THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Appellate Case No.: 2022-000079

Grace Gilchrist Knie, Circuit Court Judge

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes,
Petitioner,

v.

Bank of America National Association,
Respondent

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in reversing the circuit court's finding that Bank of America's Motion for Sanctions was premature?

2. Did the Court of Appeals err in ruling that Bank of America preserved the issue of timeliness under Rule 11 and the FCPSA?

3. Did the Court of Appeals err in ruling that Bank of America's appeal on the issue of timeliness was not precluded by the two-issue rule?

STATEMENT OF THE FACTS

This case arose from fraudulent charges made by Respondent against the bank account of John and Jane Hughes. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from Respondent in the amount of $120,000.00, secured by a mortgage ("Mortgage") on their house in Spartanburg. The line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006. (R. at 21, ¶ 7). At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed Respondent to automatically draft loan payments from the Hughes's bank account with Respondent. (R. at 21-22, ¶ 8).

During the meeting to complete the Mortgage transaction, Respondent presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Line Protection Plan")." (R. at 22, ¶ 9). If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan. (R. at 22, ¶ 10). Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that Respondent provided them with information on the Line Protection Plan. (R. at 22, ¶ 11). Jane and John Hughes declined the optional Line Protection Plan by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. (R. at 22, ¶ 11; R. at 102).

In June 2006, John Hughes was age 86. (R. at 22, ¶ 12). Mr. Hughes died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. (R. at 23, ¶ 13). Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision

impairments, including cataracts and eye surgery, from June 2006 until her death. (R. at 22, ¶ 12). Mrs. Hughes suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at a skilled nursing facility. (R. at 22, ¶ 12). Mrs. Hughes also suffered from impaired cognition, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and a lack of decisional capacity in the years subsequent to June 2006. (R. at 22-23, ¶ 12).

Over six years after Mr. Hughes's death, on or around March 17, 2015, Respondent sent a boilerplate form cancellation notice addressed to Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." (R. at 23, ¶ 14; R. at 169-170). Prior to March 2015, Respondent did not provide any statement, notice, or communication of any sort to Mrs. Hughes that the Hugheses had elected any "Protection Plan" or that an amount was being charged to them for such a plan. (R. at 24, ¶ 21). Although Mr. and Mrs. Hughes explicitly declined to purchase any "Protection Plan," Respondent sent a second letter dated March 25, 2015, stating that John Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. (R. at 23, ¶ 16).

In response to an inquiry from a family member of Mrs. Hughes, Respondent stated in a May 6, 2015, letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request...", and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." (R. at 23, ¶ 17; R. at 104-112). The eight-page "ADDENDUM" provided by Respondent in May 2015 is not the two page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the "protection." (R. at 23-24, ¶

18). Respondent did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015, nor did the Line Protection Plan premium appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (R. at 24, ¶¶ 19, 20). Respondent has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protection Plan" coverage of any sort. (R. at 24, ¶ 22).

Although the Hughes unequivocally declined to purchase the Line Protection Plan, Respondent withdrew a monthly charge of $28.40 from their joint checking account for several years. (R. at 24, ¶ 23). This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. (R. at 24, ¶ 23). Notably, all other charges from Respondent or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur"). (R. at 24, ¶ 24). Further, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's mortgage or line of credit. (R. at 24, ¶ 25).

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that Respondent had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a charge by Respondent generally or a "Line Protection Plan" charge specifically until receiving the March 2015 notices from Respondent. (R. at 25, ¶ 26). Adding insult to injury, upon receiving notice of Mr. Hughes's death, on May 6, 2015, Respondent declined coverage under the

Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)." (R. at 25, ¶ 27). Respondent refused to refund the payments drawn during Mr. Hughes's lifetime despite being unable to produce any documentation supporting the purported election to enroll in the Line Protection Plan. (R. at 25, ¶ 28).

On June 3, 2015, Jane K. Hughes passed away, and her son, Petitioner Phillip Francis Luke Hughes, was subsequently named as personal representative of her estate. (R. at 25, ¶ 29). Petitioner initiated a survival action and fraud-based causes of action on behalf of the Estate of Jane K. Hughes.

