

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie

Supreme Court Case No. 2022-000079

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

v.

Bank of America National Association,
Respondent

APPENDIX, Vol. 2

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EXHIBIT B

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
 2) COMMON PLEAS
 3 COUNTY OF SPARTANBURG) OF THE SEVENTH
 4) JUDICIAL CIRCUIT
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PHILLIP FRANCIS LUKE HUGHES,
 ON BEHALF OF THE ESTATE OF
 JANE K. HUGHES,
 Plaintiff,
 vs.
 BANK OF AMERICA NATIONAL
 ASSOCIATION,
 Defendant.

TRANSCRIPT OF RECORD
 2017-CP-42-02834

February 22, 2018
 Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
 For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
 For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
 For Defendant

Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
 2 remaining stated four claims of the conversion and
 3 breach of fiduciary duty, that they may be barred by
 4 collateral estoppel and res judicata analysis. I would
 5 tend to perhaps agree, but the crux of this case is to
 6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
 8 try to make the Court's job any easier, as I understand
 9 a dismissal is likely forthcoming. What my request
 10 would be, Judge Kelly, is that an order of dismissal be
 11 limited on the grounds that there is controlling
 12 precedent in place that forbids the fraud based claims,
 13 rather than founded on any statute of limitations
 14 argument or collateral estoppel or res judicata
 15 defenses. So I think that the order can be confined to
 16 that ruling.

17 If the Court is so inclined to explore those
 18 issues, I have made clear why we think they don't apply
 19 in the memo, that they were not adjudicated. That there
 20 were discovery inhibitions, procedural disadvantages.
 21 That they were not fully and fairly explored. I think
 22 that -- and I haven't seen much in the way of argument
 23 that they were because they were withdrawn. There was
 24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

EXHIBIT C

From: Brad Hewett <bhewett@mklawgroup.com>
Sent: Wednesday, March 21, 2018 3:39 PM
To: Muckenfuss, Robert A.
Cc: Timmermans, Elizabeth M. Z.
Subject: Re: Hughes

Suffice to say, we do not agree.

Sent from my iPhone

> On Mar 21, 2018, at 3:13 PM, Muckenfuss, Robert A. <RMuckenfuss@mcguirewoods.com> wrote:

>

> Brad,

>>

>> We are intending to file a motion for sanctions pursuant to SCRCP 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act next week seeking attorneys' fees and costs associated with defending against the second Hughes matter. Should you agree to pay those costs and fees, we will not need to file the motion. Please advise whether you will agree to pay these fees and costs by Monday, 3/26.

>>

>> Robert

>>

>> McGuireWoods LLP

>>

>>

>> This e-mail from McGuireWoods may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

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

v.

Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By:



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March 26, 2018

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cc: The Honorable Hope Blackley

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

Civil Action No.: 2017- CP-42-02834

BANK OF AMERICA, N.A.'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SANCTIONS

After losing in federal court against defendant Bank of America, N.A. ("BANA") relating to charges associated with an insurance product, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Plaintiff") and his counsel Brad Hewett of the Mike Kelly Law Group, LLC ("Counsel"), sued BANA *again* in this lawsuit on nearly identical allegations, despite knowing the frivolous nature of their claims. This Court dismissed Plaintiff's complaint, holding that all of his claims are barred by the doctrine of *res judicata* and by the same three year statute of limitations previously applied by the federal court in the prior lawsuit. This Court also held that the fraud-based claims are barred by South Carolina's survival statute, claims that Plaintiff already brought in federal court and voluntarily dismissed after recognizing binding precedent barred his claims. Finally, this Court also held that Plaintiff's unfair trade practices claim is barred because the plain language of the statute does not allow such claims to be brought in a representative capacity. By proceeding with claims that they concede are barred on numerous grounds, Plaintiff and his Counsel violated Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"), S.C. Code Ann. § 15-

36-10, *et seq.* For these reasons, BANA seeks monetary sanctions against Plaintiff and Counsel to recover the costs of defending against Plaintiff's frivolous claims, yet again.

I. FACTS AND PROCEDURAL HISTORY

A. 2015: Plaintiff first pursues frivolous claims against BANA.

This is not Plaintiff's first time suing BANA relating to the insurance product at issue in this matter. In 2015, Plaintiff filed suit against BANA in this Court (in a representative capacity on behalf of his mother's estate), and asserted almost identical factual allegations as those made in this matter: that BANA charged Plaintiff's parents for a voluntary insurance product despite them declining the product at loan origination (the "2015 Lawsuit"). Plaintiff brought claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and violation of the Truth in Lending Act ("TILA") in the 2015 Lawsuit. BANA removed the 2015 Lawsuit to the United States District Court for the State of South Carolina, Spartanburg Division on December 30, 2015 (Civil Action No. 7:15-cv-05083-MGL). (2015 Lawsuit, Dkt. No. 1.)

B. 2016: BANA moves to dismiss the 2015 Lawsuit and Plaintiff dismisses certain claims in response to Defendant's proposed Rule 11 Motion.

After Plaintiff amended his complaint three times, BANA moved to dismiss his Third Amended Complaint (the "TAC") on April 21, 2016. (*Id.*, Dkt. No. 25.) Plaintiff opposed BANA's motion on May 6, 2016, but he conceded that his breach of duty of good faith and fair dealing claim should be dismissed. (*Id.*, Dkt. No. 28.)

On June 28, 2016, BANA served Plaintiff and Counsel with a proposed Rule 11 motion because his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts) did not survive the deaths of Plaintiff's parents. (*See* BANA's

Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶ 3.)¹ On August 23, 2016, before BANA filed its proposed Rule 11 motion, Plaintiff voluntarily dismissed his fraud-based claims in the 2015 Lawsuit. (2015 Lawsuit, Dkt. No. 31.)

C. 2017: Judge Lewis dismisses the 2015 Lawsuit and then Plaintiff quickly files the nearly identical 2017 Lawsuit in this Court.

On February 13, 2017, Judge Mary Geiger Lewis dismissed the 2015 Lawsuit, holding that Plaintiff's claims were barred by the one year statute of limitations under TILA and the three year statute of limitations for the breach of contract claim. The court also held that the doctrine of equitable tolling did not apply to save Plaintiff's untimely claims. (*Id.*, Dkt. No. 33.) On February 14, 2017, Plaintiff filed a notice of appeal to the Fourth Circuit Court of Appeals. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

On July 27, 2017, Plaintiff filed this lawsuit, again in a representative capacity on behalf of his mother's estate (the "2017 Lawsuit"). Plaintiff again alleged that BANA improperly charged his parents for the same unwanted insurance product, bringing claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserted a statutory survival cause of action in an effort to enforce his six substantive causes of actions. (2017 Lawsuit, Compl.) In his 2017 Lawsuit Complaint, Plaintiff omitted specific allegations relating to the timing of the insurance charges contained in his 2015 Lawsuit, presumably in an attempt to obscure the obvious statute of limitations issues the claims faced. (*Compare id. with* 2015 Lawsuit, Dkt. No. 23 ¶ 25) (alleging that the insurance product monthly charges began "on or about June 2006".)

¹ The proposed Rule 11 motion also sought sanctions against 2015 Lawsuit plaintiff Joanne Hafter relating to her forgery claims. Ms. Hafter is not a plaintiff in the current lawsuit.

On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed Judge Lewis's dismissal order in the 2015 Lawsuit and held that Plaintiff's claims relating to the insurance product were time-barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Despite this decisive ruling by the Fourth Circuit, on November 21, 2017, Plaintiff served BANA with the 2017 Lawsuit Complaint. And subsequently, on December 11, 2017, Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari* with regard to dismissal of the 2015 Lawsuit. The Supreme Court of the United States denied Plaintiff's *writ* petition. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

On December 21, 2017, BANA filed a motion to dismiss the 2017 Lawsuit, arguing that *res judicata* barred Plaintiff's claims, that Plaintiff's claims were all time barred under the three year statute of limitations period, that Plaintiff's fraud-based claims did not survive the deaths of his parents, and that the SCUTPA claims could not be brought by a plaintiff in a representative capacity ("2017 Motion to Dismiss").

