THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

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S.C. SUPREME COURT

Appeal from Richland County

Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Estate of Edward James Mims by Laura M. Cole, Personal Representative,
Petitioner,

v.

The South Carolina Department of Disabilities and Special Needs, Kathi Lacy, and Stan Butkus, and

Henry D. McMaster, in his capacities as Governor of the State of South Carolina and Chair of the State Fiscal Accountability Authority,
Respondents.

PETITION FOR WRIT OF *CERTIORARI, MAMDAMUS* OR *SUPERSEDEAS*

I. INTRODUCTION.

Petitioner respectfully asks this Court to review the issues raised in this Petition, in its original jurisdiction, pursuant to Article I, Sections 3, 8 and 9, and Article 5, Section 5,

Constitution of South Carolina and South Carolina Code of Laws Section 14-3-310 and Rule 245 of the South Carolina Appellate Court Rules (SCRAP), and/or in review of the February 5, 2020 final order of the Court of Appeals dismissing the Estate's appeal of the trial court's order. [1] Appx. 152.

Petitioner certifies that requests for rehearings were made to the trial court and to the Court of Appeals, and that final orders have been issued by those Courts. S.C.R.C.P. Rule 242(d)(1). Appx. 88 and 152. Pursuant to S.C.R.A.P. Rule 242(b), a writ of *certiorari* may be granted where, as here, there are special and important reasons. Original jurisdiction is appropriate in cases such as this that present novel questions of law and substantial constitutional issues. Id.

Rule 245 allows this Court to entertain matters in its original jurisdiction when the matter cannot be determined in a lower court in the first instance, without material prejudice to the rights of the parties. Respondents argued below that the Court of Appeals did not have jurisdiction to hear the issues raised in that Court, and that Court agreed.

Petitioner seeks to join Henry D. McMaster in his capacities as Governor of the State of South Carolina and as Chair of the State Fiscal Accountability Authority (hereinafter referred to as the "OG/SFAA Respondents") in the constitutional issues raised in the original jurisdiction of this Court.

The Court may also consider that this case also raises issues related to those in the pending case of *South Carolina Association of Advocates v. McMaster,* Case No. 2019-002089.

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[1] In *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control,* 387 S.C. 380, fn. 1 (2010), petitioners combined writs of *certiorari* and *supersedeas* with a notice of appeal. This Court dismissed the appeal as interlocutory, but determined that exceptional circumstances existed, granting a writ of *certiorari.*

The Estate of Edward Mims would not object to the Court's consolidation of these cases.

II. BACKGROUND

A. History of Case. This lawsuit was originally brought more than a decade ago by Edward Mims, a severely intellectually and physically disabled man who was subjected to abuse in DDSN programs. Defendants originally included DDSN, various former DDSN officials and the Babcock Center.[2] *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388 (2017, withdrawn, substituted and refiled February 21, 2018). The DDSN Respondents have been represented by private counsel retained by the South Carolina Insurance Reserve Fund (IRF), a division of the State Fiscal Accountability Authority (SFAA) which is chaired by Governor McMaster.

As affirmed in the affidavit of former DDSN Commissioner, Deborah McPherson, during her tenure as a DDSN Commissioner, between 2009 and 2014, that governing board was not given the opportunity to vote to determine whether to continue to litigate or to settle cases. Appx. 77-78. McPherson reported that the governing board of DDSN was "kept in the dark about litigation and when the Davidson firm did meet with Commissioners to review legislation, we were not provided with an accurate assessment of cases, based on my later knowledge of how the cases were resolved by the Courts." Id. at 77. Her affidavit states that "this law firm will drag out cases and try to starve out plaintiffs by driving up litigation costs and delaying trials, forcing families to give up or settle for less than the case is worth." Id. at 77-78. The minutes of DDSN Commission meetings and the docket of this case show that the I.R.F. attorneys representing DDSN continue these practices, in violation of this Court's unambiguous rules discussed below.

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[2] Edward Mims died during the litigation and the Babcock Center defendants were dismissed when a settlement was reached by the Personal Representative.

The public importance of the discovery abuse issues raised in this case is shown in former Commissioner McPherson's statement that when DDSN Commissioners "attempted to obtain information about cases, we were instructed that we were interfering with management." Id.

In 2012, this Court reversed the trial court's award of summary judgment and remanded the case for trial. *Mims v. Babcock Center, Inc.*, 399 S.C. 341 (2012). On remand, the Richland County Court of Common Pleas again granted the DDSN Respondents' motion for summary judgment in 2014.

The South Carolina Court of Appeals reversed the trial court in an unpublished decision in 2017. Appellate Case No. 2014-001373, *Estate of Mims v. S.C. Dep't of Disabilities & Special Needs,* 2017 S.C. App. Unpub. LEXIS 455 (S.C. Ct. App., Nov. 8, 2017). In February, 2018, the Court of Appeals withdrew that unpublished opinion, and substituted a published opinion in favor of the Estate on the statute of limitations issues in the Tort Claims Act and Section 1983 claims. *Estate of Edward Mims v. S.C. Dep't. Of Disabilities & Special Needs*, 422 S.C. 388 (S.C.Ct.App. February 21, 2018). This Court denied the state's petition for a writ of *certiorari* and the case was again remanded for trial in August of 2018.