STATEMENT OF THE CASE

Petitioner filed the current survival action on behalf of the Estate of Jane K. Hughes on August 15, 2017, alleging fraud and other fraud-based causes of action. On December 21, 2017, Respondent filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Prior to initiating the present action, Petitioner filed a putative class action lawsuit in 2015 against Respondent for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. Respondent removed the 2015 action to federal court and filed a motion to dismiss in lieu of an answer.

Before the District Court decided Respondent's motion, Petitioner stipulated to the dismissal, without prejudice, of all claims against Respondent except breach of contract and violation of TILA since the District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina survival statute should be overturned. The question is one left to the State to decide but, because case law provides

controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under South Carolina Rules of Appellate Practice, Rule 244(a). (R. at 460, lines 1-25).

After voluntary dismissal of the fraud-based claims from the federal action, Petitioner re-filed those claims in his 2017 Complaint. On December 21, 2017, in lieu of an answer, Respondent moved to dismiss Petitioner's 2017 Complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90 (1976), South Carolina's survival statute. On February 22, 2018, the Honorable R. Keith Kelly heard arguments by counsel for Respondent and Petitioner on the Motion to Dismiss. During oral argument, Respondent's counsel raised to the court his belief that the pursuit of claims under the 2017 Complaint by Petitioner's counsel "lies close to a sanctionable type of circumstance" and that counsel is treading in a "dangerous area" by trying to overturn precedent. (R. at 446: lines 5-10, 16). The court entered an order on March 20, 2018, granting Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. However, Judge Kelly declined to entertain Respondent's allegations of sanctionable behavior and stayed silent on the issue both at the hearing and in his Order. (R. at 9-18, 440-459).

Petitioner appealed the circuit court's dismissal of his fraud-based claims, filing a timely Notice of Appeal on March 27, 2018, pursuant to Rule 201, SCACR.[1] (R. at 281-282). Two days later, on March 29, 2018, Respondent filed a Motion for Sanctions against Petitioner and his counsel, seeking $76,556.00 in attorneys' fees and costs, and alleging violations of Rule 11 and

[1] The Court of Appeals affirmed the circuit court's dismissal on September 29, 2021, regarding the survivability of fraud issue strictly on the basis of precedent (Appellate Case No. 2018-000568). Petitioner's Writ of Certiorari was granted on September 7, 2022, Supreme Court Case No. 2021-001339.

the FCPSA. (R. at 294-297, 519). The parties argued the motion before the Honorable Grace Knie on June 1, 2018, and the court subsequently denied Respondent's motion. The circuit court entered its Order on Respondent's Motion for Sanctions on July 3, 2018, finding, in relevant part:

> 7. Plaintiff and his counsel objected to the granting of Defendant's Motion for Sanctions, arguing, in part, that the Court, when presented with the opportunity to consider the same conduct for which Defendant presently seeks sanctions on a prior occasion, declined to award sanctions against Plaintiff or his counsel. The Defendant, before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly, at the February 22, 2018, hearing on its Motion to Dismiss. Although Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against Plaintiff or his counsel at that time.
>
> 8. This matter is currently pending before the South Carolina Court of Appeals as Case Number: 2018-000568, and has not yet been fully adjudicated. Accordingly, Defendant's Motion for Sanctions is untimely and premature.

(R. at 7, ¶¶ 7-8). Following this denial, Respondent filed a Notice of Appeal on August 1, 2018. (R. at 498-499).

By Opinion Number 2021-UP-354, filed October 13, 2021, the Court of Appeals reversed the circuit court's finding that Respondent's motion for sanctions was untimely and premature, ruling that that the circuit court abused its discretion in finding that it could not consider a motion for sanctions before the conclusion of Petitioner's appeal. The Court of Appeals ruled that Respondent preserved the issue of timeliness for appeal, and further ruled that the appeal was not precluded by the two-issue rule. However, the Court of Appeals held that Respondent had abandoned its argument for sanctions under Section 15-36-10(C) of the FCPSA in the appeal.

