RECORD NO. 08-2013

In The
United States Court of Appeals
For The Fourth Circuit

RAMON HERNANDEZ,

Plaintiff – Appellant,

v.

ANN ABEL, MD,

Defendant – Appellee,

and

A. ABLE; B. BAKER; C. CHARLIE,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2013	}	
	}	**Appeal from United States**
	}	**District Court of South**
RAMON HERNANDEZ	}	**Carolina**
	}	
Plaintiff-Appellant	}	**Civil Action, No. 2:06-02582-MBS**
	}	
v.	}	
	}	
ANN ABEL, M.D.	}	**Disclosure Statement**
	}	
A. ABLE,	}	
	}	
B. BAKER,	}	
	}	
C. CHARLIE,	}	
	}	
Defendants-Appellees	}	
	}	

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to FRAP 26.1 and Local Rule 26.1, Ramon Hernandez, the Plaintiff-Appellant in the above-captioned case, makes the following disclosure:

1. Is Ramon Hernandez, the Plaintiff-Appellant in the above-captioned case, a publicly held corporation or other publicly held entity? **NO.**
2. Does Ramon Hernandez, the Plaintiff-Appellant in the above-captioned case, have a parent corporation? **NO.**
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? **NO.**
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? **NO.**

5. Is Ramon Hernandez, the Plaintiff-Appellant in the above-captioned case, a trade association? **NO.**

6. Does this case arise out of a bankruptcy proceeding? **NO.**

Dated: October 6, 2008

/s/ Stuart M. Axelrod

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I.
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

District **South Carolina** Judge **Margaret B Seymour**
District Court Docket Number **CA No. 2:06-02582-MBS**
Statute or other authority establishing jurisdiction in the:
District Court **28 U.S.C. § 1331**
Court of Appeals **28 U.S.C. § 1291**

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from **February 4, 2008**
2. Date this notice of appeal filed **April 16, 2008**
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b) **February 14, 2008**
4. Date of entry of order deciding above post-judgment motion **March 17, 2008**
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b) **None**
   Time extended to **Not applicable**

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits? [**x**] Yes [ ] No
2. If no, **Not applicable**

Based upon the above information provided by Plaintiff-Appellant's docketing statement, the district court had jurisdiction over this dispute under 28 U.S.C. § 1331, because the Complaint included claims of civil rights violations perpetrated by the defendants pursuant to 42 U.S.C. § 1983. Specifically, said claims involve the deprivation of a Fourteenth Amendment fundamental liberty interest of Plaintiff without Due Process of law and a violation of Plaintiff's Fourteenth Amendment guarantee of Equal Protection.

This court has jurisdiction over this appeal under 28 U.S.C. § 1291, as this is an appeal from a final order of the district court which granted summary judgment in favor of the defendants on all the plaintiff's claims. The district court's amended summary judgment order was entered on March 28, 2007. [JA-145] The plaintiff filed his notice of appeal on April 25, 2007. [JA-146]

II.
STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. ISSUE #1:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for taxable Costs [#98, JA-350..465]?

B. ISSUE #2:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465] pursuant to 42 U.S.C. § 1988?

The following issues (Issues 2a through 2f, inclusive) are associated with Judge Seymour's ORDER [#90, JA-271..275] and are inextricably intertwined with the issue as to whether the above captioned action is "frivolous, unreasonable, or without foundation," which Judge Seymour presumably found in modifying Judge Seymour's ORDER [#90, JA-271..275] and granting [#113, JA-468] Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465]. Accordingly, to insure a

meaningful review of Judge Seymour's granting [#113, JA-468] of Defendant's Motion to award Attorney Fees, the following issues must be reviewed. *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995).

1. **ISSUE #2a:**

   Did Judge Seymour of the South Carolina District Court violate the Plaintiff's Fifth Amendment guarantee against the federal government's deprivation of a person's life, liberty or property without due process of law by depriving said Plaintiff, Ramon Hernandez, of an opportunity to be heard with respect to both:

   - Defendant Abel's *Motion for Summary Judgment* [#57, JA-82..103] and
   - Judge Seymour's ORDER [#90, JA-271..275] effectively dismissing, *sua sponte*, Plaintiff's entire claim under the doctrine of judicial estoppel?

2. **ISSUE #2b:**

   Did Judge Seymour of the South Carolina District Court violate the Plaintiff's Fifth Amendment guarantee against the federal government's deprivation of a person's life, liberty or property without due process of law by depriving said Plaintiff, Ramon Hernandez, of his procedural right to discovery?

3. **ISSUE #2c:**

   Did Judge Seymour of the South Carolina District Court err in effectively dismissing [#90, JA-271..275], *sua sponte*, Plaintiff's entire claim under the doctrine of judicial estoppel, in that the doctrine of judicial estoppel cannot apply to the facts in the instant case?

4. **ISSUE #2d:**

Did Judge Seymour of the South Carolina District Court err when she did not grant Plaintiff's Motion for Partial Summary Judgment [#81, JA-174..223], in that she failed to hold that when Defendant Ann Abel, M.D. and other MUSC personnel caused Baby Judith's life-support systems to terminate, said persons:

- breached their obligation under EMTALA to provide emergency medical treatment to Baby Judith;
- breached their affirmative Fourteenth Amendment due process duty under *DeShaney* to protect Baby Judith, who was a minor in the care and custody of said persons; and
- deprived Plaintiff, Ramon Hernandez (the natural father of Baby Judith), of his [fundamental constitutional] parental rights without due process of law under *Santosky v. Kramer*?

5. **ISSUE #2e:**

Did Judge Seymour of the South Carolina District Court err when she did not grant Plaintiff's Motion for Partial Summary Judgment [#81, JA-174..223], in that she failed to hold that South Carolina's Uniform Determination of Death Act (S.C. Code § 44-53-460) is unconstitutional as applied (and on its face) because said statute:

- directly conflicts with the requirements of EMTALA and accordingly is preempted under 42 USCS § 1395dd(f) and
- allows Baby Judith's (and any other person's) previously recognized status as a person to be stripped from her by the state, in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution?

6. **ISSUE #2f:**

Did Judge Seymour of the South Carolina District Court err in denying Plaintiff's MOTION to Strike [#35, JA-65..68] Affidavits [#26, JA-26..30]?

C. ISSUE #3:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for Sanctions [#98, JA-350..465] against Plaintiff's attorney, Stuart M. Axelrod?

III.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

As stated in Plaintiff's Complaint [Paragraph #1, JA – 12], Plaintiff identifies the nature of the case, as follows.

> "This action is a civil rights claim for money damages under the United States Constitution, particularly pursuant to the Fourteenth Amendment to the Constitution of the United States, and under federal law, particularly pursuant to Title 42 of the United States Code, Section 1983, brought by Plaintiff against Individual Defendants for money damages (actual and punitive), where the conduct of said Individual Defendants, as state actors, (a) deprived Hernandez of a fundamental liberty interest without Due Process of law and (b) was in violation of Hernandez's constitutional guarantee of Equal Protection, all in violation of Hernandez's constitutional rights under the Fourteenth Amendment."

B. COMPLAINT SUMMARY

As stated in Plaintiff's Complaint [Paragraph ##18-22, JA – 16..17], Plaintiff identifies the complaint summary, as follows.

> ". . .
>
> Deprivation of Plaintiff's U.S. Constitutional Guarantee of Equal Protection and Due Process Flowing from the Fourteenth Amendment of the U.S. Constitution
>
> 18. The Individual Defendants, as state actors, had a duty to protect Judith Hernandez, where such duty arose out of the special relationship created and assumed by the state (i.e., MUSC) with Judith Hernandez. More specifically, Judith Hernandez was in the care and

custody of MUSC for the purpose of receiving medical treatment (i.e., life support). At all relevant times, Judith Hernandez was unable to act on her own behalf. Further, at the time of Judith Hernandez's untimely death, the South Carolina Family Court (Judge Berry Mobley) was in the process of identifying the person (or persons) who would have made medical decisions on behalf of Judith Hernandez. Accordingly, MUSC had a constitutional duty to assume responsibility for the safety and general well-being of Judith Hernandez.

19. When medical personnel, agent/employees of MUSC, including the Individual Defendants, failed to provide the life support necessary to continue Judith Hernandez's life, they transgressed the substantive limits of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

20. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the "right to privacy" implicates the fundamental liberty interest in the right to engage in certain highly personal activities, such as the right to private decision-making regarding family matters.

21. In particular, there is a fundamental liberty interest in the parent-child relationship, wherein states must guarantee a parent significant procedural safeguards against improper termination of the parent-child relationship, including a requirement that parental unfitness be proven by clear and convincing evidence. Such fundamental liberty interest in the parent-child relationship has strong roots in the history and traditions of society. In this manner, the Fourteenth Amendment provides a substantial measure of sanctuary from unjustified interference by the state.

22. Based upon the above facts, under color of state law, and consistent with MUSC's policies and procedures, Individual Defendants deprived Plaintiff of Equal Protection and Due Process of law in violation of the Fourteenth Amendment of the U.S. Constitution, in that, by intentionally 'pulling the plug' on Judith Hernandez's life support systems, the Individual Defendants deprived Plaintiff of his 'right to privacy.' More specifically, by intentionally 'pulling the plug' on Judith Hernandez's life support systems, the Individual Defendants deprived Plaintiff of his

> fundamental right to engage in certain highly personal activities, e.g., the right to make private medical decision-making within the context of the parent-child relationship, which is sourced in Plaintiff's 'right to privacy' and protected against state deprivation by the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

C. COURSE OF PROCEEDINGS - PROCEDURAL FACTS

- On **September 18, 2006**, the Complaint [#1, JA-12..20] was filed.
- On **December 12, 2006**, Defendant Abel filed her Answer [#5].
- On **December 12, 2006**, Defendant Abel also filed a Motion to Dismiss or for Summary Judgment [#6].
- On **January 2, 2007**, Plaintiff Hernandez filed a Motion [#9] to Continue Defendant Abel's Motion for Summary Judgment [#6].
- On **January 12, 2007**, in a proceeding (i.e., Motion Hearing) [#15], Judge David C. Norton:

  1. DENIED Defendant Abel's Motion to Dismiss [#6] and
  2. ORDERED the parties to conduct LIMITED DISCOVERY related to 2 issues (i.e., (1) whether Roman Hernandez is the biological father of Judith Hernandez and (2) whether Stuart Axelrod is a "witness," which would prevent him from representing Ramon Hernandez, without conflict, in the above captioned case.