The case was number one on the trial roster when the parties consented to a scheduling order providing 90 days for discovery. 352. The time for discovery was extended a second time, until March 1, 2019. A third extension was granted, with the trial court setting a deadline of May 31, 2019 to complete discovery, with mediation to be conducted by July 19, 2019.[3] Appx. 20. That order states:

Defendants have noticed over a dozen depositions since December and the Plaintiff has

[3] The trial court allowed for an extension of up to 30 days only by consent of the parties. Appx. 21.

> supplemented discovery responses at the request of the Defendants...The parties have in good faith attempted to comply with this Court's scheduling Orders but have been unable to complete them in a timely fashion.

Appx. 21.

During the first decade of this litigation, the state took only two depositions. The DDSN Respondents took approximately a dozen more depositions after the 2018 remand and sought to take more after the May 31, 2019 deadline to complete discovery.[4] When counsel for the DDSN Respondents requested consent to extend the discovery period a fourth time, the Personal Representative agreed to extend only to allow several depositions of witnesses not previously deposed, on the conditions that taking these depositions would not delay the deadline for mediation and that prior arrangements be made for the DDSN Respondents to pay those expert witnesses' fees and costs. Appx. 65.

Instead of agreeing to those conditions, on the day before the third discovery deadline expired, counsel for the DDSN Respondents filed a motion to extend the date for mediation and the discovery deadline a fourth time, this time for an additional 90 days. Appx. 228. Again, this action was taken without consulting the governing board of DDSN about its litigation objectives and it delayed mediation and trial.[5] After the May 31, 2019 deadline had passed and before the

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[4] Plaintiff took approximately a dozen depositions prior to the last appeal to this Court, but none were taken after the last remand.

[5] The minutes of DDSN Commission meetings document that no executive sessions held to receive legal advice in 2019, and that the last time legal advice was received by the governing board of DDSN was October 1, 2018, when the DDSN Commission voted to approve a settlement of the lawsuit South Carolina Protection and Advocacy filed in 2007, seeking to require DDSN to promulgate regulations. Appx. 460-462. A quorum of the governing board was not present at the May 16, 2019 DDSN Commission meeting, and no executive session was held to receive legal advice at the prior (April) meeting or the next DDSN Commission meeting held on June 20, 2019. Appx. 490-512.

trial court ruled on that motion, the DDSN Respondents mailed five subpoenas to non-party witnesses, again without consulting the governing board of the DDSN Commission. Appx. 198-227. Two of these witnesses had already been deposed by the state and two were former Commissioners. See affidavits at Appx. 76-88.

In response, the Estate filed a motion for a protective order, providing the trial court affidavits of the non-party witnesses, including former DDSN Commissioners, explaining why the subpoenas constituted abusive and witness-chilling discovery tactics and should be quashed.[6] Appx. 55-63. Again, without discussing litigation objectives with the current DDSN Commissioners, as this Courts Rules required I.R.C. counsel to do, without notice to the Commission counsel sent process servers to the homes or offices of these non-party witnesses (including former DDSN Commissioners).[7] Appx.72-88. The Estate again requested a protective order, which included a request to protect the witnesses from retaliation. Appx. 94,

The trial court granted the DDSN Respondents' motion to compel and summarily denied the Estate's motion for protection, without considering the objections of Petitioner or the witnesses and without providing reasons for failing to address concerns identified in the Estate's

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[6] The importance of the chilling effect of on DDSN Commissioners cannot be overstated, coming at the time when DDSN Commissioners need to be speaking out. Commissioners learned in 2019 that from 2013 until 2018, DDSN failed to provide cost reports required by both federal law and the agency's applications approved by CMS for programs costing in excess of $700,000,000 a year. The most recent Annual Accountability Report of DDSN acknowledges that DDSN failed to provide required cost reports for the years 2013 through 2018, admitting that in failing to submit these required cost reports, the agency is "now aggregating into a sizable contingent liability estimated in the range of $10-$15 million based on the FY16 & 17 cost reports." Appx. 157-163, see page A-6.

[7] DDSN minutes document that no executive session was held to discuss litigation, although the Commission went into executive session to "discuss a contractual matter regarding Mentor," but no action was taken. Appx. 407-528.

motion. Appx. 168-170. The Estate moved to reconsider and the trial court denied that motion also. Appx. 95. The Estate filed a notice of appeal in the Court of Appeals. Appx. 155.

The South Carolina Court of Appeals dismissed the Estate's appeal on December 5, 2019, on the grounds that the underlying discovery issues are not immediately appealable. Appx. 154. On February 5, 2020, the Court of Appeals denied the Estate's motion to reconsider. Appx. 152.