D. 2018: This Court dismisses the 2017 Lawsuit.

On February 20, 2018, BANA filed its Memorandum in Support of the 2017 Motion to Dismiss, and on February 21, 2018, Plaintiff filed an opposition to BANA's 2017 Motion to Dismiss ("2017 Opposition"). In the 2017 Opposition, Plaintiff's Counsel admitted that he "previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporate[d] those facts alleged in his current Complaint." (2017 Opposition at 1.) In the Opposition, Plaintiff and Counsel misrepresented the state of the black letter law barring Plaintiff's fraud-based claims when they argued that "the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud exception." (*Id.* at

12) (referring to the *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941) decision which acknowledged that fraud-based claims do not survive death). To the contrary, as set forth both in BANA's briefing in the 2015 Lawsuit and the 2017 Lawsuit, the South Carolina Supreme Court confirmed in 2002 that a fraud-based claim does not survive death in *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002) (and the South Carolina Court of Appeals reaffirmed the same in 2008 in *Brailsford v. Brailsford*, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008)). (See 2015 Lawsuit, Dkt. 25-1 at 12-13; 2015 Lawsuit, Dkt. 29 at 7-8; 2017 Motion to Dismiss Memorandum at 15-16).

On February 22, 2018, the Honorable Judge R. Keith Kelly heard oral argument on BANA's 2017 Motion to Dismiss. During that hearing, Plaintiff's counsel conceded that all of his claims were frivolous and that dismissal was "forthcoming" based on *res judicata* and *controlling precedent*:

I'm inclined to concede the point on the remaining stated four claims of the conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and *res judicata* analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. What my request would be, Judge Kelly, is that an order of dismissal be limited on the grounds that there is controlling precedent in place that forbids the fraud based claims, rather than founded on any statute of limitations argument or collateral estoppel or *res judicata* defenses. So I think that the order can be confined to that ruling. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(See Exhibit 1, Feb. 22, 2018 Hearing Transcript at 12:11-16, 17:12-15) (emphasis added.) Counsel also conceded: "And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims." (*Id.* at 10:14-17) Counsel further admitted that Plaintiff had previously withdrawn his identical fraud claims in the 2015 Lawsuit, *knowing they could not be maintained by the estate*: "We could not go forward with [the fraud based claims],

but upon realizing that there was a disallowance based in part on the *Ma[t]tison* case, we withdrew the claims.” (*Id.* at 11:6-8.) As to the SCUTPA claim, Counsel admitted he had not reviewed whether an estate could pursue a SCUTPA claim: “As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.” (*Id.* at 17:12-21.)

On March 20, 2018, Judge Kelly dismissed Plaintiff’s complaint holding that all claims were barred by *res judicata*, the same three year statute of limitations applied by the federal court in the 2015 Lawsuit barred all of Plaintiff’s claims in the 2017 Lawsuit, Plaintiff’s fraud claims did not survive the deaths of his parents, and that Plaintiff could not bring a SCUTPA claim in a representative capacity pursuant to S.C. Code Ann. § 39-5-140. (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss.) This Court acknowledged Plaintiff and Counsel’s clear knowledge of the identical nature of Plaintiff’s frivolous claims, and held:

Plaintiff’s Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA’s allegedly wrongful charging of Plaintiff’s parents for the [line protection plan (“LPP”) insurance] product) that were previously litigated and adjudicated by the District Court. Plaintiff’s claims are therefore barred under the doctrine of *res judicata*. “*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). “Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”

Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff’s parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

(2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss at 4-5.)

This Court also applied the same three year statute of limitations as the federal court as another independent ground to dismiss Plaintiff's claims:

Statutory and common law set a three-year statute of limitations period for each of Plaintiff's claims Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of \$28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face of the complaint make clear that nothing was hidden from him.

(*Id.* at 8-10.)

After this Court's Dismissal Order was entered, on March 29, 2018, BANA filed its Motion for Sanctions pursuant to Rule 11 and the FCPSA. To date, BANA has incurred over \$70,000.00 worth of fees and costs expended in defense of the claims Plaintiff brought in the 2017 Lawsuit.

(See BANA's Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶ 31.)

On March 27, 2018, Plaintiff filed a notice of appeal with the South Carolina Court of Appeals, meaning BANA will continue to incur legal costs associated with Plaintiff's frivolous claims. (*See* Motion for Sanctions, Ex. 2, Plaintiff's Notice of Appeal)²

II. ARGUMENT

A. Rule 11 and the FCPSA Provide for Monetary Sanctions.

1. Rule 11 Standard

South Carolina's Rule 11 allows for the recovery of costs and fees for pleadings filed without good ground to support them:

Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, *or both*, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

S.C. R. Civ. P. 11(a) (emphasis added); *see also Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (S.C. 2011) ("A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing.")

Accordingly, under Rule 11(a), a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, for making frivolous arguments without proper investigation, or for filing a pleading in bad faith. *See, e.g., Ex parte Gregory*, 378 S.C. 430, 437–

² This court retains jurisdiction to consider BANA's Motion for Sanctions despite Plaintiff appealing this Court's order on BANA's Motion to Dismiss. *See* SCACR Rule 205; *see also Pee Dee Health Care v. Estate of Thompson*, 418 S.C. 557, 571, 795 S.E.2d 40, 48 (S.C. 2016) (rejecting argument that sanctions motion should not be filed until after conclusion of the appeal); *In re Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (noting that "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment").

39, 663 S.E.2d 46, 50–51 (S.C. 2008) (“Under Rule 11(a), SCRCP, a party and/or the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments . . . [or] for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it.”) “The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party’s attorney from bringing any future frivolous action or action in bad faith.” *Id.* at 437-38; *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (“Like the imposition of costs, attorney’s fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.”)³

2. FCPSA Standard

Similarly, the FCPSA states that “[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document if . . . (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). An attorney and party *shall* also be sanctioned under the

³ South Carolina’s Rule 11 is based upon the language of the pre-1983 Federal Rule 11, and thus federal law interpreting Rule 11 is relevant to this Court’s analysis. *Burns v. Universal Health Servs.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (S.C. Ct. App. 2000); *see also* S.C. R. Civ. P. 11 Notes (“[South Carolina’s] Rule 11(a) is substantially the Federal Rule, with one addition, that the pleadings must be signed by the party or, if he has an attorney, by an attorney who practices in the State. Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings and places on the lawyer who signs a pleading the duty of good faith in preparing the pleading. The lawyer may be disciplined if he violates this duty.”)

FCPSA if the court finds that: “(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law” or “(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.” S.C. Code Ann. § 15-36-10(C)(1)(a) and (c). Further, the South Carolina Supreme Court has held that “sanctions may be awarded under FCPSA regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the Act.” *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (S.C. 2014).

B. Plaintiff and Counsel Proceeding with the Duplicative 2017 Lawsuit Is Sanctionable.

This Court should sanction Plaintiff and his Counsel for actively (and repeatedly) pursuing claims barred by statutes of limitations, the doctrine of *res judicata*, the plain language South Carolina’s statutes, and binding legal precedent. Given the duplicative pleadings filed in this Court (and the district court), the omissions of facts in the pleadings, and Counsel’s own admissions and arguments at the February 2018 motion to dismiss hearing, there was no “good ground” to support any of Plaintiff’s allegations in the 2017 Complaint. There is more than a preponderance of evidence that Plaintiff and Plaintiff’s Counsel—yet again—advanced knowingly frivolous claims that had no chance of success given the facts, procedural history of the matter, and existing law.