The Court of Appeals denied Petitioner's Petition for Rehearing in an Order dated January 11, 2022. Petitioner filed for a Writ of Certiorari on January 25, 2022. Respondent filed its Return to the Petition on February 24, 2022. Certiorari was granted on September 7, 2022.

STANDARD OF REVIEW

The appropriate standard of review in this matter is for an abuse of discretion. This Court recently held:

> The decision to impose sanctions is one in equity, and thus the appellate court reviews the circuit court's factual findings de novo. If the appellate court agrees with the factual findings, then it reviews the circuit court's decision to impose sanctions and the amount of sanctions for an abuse of discretion. We also review an equity court's procedural rulings – such as a ruling on timeliness of a Rule 11 motion – for abuse of discretion.

Pee Dee Health Care, P.A. v. Estate of Thompson, 424 S.C. 520, 538 n.11, 818 S.E.2d 758, 768 n.11 (2018); *see also Russell v. Wachovia Bank, N.A.,* 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) ("On appeal, the imposition of sanctions pursuant to this rule will not be disturbed absent an abuse of discretion.").

Under the abuse of discretion standard, the lower court's decision on whether to impose sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC,* 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011).

ARGUMENTS

The decision of the Court of Appeals that the circuit court abused its discretion in finding that Respondent's Motion for Sanctions was premature conflicts with *Pee Dee Health Care.* Additionally, Respondent failed to preserve the issues of timeliness under Rule 11, SCRCP, and the FCPSA. Finally, Respondent's appeal is precluded by the two-issue rule.

I. The circuit court did not abuse its discretion in determining that Respondent's Motion for Sanctions was premature.

The circuit court's decision that Respondent's Motion for Sanctions under Rule 11, SCRCP, and Section 15-31-10(A) of the FCPSA was premature and untimely was reasonably

based, fell within the discretion of the circuit court, and did not rise to an abuse of discretion on the facts of this case as a matter of law. Further, the decision of the Court of Appeals conflicts with this Court's holding in *Pee Dee Health Care*.

A. The decision of the Court of Appeals conflicts with *Pee Dee Health Care, P.A. v. Estate of Thompson* as the circuit court acted within its discretion in finding that Respondent's Motion for Sanctions under Rule 11 was premature.

The circuit court, in concluding that Respondent's Motion for Sanctions was premature, did so under its discretionary authority to make such a determination, thus presenting this Court with review under the abuse of discretion standard. It is settled in South Carolina that where "the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Id.; see also Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996)) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court). An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citing *Father v. South Carolina Dep't of Soc. Servs.*, 353 S.C. 254, 578 S.E.2d 11 (2003)).

This Court, in *Pee Dee Health Care*, considered the question of whether a trial court abused its discretion in determining that a litigant filed a timely motion for sanctions under Rule 11 after waiting for the resolution of three pending appeals before moving for sanctions. The Court found no abuse of discretion based on several considerations: 1) whether the court maintains jurisdiction over the case; 2) the timing of the motion in light of Rule 11's objectives; 3) laches; and 4) reasonableness. *Id.* In finding that the circuit court retained jurisdiction to hear the motion for sanctions and that waiting to pursue the motion comported with the objectives of Rule 11, but did not amount to laches, the Court ultimately determined that the filing of the litigant's Rule 11

motion was timely. *Id.* 424 S.C. at 538, 818 S.E.2d at 768. In addition to the supporting factors offered by the moving party, the Court stated that:

> We are also persuaded by the fact Rule 11 permits a trial court to award sanctions "upon its own initiative," . . . and there is no stated restriction on when the trial court must do so. Certainly, *it would be reasonable for a trial court . . . that wishes to grant sanctions on that basis, to wait to see if its order on the merits is upheld on appeal before granting sanctions.*

Id. (emphasis added).

The Court in *Pee Dee Health Care* ultimately concluded that there was not an abuse of discretion in the trial court's determination of reasonableness concerning the timing of the motion for sanctions, finding that policy considerations espoused in the majority opinion "weigh heavily in favor of allowing a party to delay filing a Rule 11 sanctions motion." *Id.* 242 S.C. at 541, 818 S.E.2d at 769.