Respondents certainly cannot now argue now that the issues raised below are not ripe, as they have done in other long-suffering cases. *Levin v. S.C. HHS*, 2015 U.S. Dist. LEXIS 31754 (S.C. D.C. 2015), remanded by Fourth Circuit in *Stogsdill v. S.C. HHS,* 674 Fed. Appx. 291 (4th Cir. 2017), remanded by Fourth Circuit the second time *Stogsdill v. Azar*, 765 Fed. Appx. 873 (4th Cir. 2019) (a case filed in 2011 case now pending in the district court on the second remand) and *Kobe v. Haley, 666 Fed. Appx. 281*(4th Cir. 2016) (a case filed in 2010, now pending, for the second time, in the Fourth Circuit). Petitioner filed the petition for certiorari in the Court of Appeals to insure that right of review would not be lost. Petitioner seeks review of that February 5, 2020 order, combined with review of issues raised below in this Court's original jurisdiction.

This petition includes original jurisdiction claims against the Governor, who has failed to appoint DDSN Commissioners in a reasonably timely manner, thereby allowing the Commission to continue to function without a quorum during the time of much of the underlying discovery dispute. See pending case of *S.C. Association of AdvocatesThe Insurance Reserve Fund v. McMaster,* Case No. 2019-002089. Indeed, there was no quorum present at the DDSN Commission any of the DDSN meetings held in May, August, September, October, November or December, 2019. Appx. 140-152.

On September 24, 2019, the Office of the South Carolina Attorney General advised that resignations of DDSN Commissioners were ineffective, and that those Commissioners continued

to serve until their successors were appointed. Appx. 111-116. Citing South Carolina Code Ann. Section 44-20-210. Instead of advising these four individuals of their continuing duty to serve, upon information and belief, Governor McMaster took no action to instruct them to return to their positions to which he appointed them (when the discovery was made that cost reports had not been filed for five years). It is undisputed that none of the four returned to their duties after the opinion of the Attorney General made clear that their duties continued.

Governor McMaster also chairs and appoints the director of the South Carolina State Fiscal Accountability Authority, which provides insurance to DDSN through the Insurance Reserve Fund. S.C. Code Ann. Sections 1-11-10(A), 1-11-140 and 15-78-10 through 15-78-150. As stated on the Fund's website at https://www.irf.sc.gov/:

> The Insurance Reserve Fund functions as a governmental insurance operation with the mission to provide insurance specifically designed to meet the needs of governmental entities at the lowest possible cost. The Insurance Reserve Fund operates like an insurance company, by issuing policies, collecting premiums (based in consultation with actuaries), and by paying claims from the accumulated premiums in accordance with the terms and conditions of the insurance policies it has issued. The Insurance Reserve Fund uses Willis Towers Watson, as its consulting actuaries in determining rates, IBNR reserves, adequacy of loss reserves, and adequacy of policyholders equity in making management recommendations to the State Fiscal Accountability Authority regarding the financial management of the Fund.

According to the IRF website: "The Insurance Reserve Fund currently insures over $42.0 billion in property values, state and local governmental entities which employ over 170,000 employees, over 39,000 vehicles, 5,900 state school buses and 14 hospitals with over 2,600 governmentally employed physicians and dentists." The I.R.F., plainly put, is an insurance provider, not an expert in matters raised in the Mims or other DDSN lawsuits, where great deference has been given to decisions of the agencies.

B. DDSN Commission. The General Assembly provided by statute that the governing

board of the South Carolina Department of Disabilities and Special Needs shall consist of seven members appointed by the Governor, one must be appointed from each Congressional District of the state. S.C. Code Ann. 44-20-210. One Congressional District has been vacant since May 2018, and another since May, 2019.[8] Appx. Two other districts did not have representation from June, 2019 and August, 2019, respectfully, until successors were appointed to fill those two seats in January, 2020. Appx. 409-411.DDSN Commissioners have not voted to take action on any legal matter since October, 2018, when a special called meeting was held to approve the settlement of the lawsuit brought in 2007 by South Carolina Protection and Advocacy, Inc. According to the agency's minutes, no executive session has been held to discuss any legal issue (other than contractual and personnel matters) since October, 2018. Appx. 412-528.

Even after *South Carolina Advocates v. McMaster* was filed in December, 2019, DDSN has not gone into executive session to receive legal advice before filing its return and motion to dismiss that case. 520-521. Instead, the Commission went into executive session to discuss a contractual matter with a provider, without receiving advice on that important lawsuit. It is clear from those minutes that the practices former Commissioner McPherson complained of - the governing board being kept in the dark about important litigation issues - continues. Appx. 76-79.

III. Issues Presented and Arguments

1. **Does IRF counsel have a duty to keep the governing board of an insured entity informed about pending litigation against the agency and an obligation to inform and consult with the governing board regarding offers of settlement and the means by which the agency's litigation objectives are to be accomplished?**

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[8] On the day of this filing, Petitioner's counsel was informed by counsel for the Governor that two nominations have been transmitted to the Senate to fill these long-vacant positions.