1. Plaintiff and Counsel knew that the 2017 Lawsuit was barred by the statute of limitations and *res judicata*.

Where a Plaintiff or attorney pursues claims that they know to be time-barred, the claims are “groundless in law” and subject to Rule 11 sanctions. *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1385 (4th Cir. 1991) (“Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions.”) This is particularly true where a plaintiff’s prior efforts to pursue time barred claims were rejected by the federal court and subject to *res judicata*. Indeed, pursuing identical legal arguments that have already been rejected is itself an independent basis for sanctions. *Holmes v. E. Cooper Cmty. Hosp. Inc.*, 408 S.C. 138 (S.C. 2014) (“In our view, Judge Harrington was warranted in ordering sanctions [under the FCPSA] in this case, especially because Appellant, a licensed attorney, made identical legal arguments in the 2005 litigation and did not prevail on the merits.”); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner*, 637 S.E.2d 316, 320 (S.C. Ct. App. 2006) (“A review of the record reveals that the lawsuit at issue alleged causes of action for the same complaint as the previous lawsuits, i.e., Rutland’s dissatisfaction with Corbett and his law firm. . . . In light of this unsuccessful procedural history, it is inconceivable that Rutland reasonably believed that his claims against Respondents were valid.”).

Plaintiff and Counsel knew that all of Plaintiff’s claims in this case were barred by the three year statute of limitations, which Judge Lewis and the Fourth Circuit had already applied to dismiss the 2015 Lawsuit. Unhappy with the outcome in federal court, they simply re-filed their dismissed allegations with this Court. Indeed, Plaintiff admitted that he “previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief” in the current action. (2017 Opposition at 1.) Thus, Plaintiff and Counsel already knew that Plaintiff’s claims were barred not only by the three year statute of limitations, but also by *res judicata*. In fact, Counsel admitted at the February 2018 motion to dismiss hearing that the claims were barred by *res*

judicata, and even volunteered to forego certain of the claims. (See Feb. 22, 2018 Hearing Transcript at 12:1-16, 17:12-15.)

At no point did Plaintiff or his Counsel even raise an argument for a change in the relevant law with regard to the statute of limitations or *res judicata*. Instead, Counsel merely asked the Court to dismiss certain of his frivolous claims on grounds other than *res judicata* or the statute of limitations to assist him with his appeal. (See Ex. 1, Transcript at 12:1-16, 16:23 - 17:2, 17:22-25). This Court declined and held that all of Plaintiff's claims were barred by *res judicata* and by the three year statute of limitations. (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 4-6, 8-10). Because Plaintiff and his Counsel proceeded with claims that they knew to be time-barred and subject to *res judicata* based on prior rulings in the federal court (and that they appealed up to the Supreme Court of the United States), they should be sanctioned under Rule 11 and the FCPSA and pay BANA's costs for defending against the 2017 Lawsuit.

2. No good faith or reasonable argument exists for the extension, modification, or reversal of South Carolina's survival statute.

Even assuming that Plaintiff's fraud-based claims (fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and SCUTPA) were not independently barred by the statute of limitations and *res judicata*, Plaintiff and Counsel have not established a good faith basis for the reversal of clear law barring these claims under South Carolina's survival statute. Plaintiff and Counsel concede that the fraud-based claims expired at the death of Plaintiff's parents based on "straight forward" South Carolina Supreme Court precedent from 2002 which analyzed and affirmed the fraud exception to the survival statute. (Feb. 22, 2018 Hearing Transcript at 16:3-10.) Specifically, during the oral argument on BANA's Motion to Dismiss, Counsel admitted:

And I recognize there is controlling binding precedent on the primary issues in this case, which are the fraud based claims. That the lower court is handcuffed as to what it can do based in part on a 1941 decision and does state that those fraud claims

when you die, die with you. There's a 2002 opinion as well. I think that's the *Ferguson* case, which cited to *Ma[tt]ison* further for the support that your fraud based claim simply cannot continue on.

(*Id.* at 10:14-24.) Counsel also conceded that Plaintiff withdrew his fraud claims in the 2015 Federal Action (in response to BANA's Rule 11 Letter), knowing they could not be maintained by the estate, stating: "We could not go forward with [the fraud based claims], but upon realizing that there was a disallowance based in part on the *Ma[tt]ison* case, we withdrew the claims." (*Id.* at 11:6-8.)⁴

In *Mattison*, the South Carolina Supreme Court analyzed the survival statute in detail, including analyzing the intent of the legislature in passing the 1932 version the statute that contains identical language to today's version. *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941). The *Mattison* court noted that "[u]nder the common law there was no survival of actions in tort." *Id.* at 119. The Court determined that in creating the statute, the legislature only sought to create an exception to the common law and allow a cause of action to survive in two instances: "(1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to personal property." *Id.* The Court concluded that "it is just as readily seen that respondent's second cause of action [for fraud and deceit] does not come within either of the instances where a cause of action survives" and dismissed those claims. *Id.*

The survival statute has since been renewed by the legislature without change three times in 1942, 1952, and 1962. See S.C. Code Ann. 15-5-90 Credits ("History: 1962 Code Section 10-209; 1952 Code Section 10-209; 1942 Code Section 419; 1932 Code Section 419; Civ. P. '22

⁴ Incredibly, in his Opposition briefing, Plaintiff represented to this Court that "the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud 'exception,'" and that "there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute." (Opposition at 12) (citing *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)). This representation was clearly false based on Counsel's own admissions at the motion to dismiss hearing.

Section 375; Civ. C. '12 Section 3963; Civ. C. '02 Section 2859; R.S. 2323; 1892 (21) 18; 1905 (24) 945.”) At no point did the legislature seek to expand the right of survival to include fraud-based claims. *See* S.C. Code Ann. 15-5-90 (allowing survival in only two situations: “Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative”) In 2002, the South Carolina Supreme Court affirmed that “South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit.” *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563-64, 564 S.E.2d 94, 97 (S.C. 2002) (also finding a fraud-based claim under SCUTPA to be “exempted from the general survival statute [and did] not survive the plaintiff’s death”); *see also Davis v. Life Care Centers of Am., Inc. et al*, Case No. 02-CP-10-3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) (“SCUTPA does not survive the death of an alleged injured party.”).

More recently, in 2008, the South Carolina Court of Appeals again reaffirmed this longstanding exception to the survivability of a fraud claim. *Brailsford v. Brailsford*, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (“South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.”). The *Brailsford* court also catalogued the 70-plus year history of South Carolina Supreme Court rejecting the survivability of fraud-based claims. *See Brailsford*, 669 S.E.2d at 345 (citing *Ferguson*, 564 S.E.2d at 97; *Pamplico Bank & Trust Co. v. Prosser*, 193 S.E.2d 539, 540 (S.C. 1972); *Brewer v. Graydon*, 103 S.E.2d 767, 769 (S.C. 1958); *Mattison v. Palmetto State Life Ins. Co.*, 15 S.E.2d 117 (S.C. 1941)).

The history of South Carolina's survival statute and precedent analyzing that statute make clear that Plaintiff and Counsel have no good faith basis for seeking a modification of the statute. Indeed, that tort causes of action do not survive death was the rule and not the exception. The South Carolina legislature sought to allow two types of claims to be exceptions from the common law and has never sought to expand that exception to include fraud claims, despite numerous opportunities. The South Carolina courts do not have the power to rewrite the text of Section 15-5-90 to expand the statute to cover fraud-based claims. See S. C. Constitution, Art. I, §7. ("The power to suspend the laws shall be exercised *only* by the General Assembly or by its authority in particular cases expressly provided for by it.") Thus, Plaintiff cannot hope to use the court system to change the language of the survival statute in order to save his claims. Indeed, Counsel admitted during the March 2018 hearing that his arguments as to the fraud-based claims were "an exercise of futility" and that Plaintiff had previously dismissed these claims after acknowledging their futility. (Feb. 22, 2018 Hearing Transcript at 11:1-3.) ("And so I recognize this may be at this stage in the proceeding an exercise of futility in terms of what the Court can do on fraud based claims"); see also *id.* at 11:6-8 ("We could not go forward with [the fraud based claims in the 2015 Lawsuit], but upon realizing that there was a disallowance based in part on the *Mattison* case, we withdrew the claims."). This Court agreed that Plaintiff's fraud-based claims were futile and, after reviewing the *Mattison*, *Ferguson*, and *Brailsford* cases, held that "Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina's survivability and SCUTPA statutes." (2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 6).

A legal position is sanctionable if, like here, it "has absolutely no chance of success under the existing precedent." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1373 (4th Cir. 1991).