- On **February 9, 2007**, Defendant Abel filed her Motion to Compel Settlement [#17].
- On **March 1, 2007**, Defendant Abel filed a REPLY [#24, JA-21..25] to [#21] the Court's Scheduling Order and the Court's Order to Conduct Limited Discovery.
- On **March 8, 2007**, Defendant Abel filed Affidavits [#26, JA-26..30] in Support of her Reply [#24, JA-21..25].
- On **March 30, 2007**, Plaintiff filed his Motion to Amend/Correct Plaintiff's Original Complaint [#27] for the purpose of adding necessary parties.
- On **April 18, 2007**, at the Motion Hearing [#54, Transcript of Motion Hearing [#119, JA-31..58]], Judge David C. Norton (a) held in abeyance Plaintiff's Motion to Amend [#27], (b) STAYED the Court's Scheduling Order [#21], (c) continued Limited Discovery as referenced above and (d) ordered Plaintiff's counsel to file a response to Affidavits [#26, JA-26..30] by 5/18/07.
- On **May 22, 2007**, Plaintiff filed a REPLY [#38, JA-59..64] to Affidavits [#26, JA-26..30] in Support of Defendant Abel's REPLY [#24, JA-21..25].
- **On May 18, 2007**, Plaintiff filed a MOTION to Strike [#35, JA-65..68] Affidavits [#26, JA-26..30], for which (a) Defendant Abel filed a RESPONSE [#39, JA-69..77] in

Opposition and (b) Plaintiff filed a REPLY [#41, JA-78..81].

- On **November 2, 2007**, Defendant Abel filed a Motion for Summary Judgment [#57, JA-82..103] for which ADDITIONAL ATTACHMENTS [#71, formerly #69, JA-104..121] were filed on December 5, 2007.
- As of **November 25, 2007**, the District Court had neither lifted the stay on the Court's Scheduling Order [#21], nor lifted the limitation on discovery. Consequently, on **November 25, 2007**, Plaintiff filed a Motion [#66] for the Court to Lift its (1) Limitation on Discovery and (2) Stay on the Scheduling Order [#66], for which (a) Defendant Abel filed a Response [#73] in Opposition on December 13, 2007 and (b) Plaintiff filed a REPLY [#76] on December 26, 2007.
- On **November 26, 2007**, Plaintiff filed a Motion to Continue [#67, JA-142..151] Defendant Abel's Motion for Summary Judgment [#57, JA-82..103], for which (a) Defendant Abel filed a Memorandum in Opposition [#74, JA-152..158] on December 14, 2007 and (b) Plaintiff filed a REPLY [#75, JA-159..173] on December 26, 2007.
- On **January 7, 2008**, Plaintiff filed a MOTION [#81, JA-174..223] for Partial Summary Judgment, for which Defendant Abel filed a Response in Opposition [#89, JA-224..270] on January 25, 2008.

D. DISPOSITION OF COURT BELOW

- **On February 1, 2008**, Judge Margaret B. Seymour entered an ORDER [#90, JA-271..275]: finding as moot [#27] Motion to Amend/Correct; finding as moot [#35, JA-65..68] Motion to Strike; finding as moot [#46] Motion to Produce; granting [#57, JA-82..103] Motion for Summary Judgment; finding as moot [#66, JA-122..124] Motion to Lift Stay; denying [#67, JA-142..151] Motion to Continue; finding as moot [#78] Motion to Continue; finding as moot [#79] Motion for Joinder; and denying [#81, JA-174..223] Motion for Partial Summary Judgment, for which the Court entered SUMMARY JUDGMENT [#92, JA-276..277] on February 4, 2008 in favor of Ann Abel against plaintiff and dismissing remaining defendants with prejudice.
- On **February 14, 2008**, Plaintiff filed a MOTION [#93, JA-278..312] for Reconsideration of the District Court's ORDER [#90, JA-271..275] and SUMMARY JUDGMENT [#92, JA-276..277], for which (a) Defendant Abel filed a RESPONSE in Opposition [#100, JA-313..329] on February 27, 2008 and (b) Plaintiff filed a REPLY [#101, JA-330..344] on March 10, 2008.
- **On February 19, 2008**, Defendant Abel filed a MOTION [#98, JA-350..399] (a)for Costs, (b) for Attorney Fees, and (c) for Sanctions, for which Plaintiff filed a RESPONSE [#106, JA-400..465] in Opposition on March 21, 2008.

- On **March 17, 2008**, Judge Margaret B. Seymour entered an ORDER [#104, 345..348] denying [#93, JA-278..312] Motion for Reconsideration.
- On **April 16, 2008**, Plaintiff filed a NOTICE OF APPEAL [#108, JA-349] re [#90, JA-271..275] Order on Motion to Amend/Correct, Order on Motion to Strike, Order on Motion to Produce, Order on Motion for Summary Judgment, Order on Motion to Lift Stay, Order on Motion to Continue, Order on Motion for Joinder, Order on Motion for Partial Summary Judgment, [#104, JA-345..348] Order on Motion for Reconsideration.
- On **June 12, 2008,** the USCA entered an ORDER [#111, JA-466] as to [#108, JA-349] Notice of Appeal, filed by Ramon Hernandez, dismissing the proceeding for failure to prosecute pursuant to Local Rule 45, whereupon the USCA MANDATE [#112, JA-467] as to [#108, JA-349] Notice of Appeal, filed by Ramon Hernandez, was entered on June 12, 2008.
- On **August 11, 2008**, Judge Margaret B. Seymour entered a TEXT ORDER [#113, JA-468] granting Defendant's (a) Motion for Costs [#98, JA-350..465]; (b) Motion to award Attorney Fees [#98, JA-350..465]; and (c) Motion for Sanctions [#98, JA-350..465], wherein Plaintiff's attorney, Stuart Axelrod, is ordered to pay Defendant's attorney's fees and costs.

- On **September 5,2008**, Plaintiff filed a NOTICE OF APPEAL [#114, JA-469] re [#113, JA-468] Order on Motion for Miscellaneous Relief, Order on Motion for Attorney Fees, Order on Motion for Sanctions.

IV.
STATEMENT OF THE FACTS

As stated in Plaintiff's Motion for Reconsideration [#93, JA-284 thru JA-287], Plaintiff establishes the facts of the case, as follows.

> "Baby Judith was born on June 30, 2006 at Georgetown Hospital in Georgetown, S.C.[1] On July 27, 2006, the Georgetown City Police took Emergency Protective Custody of Baby Judith pursuant to S.C. Code 20-7-610(A), the police having probable cause to believe that Baby Judith had sustained physical abuse.[2] Allegedly, on July 25, 2006, Ramon Hernandez, the father of Baby Judith, physically assaulted Baby Judith, who was three (3) weeks old at the time, by hitting her head against a tile wall.[3] To compound matters, Ramon Hernandez allegedly waited twenty-four (24) hours before seeking medical attention for Baby Judith.[4] On July 27, 2006, upon being examined at Georgetown Hospital, Baby Judith was diagnosed as having three (3) skull

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[1] South Carolina Guardian ad Litem Program Report and Recommendations of the Volunteer Guardian *ad Litem*, Fifteenth Judicial Circuit, Georgetown County, S.C. (hereinafter referred to as the Report) prepared by Therese M. Kelly, Guardian ad Litem for Baby Judith, for a Merits Hearing on August 30, 2006 in *South Carolina Department of Social Services (S.C. D.S.S.) v. Hernandez*, 2006-DR-22-447, a family court proceeding, p. 1 [See Exhibit #1 [JA-295 thru JA-298, JA-295], incorporated by reference herein, a true and correct copy].

[2] *Id.* at p. 2 [JA-296].

[3] *Id.*

[4] *Id.*

fractures and bruises all over her body.[5] Because MUSC had a Pediatric Intensive Care Unit, Baby Judith was transported from Georgetown Hospital to MUSC, where MUSC personnel placed Baby Judith on life support systems to stabilize her condition and reported that Baby Judith 'may not live because she [was] brain dead.'[6] Said life support systems consisted of creating blood flow to the brain with one machine and air to the lungs with another machine. Without either one of these machines, Baby Judith would have died. Further, while Baby Judith was a patient at MUSC, MUSC was bearing the cost of Baby Judith's emergency medical treatment.

Note: Ramon Hernandez was arrested for *Child Abuse* on July 27, 2006 and has remained incarcerated.[7] Further, on September 13, 2007, Ramon Hernandez pled guilty to *Homicide by Child Abuse* in the Court of General Sessions (Criminal Court), Georgetown County, S.C.[8]

On August 11, 2006, MUSC personnel met with Therese M. Kelly, Guardian *ad Litem* for Baby Judith, and Ernest Jarrett, Attorney for S.C. DSS, at MUSC's Pediatric Intensive Care Unit regarding Baby Judith.[9] At that meeting, Joel Cochran, the Attending Physician for Baby Judith declared:

> '[T]here is no Medical or Ethical reason for keeping this child on Life Support or continuing treatment. . . Clinically this baby is dead.'[10]

On August 30, 2006, a hearing on the merits pursuant to S.C. Code § 20-7-736 (a family court proceeding) was

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Transcript of Record (Guilty Plea), *State v. Hernandez*, 2006-GS-22-851 (S.C. Gen. Sess. September 13, 2007) [see generally, #71-2, JA-105 thru JA-121].