This is novel issue of extreme public importance, because the law firm that probably has represented more agencies than any other in this state does not even now recognize that it has duties to its *clients* - the insured entities whose attorneys are chosen by the G.O./I.R.F. Respondents appear to argue in *South Carolina Association of Advocates v. McMaster* that attorneys chosen by the IRF have no duty to consult with and keep informed their clients - members of the governing board of an insured entity regarding lawsuits filed against the agency.

I.R.F. counsel made the same argument in this case, that the have no duty to keep the governing board of the agency informed. Appx. 403-404. In the DDSN Respondents' return to the Association's petition, DDSN argued that "a Commission vote was not necessary on this litigation decision in the Mims case, where DDSN's representation was controlled by the Insurance Reserve Fund pursuant to S.C. Code Ann. § l-11-140(A)." Return at 12-13. This is a dangerous interpretation of the law which cries out to be corrected by this Court's review of this Petition.

Failing to keep the governing board of DDSN informed of litigation proceedings in this and other cases results in immeasurable harm to the persons and families that the General Assembly has charged DDSN with the obligation to serve and support. Title 44, Chapters 20 and 21 of the South Carolina Code of Laws Ann. An example of the harm to the DDSN client and to taxpayers caused by I.R.F. counsel's understanding of their duties to their client is found in the case of *Jane Doe v. S.C. DHHS*, 398 S.C. 62 (2011). In that case, this Court ruled in 2011 that the age of onset to determine whether an applicant to DDSN programs has "mental retardation" (now called "intellectual disabilities") is age 22. As documented in the 2014 Legislative Audit Council audit of DDSN issued three years later, DDSN totally disregarded this Court's order and continued (while represented by counsel representing DDSN in this lawsuit) to apply the illegal

age 18 criteria.[9] See *S.C. Department of Disabilities and Special Needs' Process to Protect Consumers from Abuse, Neglect, and Exploitation, Administrative Issues, and a Follow Up to Our 2008 Audit* issued in June, 2014 at https://lac.sc.gov/sites/default/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DDSN_2014.pdf. On pages 60 and 61 of that audit, the LAC reported:

> DDSN's eligibility directive is inconsistent with an S.C. Supreme Court ruling. Though DDSN was not a party to the case, the Medicaid waiver at issue in the case is administered by DDSN. S.C. Code §44-20-30(12) defines intellectual disability (ID) as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." DDSN's eligibility directive provides ID diagnostic criteria consistent with the American Psychiatric Association's fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM- 4). These criteria include a requirement that the deficits in functioning that define ID be present by the age of 18. While the agency's published directive states that these criteria are based on the fifth and current edition of the manual, the fifth edition does not include a specific age of onset; rather it states that the onset of intellectual and adaptive deficits must occur during the developmental period.
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> On December 28, 2011, the S.C. Supreme Court held that, when taken together, lack of additional criteria in the state's Medicaid waiver application, the broad definition of ID in S.C. Code §44-20-30(12) and use of an onset cutoff age of 22 in a regulation promulgated by the agency indicate that the proper legal standard for ID includes an onset cutoff age of 22, not 18. The court also held that the agency's policy conflicted with law and should be disregarded. In November 2013, the S.C. Department of Health and Human Services (SCDHHS — state Medicaid agency to which applicants must appeal waiver-related decisions) directed DDSN to continue the eligibility process for the petitioner, apply the age 22 standard, and issue a new notice of approval or denial.
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> In the current directive (last updated in October 2013), the standard for eligibility for a determination of ID remains an onset age of 18. In addition, the CAT applied the age 18 standard as recently as August 2013. While the case cited above was specific to a Medicaid waiver, the effect of the general age of onset directive is that all applicants who do not meet the age 18 cutoff will be denied eligibility for DDSN services. The applicant would never get to the point of examination for waiver eligibility.

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[9] DDSN and DHHS were both represented in Doe's federal lawsuit by the same law firm that represents DDSN in this case, litigation that dragged out for fourteen years in federal courts.

Untold numbers of intellectually disabled persons were harmed by benefits being denied because DDSN failed to implement the ruling of this Court and counsel failed to communicate this Court's ruling to the Commission. The DDSN Respondents will surely trot out the argument that DDSN was not the defendant in *Jane Doe v. DHHS*. But, DDSN was represented by the same law firm in the simultaneous parallel case in the federal court, *Doe v. Kidd,* in which DDSN challenged Doe's eligibility for services she was qualified to receive from 2003 until 2016. *Doe v. Kidd III*, 656 Fed. Appx. 643 (4th Cir. 2016).

I.R.C. counsel represented DDSN in Doe's three successful appeals to the Fourth Circuit, where her attorneys were awarded $669,077.20 for work performed in the federal court until 2013, in addition to $1,312,681.41 for work performed in the state administrative appeal that lasted from 2005 until 2013 (*Jane Doe v. DHHS, supra*) and post-2013 work in the federal courts. In addition to the legal fees state taxpayers paid for work performed by numerous agency and I.R.F. funded attorneys, the I.R.F. paid a total of $1,981,758 in legal fees and costs necessitated in order to obtain needed services for a single intellectually disabled young woman.[10] These costs would not have been necessary had I.R.F. counsel communicated with its clients - the DDSN Commission about their trial objectives. Appx. 77-79.