(quoting *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 988 (4th Cir. 1987)); see also *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) (“We are left with the unavoidable conclusion that plaintiff’s counsel violated Rule 11 by filing the action below. The weight of existing law overwhelmingly favored the defendants, while the record appears devoid of any factual or legal investigation conducted by plaintiffs’ counsel as an effort to formulate an alternative argument in favor of his clients.”). Plaintiff’s filing of the 2017 Lawsuit despite knowing the frivolous nature of his fraud-based claims warrants sanctions on both Plaintiff and Counsel. See, e.g., *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 728-729 (S.C. 2006) (“The trial court found that [Plaintiff] improperly continued the litigation of this case, even after she realized that the facts did not support her claims. Consequently, the court ordered [Plaintiff] to pay certain attorney’s fees and costs incurred from the point in the litigation that she should have realized the lawsuit was frivolous. We agree with the imposition of sanctions [pursuant to the FCPSA and Rule 11].”)

3. Plaintiff’s SCUTPA claim was also barred by the plain terms of the SCUTPA statute.

In addition to being frivolous based on *res judicata*, the statute of limitations, and the survival statute, Plaintiff’s SCUTPA claim is also frivolous for a *fourth* reason: the plain text of the statute bars claims brought in a representative capacity. As this Court noted in its Order on Motion to Dismiss:

The plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUTPA clearly states:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action

individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that “an unfair trade practices claim may not be brought in a representative capacity.” *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff’d as modified*, 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008).

(2017 Lawsuit, March 20, 2018 Order On Motion To Dismiss, at 8). Thus, Plaintiff simply cannot pursue a SCUTPA claim against BANA in a representative capacity based on alleged injury to his parents.

Plaintiff’s defense to pursuing this frivolous SCUTPA claim despite this clear language is that his Counsel did not read the statute before suing BANA and seeking treble damages. Even after BANA briefed this issue in its 2017 Motion to Dismiss, Counsel still declared sanctionable ignorance at the hearing: “As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.” (See Feb. 22, 2018 Hearing Transcript at 17:12-21.)

Rule 11 mandates that “[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” S.C. R. Civ. P. 11; *see Ex parte Gregory*, 378 S.C. at 437–39, 663 S.E.2d at 50–51 (S.C. 2008) (“[A]ppellant failed to properly investigate the matter prior to filing it, and that the action was frivolous.”); *Brubaker*, 943 F.2d at 1373 (“To be reasonable, the prefiling factual investigation must uncover some information to support the allegations in the complaint. A complaint containing allegations unsupported by any information obtained prior to filing violates the required

pre-filing factual investigation. That is, where there is no factual basis for a plaintiff's allegations, the complaint violates Rule 11's factual inquiry requirement. The pre-filing investigation must also uncover some basis in law to support the claims in the complaint."). Similarly, pursuant to the FCPSA, "a reasonable attorney in the same circumstances would believe that under the facts, [the SCUTPA claim] was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." Here, simply reading the statute that Plaintiff proceeded under would have made clear to Plaintiff and Counsel that the SCUTPA claim was frivolous for yet another reason. As a result, Plaintiff and Counsel should be sanctioned pursuant to Rule 11 and the FCPSA.

C. BANA'S COSTS AND ATTORNEYS' FEES DEFENDING THIS ACTION SHOULD BE RECOVERED.

Rule 11 and the FCPSA both allow sanctions consisting of the reasonable costs and attorney's fees of the prevailing party. *See* S.C. Code Ann. § 15-36-10(G); *see Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 600, 713 S.E. 2d 624, 629 (S.C. 2011) ("[T]he award to the other party of its detailed, itemized costs and fees incurred as a result of the improper [conduct] plainly is allowed under the express language of Rule 11, SCRCF); *Ex parte Gregory*, 378 S.C. 430, 437-38, (S.C. 2008); *Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 567, 795 S.E.2d 40, 46 (S.C. Ct. App. 2016) ("The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction."). BANA expended significant funds defending against the 2015 Lawsuit in federal court, where it prevailed on the merits. BANA has thus far expended over \$70,000.00 defending against this frivolous 2017 Lawsuit—prior to completing the briefing of this motion and briefing the appeal that Plaintiff has already filed. Plaintiff has refused to reimburse

BANA for its costs and fees. (See BANA's Motion for Sanctions, Ex. 1, Affidavit of E. Timmermans ¶¶ 5-6, 31.)

Here, BANA requests that this Court sanction Plaintiff and his Counsel for the improper conduct of filing a meritless Complaint unsupported by facts or existing law, on multiple grounds. BANA's counsel has incurred over \$70,000.00 in costs and fees thus far obtaining dismissal of Plaintiff's 2017 Lawsuit, including fees associated with briefing BANA's Motion to Dismiss, preparing the hearing on BANA's Motion to Dismiss, traveling to and attending the hearing on BANA's Motion to Dismiss, drafting the proposed order granting BANA's Motion to Dismiss, and drafting the Motion for Sanctions (but does not include the legal fees associated with briefing the motion). (See *id.* ¶ 31.)

III. CONCLUSION

Based on the meritless legal and factual allegations contained in the Complaint, Bank of America, N.A. respectfully requests that this Court impose sanctions on Plaintiff and Counsel for the costs and attorneys' fees expended to defend the 2017 State Action and such other relief as is just and reasonable.

This the 29th day of May 2018.

Respectfully submitted,

/s/Robert A. Muckenfuss

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of May 2018, the foregoing BANK OF AMERICA, N.A.'S MEMORANDUM IN SUPPORT OF MOTIONS FOR SANCTIONS was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

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EXHIBIT 1

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3) OF THE SEVENTH
4) JUDICIAL CIRCUIT
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PHILLIP FRANCIS LUKE HUGHES,
ON BEHALF OF THE ESTATE OF
JANE K. HUGHES,
Plaintiff,
vs.
BANK OF AMERICA NATIONAL
ASSOCIATION,
Defendant.

TRANSCRIPT OF RECORD
2017-CP-42-02834

February 22, 2018
Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE
For Defendant

Julie A. Ashbrook,
Circuit Court Reporter
Seventh Judicial Circuit

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EXHIBITS

MARKED ENTERED

NO EXHIBITS PROFFERED

1 PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

2 THE COURT: Okay. The first matter is -- the
3 first matter is Phillip Francis Luke Hughes, the
4 Plaintiff, et al. versus Bank of America National
5 Association.

6 MR. HEWITT: Good morning, Your Honor.

7 MR. MUCKENFUSS: Good morning.

8 THE COURT: All right. I have read everything
9 that has been submitted.

10 MR. HEWITT: Thank you.

11 THE COURT: Yes, sir.

12 MR. MUCKENFUSS: Thank you, Your Honor. Robert
13 Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of
14 America, Your Honor. This is our motion to dismiss.

15 I think the arguments in our motion are fairly
16 straight forward and I won't go through, Your Honor, I
17 know you've read the briefs. But essentially, this is
18 an identical case to a case that was filed previously in
19 2015 in state court, was removed to federal court. At
20 that time the federal court questioned jurisdiction.

21 I think in this case plaintiff's counsel doesn't
22 -- he admits it's an identical case in terms of the
23 facts and circumstances that are alleged. Essentially
24 it was a bank product line protection plans insurance.
25 And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.)
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death..

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments, and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
2 estoppel may be in play, there are exceptions. The
3 State has adopted the restatement of judgment. And
4 provisions 27, 28 and 29 find that when you deal with
5 interests of public policy and fundamental unfairness
6 that the Court can refuse to apply collateral estoppel
7 and res judicata.

8 And we've made clear through certain studies that
9 we've cited about what is happening to senior citizens
10 in this country in terms of exploitation and fraudulent
11 schemes, that one in three -- over one in three senior
12 citizens are subject to fraudulent exploitation and
13 schemes. And the victims of that conduct -- and that
14 it's costing the country over 36 billion dollars each
15 year, that there are policy reasons in play. Not to
16 mention, you have Jane and John Hughes, who were
17 defrauded of several thousand dollars by Bank of
18 America.