Likewise, in the instant case, Petitioner filed an appeal challenging the merits of a circuit court decision prior to Respondent moving for sanctions. Indeed, Respondent seeks sanctions against Petitioner and his counsel for filing pleadings it alleges to be frivolous, while Petitioner is actively appealing the Order of Dismissal relied upon by Respondent to support its argument. The circuit court's reluctance to rule on the frivolity of a pleading that may be subsequently deemed viable is certainly reasonable and is consistent with the objectives of Rule 11 to streamline court dockets and facilitate court management by minimizing the amount of court resources dedicated to this matter. *Id.*, 424 S.C. at 533, 818 S.E.2d at 765.

In the event that the circuit court prematurely deemed Petitioner's filings frivolous and granted an award of sanctions, and Petitioner subsequently succeeded in the appeal of the dismissal, further litigation would inevitably ensue. The Court in *Pee Dee Health Care* anticipated this very situation, reasoning that a circuit court might decline to hear a sanctions motion, pending

the appeal of related matters, which would arguably be stayed pursuant to Rule 241(a), SCACR. *Id.,* 424 S.C. at 538, 818 S.E.2d at 768.

The circuit court's decision not to issue a ruling on the merits of Respondent's sanctions motion pending Petitioner's appeal, under the factors set forth by the Supreme Court in *Pee Dee Health Care,* does not preclude Respondent from refiling a Rule 11 motion at the conclusion of Petitioner's appeal. The jurisdiction of the circuit court to hear matters relating to an action does not lapse after the expiry of the ten day window to file a motion to alter or amend prescribed by Rule 59(e), SCRCP. In the case of an action appealed by a party, it is well established that the circuit court retains jurisdiction to hear matters after remittitur and take action consistent with the appellate court's ruling. *Id.,* 424 S.C. at 531-532, 818 S.E.2d at 764, (citing *Martin v. Paradise Cove Marina, Inc.,* 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001)). The circuit court's jurisdiction to consider a Rule 11 motion is not subject to set time constraints, but continues for a period deemed fair by the lower court in light of equitable considerations. *Id.* 424 S.C. at 540, 818 S.E.2d at 769.

The Court in *Pee Dee Health Care* reasoned that the circuit court is entitled to consider "all relevant circumstances in the context of the litigation" when determining the timeliness of a motion for sanctions. *Id.,* 242 S.C. at 537, 818 S.E.2d at 767. Thus, the holding in *Pee Dee Health Care* ratified a circuit court's decision to abstain from issuing sanctions during the pendency of an appeal.

As the Court of Appeals correctly noted, there is an absence of authority in which South Carolina courts have considered sanctions solely under subsection (A) of the post-2005 FCPSA. In reversing the circuit court, the Court of Appeals acknowledged that its holding can leave circuit courts in an awkward position. Given such awkwardness, the ruling in *Pee Dee Health Care,* and

the absence of any authority on subsection (A) of the FCPSA, there is no basis for a conclusion that the circuit court abused its discretion in declining to award sanctions. To the contrary, the circuit court's decision is well within the guard rails of controlling law.

Thus, because no abuse of discretion occurred here, application of the proper standard is critical, if not dispositive. The ruling by the Court of Appeals, thus, conflicts with the holding of *Pee Dee Health Care*, which establishes that the circuit court did not abuse its discretion. Petitioner respectfully submits that the decision of the Court of Appeals is properly reversed by this Court.

B. The circuit court did not abuse its discretion in finding that Bank of America's Motion for Sanctions under the FCPSA was premature.

The circuit court likewise properly declined to award sanctions to Respondent pursuant to its request for attorney fees and costs under FCPSA. While our courts require that a motion under certain provisions of the FCPSA be filed within ten days of a final order or judgment, Respondent's motion does not fall under one of these provisions, and whether its motion under the FCPSA is premature should be determined by the same equitable considerations applied to Rule 11 motions in *Pee Dee Health Care.* Accordingly, as it was within the circuit court's discretion to conclude that Respondent's Motion for Sanctions was premature under Rule 11, the court's dismissal of Respondent's FCPSA claim should likewise be upheld.