The litigation decisions and tactics which drug that case and this one out for years were by no means routine matters. They were issues which this Court's rules require I.R.F. counsel to consult with their client about to determine the client's objectives. Instead, the trial tactics in this cases benefitted the attorneys paid by the hour by the I.R.F. instead of the client - the DDSN

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[10] DDSN's practice of dragging out litigation is demonstrated by the fact that Doe was twice required to wait out DDSN's two unsuccessful petitions for *certiorari* in the United States Supreme Court. *Kidd v. Doe* II, 137 S. Ct. 638, 196 L. Ed. 2d 520, 2017 U.S. LEXIS 505 (2017) and *Kidd v. Doe* I, 552 U.S. 1243 (2008).

Commission.

Compelling former members of the governing board of an insured to respond to allegedly abusive subpoenas, would leave them only the Hobson's choice - of risking contempt in the trial court and paying legal fees out of their own pockets to appeal that order in the appellate courts, or having to spend enormous amounts of uncompensated time responding to DDSN's subpoenas. This is not a litigation decision that should be made by I.R.F. counsel without consultation with the current governing board.

If the trial court's decision in this case is upheld, those current Commissioners who are, by this Court's rules, the client in this case, will likely find themselves in the same boat in the future, after they leave the Commission. Petitioners pray that this Court will consider the dangerous precedent set by that "choice" and grant the Estate's petition for review.

Qualified citizens who might consider serving on the Commission will be discouraged by the threat of being left to defend themselves from contempt proceedings, or complying with abusive discovery requests when they are called as witnesses in future cases. This will exacerbate the problem of large portions of the state going without representation on that governing board. DDSN Commissioners and others will be chilled and be unlikely to willingly testify on behalf of DDSN clients who have been, and will continue to be abused and neglected in the future without redress in violation of Article 1, §9 of the South Carolina Constitution if the lower court's ruling is not vacated.

This Court clearly recently settled any question as to who is the "client" - the named defendant, or the insurer - in *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 826 S.E.2d 270, 271 (2019):

> When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client. Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty. See Spence v. Wingate, 395 S.C. 148, 158-59, 716 S.E.2d 920, 926 (2011) (stating "an attorney-client relationship is, by its very nature, a fiduciary relationship"). Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibilities the attorney owes his client.

In that opinion, this Court held that provisions in the insurance contract, like those in S.C. Code 1-11-143(A), giving the insurer the "right to investigate and settle claims" does not transform that insurer into the "client." As this Court recognized in that case, the "insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits." Id. at 272, citing *Tiger River* 161 S.E. 491, 493-94 (1931). Acting reasonably and in good faith involves keeping the client informed about the litigation and achieving the trial goals of the client. This Court emphasized in *Sentry* that:

> ...the loyalties of the attorney may not be divided. See Fabian, 410 S.C. at 490, 765 S.E.2d at 140 ("It is the breach of the attorney's duty to the client that is the actionable conduct in these cases."). The duties an attorney owes his client are well-established according to law, and this opinion does nothing to change that. See generally Rule 407, SCACR (South Carolina Rules of Professional Conduct). The attorney owes no separate duty to the insurer. We do not recognize what the dissent calls the "dual attorney-client relationship."

Id. at 273.

This Court's Rules of Professional Conduct require the attorney to obtain "Informed consent" to trial strategy, defining that term as "agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(g). The minutes of DDSN Commission meeting show that the I.R.C. counsel

has demonstrated disregard for this Rule.

I.R.C. counsel also disregarded Rule 1.2(a), which deals with the representation and allocation of authority between the client and the lawyer. That Rule states:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by *a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.* A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter.

Comments to these Rules provide that client always "has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."

In this case, it is clear from DDSN minutes that the client was not consulted prior to filing subpoenas imposing tremendous hardship on former DDSN Commissioners and other witnesses and delaying mediation and possible settlement of this case. Comments to the rule instruct that it is the client who must "make or accept an offer of settlement of a civil matter" and the lawyer must "consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation." Those Comments instruct that Paragraph (a)(1) "requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take" and explain that:

> For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy ... must promptly inform the *client* of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

Comments to Paragraph (a)(3) instruct the lawyer to "keep the client reasonably informed about

the status of the matter, such as significant developments affecting the timing or the substance of the representation." Id. The lawyer must provide the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so."

Significantly, those Comments instruct that "In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others." The Rules provides that only where "routine matters are involved," may the attorney provide "limited or occasional reporting" to the client.

Rule 1.13(a) provides that "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13(g) provides that "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Where, as here, the organization's consent to the dual representation is required by Rule 1.7, that consent must be given "by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." In this case, there is no evidence that the consent of the governing board of DDSN to the dual representation was ever obtained to represent both the agency and the former officials Butkus and Lacy, who could not provide consent themselves.