[9] *See Foot*note #2, p. 3 [JA-297].

[10] *Id.*

held in *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447.[11] At said hearing, Ramon Hernandez admitted to physically abusing Baby Judith.[12] In addition, 'Dr. Anne Abel, the child's physician, testified that in her medical opinion, the child is clinically brain dead.'[13]

Furthermore, at said hearing, S.C. DSS requested that the Court grant S.C. DSS the authority to make 'decisions of substantial legal significance' affecting Baby Judith, including, but not limited to, whether to withdraw her life sustaining treatment and to contemporaneously have a Do Not Resuscitate (DNR) Order in place.[14] Baby Judith's Natural Mother consented to the motion but Baby Judith's Natural Father, Ramon Hernandez, objected, because if Baby Judith's life support systems were withdrawn, the charges against Ramon Hernandez would be upgraded to *Homicide by Child Abuse*.[15] However, rather than ruling on the motion during the hearing, the Court (i.e., Judge Mobley) took the matter under advisement and requested that the attorneys for S.C. DSS (i.e., Ernest J. Jarrett) and Ramon Hernandez (i.e., Scott A. Graustein) provide the Court with additional briefing regarding the legality of granting S.C. DSS certain rights (normally retained by Baby Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems.[16]

First, in response to Judge Mobley's request for additional briefing [concerning the motion by S.C. DSS to grant S.C. DSS certain rights (normally retained by Baby

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[11] Merits Hearing Order, *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447 (Fifteenth Judicial Circuit, Georgetown County, S.C.), September 26, 2006, p. 2 [See Exhibit #2 [JA-299 thru JA-305, JA-300], incorporated by reference herein, a true and correct copy].

[12] *Id.* at p. 3 [JA-301].

[13] Order on Motion, *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447 (Fifteenth Judicial Circuit, Georgetown County, S.C.), September 7, 2006, p. 2 [See Exhibit #3 [JA-306 thru JA-307, JA-307], incorporated by reference herein, a true and correct copy].

[14] *Id.*

[15] *See* Footnote #12, p. 4 [JA-302].

[16] *Id.*

> Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems], in three steps, Ernest J. Jarrett, Attorney for S.C. DSS, argues that S.C. Code § 20-7-490(21) vests the Court with the authority to grant the relief requested.[17] First, Jarrett states that S.C. Code § 20-7-490(21) specifically provides that 'the Court may in its Order place other rights and duties with the legal custodian.'[18] Second, he observes: 'Whether or not to withdraw life sustaining treatment or to sign a DNR is normally a duty and [fundamental constitutional] right of the natural parent and decisions they would certainly be entitled to make under normal circumstances.'[19] Third, Jarrett argues that S.C. statutes give the Court the authority to divest the natural parents of those [fundamental constitutional] rights, in favor of an appointed legal custodian (e.g., S.C. DSS).[20] In using this seemingly indirect (backdoor) approach to legislative interpretation, Jarrett concludes that S.C. Code § 20-7-490(21) gives the Georgetown Family Court (i.e., Judge Mobley) the power to divest the natural parents of Baby Judith of their fundamental constitutional right to withdraw Baby Judith's life support systems in favor of S.C. DSS, as the presumed court appointed legal custodian of Baby Judith.[21]
>
> Second, in response to Judge Mobley's request for additional briefing [concerning the motion by S.C. DSS to grant S.C. DSS certain rights (normally retained by Baby Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems, in a three-pronged attack, Scott A. Graustein, Attorney for Ramon Hernandez,

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[17] Letter from Ernest J. Jarrett, Attorney for S.C. DSS, in a family court proceeding to Judge Mobley of the Georgetown (S.C.) Family Court (August 31, 2006) regarding the Merits Hearing in *S.C. DSS v. Hernandez*, 2006-DR-22-447 (Fifteenth Judicial Circuit, Georgetown County, S.C.), August 30, 2006, p. 1[See Exhibit #4 [JA-308 thru JA-309, JA-308], incorporated by reference herein, a true and correct copy].

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

argues that S.C. Code § 20-7-490(21) does not vest the Court with the authority to grant the relief requested.[22] First, S.C. Code § 20-7-490(21) allows a Court to grant to S.C. DSS ONLY 'the right to consent to . . . nonemergency medical and surgical treatment.'[23] Moreover, the statute describes several rights for which S.C. DSS may petition; 'however, the removal of medical treatment or life support is not one of these rights.'[24] Accordingly, Graustein argues: 'Absent clear statutory authority, the Court should not read into the statute that the removal of life support from a minor child is 'medical treatment' within the meaning of § 20-7-490(21).'[25] Bold added. Second, Graustein observes that S.C. (similar to other states) has a presumption in favor of life.[26] Finally, Graustein notes: 'if the Court were to grant the Department's motion, then the State, through the administrative action of one of its Departments, could take action which could subject the Defendants to being charged with further criminal conduct by the State [*Homicide by Child Abuse*]. The Defendant, Ramon Hernandez, believes that such action may violate his constitutional rights, to include due process rights.'[27]

Important Note: While the motion by S.C. DSS [to grant S.C. DSS certain rights (normally retained by Baby Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems] was under advisement by the Georgetown Family Court (i.e., Judge Mobley), MUSC withdrew Baby Judith's life-support systems and Baby Judith died on

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[22] Letter from Scott A. Graustein, Attorney for Ramon Hernandez, in a family court proceeding to Judge Mobley of the Georgetown (S.C.) Family Court (September 4, 2006), regarding the Merits Hearing in *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447 (Fifteenth Judicial Circuit, Georgetown County, S.C.), August 30, 2006, p. 1 [See Exhibit #5 [JA-310 thru JA-311, JA-310], incorporated by reference herein, a true and correct copy].

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at p. 2[JA-311].

[27] *Id.*

> September 5, 2006.[28] More specifically, based upon the testing of Baby Judith, conducted during the afternoon of September 5, 2006 by MUSC personnel, the testing of which revealed that without the machine there was basically no blood flow to Baby Judith's brain, MUSC personnel made a unilateral decision to withdraw Baby Judith's life support systems.[29] However, before withdrawing Baby Judith's life support systems, during the evening of September 5, 2006, MUSC personnel did communicate their intention to both natural parents of Baby Judith.[30]
> . . ."

In addition, as stated in Plaintiff's RESPONSE [#106, JA-417..419], Plaintiff establishes the crucial facts (a – g) in relation to Defendant Abel's MOTION [#98, JA-350..399] (1) for Costs, (2) for Attorney Fees, and (3) for Sanctions, as follows.

> ". . .
> a. Dr. Abel and other MUSC personnel [JA-297] met at MUSC on August 11, 2006 with S.C. DSS personnel and participated in a multi-disciplinary staffing concerning the prognosis and what steps needed to be taken with respect to Baby Judith. At that meeting, it was the consensus of all the treating professionals that Baby Judith needed to be removed from life support. Further, Joel Cochran, the Attending Physician for Baby Judith declared:

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[28] Order on Motion, *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447 (Fifteenth Judicial Circuit, Georgetown County, S.C.), September 7, 2006, p. 1 [JA-306].

[29] Letter from Ernest J. Jarrett, Attorney for S.C. DSS in a family court proceeding) to Judge Mobley of the Georgetown (S.C.) Family Court (September 6, 2006) regarding the motion by S.C. DSS to grant S.C. DSS certain rights (normally retained by Baby Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems. [See Exhibit #6 [JA-312], incorporated by reference herein, a true and correct copy].

[30] *Id.*

'[T]here is no Medical or Ethical reason for keeping this child on Life Support or continuing treatment. . . Clinically this baby is dead.'

b. On August 30, 2006, a hearing on the merits pursuant to S.C. Code § 20-7-736 (a family court proceeding) was held in S. C. D.S.S. v. Hernandez, 2006-DR-22-447. At that proceeding:

(1) S.C. DSS made a motion to the Court for the Court to grant S.C. DSS the authority to make 'decisions of substantial legal significance' affecting Baby Judith, including, but not limited to, whether to withdraw her life sustaining treatment;

(2) Dr. Abel spearheaded MUSC's desire to terminate Baby Judith's life support systems [JA-304; 307; 447..456], since Baby Judith was "clinically deceased, brain dead;"

(3) Dr. Abel and other MUSC personnel recognized that even though Baby Judith was clinically brain dead, there were some "legal [constitutional] implications" if Baby Judith's life support systems were removed. [JA-452..453; 457..459]

(4) With respect to the motion of S.C. DSS that the Court grant to S.C. DSS the authority to make "decisions of substantial legal significance" affecting Baby Judith, including, but not limited to, whether to withdraw her life sustaining treatment [JA-456..458], Mr. Graustein (Attorney for Ramon Hernandez, a Defendant) stated:

(a) Ramon Hernandez has never consented to having Baby Judith removed from life support. [JA-462]

(b) A primary concern (and a primary concern of the criminal attorney) of Ramon Hernandez relates to a conflict of interest in that if an agency of the state (i.e., S.C. DSS) is given the power to make the decision to have another agency of the state (i.e., MUSC) remove Baby Judith's life support systems,

such state decision could result in the upgrading of criminal charges by the state against him. [JA-302..303; 462]

Accordingly, Mr. Graustein argued that it would be improper for S.C. DSS to be allowed to make a medical decision to have MUSC remove Baby Judith's life support systems. [JA-462]

