withdrawn under Rule 10 of Rule 416;<sup>1</sup> (3) the Rule 416 procedure is essentially an arbitration and not in compliance with the Uniform Arbitration Act; and (4) Attorney waived the Rule 416 procedure by filing the lawsuit.<sup>2</sup> App. p. 102, line 4 – p. 105, line 2; pp. 135-36. She did not assert that compelling resolution of the fee dispute by the Board would eliminate the requirement of “an application” under Rule 9(b) of Rule 416.

Because Client did not assert an argument in the court below with respect to the requirement of “an application” to commence a proceeding for resolution of a fee dispute before the Board, Attorney noted this procedural deficiency in her brief in the Court of Appeals and in her return to the petition for rehearing in that court.<sup>3</sup> Client’s argument

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<sup>1</sup> The circuit court correctly rejected the argument that consent could be withdrawn, under Rule 10 of Rule 416, and Client did not challenge that ruling on appeal.

<sup>2</sup> On appeal, Client pursued her claim that a proceeding under Rule 416 is essentially an arbitration and that the fee agreement did not comply with the Arbitration Act, and she also pursued her claim that Attorney waived the right to pursue resolution of the fee dispute through the Board by filing the action to collect the unpaid fees. The Court of Appeals affirmed the lower court’s rejection of these claims, and Client has not renewed these arguments in her petition for writ of certiorari, thereby abandoning these issues.

<sup>3</sup> In her brief in the Court of Appeals, Client raised the Rule 416 requirement of “an application” for the first time. App. pp. 7-8. Attorney’s brief challenged this argument, not made in the court below, on preservation grounds, citing *Wilder Corp.* and *Easterling*. App. pp. 26-27. In her petition for rehearing, Client abandoned many of her prior arguments but continued to invoke the requirement of “an application.” App. pp. 152-53. Attorney’s return to the petition for rehearing again noted that this argument, not made in the court below, was not preserved. App. p. 160.

concerning the lack of an application to begin the dispute resolution process, not raised in the lower court, is not preserved. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Easterling*, 416 S.C. at 453, 786 S.E.2d at 451. It should not be given any consideration at this stage of these appellate proceedings. At any rate, as set out in Argument II, *supra* 7-8, upon the conclusion of this appeal and affirmance of the circuit court's order, an application will be filed, along with Client's written consent, satisfying the requirements of Rule 9(b) of Rule 416.

#### CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,



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PROOF OF SERVICE

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I certify that I have served the Return to Petition for Writ of Certiorari upon Petitioner, by mail, postage prepaid, to Petitioner's counsel, Robert D. Dodson, 1722 Main Street, Suite 200, Columbia, South Carolina 29201, on June 21, 2019.

  
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