How can a lawyer abide by the client's decisions concerning trial objectives, when the client is not informed or consulted about the lawsuit? That is a question which the Court should take this opportunity to clearly explain to attorneys hired by the I.R.F. South Carolina law has long held that an insurer has a fiduciary duty to an insured. In *Tiger River Pine Co. v. Maryland*

Casualty Co.,[11] 163 S.C. 229, 235 (1931), this Court has recognized since 1931, in what was to become the "Tyger River Doctrine" that:

> An insurer which has by the terms of a policy the exclusive right to settle claims arising against the assured, the assured being expressly prohibited in the policy from assuming any liability or interfering in any legal proceedings or negotiations for settlement, must act with good faith towards the assured, and if, by refusing to compromise, the insurer acts with improper motives--as, to coerce the assured into bearing part of the expense of compromising for a sum within the liability covered by the policy, or slightly in excess thereof, in lieu of taking the risk of a large judgment being recovered, or goes to trial or appeals from an adverse judgment with view solely to its own interests to the exclusion of the just rights of the assured--it does so at the peril of probably being held liable for any sum recovered by the claimant, even though in excess of the face of the policy.

More recently, this Court held in *Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 339 (2017) that:

> "If the insured does not know the grounds on which the insurer may contest coverage, the insured is placed at a disadvantage because it loses the opportunity to investigate and prepare a defense on its own." Desert Ridge Resort LLC v. Occidental Fire & Cas. Co. of N.C., 141 F. Supp. 3d 962, 967 (D. Ariz. 2015). Indeed without knowledge of the bases upon which the insurer might dispute coverage, "the insured has no reason to act to protect its rights because it is unaware that a conflict of interest exists between itself and the insurer." Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1498 (10th Cir. 1994) (internal quotation marks and citation omitted).

This case represents an oppotunity for this Court to explain to DDSN and I.R.F. counsel that there exists no legal basis for the DDSN Respondents' argument that the insurer, in this case IRF, somehow becomes the "client." I.R.C. counsel representing the DDSN Respondents have argued that S.C. Code Ann. 1-11-140(A) provides justification for not treating the DDSN Commission as the client. That statute states:

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[11] The reporter misspelled "Tyger River" in that opinion, as the case clearly refers to the "Tyger River" in Union County. See *Sentry Select Ins. Co. v. Maybank Law Firm*, LLC, 826 S.E.2d 270, fn. 3 (2019).

> (A) The State Fiscal Accountability Authority, through the Insurance Reserve Fund, is authorized to provide insurance for the State, its departments, agencies, institutions, commissions, boards, and the personnel employed by the State in its departments, agencies, institutions, commissions, and boards so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment. The insurance also may be provided for physicians or dentists employed by the State, its departments, agencies, institutions, commissions, or boards against any tort liability arising out of the rendering of any professional services as a physician or dentist for which no fee is charged or professional services rendered of any type whatsoever so long as any fees received are directly payable to the employer of a covered physician or dentist, or to any practice plan authorized by the employer whether or not the practice plan is incorporated and registered with the Secretary of State; provided, any insurance coverage provided by the authority may be on the basis of claims made or upon occurrences. The insurance also may be provided for students of high schools, South Carolina Technical Schools, or state-supported colleges and universities while these students are engaged in work study, distributive education, or apprentice programs on the premises of private companies. Premiums for the insurance must be paid from appropriations to or funds collected by the various entities, except that in the case of the above-referenced students in which case the premiums must be paid from fees paid by students participating in these training programs. *The authority has the exclusive control over the investigation, settlement, and defense of claims against the various entities and personnel for whom it provided insurance coverage and may promulgate regulations in connection therewith.*

(Emphasis added.) In *Tiger River* and *Harleysville*, the insurance policy in question, like South Carolina Code 1-11-140(A) gave the insurer "exclusive control" over the litigation, but nothing in those or other opinions of this Court interpreting that phrase suggests that this Court considers that language to transform the insurance carrier into the "client" to whom this Court's Rules of Professional Conduct require clear and unambiguous responsibilities.

Other law firms represented by I.R.F. have taken the same position, i.e. that the governing board or agency director (in the case of an agency like DHHS, where the director is the highest official) need not be consulted or informed regarding mediation conferences. It is the experience of Petitioner's counsel that DDSN and other law firms representing agencies involved in litigation involving DDSN clients have refused plaintiffs' requests to inform DDSN Commissioners of mediation conferences. S.C.A.D.R. Rule 6 establishes duties of "the Parties,

Representatives and Attorneys Mediation." These duties include (a) the duty to inform and (b) to attend mediation. This rule provides that "all attorneys should fairly and objectively inform their *clients* about mediation and arbitration." The Rule requires the following persons to "physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties:"

> (1) The mediator;
> (2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, *a representative of that agency with full authority to negotiate on behalf of the agency* and recommend a settlement to the appropriate decision-making body of the agency;
> (3) The party's counsel of record, if any; *and*
> (4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

When an agency is governed by a Commission established by the General Assembly, only that governing board can grant "full authority to negotiate on behalf of an agency" to an "officer, director or employee" of that agency.