19 And just very quickly, although it's in the, the
20 brief, the factual context for this entire case is a
21 2006 transaction with Bank of America. Jane and John
22 Hughes were 86 years old at the time. Owned their home
23 outright and took out a line of credit with Bank of
24 America. I don't know why. If they were sold a bill of
25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
 2 it.

3 And during that transaction, they were offered an
 4 optional line of protection plan where if they died or
 5 became disabled or unemployed, which they already were,
 6 it might provide some assurance that they would not have
 7 to make some of the monthly payments. They declined
 8 that expressly. It's commemorated. They both signed
 9 it, we don't want this product, we don't need this
 10 product. They checked the box that we -- do not charge
 11 us for it.

12 Soon after the closing, John Hughes died. And
 13 Jane Hughes was diagnosed with dementia, a-typical
 14 psychosis, cataracts, which required surgery and some
 15 degree of blindness, renal insufficiency. She broke her
 16 hip, went to a nursing home. Was noted to lack
 17 decisional capacity. So she had a precipitous decline
 18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
 20 by Bank of America. It was a \$28-a month charge. It
 21 was buried in a nondescript, ambiguous line item charge
 22 that didn't say anything about Bank of America. It was
 23 an abbreviated insurance charge with some serial numbers
 24 attached. She had no idea. She was in a nursing home,
 25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
 2 a test, less restrictive.

3 And so I've said all that to say this, that I
 4 think that the decision for the Court is fairly straight
 5 forward on the fraud claims, and that we endeavor to
 6 change the law in this state, which has been a law,
 7 really a common law created since 1941 in a very
 8 different world when you didn't have to worry about
 9 certain types of identity theft, perhaps when people
 10 could trust their banks.

11 And as a relevant aside, I know these allegations
 12 made by the Hughes family are true. We've been
 13 approached by other families. It happened to me as a
 14 former Bank of America customer. Right about the same
 15 time, right when I get married and purchased my first
 16 house, we're financing through Bank of America and I
 17 found a few months after the closing I was getting
 18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
 20 address it with Bank of America right then and there.
 21 Ms. Hughes did not. And so that's the context as to why
 22 we're here.

23 And so I know what the Court decision will be in
 24 terms of the disposition. My hope is that it would be
 25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowling*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously. (

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1 federal level, which is why we're here today.

2 So unless the Court has any questions, I do
3 appreciate your time.

4 THE COURT: No, I don't have any.
5 Anything?

6 MR. MUCKENFUSS: Very briefly, Your Honor. I
7 think it is appropriate for this Court to apply issue
8 preclusion in addition to the fact that there is no
9 claim in South Carolina for fraud post death. But it is
10 appropriate issue preclusion as to equitable estoppel
11 decision by the federal court would apply to all of
12 these claims.

13 That's different than claim preclusion, but the
14 federal court very specifically held that the plaintiffs
15 in this case, the plaintiffs in this case did not
16 exercise the due diligence that would be required. It's
17 cited in the South Carolina case that's on point for
18 that standard.

19 So there is not a different federal standard to
20 the standard that South Carolina courts will apply. So
21 we would ask that when the case is dismissed, that it's
22 dismissed on the fact that there's clear precedent,
23 obviously, you know, bringing these claims, in addition
24 to issue preclusion on the equitable estoppel, equitable
25 tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

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14 --- THIS ENDS REQUESTED TRANSCRIPT ---
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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A. Ashbrook
 Julie A. Ashbrook
 Circuit Court Reporter
 Seventh Judicial Circuit

Certificate of Electronic Notification

Recipients

Robert Muckenfuss - Notification transmitted on 05-29-2018 06:01:37 PM.

Bradley Hewett - Notification transmitted on 05-29-2018 06:01:37 PM.

Elizabeth Timmermans - Notification transmitted on 05-29-2018 06:01:37 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2017CP4202834

Official File Stamp: 05-29-2018 06:01:16 PM

Court: CIRCUIT COURT

Common Pleas

Spartanburg

Case Caption: Phillip Francis Luke Hughes , plaintiff, et al VS
Bank Of America National Association

Document(s) Submitted: Memo/Memo in Support

- Exhibit/Filing of Exhibits

Filed by or on behalf of: Robert A. Muckenfuss

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Robert A. Muckenfuss for Bank Of America
National Association

Elizabeth Marion Zwickert Timmermans for Bank
Of America National Association

Bradley Davis Hewett for Phillip Francis Luke
Hughes

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

On Behalf Of The Estate Of Jane K. Hughes

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT'S
	)	MOTION FOR SANCTIONS
vs.	)	
	)	
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion for Sanctions. The Court dismissed Plaintiff's underlying complaint pursuant to a motion to dismiss filed by BANA in lieu of an answer, and Plaintiff has since appealed that decision. Shortly after the Court granted Defendant's motion to dismiss, Defendant moved for sanctions under Rule 11, SCRCF and the South Carolina Frivolous Proceedings Sanctions Act. Because Plaintiff brought the action in good faith and presented reasonable grounds for modifying existing law, Defendant is not entitled to their requested attorney's fees and costs.

BANA's decision to seek sanctions against Plaintiff is audacious in light of Defendant's and defense counsel's own conduct throughout the course of this case and its sister District Court case. Defendant contends that Plaintiff engaged in sanctionable activity, a point that counsel for Defendant also raised during oral argument on BANA's motion to dismiss. Yet, a mere day before oral argument, defense counsel sent an unsolicited email to Plaintiff's counsel requesting a demand

in an attempt to settle the case. See, Ex. A, February 21, 2018 email from Robert Muckenfuss, Esq. Further, prior communications from opposing counsel contain repeated threats of Rule 11 sanctions and, in some instances, hostile and inappropriate remarks. See, Ex. B, March 11, 2016 email from Robert Muckenfuss, Esq; see also, Ex. A to Def. Mot. for Sanctions. All the while, BANA cannot, or refuses to, provide any documentation authorizing the account withdrawals that form the basis of this action, effectively conceding that it improperly withdrew charges account of an elderly couple.

BANA comes to this case with unclean hands, evidenced by its failure to provide any documentation that Mr. or Mrs. Hughes ever agreed to the charges, and when viewed in conjunction with BANA's payments of nearly \$58 billion in settlements and penalties for financial fraud as well as its liability in a recent South Carolina case for reprehensible conduct since defrauding the Hugheses. BANA's improper conduct in this State is nothing new, as the Court of Appeals upheld a sizeable punitive damages verdict against BANA in the years since it began defrauding Plaintiff, holding that BANA had engaged in reprehensible conduct sufficient to support the amount of punitive damages. See, *Cody P v. Bank of Am., N.A.*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (holding that a \$1.5 million punitive damages award would act to deter BOA from reprehensible conduct and encourage the bank to better train its employees and implement more effective safeguards to protect customer's funds.)

BANA's decision to seek sanctions in this matter is even more ironic in light of its agreement to a \$16.65 billion settlement with the Department of Justice for financial fraud leading up to and during the financial crisis, including a \$5 billion penalty, just months before notifying the Hugheses that it was cancelling a product they had expressly declined. *Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to*

and During the Financial Crisis, U.S. Dep't of Justice, Office of Public Affairs (August 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>. In fact, Bank of America has paid nearly \$58 billion in fines, penalties, and restitution for financial misconduct since the 2008 financial crisis. John Schoen, *7 Years on from crisis, \$150 billion in bank fines and penalties*, CNBC (April 30, 2015), <https://www.cnbc.com/2015/04/30/7-years-on-from-crisis-150-billion-in-bank-fines-and-penalties.html>.

Now, Defendant seeks **\$70,000.00** in attorney's fees simply for filing an eight page motion to dismiss, arguing the motion, and preparing a proposed order. For the reasons set forth below, Plaintiff respectfully asks this court to deny Defendant's Motion for Sanctions.