(5) On August 30, 2006, Judge Mobley considered Mr. Graustein's argument to have substantial merit so that Judge Mobley did not grant S.C. DSS's motion, but instead took S.C. DSS's motion [i.e., to grant S.C. DSS certain rights (normally retained by Baby Judith's natural parents) for the sole purpose of removing Baby Judith's life support systems] under advisement. [JA-462..464]

c. By letter dated September 4, 2006 to Judge Mobley, Mr. Graustein (Attorney for Ramon Hernandez, a Defendant) reiterated his position that granting S.C. DSS the right to be allowed to make a medical decision to have MUSC remove Baby Judith's life support systems would violate the constitutional rights of Ramon Hernandez to include his constitutional right not to be deprived of due process. [JA-310..311]

d. On the afternoon of September 5, 2006, a single test was performed on Baby Judith. As a result of this test and in comparison with prior tests (more than one month earlier), MUSC had an IMPRESSION that there was 'no evidence of cerebral cortex perfusion via internal carotid circulation, compatible with brain death [JA-103].'

e. During the evening of September 5, 2006, based upon the above stated IMPRESSION of MUSC personnel, MUSC personnel removed Baby Judith's life support systems and Baby Judith died. [JA-302..303]

f. On September 6, 2006, Ramon Hernandez was charged by the state with *Homicide by Child Abuse*. [JA-364]

g. On September 18, 2006, Ramon Hernandez filed the instant Section 1983 action in which he claimed that Dr. Anne Abel had deprived him of Substantive Due Process by causing either (1) the removal of Baby

> Judith's life support systems or (2) the denial of his right to make medical decisions regarding Baby Judith's life support systems."

V.
SUMMARY OF ARGUMENT

A. ISSUE #1:

> Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for taxable Costs [#98, JA-350..465]?
>
> Yes, Judge Seymour erred in granting [#113, JA-468]

Defendant's Motion for taxable Costs, since the District Court did not award Costs in its ORDER [#90, JA-271..275] and Defendant Abel never filed a Bill of Costs pursuant to FRCP 54(d)(1) and L.R. 54.03.

B. ISSUE #2:

> Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465] pursuant to 42 U.S.C. § 1988?
>
> Yes, Judge Seymour erred in granting [#113, JA-468]

Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465] pursuant to 42 U.S.C. § 1988, because:

1. Defendant Abel's Motion for Attorney's Fees [#98, JA-350..399] did not comply with the requirements set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978);

2. Judge Seymour's TEXT ORDER [#113, JA-468] is critically deficient under *Barber v. Kimbrell's, Inc.*, supra., which requires a "detailed findings of fact with regard to the factors considered;" and

3. Plaintiff's claims were not frivolous, had foundation and were reasonable.

Moreover, the issues (Issues 2a through 2f, inclusive) presented in the discussion below support Plaintiff's argument that the above captioned case was not frivolous, had foundation and was reasonable. These issues are associated with Judge Seymour's ORDER [#90, JA-271..275] and are inextricably intertwined with the issue as to whether the above captioned action is "frivolous, unreasonable, or without foundation," which Judge Seymour presumably found in modifying Judge Seymour's ORDER [#90, JA-271..275] and in Judge Seymour's TEXT ORDER [#113, JA-468] granting Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465]. Accordingly, to insure a meaningful review of Judge Seymour's TEXT ORDER [#113, JA-468], granting Defendant's Motion to award Attorney Fees, the following issues must be reviewed to determine whether the above captioned action is "frivolous, unreasonable, or without foundation." *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995).

C. ISSUE #3:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for Sanctions [#98, JA-350..465] against Plaintiff's attorney, Stuart M. Axelrod?

Yes, Judge Seymour erred in granting [#113, JA-468] Defendant's Motion for Sanctions [#98, JA-350..465] against Plaintiff's attorney, Stuart M. Axelrod. Defendant Abel cannot rely on S.C. Code Ann. § 15-78-120 for an award of 'reasonable expenses incurred, because of the filing of the pleading, motion or other paper, including attorney's fees', since S.C. Code Ann. § 15-78-120 is strictly limited to claims under the South Carolina Tort Claims Act. In contrast, the instant case is a Section 1983 action.

VI. ARGUMENT

A. STANDARD OF REVIEW

The standard of appellate review of the TEXT ORDER [#113, JA-468] of the South Carolina District Court granting costs, attorney's fees and sanctions, wherein Plaintiff's Counsel is ordered to pay Defendant's costs and attorney's fees is the "Clearly Wrong" standard as enunciated in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), more specifically described as follows.

> "It is well established that the allowance of attorneys' fees is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong." *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

However, application of this standard demands that that the substantive requirements of *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978) be satisfied. See below in B(1) for an analysis of said requirements.

Further, the standard of necessary appellate review of those issues (Issues 2a through 2f, inclusive) arising from the District Court's Judgment and ORDER [#90, JA-271..275] granting Summary Judgment, which are inextricably intertwined with appellate review of the TEXT ORDER [#113, JA-468], is DE NOVO and more specifically described as follows.

> "The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule *56(c)*, FRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. *Celotex*, 477 U.S. 317. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. *56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Barber v. Hosp. Corp. of Am.*, 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet 'the substantive evidentiary standard of proof that would apply at a trial on the merits.' *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993).

Rule *56(e)* provides, 'when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves'). To raise a genuine issue of material fact, a party may not rest upon the mere allegations or denials of his pleadings. Rather, the party must present evidence supporting his or her position through 'depositions, answers to interrogatories, and admissions on file, together with affidavits, if any.' *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390 (4th Cir. 1994); *Orsi v. Kickwooci*, 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C."

B. DISCUSSION OF ISSUES

1. ISSUE #1:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for taxable Costs [#98, JA-350..465]?

As argued in Plaintiff's RESPONSE [#106, JA-415], the Defendant is not entitled to an award of taxable costs under

FRCP 54(d)(1) and Local Rule 54.03 of the District of South Carolina.

First, FRCP 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." However, in the instant case, the District Court did not award "Costs" in either its ORDER [#90, JA-271..275] dated February 1, 2008 or its JUDGMENT [#92, JA-276..277] dated February 4, 2008. Accordingly, Defendant Abel cannot rely on FRCP [54](d)(1) for an award of taxable "Costs."

Second, notwithstanding the foregoing, LR 54.03 (Application for Costs) provides:

> "The items set forth below detail the costs normally allowed in the District when filing Bill of Costs pursuant to 28 U.S.C. § 1920 and Fed. R. App. P. 39(e) and are subject to final approval by the Court. Bill of costs shall be filed within the time limits set by Fed. R. Civ. P. 54(d)(2)(B) for applications for attorney's fees. Noncompliance with this time limit shall be deemed a waiver of any claim for costs."

In the instant case, Defendant Abel never filed a Bill of Costs pursuant to 28 U.S.C. § 1920 and Fed. R. App. P. 39(e) within the time limits set by FRCP 54(d)(2)(B) (i.e., 14 days). Accordingly, Defendant Able has waived any claim for costs that could have been allowed.

Finally, to the extent that Judge Seymour has awarded taxable "Costs" to Defendants in her TEXT ORDER [#113, JA-468],

Judge Seymour has modified her ORDER [#90, JA-271..275] dated February 1, 2008 and JUDGMENT [#92, JA-276..277] dated February 4, 2008. From this observation, it follows that the issues found below (i.e., Issues 2a through 2f, inclusive), which are inextricably intertwined with Judge Seymour's ORDER [#90, JA-271..275], must also be reviewed to insure a meaningful review of Judge Seymour's TEXT ORDER [#113, JA-468], granting Defendant's Motion for taxable Costs. *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995).

2. ISSUE #2:

Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465] pursuant to 42 U.S.C. § 1988?

Defendant Abel is not entitled to an award of nontaxable costs and attorney fees pursuant to 42 U.S.C. § 1988 for the following reasons.

a. Defendant Abel's Motion for Attorney's Fees [#98, JA-350..399] did not comply with the requirements set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

b. The TEXT ORDER [#113, JA-468] of Judge Seymour of the South Carolina District Court, wherein Judge Seymour granted Defendant Abel's Motion for Attorney's Fees

[#98, JA-350..399] "for the reasons stated in Defendant's memorandum" is critically deficient under *Barber v. Kimbrell's, Inc.*, supra.

c. Defendant Abel cannot show that the above captioned action was "frivolous, unreasonable, and groundless" under *Garment Co. v. EEOC*, 424 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978).

The Law

In general, expenses and nontaxable costs can be recovered as a part of the attorneys' fee award under 42 U.S.C. § 1988. *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983). For items not reimbursable as a part of an attorneys' fees award, 28 U.S.C. § 1920 allows certain costs to be taxed against the losing party. *Ramos*, 713 F.2d at 560. However, expert witness fees (and other witness fees) cannot be collected in a civil rights lawsuit. *West Virginia University Hospital v. Carey*, 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991).

In particular, a defendant in a federal civil rights case can recover attorneys' fees if she can show that the action was frivolous, unreasonable, and groundless. *Garment Co. v. EEOC*, 424 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). The award is made pursuant to 42 U.S.C. § 1988. *Wilson-Simmons v. Lake County Sheriff's Department*, 207 F.3d 818, 823 (6th Cir. 2000).

Argument

As argued in Plaintiff's RESPONSE [#106, JA-400..465], the Defendant is not entitled to an award of nontaxable costs and attorney fees pursuant to 42 U.S.C. § 1988.

First, FRCP 54(d)(2)(A-B) allows "claims for attorneys' fees and related nontaxable expenses [to be] made by motion" within fourteen days of the entry of the judgment. However, 54.02(A) [Petition for Attorney's Fees] provides: "Any petition for attorney's fees shall comply with the requirements set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), and shall state any exceptional circumstances and the ability of the party to pay the fee." In the instant case, Defendant Abel's Motion for Attorney's Fees [#98, JA-350..399] did not comply with the requirements set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978). Accordingly, on this basis alone, Defendant Abel cannot be awarded attorney's fees. *Id*.