Subsection (A)(4) of the FCPSA provides that an attorney may be sanctioned for "filing a frivolous pleading, motion or document" (S.C. Code Ann. § 15-36-10(A)(4)(a)); "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts," (*id.*, § 15-36-10(A)(4)(b)); or "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law" (*id.*, § 15-36-10(A)(4)(c)). Respondent contends that Petitioner acted in violation of section 15-36-10(A)(4)(a)(ii) for filing a frivolous

pleading. Under the FCPSA, a motion alleging a violation of subsection (A)(4) is properly raised pursuant to subsection (B)(2) of the Act. *See* S.C. Code Ann. § 15-36-20(B)(2). Section 15-36-10(B)(2) provides that, where an attorney violates subsection (A)(4) of the statute, upon its own motion or upon motion of a party, the court may impose any sanctions which the court considers "just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2).

Whether a motion brought pursuant to subsection (B)(2) of the FCPSA is considered to be a post-trial motion subject to the ten-day filing period is a novel issue that South Carolina courts have not yet considered. The Court of Appeals acknowledged the lack of any authority in which South Carolina courts had considered sanctions solely under subsection (A) of the current FCPSA, and even acknowledged that its holding can leave circuit courts in an awkward position. Despite such awkwardness, the absence of authority, and the holding in *Pee Dee Health Care* allowing the circuit court the discretion in denying a motion for sanctions as premature, the Court of Appeals nevertheless found that the circuit court erred. This decision disregards clear distinguishing language between subsections (B) and (C) of the FCPSA, the likeness between FCPSA subsection (B) and Rule 11, and squarely conflicts with the *Pee Dee Health Care* decision.

The language of the FCPSA's subsection (B)(2) markedly parallels that of Rule 11(a), SCRCP, lending to the position that the timeliness consideration for FCPSA (B)(2) motions should reflect those applied to Rule 11 motions by this Court in *Pee Dee Health Care* rather than the strict, ten-day filing deadline applied to post-trial motions. Unlike sanctions imposed pursuant to subsection (C)(1) of the FCPSA, which require a motion by the prevailing party, subsection (B)(2) offers that "the court, upon its own motion or motion of a party" may impose sanctions for a violation of section 15-36-10(A)(4); Rule 11 sanctions may likewise be imposed "by the court, upon motion or upon its own initiative." Also distinct from subsection (C)(1), neither Rule 11 nor

subsection (B)(2) limits sanctions motions to the prevailing party. *See* Rule 11(a), SCRCP; S.C. Code Ann. § 15-36-10(B)(2). Rule 11 and subsection (B)(2) motions are distinguishable from one brought pursuant to (C)(1) in that, under these provisions, a sanctions award is discretionary as opposed to the compulsory sanctions provided for in (C)(1).

Perhaps most relevant is the similarity between the FCPSA's subsection (B)(2) and Rule 11—and their departure from subsection (C)(1)—as to *when* a party can move for sanctions under each rule. The limiting "at the conclusion of trial" language contained in subsection (C)(1) is conspicuously absent from subsection (B)(2) which, like Rule 11, contains no statutorily prescribed filing limitations. In fact, as compared to subsection (C)(1), and within the context of the FCPSA in its entirety, the language of subsection (B)(2) makes apparent that the legislature, by design, did not impose limitations on when motions could be brought under the provision.

Because subsection (B)(2) serves as the statutory mechanism allowing sanctions awards for violations of (A)(4), and alleged (A)(4) violations may be cured prior to the final disposition of a case, any characterization of a motion for sanctions under subsection (B)(2) of the FCPSA as a post-trial motion is irreconcilable with the language of the statute itself. Thus, Respondent's contention that it was required to file its Motion for Sanctions, alleging a violation of S.C. Code Ann. § 15-36-10(A)(4)(a)(ii), within ten days of the entry of judgment, is inaccurate.