To allow any entity not so appointed with that power by the General Assembly would ignore the clear legislative intent to establish a Commission, with each Congressional District of the state represented, and thus violate the Separation of Powers mandate of the South Carolina Constitution contained in Article I, § 8 of the South Carolina Constitution. As this Court ruled in *Hampton v. Haley*:

> The South Carolina Constitution establishes three branches of government and requires they be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. This mandate of a separation of powers stems from "the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances." State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

403 S.C. 395 (2013). The clear intent of the General Assembly set forth in S. C. Code Section 44-20-210 is violated by giving an attorney hired by the I.R.C. that power.

Allowing attorneys hired by the I.R.C. to control litigation, without consulting the governing board of DDSN also deprives plaintiffs of their due process rights established under Article I, §3 of the South Carolina Constitution which states that:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Delays in this case resulting from litigation decisions being left in the hands of I.R.F. counsel, without consultation with and direction from the DDSN Commission have also resulted in a violation of Mims' due process rights under Article I, § 9 of the South Carolina Constitution, which provides citizens of this state the right to a "speedy remedy." The state's constitution provides in that Section that "All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."

It is obvious from the DDSN Respondent's return to the petition filed in *South Carolina Association of Advocates v. McMaster* that they consider the obligation to treat the governing board of DDSN as the "client," novel warranting this Court's review of that issue. Review of these issues is a matter of extreme importance, one of great public concern. The violations complained of herein are continuing, and not limited to this case, warranting this Court's review, not only to protect the rights of Mims's Estate, but also to prevent the same harm from being imposed on similarly situated DDSN clients, their families and witnesses, and the taxpayers of this state.

2. Did the trial court abuse its discretion by ordering discovery that exceeded that permitted by the South Carolina Rules of Civil Procedure?

Plaintiffs recognize that a trial judge's rulings on discovery matters will not be disturbed by an appellate court "absent a clear abuse of discretion." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (citing *Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989)).* However, a writ of *certiorari* may be issued by this Court to review a discovery order "where exceptional circumstances exist." *Id. at 577, 683 S.E.2d at 498* (citing *Laffitte v. Bridgestone Corp.,381 S.C. 460, 674 S.E.2d 154 (2009)).* Exceptional circumstances exist in this case, where abusive subpoenas were served by private attorneys hired by the I.R.F., without considering the trial objectives of the governing board of DDSN, or even informing the Commission of the actions Respondent's counsel intended to take against former DDSN Commissioners and other witnesses.

Plaintiffs are "keenly aware that the scope of discovery is broad" in South Carolina. *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control,* 387 S.C. 380, 387 (2010). But, there are limits. This Court has observed that trial courts have been "generally unwilling to recognize and enforce" those limits. Id. As in *Oncology*, the discovery demands in this case have been "abusive and beyond the pale," particularly as they relate to the oppressive discovery demands directed at former members of the governing board of the South Carolina Department of Disabilities and Special Needs intended to chill their testimony. Id.

The Petitioner recognizes that this Court's "willingness to review a discovery order by way of a writ of *certiorari* will be as rare as the proverbial 'hen's tooth.'" This case, which was filed in 2007 by an impoverished, severely intellectually disabled plaintiff, represents such a rare

case. Rather than asking this Court to "micromanage discovery orders," Petitioner urges this Court to "speak to trial courts generally" once again regarding its concern that "'discovery practice' has become a cottage industry" and that the merits of the Petitioners a claim have been improperly "relegated to a secondary status." Id. at 388. The issues Petitioner raises are of tremendous public importance to poorly funded plaintiffs, who must rely primarily upon volunteer witnesses. Abusive discovery practices, such as those in this case, allow the deep pocketed I.R.F. to obstruct access to justice, disregard injured DDSN clients right to a prompt trial and provide no incentive to fairly resolve cases.

The trial court erred as a matter of law and abused its authority by failing to consider and rule upon Petitioner's arguments that (1) the subpoenas required non-parties to produce unreasonably cumulative or duplicative information obtainable from DDSN that was "more convenient, less burdensome, or less expensive," (2) DDSN had "ample opportunity by discovery in the action to obtain the information sought; and that (3) the subpoenas were "unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." S.C.R.C.P. Rule 26(a).