Second, "any award of attorneys' fees must be accompanied by detailed findings of fact with regard to the factors considered," *Id.*, where "District courts in the Fourth Circuit are to consider and make detailed findings with regard to twelve factors relevant to the determination of a reasonable attorneys' fees. These include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4)

the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Id*. Accordingly, the TEXT ORDER [#113, JA-468] of Judge Seymour of the South Carolina District Court, wherein Judge Seymour granted Defendant Abel's Motion for Attorney's Fees [#98, JA-350..399] "for the reasons stated in Defendant's memorandum" is critically deficient under *Barber v. Kimbrell's, Inc.*, supra., which requires a "detailed findings of fact with regard to the factors considered." Accordingly, on this basis alone, the instant case must be reversed and remanded for additional inquiries.

Finally, in her Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465], Dr. Abel argues that she is entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988, as follows.

> "Under 42 U.S.C. §1988(b), 'the Court has discretion to award attorney's fees to the prevailing party in an action brought pursuant to 42 U.S.C. §1983.' *Cochran v. G.R. Bobo*,

> 2007 WL 1847708 (D.S.C. 2007). . . The Court held that 'when the prevailing party is the defendant, the attorneys fees should be awarded if the court finds that the plaintiff's actions were frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id*. citing *Debauche v. Trani*, 191 F.3d 499, 510 (4th Cir. 1999), citing *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)."

Here, it is important to note that the District Court did not initially find that Plaintiff's actions were "frivolous, unreasonable, or without foundation" in either its ORDER [#90, JA-271..275] dated February 1, 2008 or its JUDGMENT [#92, JA-276..277] dated February 4, 2008. From this fact, it follows that Dr. Abel is arguing in her Motion to award Attorney Fees [#98, JA-350..465] for the District Court to modify its ORDER [#90, JA-271..275] dated February 1, 2008 to now find that the Plaintiff's claims are "frivolous, unreasonable, or without foundation," because, if the District Court so finds, then Dr. Abel is now allowed "claims for attorneys' fees and related nontaxable expenses" pursuant to FRCP 54(d)(2)(A-B) and 42 U.S.C. § 1988(b), since the instant case was a Section 1983 action. *Cochran v. G.R. Bobo*, 2007 WL 1847708 (D.S.C. 2007). Accordingly, unless the District Court can lawfully modify its ORDER [#90, JA-271..275] and find that Plaintiff's claims are "frivolous, unreasonable, or without foundation," Dr. Abel is precluded from being awarded "claims for attorneys' fees and related nontaxable expenses" pursuant to FRCP 54(d)(2)(A-B) and

42 U.S.C. § 1988(b). *Cochran v. G.R. Bobo*, 2007 WL 1847708 (D.S.C. 2007).

To insure a meaningful review of Judge Seymour's TEXT ORDER [#113, JA-468], granting Defendant's Motion to award Attorney Fees, the following issues (Issues 2a through 2f, inclusive) presented below must be reviewed to determine whether the above captioned action is "frivolous, unreasonable, or without foundation," because said issues are inextricably intertwined with such determination. *Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995). More specifically, Issues 2a through 2f, inclusive, are associated with Judge Seymour's ORDER [#90, JA-271..275] and are inextricably intertwined with the issue as to whether the above captioned action is "frivolous, unreasonable, or without foundation," which Judge Seymour presumably found in modifying Judge Seymour's ORDER [#90, JA-271..275] and in Judge Seymour's TEXT ORDER [#113, JA-468] granting Defendant's Motion to award Attorney Fees and other nontaxable expenses [#98, JA-350..465]. Issues 2a through 2f, inclusive, presented below can be further broken down into (1) threshold issues and (2) issues that relate directly to the determination as to whether the above captioned action is "frivolous, unreasonable, or without foundation."

In particular, Issues 2a and 2b presented below are threshold issues that relate to Plaintiff's argument the

District Court cannot lawfully make an overall determination that Plaintiff's claims are "frivolous, unreasonable, or without foundation."

3. Issue #2a:

Did Judge Seymour of the South Carolina District Court violate the Plaintiff's Fifth Amendment guarantee against the federal government's deprivation of a person's life, liberty or property without due process of law by depriving said Plaintiff, Ramon Hernandez, of an opportunity to be heard with respect to both:

- Defendant Abel's *Motion for Summary Judgment* [#57, JA-82..103] and
- Judge Seymour's ORDER [#90, JA-271..275] effectively dismissing, *sua sponte*, Plaintiff's entire claim under the doctrine of judicial estoppel?

Firstly, as argued in Plaintiff's MOTION [#93, JA-280..282] for Reconsideration of the District Court's ORDER [#90, JA-271..275], Plaintiff argues that Judge Seymour of the South Carolina District Court erred in unlawfully precluding Plaintiff from responding to Dr. Abel's Motion for Summary Judgment [#57, JA-82..103], in violation of Plaintiff's constitutional (Fifth Amendment) guarantee of procedural due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In addition, Judge Seymour erred in unlawfully dismissing Plaintiff's entire case, sua sponte, under the doctrine of judicial estoppel, without notice and opportunity to be heard,

in violation of Plaintiff's constitutional (Fifth Amendment) guarantee of procedural due process. *Id*.

4. Issue #2b:

> Did Judge Seymour of the South Carolina District Court violate the Plaintiff's Fifth Amendment guarantee against the federal government's deprivation of a person's life, liberty or property without due process of law by depriving said Plaintiff, Ramon Hernandez, of his procedural right to discovery?

Secondly, the District Court limited discovery in the instant case. Accordingly, there has been no discovery – no interrogatories, no production of documents and no depositions upon which Plaintiff could rely (1) to overcome Defendant Abel's allegation that Plaintiff's claims are "frivolous, unreasonable, or without foundation" or (2) to establish that the decision to remove Baby Judith's life support systems was not based upon a reasonable medical standard.

Further, in Judge Seymour's ORDER [#90, JA-271..275], she found as moot [#66, JA-122..124] Plaintiff's Motion to Lift the District Court's Limitation on Discovery. Here, by depriving said Plaintiff, Ramon Hernandez, of his procedural right to discovery, Judge Seymour of the South Carolina District Court violated the Plaintiff's Fifth Amendment guarantee against the federal government's deprivation of a person's life, liberty or property without due process of law.

Moreover, Issues 2c through 2f, inclusive, presented below relate directly to Dr. Abel's substantive argument that Plaintiff's Section 1983 action is "frivolous, unreasonable, or without foundation," where the facts established by Plaintiff in Part V [Statement of the Facts] of this Brief and in Plaintiff's RESPONSE [#106, JA-417..419] overwhelmingly dispute such argument. More specifically, based upon the above referenced facts, for which Plaintiff has provided sufficient evidence, Issues 2c through 2f, inclusive, presented below, indisputably show that Plaintiff's Section 1983 action cannot be categorized as "frivolous, unreasonable, or without foundation."

5. ISSUE #2c:

> Did Judge Seymour of the South Carolina District Court err in effectively dismissing [#90, JA-271..275], *sua sponte*, Plaintiff's entire claim under the doctrine of judicial estoppel, since the doctrine of judicial estoppel cannot apply to the facts in the instant case?

As argued in Plaintiff's MOTION [#93, JA-283..290] for Reconsideration of the District Court's ORDER [#90, JA-271..275], Plaintiff argues that Judge Seymour erred in effectively dismissing [#90, JA-271..275], *sua sponte*, Plaintiff's entire claim under the doctrine of judicial estoppel, because the doctrine of judicial estoppel cannot apply to the facts in the instant case.

The Law

> "The Fourth Circuit has characterized the doctrine of judicial estoppel as 'an equitable doctrine that exists to prevent litigants from playing fast and loose with the courts -- to deter improper manipulation of the judiciary.' *Folio v. City of Clarksburg, W. Va.*, 134 F.3d 1211, 1217 (4th Cir. 1998) (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995)). The court has developed the following test for the doctrine:
>
> > In order for judicial estoppel to apply, (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position must be one of fact, rather than law or legal theory; (3) the prior position must have been accepted by the court in the first proceeding; and (4) the party to be estopped must have acted intentionally, not inadvertently.
>
> *Havird Oil Co., Inc. v. Marathon Oil Co., Inc.*, 149 F.3d 283, 292 (4th Cir. 1998) (citing *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113, 117 S. Ct. 954, 136 L. Ed. 2d 841 (1997))." [#93, JA-283]

Argument

As argued in Plaintiff's MOTION [#93, JA-283..290] for Reconsideration of the District Court's ORDER [#90, JA-271..275], Plaintiff Hernandez NEVER advanced an assertion that was inconsistent with a position taken during a previous litigation. This is clear from Plaintiff's Statement of the Facts in Part V, above. There, Plaintiff establishes:

1. On **August 30, 2006**, at a hearing on the merits pursuant to S.C. Code § 20-7-736 (a family court proceeding) in *S.C. D.S.S. v. Hernandez*, 2006-DR-22-447, Mr. Graustein (Attorney for Ramon Hernandez, the

Defendant) argued that granting S.C. DSS the right to be allowed to make a medical decision to have MUSC remove Baby Judith's life support systems would violate the constitutional rights of Ramon Hernandez to include his constitutional right not to be deprived of due process. [JA-462]. Within the context of the same proceeding, by letter dated **September 4, 2006** to Judge Mobley, Mr. Graustein (Attorney for Ramon Hernandez, the Defendant) reiterated his position and first observed that S.C. (similar to other states) has a presumption in favor of life. [JA-311]. Then, Mr. Graustein argued: "if the Court were to grant the Department's motion, then the State, through the administrative action of one of its Departments, could take action which could subject the Defendants to being charged with further criminal conduct by the State [*Homicide by Child Abuse*]. The Defendant, Ramon Hernandez, believes that such action may violate his constitutional rights, to include due process rights." [JA-311].