As the language of the FCPSA establishes that a motion for sanctions under subsection (B)(2) is not a post-trial motion, and in light of the unmistakable similarities between this provision and Rule 11, it stands to reason that the same factors considered by this Court in *Pee Dee Health Care* to determine the timeliness of a Rule 11 motion would apply to FCPSA motions raised under subsection (B)(2). Thus, for the same reasons that the circuit court did not abuse its discretion by denying Respondent's Motion for Sanctions as untimely and premature under Rule 11, as

described in Section I(A), *supra*, it did not abuse its discretion in denying Respondent's request for sanctions under the FCPSA.

II. Bank of America failed to preserve the issues of timeliness under Rule 11 and the FCPSA.

The circuit court, *sua sponte*, determined that Respondent's motion was untimely and premature. In its appeal, Respondent argued that the circuit court erred as a matter of law in concluding that the Motion for Sanctions under Rule 11 and the FCPSA was premature and untimely. However, Respondent failed to preserve the issue of timeliness and its appeal should have been denied.

The record is barren of any argument by either party as to whether the filing was timely or premature. Respondent cannot establish where it raised the issues of timeliness that were ruled on by the Court of Appeals. Neither in the Motion for Sanctions, its Memorandum in Support thereof, nor its oral argument, does Respondent even make a standard note that it timely filed the Motion for Sanctions. Fatally, before filing its Notice of Appeal, Respondent did not move to alter or amend the lower court's ruling pursuant to Rule 59(e), SCRCP ("Rule 59(e)") or otherwise notify the court of its objection to the court's decision on the issue of whether Respondent filed its Motion for Sanctions in an untimely and premature fashion.

Critically, the Court of Appeals' conclusion that a vague reference in a footnote is sufficient to "present" an issue for consideration by a trial court, undermines the standard for preserving an issue for appeal.[2] "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369

[2] In its footnote, Respondent provides only "This court retains jurisdiction to consider BANA's Motion for Sanctions despite Plaintiff appealing this Court's Order on BANA's Motion to Dismiss." (R. at 343, n. 2) (citations to rule and case law omitted).

S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Nor may an argument be raised on appeal unless it has been presented to the lower court for its consideration. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Should a party wish to appeal an issue that was not raised and ruled upon by the lower court, it must file a motion under Rule 59(e), to alter or amend the judgment, in order to have the issue preserved. *Elam v. S. Carolina Dep't of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In fact, the purpose of a Rule 59(e) motion is to ask the judge to reconsider matters contained in—or omitted from—its decision. *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999). Then, once the issue has been raised by a Rule 59(e) motion, that issue is preserved. *Id.* (citing James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996)).

This standard applies to circumstances where a party raises an issue but the judge fails to enter a ruling on that issue, and also requires a party to file a Rule 59(e) motion interposing an objection to a ruling where, as in the present case, the court rules on an issue *not* presented by the parties in order to preserve that issue for appeal. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). "Post-trial motions are *required* in two primary circumstances: to preserve issues that have been raised to the trial court but not yet ruled upon or when the trial court grants relief not requested or rules on an issue never raised at trial." *Elam*, 361 S.C. at 29, 602 S.E.2d 782-83 (citing Hoefer Toal, et al, *Appellate Practice in South Carolina* 59–60 (2d ed. 2002)) (emphasis added).

Respondent had the opportunity to raise its objection to the circuit court's ruling on timeliness through a Rule 59(e) motion and failed to do so. Because Respondent never raised to the circuit court the issues and arguments presented on appeal, they were not properly preserved for appellate review. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev.*

Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

Respondent failed to submit even the bare minimum of what was required to preserve its appeal by neglecting to raise the issue of timeliness in its Motion for Sanctions, Memorandum in Support of Motion for Sanctions, or at the hearing before the circuit court. Respondent then had yet another opportunity to raise its objection to the circuit court's ruling on timeliness through a Rule 59(e) motion, but yet again failed to raise the issue. Nor has Respondent ever even tried to excuse its lack of diligence in failing to do so.