The trial court also erred by failing to consider and rule upon Petitioners arguments supported by Rule 26(c) of the South Carolina Rules of Civil Procedure, which provides that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain

> matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Rule 45 S.C.R.C.P.(c) provides protection to persons subject to subpoenas. That Rule requires that:

> (1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued *shall enforce this duty* and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

The witnesses subject to the DDSN Respondents' abusive subpoenas served timely written objections pursuant to Rule 45(B) S.C.R.C.P. The trial court erred by failing to consider and rule upon those objections and failing to protect non-party witnesses from "significant expense resulting from the inspection and copying commanded," as required by that Rule. The trial court erred by failing to consider and rule upon Petitioner's objections regarding non-party witnesses pursuant to Rule 45(c)(3)(A), which provides that the trial court "shall quash or modify" a subpoena served on a non-party that: (i) fails to allow reasonable time for compliance; or (iv) subjects a person to undue burden. The trial court erred by failing to consider and rule upon objections that required production by non-parties of "material that cannot be otherwise met without undue hardship" and ignoring Petitioner's objections that DDSN Respondents refused to assure that the persons to whom the subpoenas were addressed would be reasonably compensated." The lower court also erred by failing to address Petitioner's objections that the subpoenas required production of electronically stored information from sources that the witnesses identified as "not reasonably accessible because of undue burden or cost," and failing

to require the DDSN Respondents to "good cause, considering the limitations of Rule 26(b)(6)(B)" or specifying conditions for the discovery.

For these reasons and those described in more detail in the witnesses affidavits, the trial court abused its authority by compelling non-party witnesses to respond to the subpoenas issued by I.R.F. counsel, without consulting, or even informing the governing board of DDSN. Appx. 72-87. In *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. at 388, this Court found a decision of the Texas Supreme Court in a similar situation to be persuasive. Quoting the Texas Supreme Court's order granting mandamus relief from overly broad discovery requests in CSX Corp., 124 S.W.3d 149 (2003), this Court held that:

> Generally, the scope of discovery is within the trial court's discretion. However, the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.
>
> ...Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters.

Id. at 152 (internal citations omitted). As in those cases, the trial court "abused its discretion by issuing an overly broad discovery order." The trial court erred by failing to consider and rule upon the objections of the witnesses set forth in the Petitioner's motion for protection and their affidavits. As the Texas Supreme Court did in that case, this Court should vacate the trial court order compelling discovery. Id. at 153. Petitioner respectfully prays that this Court will again send a message to trial courts that they must "impose reasonable discovery limits" by not allowing discovery that exceeds that permitted by the rules of procedure and that this Court will again decline to "rewrite and narrowly tailor" the "oppressive discovery requests so as to make them proper." *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl.*

Control, 387 at 388-389. To do so "would reward improper conduct" and, as in that case, "the proper remedy is to vacate the requests."

IV. Conclusion

This case presents the important, apparently novel question (or at least novel to the I.R.C. attorneys involved in this case) of "who is the client" when the I.R.C. retains a private attorney to represent a state agency. Respondent has argued that counsel retained by the I.R.C. has no obligation to keep the governing board of DDSN - it's client - informed regarding the litigation, or to obtain consent of the Commission regarding the means to be used to accomplish the litigation objectives of their client.

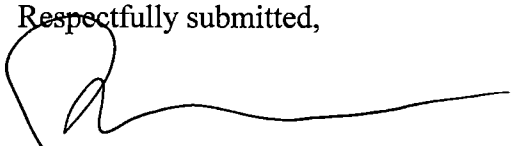
Unless the trial court's order is vacated, current DDSN Commissioners will also be chilled from testifying in this and any other proceedings, at a time when it was recently learned that the agency failed for at least five years to provide cost reports for this agency which spends more than $700 million in taxpayer dollars each year. Chilling these representatives appointed by the Governor at this critical time will not only allow litigation to drag out, but will prevent those officials from coming forward with information needed to protect other DDSN clients and the taxpayers of this state.

The matters raised in this Petition cannot be entertained in a lower court in the first instance, without material prejudice to both the Estate of Edward Mims and the witnesses, some of whom are former members of the governing board of DDSN. The actions complained of in this Petition violate not only the clear and unambiguous Rules of Professional Conduct and Rules of Civil Procedure established by this Court, but also the Separation of Powers mandate of the South Carolina Constitution and the due process rights of Petitioners, as described above.

For the reasons set forth above and in the affidavits of the non-party witnesses and

Petitioners' filings in the lower courts, the Estate of Edward Mims respectfully prays that this Court will grant this Petition and direct the parties to file briefs on these issues.

Respectfully submitted,



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March 6, 2020

THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

RECEIVED

MAR 06 2020

S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas

Robert E. Hood, Circuit Judge

Estate of Edward James Mims by Laura M. Cole, Personal Representative,
Petitioner,

v.

The South Carolina Department of Disab ilities and Special Needs, Kathi Lacy, and Stan Butkus,
and
Henry D. McMaster, in his capacities as Governor of the State of South Carolina and Chair of the State Fiscal Accountability Authority,
Repsondents.

CERTIFICATE OF SERVICE

On March 6, 2020, the Petition for Writ of *Certiorari, Mamdamus* or *Superdeas*, the Complaint, and the Appendix were sent by Priority United States Mail to the following:

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Thomas Limehouse, Esq.
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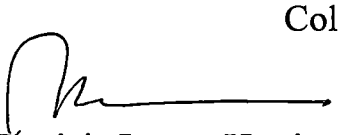

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