2. On the afternoon of **September 5, 2006**, a single test was performed on Baby Judith. [JA-103] As a result of this test and in comparison with prior tests (more than one month earlier), MUSC had an "IMPRESSION" that

there was "no evidence of cerebral cortex perfusion via internal carotid circulation, compatible with brain death." [JA-103] During the evening of September 5, 2006, based upon the above stated IMPRESSION of MUSC personnel (no evidence . . ., compatible with brain death), MUSC personnel removed Baby Judith's life support systems and Baby Judith died. [JA-302..303]. Clearly, the decision to remove Baby Judith's life support systems was not based upon a reasonable medical standard (i.e., one test with some impression).

3. On **September 6, 2006**, Ramon Hernandez was charged by the state with *Homicide by Child Abuse*. [JA-364].

4. On **September 18, 2006**, the civil attorney for Ramon Hernandez, Stuart Axelrod, filed the instant Section 1983 action in which Plaintiff claimed that Dr. Anne Abel had deprived him of Substantive Due Process by causing either (1) the removal of Baby Judith's life support systems or (2) the denial of his right to make medical decisions regarding Baby Judith's life support systems. Under Plaintiff's theory, as argued in Plaintiff's MOTION [#93, JA-283..290] for Reconsideration:

> "By UNLAWFULLY "pulling the plug" on Baby Judith's life-support systems, wherein, as noted above, MUSC breached (a) its obligation under EMTALA to provide emergency medical treatment to Baby Judith and (b) its affirmative Fourteenth Amendment due process duty to protect its citizens under *DeShaney*, *supra.*, MUSC personnel deprived the natural father of Baby Judith, Ramon Hernandez, of his [fundamental constitutional] parental rights without due process of law under *Santosky v. Kramer*, *supra*." [#93, JA-289].

5. On **April 18, 2007**, in a proceeding (i.e., Motion Hearing) [#54] in front of Judge David C. Norton, the civil attorney for Ramon Hernandez, Stuart Axelrod, defended the critical importance of the instant action by Plaintiff Hernandez, to the presumed satisfaction of Judge Norton. Transcript [#119, JA-38..49].

Although Plaintiff Hernandez pled guilty to *Homicide by Child Abuse* in a criminal proceeding more than a year later, on **September 13, 2007**, Plaintiff Hernandez continued to maintain his civil action, based upon his reasoning as enunciated by Mr. Graustein (Attorney for Ramon Hernandez, the Defendant in a family court proceeding) and Mr. Axelrod (Attorney for Ramon Hernandez, the Plaintiff in a civil proceeding). As shown, Plaintiff NEVER advanced an assertion in the instant action that was inconsistent with a position taken during a previous litigation. If fact, the assertion in the instant action is exactly the same as the position taken in the previous

litigation. Accordingly, the doctrine of judicial estoppel cannot apply to the facts in the instant case.

6. ISSUE #2d:

Did Judge Seymour of the South Carolina District Court err when she did not grant Plaintiff's Motion for Partial Summary Judgment [#81, JA-174..223], in that she failed to hold that when Defendant Ann Abel, M.D. and other MUSC personnel caused Baby Judith's life-support systems to terminate, said persons:

- breached their obligation under EMTALA to provide emergency medical treatment to Baby Judith;
- breached their affirmative Fourteenth Amendment due process duty under *DeShaney* to protect Baby Judith, who was a minor in the care and custody of said persons; and
- deprived Plaintiff, Ramon Hernandez (the natural father of Baby Judith), of his [fundamental constitutional] parental rights without due process of law under *Santosky v. Kramer*?

Firstly, as argued in Plaintiff's MOTION [#81, JA-174..223] for Partial Summary Judgment, when Defendant Ann Abel, M.D. and other MUSC personnel caused Baby Judith's life-support systems to terminate, said persons breached their obligation under EMTALA to provide emergency medical treatment to Baby Judith.

The Law

As stated in Plaintiff's MOTION [#81, JA-177..180] for Partial Summary Judgment:

> *". . .*
> *In the Matter of Baby "K"*, 16 F.3d 590 (4th Cir 1994), *cert. denied*, 115 S. Ct. 91 (1994), the Fourth Circuit Court of Appeals determined whether a hospital was obligated to provide emergency medical treatment to Baby K

under the Emergency Medical Treatment and Active Labor Act [EMTALA], 42 USCS § 1395dd, in circumstances where (1) the hospital had determined such medical treatment to be medically and ethically inappropriate and (2) Baby K's guardian *ad litem* and father believed such treatment to be medically and ethically inappropriate, although Baby K's mother requested such emergency medical treatment for Baby K.

Congressional Intent – EMTALA

As background, in making its determinations, the Fourth Circuit Court of Appeals identified Congressional intent with respect to the enactment of EMTALA:

> 'Congress enacted EMTALA in response to its 'concern that hospitals were 'dumping' patients [who were] unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their emergency conditions were stabilized.' *Brooks v. Maryland Gen. Hosp. Inc.*, 996 F.2d 708, 710 (4th Cir 1993).Through EMTALA, Congress sought 'to provide an 'adequate' first response to a medical crisis for all patients,' *Baber v. Hospital Corp. of America*, 977 F.2d 872, 880 (4th Cir. 1992) (quoting 131 Cong. Rec. S13904 (daily ed. Oct. 23, 1985) (statement of Sen. Dole)) . . .' *In the Matter of Baby "K"*, *supra*., at 593. Bold added.

A Hospital's Obligation to Provide
Emergency Medical Treatment under EMTALA

Further, *In the Matter of Baby "K"*, *supra.*, the Fourth Circuit Court of Appeals delineated a participating hospital's obligation to provide emergency medical treatment under the EMTALA, as follows.

> (1) 'Hospitals with an emergency medical department must provide appropriate medical screening to determine whether an emergency medical condition exists for an individual who comes to the emergency medical department requesting treatment. 42 USCS § 1395dd(a). A hospital fulfills this duty if it utilizes identical screening procedures for all patients complaining of the same condition or exhibiting the same symptoms. *See Baber*, 977 F.2d at 879 n.6.' *In the Matter of Baby "K"*, *supra*., at 593.

(2) 'An additional duty arises if an emergency medical condition is discovered during the screening process. *See* 42 USCS § 1395dd(g). EMTALA defines an 'emergency medical condition' as including:

'a medical condition manifesting itself by acute symptoms of sufficient severity (including sever pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual . . . in serious jeopardy,

(ii) serious dysfunction of any bodily organ or part.'

42 USCS § 1395dd(e)(1)(A).' *In the Matter of Baby "K"*, *supra*., at 593, 594.

(3) 'When an individual is diagnosed as presenting an emergency condition:

'the hospital must provide either –

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for the transfer of the individual to another medical facility in accordance with subsection (c) of this section.'

42 USCS § 1395dd(b)(1). *In the Matter of Baby "K"*, *supra*., at 594.

'[T]he plain language of EMTALA requires stabilizing treatment for any individual who comes to a participating hospital, is diagnosed as having an emergency medical condition, and cannot be transferred. 42 USCS § 1395dd(b).' *In the Matter of Baby "K"*, *supra*., at 596.

Further, 'the duty of the Hospital to provide stabilizing treatment for an emergency medical

condition is not coextensive with the duty of the Hospital to provide an 'appropriate medical screening.' Congress has statutorily defined the duty of a hospital to provide stabilizing treatment as requiring that treatment necessary to prevent the material deterioration of a patient's condition. 42 USCS § 1395dd(e)(3)(A).'

(4) Further, participating hospitals that have specialized capabilities or facilities, such as neonatal intensive care units, shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual. 42 USCS § 1395dd(g).

(5) 'The treatment required 'to stabilize' an individual is that treatment 'necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility.' 42 USCS § 1395dd(e)(3)(A). Therefore, once an individual has been diagnosed as presenting an emergency medical condition, the hospital must provide that treatment necessary to prevent the material deterioration of the individual's condition or provide for an appropriate transfer to another facility.' *In the Matter of Baby "K"*, *supra*., at 594.

(6) 'The duty to provide stabilizing treatment set forth in EMTALA [42 USCS § 1395dd] applies not only to participating hospitals but also to treating physicians in participating hospitals. 42 USCS § 1395dd(d)(1)(B). EMTALA does not provide an exception for stabilizing treatment physicians may deem medically or ethically inappropriate. Consequently, to the extent [a state statute] exempts physicians from providing care they consider medically or ethically inappropriate, it [the state statute] directly conflicts with the provisions of EMTALA that require stabilizing treatment to be provided.' *In the Matter of Baby "K"*, *supra*., at 597.

(7) As a consequence, 'state and local laws that directly conflict with the requirements of EMTALA are preempted. 42 USCS § 1395dd(f).' *Id.*

. . ."

Argument

As stated in Plaintiff's MOTION [#81, JA-186..188] for Partial Summary Judgment:

". . .

'[T]he plain language of EMTALA requires stabilizing treatment for any individual who comes to a participating hospital, is diagnosed as having an emergency medical condition, and cannot be transferred. 42 USCS § 1395dd(b).' *In the Matter of Baby "K"*, *supra*., at 596. In applying the provisions of EMTALA [as interpreted by the Fourth Circuit Court of Appeals *In the Matter of Baby "K"*, 16 F.3d 590 (4th Cir 1994)] to the facts in the instant case, as such facts relate to Baby Judith:

1. Under EMTALA, as a participating hospital, MUSC has a continuing duty to provide stabilizing treatment for a patient's diagnosed emergency medical condition, where such stabilizing treatment requires that treatment necessary to prevent the material deterioration of such patient's condition. 42 USCS § 1395dd(e)(3)(A).