Respondent, as the losing party, was required to first try to convince the circuit court that it ruled wrongly. *See, I'On v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The record is devoid of any attempt by Respondent to present the issues and arguments of timeliness to the circuit court. The inclusion of a footnote vaguely referencing jurisdiction is not the equivalent of raising and preserving the issue of timeliness and cannot satisfy this Court's standards of issue preservation. Nor is it necessary or appropriate to dilute the existing standard to encompass a nebulous footnote as adequately informing a circuit court about any issue for appellate purposes.

In sum, Respondent undeniably failed at any point to raise the issue of timeliness to the circuit court under the longstanding standards for issue preservation. Nor did the Court of Appeals provide an explanation for expanding those standards to include a passing footnote regarding jurisdiction as sufficient to preserve a *different* issue for appeal. The Court of Appeals, therefore, erred in finding that Respondent preserved the issues of timeliness under Rule 11 and the FCPSA.

III. The two-issue rule precludes Bank of America's appeal on the issue of timeliness.

Even if Respondent had properly preserved the timeliness of its Motion for Sanctions for appeal, those issues are nonetheless precluded under the two-issue rule. *See Atl. Coast Builders & Contractors, LLC v. Lewis.* 398 S.C. 323, 730 S.E.2d 282 (2012). "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Id.* 398 S.C. at 323, 730 S.E.2d at 284 (citing *Jones v. Lott,* 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

"A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *See Jones*, 387 S.C. at 346-347, 692 S.E.2d at 904 (citing *I'On v. Town of Mt. Pleasant,* 338 S.C. at 422, 526 S.E.2d at 724); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

An objective reading of the circuit court's Order denying Respondent's Motion for Sanctions reveals that the denial was based, in part, on Judge R. Keith Kelly's decision not to award sanctions at the hearing on February 22, 2018. The circuit court found that Respondent, "before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly," and that "[a]lthough Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions…." (R. at 3, ¶ 7).

The record establishes that the circuit court specifically found that Judge Kelly had previously considered the same issues raised by Respondent but declined to impose sanctions. The allowance for a trial court to award sanctions upon its own initiative under Rule 11 and FCPSA

subsection (B)(2), in combination with Judge Kelly's refusal after considering the same issues further supports that the circuit court's denial of Respondent's motion was based, in part, on Judge Kelly's prior decision. There is a ground for the circuit court's decision declining to award sanctions from which no appeal was taken. Thus, the two-issue error preservation rule bars Respondent's arguments.

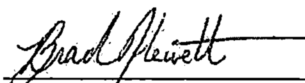
The decision to include one, but not all, of Petitioner's objections in its Order—especially in light of the court's provided factual support—indicates that the circuit court assigned particular relevance to the issue, obviating the need to recount the remaining arguments. Accordingly, the Order on Motion for Sanctions is fairly read as the circuit court denying Respondent's motion based, in part, on Judge Kelly's prior decision to decline to issue an award of sanctions despite having the discretion to do so after Respondent raised the matter during oral argument. (R. at 385-386).

Thus, because the circuit court denied Respondent's Motion for Sanctions on two grounds, and Respondent raised only the timeliness issue on appeal, the two-issue error preservation rule bars Respondent's arguments, making the circuit court's deferral to Judge Kelly's inaction, whether right or wrong, the law of this case.

In sum, even had Respondent properly preserved the issues stated on appeal, because it neglected to appeal the circuit court's findings as they relate to Judge Kelly, that unappealed ruling became the law of this case for appellate purposes. Respondent's arguments are therefore procedurally barred under South Carolina's longstanding two-issue rule, precluding consideration of Respondent's appeal. The Court of Appeals erred in finding that Respondent's appeal on the issues of timeliness were not precluded by the two-issue rule.

CONCLUSION

The Court of Appeals erred in overturning a discretionary decision of the circuit court regarding the imposition of sanctions. In addition to falling well within the scope of accepted discretionary bounds, the Court of Appeals conceded that the sparse controlling case law created an "awkward" situation, a setting especially craving the discretion of the court most familiar with the issues in context. Further, Respondent failed to preserve the issues of timeliness and its appeal is barred by the two-issue rule. For any of all of the reasons stated, Petitioner respectfully submits that the Court of Appeals decision is properly reversed.



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