STATEMENT OF FACTS

This case arose from fraudulent charges made by Defendant Bank of America National Association ("BANA") against the account of John and Jane Hughes beginning on or around June 2006. Defendant, between June 2006 and March 2015, illegally withdrew monies from the Hugheses' account for a mortgage insurance product that the couple expressly declined in writing at the loan closing. Each of Defendant's withdrawals was relatively small and the line-item descriptions of the transactions were opaque and did not identify the actual purpose of the charge. At the time the fraudulent transactions began, Mr. and Mrs. Hughes were 86 and 85 years old respectively.

John Hughes died in October 2008. Jane Hughes was then in poor health and after June 2006 suffered from, among other ailments, blindness and impaired cognition; she died June 3, 2015. Shortly before Mrs. Hughes passed away, BANA sent her a notice in March 2015 that the mortgage insurance plan was being cancelled, and she would no longer be charged for the product.

Defendant subsequently established that it had been charging the Hugheses' account for the declined mortgage insurance in John Hughes's name, although he had been deceased for over six years. Defendant refused to refund the money withdrawn between June 2006 and October 2008 or to provide any documentation that John Hughes ever elected to receive the insurance product.

Plaintiff Phillip Francis Luke Hughes 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. *See*, Ex. C, Pl.'s Compl. Plaintiff incorporates the facts of the complaint into the present memorandum.

Prior to initiating the present action, Plaintiff filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the facts and transaction that establish his claim for relief in the current action. Plaintiff's 2015 complaint was filed as a putative class action against BANA for violation of the Truth in Lending Act, Fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent Acts. BANA removed the 2015 action to federal court and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Plaintiff dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims¹ in his 2017 complaint because District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina

¹ The 2017 complaint also included claims for breach of fiduciary duty, conversion, and South Carolina Unfair Trade Practices, which were not included in the putative class action.

survival statute should be overturned. The question is one left to the State to decide under federal common law but, because South Carolina case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR.

On December 21, 2017, BANA moved to dismiss Plaintiff'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, South Carolina's survival statute. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018, and subsequently granted Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. On March 27, 2018, Plaintiff filed a timely Notice of Appeal, and currently appeals the Court's Order of Dismissal as it pertains to the question of the survivability of fraud and *res judicata* of Plaintiff's fraud-based claims. Two days later, Defendant moved for sanctions.

STANDARD OF REVIEW

Pursuant to Rule 11, SCRCP, the court, in its discretion, may award sanctions against a party and/or the party's attorney for filing a frivolous pleading, motion, or other paper making frivolous arguments; sanctions may also be appropriate where such filings are made in bad faith, even when there are good grounds to support the filing. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). The South Carolina Frivolous Civil Proceedings Sanctions Act further provides for the imposition of sanctions against a party and/or his attorney for frivolously filing papers or asserting arguments, as determined under a "reasonable attorney" standard. *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (2014). Sanctions may be awarded under this section "so long as the trial court finds by a preponderance of the evidence" that a party or attorney should be sanctioned under the terms of the FCPSA. *Id.* The

provisions of the FCPSA do *not* apply, however, where an attorney establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, including a good faith argument for an extension, modification, or reversal of existing law. *Id.* (citing S.C. Code Ann. 15-36-10(J)).

Whether attorney's fees should be awarded under Rule 11, SCRCP, or under the FCPSA, is treated as a decision in equity. *Se. Site-Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). The trial court has discretion to award or deny sanctions under Rule 11 or the FCPSA, and will not be disturbed on appeal unless the conclusions reached by the lower court are without reasonable factual support. *Ex parte Gregory* at 438, 663 S.E.2d at 51.

ARGUMENT

Defendant BANA seeks an award of sanctions pursuant to Rule 11 and the FCPSA, including an exorbitant \$70,000.00 in attorney's fees and costs allegedly incurred for filing and arguing a motion to dismiss on the pleadings. Because Plaintiff filed the underlying action in good faith and with the support of a reasonable argument for a modification of existing common law, sanctions under these rules are not warranted. Indeed, awarding sanctions in this case would chill the reasonable pursuit of updated precedent and leave South Carolina case law permanently ossified. Moreover, even if this Court determines that Plaintiff and/or his counsel engaged in sanctionable conduct, an award of \$70,000.00 is unreasonable.

I. Neither Plaintiff nor Plaintiff's counsel acted in violation of any FCPSA provision and an imposition of sanctions thereunder is improper.

In order to impose sanctions against Plaintiff or his counsel under the FCPSA, the court must find, by a preponderance of the evidence, that the parties violated the FCPSA. *Holmes* at 152-153, 758 S.E.2d at 491. Defendant argues that, because the court ultimately determined that

Plaintiff's claims were barred by res judicata and binding legal precedent, the suit was frivolous and warrants sanctions. Def. Mot. for Sanctions, ¶ 30. In support, Defendant relied on a few, carefully selected facts crafted to create the impression that Plaintiff and his counsel filed a meritless lawsuit and that the parties knew the filing lacked merit. As set forth below, however, the picture painted by Defendant BANA is inaccurate. Indeed, viewing *all* of the facts relevant to the pending motion establishes that an imposition of sanctions against Plaintiff or his counsel is not warranted under a preponderance of the evidence.

- a. Under the terms of the FCPSA, Plaintiff is not subject to court-imposed sanctions in the present case.

In its motion for sanctions, BANA cites to the FCPSA provisions codified at S.C. Code Ann. §§ 15-36-10(A)(4)(a)(ii) and 15-36-10(C)(1)(a), which both allow for sanctions in instances where “a reasonable attorney presented with the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.” Def. Mot. for Sanctions, ¶¶ 28-29. Specifically, section 15-36-10(A)(4)(a)(ii) states that, where these circumstances are met, an attorney may be sanctioned under the Act. Section 15-36-10(C)(1)(a), on the other hand, provides that when a court finds the above circumstances to be satisfied, upon motion by a prevailing party, a non-prevailing party *shall* be sanctioned “[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by directed verdict, summary judgment, or judgment notwithstanding the verdict.”

As an initial matter, Plaintiff submits that because the underlying action was dismissed pursuant to a motion to dismiss filed by Defendant in lieu of an answer—not by verdict, directed verdict, summary judgment, or judgment notwithstanding the verdict—Defendant lacks standing

to seek sanctions under section 15-36-10(C)(1)(a). The Act's plain language clearly indicates when the provision applies, and omits actions concluded by a motion to dismiss. Due to the explicit language used in the statute, the omission must be construed as purposeful. *See Holmes* at 152-153, 758 S.E.2d at 491 ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (internal citations omitted)). Accordingly, the following analysis only addresses Defendant's motion for sanctions pursuant to S.C. Code Ann § 15-36-10(A)(4)(a)(ii). Unlike section 15-36-10(C)(1)(a), section 15-36-10(A)(4)(a)(ii) authorizes sanctions against an attorney or pro se litigant, but does not allow for sanctions against a party. *See*, S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Therefore Defendant's motion for sanctions against Phillip Hughes pursuant to the FCPSA is without legal basis.

b. Plaintiff's counsel asserted good faith, reasonable arguments in support of the underlying complaint and on appeal.

Defendant BANA's motion specifically seeks sanctions against Plaintiff and his counsel for asserting the fraud-based claims in the underlying action, arguing that "[l]awsuits where, like here, a plaintiff pursues claims barred both by res judicata and binding legal precedent are the exact sort of frivolous lawsuits warranting sanctions." Def. Mot. for Sanctions, ¶ 30. Contrary to this argument, however, Plaintiff and Plaintiff's counsel produced a sound argument, supported by extensive research, for the need to modify the fraud exception to the South Carolina survival statute, and set forth a well-supported, good faith and reasonable argument as to why res judicata does not bar the underlying claim from proceeding. *See*, Ex. D, Pl. Mem. in Opp'n of Def. Mot. to Dismiss. Both Plaintiff and his counsel stand behind the arguments asserted, to the extent that Plaintiff filed a Notice of Appeal challenging the Court's decision. *See*, Ex. E, Notice of Appeal.