2. Accordingly, as applied to the facts in the instant case, EMTALA gives rise to a duty on the part of MUSC to provide and administer life-support systems (including respiratory support) to Baby Judith when she is presented at MUSC in respiratory distress, since –

   a. Baby Judith's emergency medical condition would have reasonably been expected to cause serious impairment of Baby Judith's bodily functions, 42 USCS § 1395dd(e)(1)(A), and

   b. treatment was requested for Baby Judith, 42 USCS § 1395dd(a).

Here, Baby Judith's breathing difficulty qualifies as an emergency medical condition, and MUSC's diagnosis of this emergency medical condition triggers the duty of MUSC to provide Baby Judith with stabilizing treatment or to

> transfer her in accordance with the provisions of EMTALA. Since the transfer of Baby Judith was not an option available to MUSC, MUSC was required under EMTALA to stabilize Baby Judith's condition. MUSC has admitted that the administration of life-support systems (including mechanical ventilation) was necessary to assure within a reasonable medical probability, that no material deterioration of Baby Judith's condition would likely occur. Thus, stabilization of Baby Judith's condition required that MUSC provide and administer life-support systems (including mechanical ventilation through the use of a respirator or other means necessary to ensure adequate ventilation).
>
> 3. Thus, when employees of MUSC "pulled the plug" on Baby Judith's life by terminating Baby Judith's life-support systems, MUSC breached its obligation under EMTALA to provide stabilizing emergency medical treatment to Baby Judith.
>
> 4. Further, because the requirements of EMTALA directly conflict with South Carolina's Uniform Determination of Death Act (Section 44-53-460), said statute is unconstitutional as applied to Baby Judith and on its face under 42 USCS § 1395dd(f).
>
> . . ."

Secondly, as argued in Plaintiff's MOTION [#81, JA-174..223] for Partial Summary Judgment, when Defendant Ann Abel, M.D. and other MUSC personnel caused Baby Judith's life-support systems to terminate, said persons breached their affirmative Fourteenth Amendment due process duty under *DeShaney* to protect Baby Judith, who was a minor in the care and custody of said persons.

The Law

As stated in Plaintiff's MOTION [#81, JA-180..182] for Partial Summary Judgment:

"... Generally, the Due Process Clause does not impose an affirmative duty upon the state to protect citizens from the acts of private individuals. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198-200, 109 S. Ct. 998, 103 L. Ed. 2d 249(1989). However, courts have explicitly recognized two exceptions to this general rule. *Id.*

Exception #1 – State Protection of Individuals when a "Special Relationship" Exists

The state has a duty to protect or care for individuals when a "special relationship" exists. The Supreme Court has defined a "special relationship" in the following way:

> 'When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by . . . the Due Process Clause. . . . It is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.' *Id.* at 200. Bold added.

The Fourth Circuit has also recognized that 'incarceration, institutionalization, or the like' is needed to 'trigger the affirmative duty' under the Due Process Clause. *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc). In interpreting *DeShaney*, *supra.*, the Fourth Circuit held:

> 'The specific source of an affirmative duty to protect, the Court emphasized, is the custodial nature of a 'special relationship.' *DeShaney* reasoned that 'the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from

> the limitation which it has imposed on his freedom to act on his own behalf.' *Id*. Some sort of confinement of the injured party -- incarceration, institutionalization, or the like -- is needed to trigger the affirmative duty. *Id*. This Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause. See, e.g., Rowland, 41 F.3d at 174-75 (noting that when the state has not restricted one's ability to care for oneself, the rationale for an affirmative duty falls away); Piechowicz v. United States, 885 F.2d 1207, 1215 (4th Cir. 1989) (holding that 'substantive due process protects the liberty interests only of persons affirmatively restrained by the United States from acting on their own behalf')." *Pinder*, *supra.*, at 1175. Bold added.
>
> "Promises do not create a special relationship -- custody does. . ." Id.

Under this first exception, derived from *DeShaney*, a majority of appellate courts have held that a custodial relationship is required. For example, the Third Circuit has read *DeShaney* 'primarily as setting out a test of physical custody.' *Torisky v. Schweiker*, 446 F.3d 438, 445 (3d Cir. 2006).

Protection from harm. Bodily injury resulting from state official's negligence deprives person of liberty interest protected by Fourteenth Amendment. . . *Daniels v Williams* (1983, CA4 Va) 720 F2d 792. Further, the allegation that non-professional health services technicians physically abused autistic child who was committed to state hospital was specific enough to support claim of substantive due process violation by failure to provide safe environment. *Kyle K. v Chapman* (2000, CA11 Ga) 208 F3d 940, 25 FLW Fed C 562.

Exception #2 – State Protection of Individuals when a "State-Created Danger" is Involved

The state has a duty when a "state-created danger" is involved. *See Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 907 (3d Cir. 1997); *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc).

Under *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006), to prevail on a state-created danger claim, a plaintiff must prove the following four elements:

(1) the harm ultimately caused was foreseeable and fairly direct;

(2) a state actor acted with a degree of culpability that shocks the conscience;

(3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all."

Argument

As stated in Plaintiff's MOTION [#81, JA-188] for Partial Summary Judgment:

". . .

Under *DeShaney*, MUSC has an affirmative Fourteenth Amendment due process duty to protect its citizens.

Under the facts in the instant case, Plaintiff argues that the UNLAWFUL dumping of Baby Judith as a patient by the Children's Hospital of the Medical University of South Carolina [MUSC], wherein employees of MUSC "pulled the plug" on Baby Judith's life, breached MUSC's affirmative Fourteenth Amendment due process duty to protect Bab y Judith. Contemporaneously, these MUSC employees had actual knowledge of the deadly and painfully horrific consequences of "pulling the plug" on Baby Judith's life-support systems, which included a respirator and artificial feeding device.

Also, in the instant case, Plaintiff argues that MUSC employees are liable under Section 1983 under a state-created danger theory because their actions "increased the risk" that the Plaintiff would be deprived of his fundamental constitutional (1) right to family autonomy and the (2) care custody of control of his child, free from governmental intrusion. In this case, under *DeShaney*, liability attaches when the state acts to *create* or *enhance* a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process."

Thirdly, as argued in Plaintiff's MOTION [#81, JA-174..223] for Partial Summary Judgment, when Defendant Ann Abel, M.D. and other MUSC personnel caused Baby Judith's life-support systems to terminate, said persons deprived Plaintiff, Ramon Hernandez (the natural father of Baby Judith), of his [fundamental constitutional] parental rights without due process of law under *Santosky v. Kramer*.

The Law

As stated in Plaintiff's MOTION [#81, JA-183..185] for Partial Summary Judgment:

". . .

At the outset, in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Supreme Court held:

'Since Cruzan was a patient at a state hospital, when this litigation commenced, the State has been involved as an adversary from the beginning.' *Cruzan, supra.*, at 282.

Concerning the fundamental rights of an incompetent person, in *Cruzan, supra.*, the Supreme Court held:

(1) 'The Fourteenth Amendment provides that no state shall 'deprive any person of life, liberty, or property without due process of law.' The principle that a competent person has constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.' *Cruzan, supra.*, at 278.

(2) However, '[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such 'right' must be exercised for her, if at all, by some sort of surrogate. *Cruzan*, *supra.*, at 280.

(3) 'The choice between life and death is a deeply personal decision of obvious and overwhelmingly finality. We believe [states] may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.' *Cruzan*, *supra.*, at 281.

(4) 'The function of a standard of proof, as that concept is embodied in the due process clause of the Federal Constitution's Fourteenth Amendment and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'' *Cruzan*, *supra.*, at 282.

(5) Specifically, 'This Court has mandated [under the Due Process Clause of the Federal Constitution's Fourteenth Amendment] an intermediate standard of proof – 'clear and convincing' evidence – when the individual interests at stake at a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' . . . But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants,' . . . The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. [A] state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.' *Cruzan*, *supra.*, at 282-84.

(6) As an example, 'such a standard [clear and convincing evidence] has been required . . . in proceedings for the termination of parental rights. . . [O]ne of the factors that led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable.' *Cruzan*, *supra.*, at 283-84.

Moreover, in *Cruzan*, *supra.*, Justice O'Connor, in a concurring opinion stated:

'[T]he Court's does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. . . In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment.' *Cruzan*, *supra.*, at 289.

And finally, in *Cruzan*, *supra.*, Justices Marshall and Blackmun, in a dissenting opinion stated:

(1) 'Nor does the fact that Nancy Cruzan is now incompetent deprive her of her fundamental rights. . . As the majority recognizes, 497 U.S. at 280, the question is not whether an incompetent has constitutional rights, but how such rights may be exercised. As we explained in *Thompson v. Oklahoma*, 487 U.S. 815, 101 L.Ed. 2d 702, 108 S. Ct. 2687 (1988): 'The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and *those who are irreversibly ill with loss of brain function, for instance, all retain 'rights,'* to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind.' *Id.*, at 825, n.23 (emphasis added). 'To deny [its] exercise because the patient is unconscious or incompetent would be to deny the right.' *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 133, 482 A.2d 713, 718 (1984).' *Cruzan*, *supra.*, at 309.

(2) 'See Santosky v. Kramer, 455 U.S. 745, 753, 766-767, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the state has no legitimate interest in termination unless the parent is unfit, and finding that the state's interest in finding the best home for the child does not arise until the parent has been found unfit) . . .' *Cruzan*, *supra.*, at 319.