Accordingly, Plaintiff has not violated S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) or any other provision of the FCPSA.

i. *Argument for modifying the common law rule excepting fraud from S.C. Code Ann § 15-5-90*

Defendant suggests that, by filing the underlying complaint despite the common law rule that fraud does not survive death, Plaintiff and his counsel engaged in sanctionable activity. Def. Mot. for Sanctions, ¶¶ 22, 28-30. That simply is not the case, as evidenced by the language of the FCPSA. The provisions of the Act relied upon by Defendant anticipate challenges to existing precedent, and state that an attorney may be sanctioned when a reasonable attorney would believe that 1) his claim is not warranted under existing law; and 2) a good faith or reasonable argument did not exist for the *extension, modification, or reversal of existing law*. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Plaintiff does not dispute that existing law bars fraud-based claims raised after a party's death. Plaintiff, however, raised a good faith, reasonable argument as to why the common law rule excepting fraud from the survival statute should be changed. *See*, Ex. D at 10-17. Plaintiff's argument is two-fold: 1) the exception is based upon a 1941 Supreme Court case, and the court has not since reconsidered the rationale supporting that decision; and 2) modern public policy considerations warrant reconsideration of the fraud exception. *Id*.

And at least a review of this hoary precedent is timely, if not overdue. The fraud exception to the survival statute stems from the South Carolina Supreme Court opinion in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). The survival statute—both at the time of *Mattison* and today—provides that “any and all injuries to the person or to personal property” survive the death of a party. *Id*; S.C. Code Ann § 15-5-90. The *Mattison* court held that fraud is neither an injury to the person nor to personal property, and thus does not survive under the language of the statute. *Id*. Although Defendant correctly argues that the Supreme Court

reaffirmed *Mattison* in 2002, as did the Court of Appeals in 2008, the cases *did not* revisit the rationale behind the *Mattison* decision. Rather, the cases Defendant cites to simply provide that fraud does not survive because *Mattison* created an exception to the statute. *See, Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (citing to *Mattison* in holding that “South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud”.); *see also, Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (citing to *Mattison* in holding that “South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud”).

Defendant’s motion suggests that the *Ferguson* and *Brailsford* opinions revisited the *Mattison* court’s rationale in support of the fraud exception. Def. Mot. for Sanctions, ¶¶ 19-20. These opinions, however, simply state that fraud *is* an exception to the survival statute; they do not articulate *why* fraud is an exception. The distinction is important because *Ferguson* states that fraud falls within the scope of the survival statute, but does not survive due to the *Mattison* exception. *Ferguson* at 563, 564 S.E.2d at 96 (“[t]he general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions”). *Mattison*, however, does not create an “exception” at all—it states that fraud falls outside the scope of the survival statute. *Mattison* at 256, 15 S.E.2d at 119 (deciding that fraud “does not come within either of the instances where a cause of action survives” under the statute). Looking closely at the two cases reveals a paradox in the *Ferguson* opinion: the *Ferguson* court opined that all causes of action—including fraud—fall within the scope of the survival statute, but reaffirmed *Mattison*’s holding that fraud does *not* fall within the scope of the survival statute. Plaintiff asserts that this inconsistency makes ripe for review the question of whether fraud falls within the scope of the survival statute and,

applying the more recent statutory interpretation set forth in *Ferguson*, fraud should survive under S.C. Code Ann § 15-5-90.

Plaintiff also presented public policy arguments in support of the modernization of the fraud exception to the survival statute. The most significant public policy consideration presented pertains to the susceptibility of elderly individuals to fraud. Ex. B at 13-14. Plaintiff offered the court data derived from recent studies showing that elderly people, like Jane and John Hughes, are a favorite target of fraudsters due to vulnerabilities caused, in part, by loss of cognitive functions. Id. at 14. Individuals with impaired cognition or a below-average memory are 78% more likely to be a victim of fraud, and approximately one in three American seniors fall victim to fraud in any five-year span. Id. at 13-14. This vulnerability is exacerbated by the speed and complexity of financial transactions and sophisticated technology not conceivable when *Mattison* was decided. In sum, Plaintiff challenged the fraud exception in the face of evidence that, as of 2015, fraud and financial exploitation cost America's seniors an estimated total of \$36.48 billion annually. Id. at 14.

Plaintiff takes the position that these facts become especially problematic when considered in conjunction with the South Carolina survival statute. South Carolina's seniors are losing enormous amounts of money to fraud, and the time that it takes to identify, investigate, report, and prosecute civil cases can take years and often exceeds the lifespan of the victims. The survival statute serves to prevent an estate from raising or continuing lawsuits against perpetrators of fraud upon the death of a victim, and many tactics used to defraud seniors do not rise to the level of criminal activity, leaving estates without legal recourse to hold perpetrators accountable. Id. at 14. Consequently, the statute creates an avenue for fraudsters to exploit seniors with little possibility of consequence which, in turn, arguably incentivizes fraudulent conduct.

The arguments presented by Plaintiff in support of the modification of the fraud exception to the survival statute were carefully considered and thoroughly explained. Not only are these good faith, reasonable arguments, they are persuasive even if ultimately rejected by the Supreme Court and, in part, form the basis of Plaintiff's appeal. Defendant's position that Plaintiff lacked a good faith or reasonable argument for modifying existing law is thus meritless, and rests on a contorted view of Plaintiff's position. In light of the foregoing, the by a preponderance of the evidence is *against* a finding that Plaintiff lacked a good faith or reasonable argument for changing existing precedent and so sanctions are not warranted under the FCPSA.

ii. *Argument against res judicata*

Defendant asked the court to penalize Plaintiff and his counsel under S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) on the grounds that, in addition to being barred by existing law, the underlying claim is barred by *res judicata*. Plaintiff does not seek to change existing law surrounding the doctrine of *res judicata*, and he and his counsel filed the underlying complaint with the reasonable understanding and belief that the doctrine did not bar the claims asserted therein. A review of Plaintiff's Memorandum in Opposition of Defendant's Motion to Dismiss, and the transcript from the February 22, 2018 hearing on Defendant's Motion to Dismiss offer facts more than sufficient to support a finding that Plaintiff did not violate the FCPSA by filing the 2017 complaint. *See*, Ex. D at 3-10; Ex. F at 10-18.

The FCPSA provision under which Defendant seeks sanctions provides that the court may impose sanctions against an attorney for filing a pleading where "a reasonable attorney presented with the same circumstances would believe that under the facts, his claim or defense was *clearly* not warranted under existing law." S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (emphasis added). The Act does not hold a lawyer to a standard of brilliance in predicting the outcome of a case;

rather, it only requires a lawyer to be competent. *Se. Site Prep, LLC* at 104, 713 S.E.2d at 653. Plaintiff argues, and Defendant must agree, that a competent, reasonable attorney would not believe that the 2017 complaint was clearly not warranted under the doctrine of *res judicata*. During oral argument on Defendant's Motion to Dismiss, Defendant's own counsel Robert Muckenfuss prefaced his argument with an admission that "[i]n re-filing this case, it appears to survive *res judicata*. And so I'm gonna break it down into two pieces" Ex. F, Feb. 22, 2018 Hearing Transcript at 5: 10-12. This statement by defense counsel renders any subsequent argument that a reasonable attorney would believe Plaintiff's claim to be clearly not warranted under the doctrine of *res judicata* disingenuous.

Moreover, Plaintiff and Plaintiff's counsel had fair reason to believe that the court would not find the underlying complaint barred by claim preclusion. *Res judicata* prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, a party must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff's fraud-based claims were voluntarily dismissed without prejudice in the District Court proceeding prior to being re-filed in state court, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

Moreover, while Plaintiff acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit," the issue of whether fraud should continue to be exempted from the survival statute could *not* be adjudicated in the prior lawsuit. *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). After Defendant removed the initial action to federal court,

the court exercised diversity jurisdiction over Plaintiff's state law claims which, pursuant to the *Erie* doctrine, must be decided under South Carolina substantive law. *See, Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Because *Mattison* is binding, substantive South Carolina law the federal court would be bound to by precedent to dismiss Plaintiff's claims of fraud. Furthermore, under South Carolina Appellate Court Rule 244(a), Plaintiff could not ask the District Court to certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. *See* SCACR 244(a). Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Plaintiff's challenge to the fraud exception to survivability. Thus, because the issue of survivability could not have been heard in the prior action, Plaintiff reasonably believed that the claims asserted in his 2017 complaint were not barred by the doctrine of *res judicata*.