Note: In recognition of the fundamental rights of the incompetent patient, in New York and New Jersey, the law now requires physicians to honor the objections of family members to the cessation of treatment (the provision and administration of life-support systems) for a patient who has a loss of brain function. In other words, under New York statutory law [N.Y. COMP. CODES R. & REGS. § 400.16(d), (e)(3)] and New Jersey statutory law [N.J. STAT. ANN. § 26.6A-5], a patient diagnosed as brain dead continues to receive medical care treatment (the provision and administration of life-support systems) if family members object to the cessation of the provision and administration of "life-support" systems.

Argument

As stated in Plaintiff's MOTION [#81, JA-189..190] for Partial Summary Judgment:

". . .

Similar to the facts in the instant case, in *Cruzan*, *supra.*, the patient was in a state hospital, which was bearing the cost of her medical care. In the instant case, Baby Judith was a patient at MUSC, a state hospital, which was also bearing the cost of her medical care. In *Cruzan*, *supra.*, the Supreme Court held that '[s]ince Cruzan was a patient at a state hospital, when this litigation commenced, the State has been involved as an adversary from the beginning.' *Cruzan*, *supra.*, at 282. Accordingly, under the facts in the instant case, MUSC is an adversary to the interest of Baby Judith and has acted unlawfully in unilaterally "pulling the plug" on Baby Judith's life-support systems.

> However, unlike the facts in the instant case, in *Cruzan*, *supra.*, the patient's parents requested hospital employees to terminate the patient's artificial nutrition and hydration, but hospital employees refused the request without court approval, since such termination would result in the subsequent death of the patient.
>
> The right to privacy, the right to autonomy, and most importantly, the right to be treated humanely with dignity are not subject to degrees of gradation. These rights are fundamental rights that, due to their nature, demand protection by strict scrutiny. By unilaterally declaring Baby Judith brain dead pursuant to South Carolina's Uniform Determination of Death Act (Section 44-53-460), the individual defendants, physicians, and others at MUSC caused Baby Judith's previously recognized status as a person to be stripped from her, in violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution."

Conclusion

As stated in Plaintiff's MOTION [#81, JA-190] for Partial Summary Judgment:

> "In *Santosky v. Kramer*, 455 U.S. 745, 753, 766-767, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), the Supreme Court identified that process that is due to a parent under the Fourteenth Amendment to the U.S. Constitution, before a parent's parental rights can be lawfully terminated. Within this context, Plaintiff argues in his Complaint that by UNLAWFULLY terminating the medical treatment [wherein (as process duty to protect its citizens under *DeShaney* and (b) its obligation under EMTALA to provide emergency medical treatment to Baby Judith], employees of MUSC noted above) MUSC breached (a) its affirmative Fourteenth Amendment due each deprived Plaintiff of his parental rights without due process of law under *Santosky v. Kramer*."

7. ISSUE #2e:

Did Judge Seymour of the South Carolina District Court err when she did not grant Plaintiff's Motion for Partial Summary Judgment [#81, JA-174..223], in that she failed to hold that South Carolina's Uniform Determination of Death Act (S.C. Code § 44-53-460) is unconstitutional as applied (and on its face) because said statute:

- directly conflicts with the requirements of EMTALA and accordingly is preempted under 42 USCS § 1395dd(f) and

- allows Baby Judith's (and any other person's) previously recognized status as a person to be stripped from her by the state, in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution?

See the analysis of Issue #2d for an analysis of Issue #2e.

8. ISSUE #2f:

Did Judge Seymour of the South Carolina District Court err in denying Plaintiff's MOTION to Strike [#35, JA-65..68] Affidavits [#26, JA-26..30]?

Judge Seymour erred in denying Plaintiff's MOTION to Strike [#35, JA-65..68] Affidavits [#26, JA-26..30], since said Affidavits [#26, JA-26..30] were not based on personal knowledge, but instead incorporated statements that were either hearsay or conclusory.

The Law

An affidavit submitted in support of or in opposition to a motion for summary judgment should be based on personal knowledge and should consist solely of evidence that would be admissible at trial. [Fed. R. Civ. P. 56(e); *Horta v. Sullivan*,

4 F.3d 2, 7-8 (1st Cir. 1993) (on summary judgment, court may take into consideration any material that would be admissible or usable at trial).] In *Horta*, the court held that a newspaper article in which a police chief was quoted, offered in support of plaintiff's motion for summary judgment, was hearsay and should have been stricken. The rule prohibiting use of inadmissible evidence applies when either party moves for summary judgment. *[Steinle v. Warren*, 765 F.2d 95, 99-101 (7th Cir. 1985) (when a former attorney and an investigator filed affidavit denying knowledge of break-in and plaintiff merely relied upon his own conclusory allegations, this was not sufficient to withstand motion for summary judgment).]

Further, a party opposing a motion for summary judgment may not rest upon the mere allegations or denials of the pleadings but must present facts in opposition. *[Alexis v. McDonald's Restaurants*, 67 F.3d 341, 347-48 (1st Cir. 1995) (court excluded affidavits regarding racial animus because they were conclusory lay opinions); *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996) (upholding district court's striking of portions of affidavit submitted in opposition to employer's motion for summary judgment, noting that plaintiff's statements were conclusory and therefore inadmissible under Fed. R. Civ. P. 56(e)).

Finally, statements in affidavit prefaced by phrases, "I believe," or "upon information and belief," or those made upon an "understanding," were properly subject to motion to strike. *Tavery v. United States*, 32 F.3d 1423, 1426 nA (10th Cir. 1994)

Argument

As argued in Plaintiff's MOTION to Strike [#35, JA-65..68] Affidavits [#26, JA-26..30], the Affidavits [#26, JA-26..30] of (a) Natasha Simeon-Major, M.S.W. and (b) Susan Beason, R.N. are not based on personal knowledge, but instead incorporate statements that are either hearsay or are conclusory and therefore inadmissible under Fed. R. Civ. P. 56(e)). *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962 (4th Cir. 1996).

Conclusion

Based upon the foregoing discussion, Defendant Abel cannot rely on FRCP 54(d)(2)(A-B) and 42 U.S.C. § 1988(b) for an award of "claims for attorneys' fees and related nontaxable expenses," since Plaintiff's claims are not frivolous, unreasonable, and groundless. *Cochran v. G.R. Bobo*, 2007 WL 1847708 (D.S.C. 2007).

9. ISSUE #3:

> Did Judge Seymour of the South Carolina District Court err in granting [#113, JA-468] Defendant's Motion for Sanctions [#98, JA-350..465] against Plaintiff's attorney, Stuart M. Axelrod?

Judge Seymour erred in granting [#113, JA-468] Defendant's Motion for Sanctions [#98, JA-350..465] against Plaintiff's attorney, Stuart M. Axelrod, since the Defendant's basis for said sanction [S.C. Code Ann. § 15-78-120(c)] does not apply to the instant action.

Argument

As argued in Plaintiff's RESPONSE [#106, JA-420],

> "In Defendant Abel's Motion for Sanctions [#98, JA-350..399], Defendant Abel states:
>
> > 'In addition to reimbursement of costs and attorney fees under 42 U.S.C. §1988, the Defendant is also seeking sanctions of the Plaintiff's attorney Stuart Axelrod pursuant to SC Code Ann. §15-78-120(c). This statute, referring to the South Carolina Tort Claims Act, states in part that "in any claim, action, or proceeding to enforce a provision of this chapter . . .
> >
> > In this case, the Plaintiff and his attorney filed pleadings, the Complaint and countless motions, that were not well-grounded in fact and were intended for an improper purpose. Plaintiff's attorney Stuart Axelrod brought the Plaintiff's Complaint under the South Carolina Tort Claims Act as he has sued Dr. Abel, acting in her capacity as a state official at MUSC.'
>
> As a threshold issue, Defendant Abel cannot rely on S.C. Code Ann. §15-78-120 for an award of 'reasonable expenses incurred because of the filing of the pleading, motion or other paper, including attorney's fees' because S.C. Code Ann. §15-78-120 is strictly limited to claims under the South Carolina Tort Claims Act. In contrast, the instant case is a Section 1983 action.

> Further, Dr. Abel claims that she was sued by the Plaintiff in her capacity as a state official at MUSC. Dr. Abel is mistaken. In his Original Complaint [#1, JA-12..20], Plaintiff states:
>
> > 'Dr. Abel is being sued personally and individually and not in her official capacity as an employee/agent of MUSC.'
>
> . . ."

VII.
CONCLUSION STATING PRECISE RELIEF SOUGHT

Vacate Judge Seymour's TEXT ORDER [#113, JA-468] granting costs, attorneys' fees and sanctions and ORDER [#90, JA-271..275]. Reverse and Remand: (1) lifting the stay on discovery, (2) striking Affidavits [#26, JA-26..30], and (3) allowing the Plaintiff to respond to (a) Defendant's Motion for Summary Judgment and (b) Judge Seymour's application of Judicial Estoppel.

VIII.
REQUEST FOR ORAL ARGUMENT

Because many of the issues raised by the Brief of Appellant are instances of first impression, Counsel for Plaintiff-Appellant believes Oral Argument is appropriate.

Respectfully Submitted,

Dated: January 30, 2009

/s/ Stuart M. Axelrod
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IX.
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains *13,916* words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [ ] this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of the type style*]; *or*

   [X] this brief has been prepared in a monospaced typeface using *Microsoft Word 2000* in *12 pt. Courier New*.

Dated: January 30, 2009

/s/ Stuart M. Axelrod
Stuart M. Axelrod
Counsel for Appellant

X.
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 30th day of January, 2009, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Counsel for Appellee

I further certify that on this 30th day of January, 2009, I caused the required number of bound copies of the Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of the Court, and one copy of the same to be served, via UPS Ground, to Counsel for Appellee at the above-listed address.

/s/ Stuart M. Axelrod
Stuart M. Axelrod
Counsel for Appellant