In sum, Defendant's Motion for Sanctions lacks any discussion and offers no evidence to suggest that a reasonable attorney would believe that, in light of the facts and circumstances relevant to the issue of *res judicata*, Plaintiff's claims were clearly not warranted. On the contrary, counsel for Defendant previously admitted, on the record, that Plaintiff's 2017 complaint "seems to survive *res judicata*." Ex. F at 5: 10-12. Accordingly, there is no basis for sanctions under the FCPSA.

- c. This Court has already had the opportunity to consider Defendant's position and did not impose sanctions.

Finally, this Court was previously presented with the opportunity to consider the same conduct Defendant objects to herein and impose appropriate sanctions. Notably, the Court declined to award sanctions at that time, and it should do the same now.

The FCPSA allows the court, in its discretion, to initiate an action for sanctions under S.C. Code Ann. § 15-36-10(A)(4) absent any motion by a party. *See*, S.C. Code Ann. § 15-36-10(D) (specifying that the court or a party may propose sanctions under the Act). Before it filed the current Motion for Sanctions, counsel for Defendant raised the issues set forth in its motion to Judge Kelly at the February 22, 2018 hearing on Defendant's Motion to Dismiss. Ex. F at 7: 5-16. Attorney Robert Muckenfuss argued before the Court that, although Defendant had not moved for sanctions at that time, he believed that Plaintiff and his counsel entered "dangerous area" by re-filing the fraud claims in the 2017 complaint, and that the conduct came "close to a sanctionable type of circumstance." *Id.* Yet, Judge Kelly, who read both parties' briefs and heard oral argument on Defendant's motion and Plaintiff's rebuttal, declined to entertain counsel's accusations either at the hearing or in his Order of Dismissal. The fact that the Court did not take the initiative to sanction Plaintiff or otherwise reprimand him despite Defendant's argument indicates that Plaintiff's complaint did not, in fact, constitute a "sanctionable type of circumstance."

Now, Defendant once again proposes that Plaintiff and/or his counsel should be sanctioned for filing the 2017 complaint. Though the case was dismissed, the facts surrounding Plaintiff's decision to file the complaint remain unchanged. That the Court previously declined to sanction Plaintiff for the same filing creates a strong indication that the complaint did not violate the FCPSA. Accordingly, Plaintiff asks the court to deny Defendant's Motion for Sanctions.

II. Neither Plaintiff nor Plaintiff's counsel acted in violation of Rule 11, SCRPC and an imposition of sanctions thereunder is improper.

In addition to seeking sanctions under the FCPSA, Defendant moves this court for an award of sanctions pursuant to SCRPC Rule 11. Sanctions are available against a party under Rule 11 where a party files a frivolous pleading, motion, or other paper, or where a party files a pleading without good ground to support it. *Ex parte Gregory*, 378 S.C. at 437, 663 S.E.2d at 50; *Runyon*

v. *Wright*, 322 S.C. 15, 16, 471 S.E.2d 160, 161-162 (1996). The “criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA].” *In re Beard*, 359 S.C. 351, 360, 597 S.E.2d 835, 839 (Ct. App. 2004) (citing *The Father v. South Carolina Dep’t of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct.App.2001)).

Plaintiff incorporates the arguments asserted in Section I, *infra*, herein, and maintains that neither Plaintiff nor Plaintiff’s counsel has engaged in conduct sanctionable under Rule 11. For the same reasons that sanctions are not warranted under the FCPSA, they are not warranted under Rule 11. Plaintiff and his counsel filed the 2017 complaint with good ground to support it and in good faith. Accordingly, Plaintiff respectfully asks this Court to deny Defendant’s Motion for Sanctions.

III. Defendant’s request for \$70,000.00 in attorney’s fees and costs is unreasonable.

Both Rule 11 and the FCPSA allow for an award of reasonable attorney’s fees and costs against parties found to have violated the respective rules. *See*, Rule 11, SCRCF; S.C. Code Ann. § 15-36-10(G)(1). In the present matter, Defendant seeks an award of \$70,000.00 in fees and costs incurred “briefing BANA’s Motion to Dismiss, preparing the hearing on BANA’s Motion to Dismiss, traveling to and attending the hearing on BANA’s Motion to Dismiss, drafting the proposed order granting BANA’s Motion to Dismiss, and drafting this Motion for Sanctions.” Def. Mot. for Sanctions, ¶ 31. BANA’s alleged amount of attorney’s fees and costs associated with filing two motions, and arguing one, is positively extortionate.

Should the Court decide to impose sanctions against Plaintiff and/or his counsel, Plaintiff would ask this Court to look to the context of the claim and relevant factors in determining an award of sanctions. *See*, S.C. Code Ann. § 15-36-10(E). This case was dismissed in its infancy, on a motion to dismiss filed by Defendant in lieu of an answer. The parties did not engage in

written discovery or take depositions, as the matter never graduated from the pleadings stage. Moreover, because the facts alleged in Plaintiff's 2017 complaint formed the basis of his 2015 complaint against BANA, Defendant and its counsel investigated and formed rebuttals to those allegations before Plaintiff ever filed the underlying action. Overall, the amount of work required of defense counsel to respond to Plaintiff's 2017 complaint does not support the alleged \$70,000.00 in attorney's fees and costs suggests otherwise. Defendant conveniently omitted documentary support for this figure, offering it only upon request by the Court and thereby depriving Plaintiff the opportunity to fully respond to its exorbitant request. Def. Mot. for Sanctions, ¶ 31. In light of these circumstances, and in the event the Court finds that sanctions are warranted, Plaintiff would respectfully ask this Court to impose a more appropriate penalty.

CONCLUSION

Defendant fails to offer evidence to support a finding that, by a preponderance of the evidence, filing Plaintiff's 2017 complaint constituted frivolous or sanctionable behavior. On the contrary, Plaintiff set forth well-supported, good faith grounds for filing the complaint and challenging existing precedent. Throughout the course of litigating the underlying case and its sister federal court case, Defendant has engaged in unsavory conduct in an effort to dispel Plaintiff's claims against it, and its Motion for Sanctions is yet another untenable ploy to accomplish just that. Plaintiff respectfully asks this Court to decline to penalize Plaintiff for reasonable conduct and to deny Defendant's Motion for Sanctions.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By: s/ Brad D. Hewett

Brad D. Hewett

S.C. Bar No. 77924

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D. Michael Kelly

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Columbia, South Carolina 29202

(803) 726-0123

(803) 252-7145

Attorneys for Plaintiff

May 30, 2018

Exhibit A

From: Muckenfuss, Robert A.
To: Brad Hewett
Subject: Hughes
Date: Wednesday, February 21, 2018 12:14:05 PM

Brad:

Prior to the hearing tomorrow, do you have a demand for settlement purposes? Just trying to see if we can resolve prior to the hearing.

Thanks,

R.

This e-mail from McGuireWoods may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.

Exhibit B

From: Muckenfuss, Robert A.
To: Brad Hewett
Subject: Re: Hughes v. BANA
Date: Friday, March 11, 2016 8:42:57 AM
Attachments: [image001.png](#)
[image003.png](#)
[image004.png](#)
[image004.png](#)
[image001.png](#)
[image001.png](#)
[image001.png](#)

When was the first time I "threatened" Rule 11? Trust me, I don't make threats and don't need to. It's fine if you want to play the "I'm a badass plaintiff's lawyer" routine. I see it all the time and I don't really care. Just send me the specific allegations and I'll let you know if my client consents.

On Mar 11, 2016, at 8:32 AM, Brad Hewett <bhewett@mklawgroup.com> wrote:

I will send you the proposed filing shortly.

This now the second time that you have threatened me with Rule 11 sanctions. In order to properly evaluate your threats, please specify what conduct you deem rises to the level of sanctions pursuant to Rule 11 in light of Ms. Hafter's position that she did not sign the documents so that we can address such issue in a civil manner.

As to your "warning," I investigated the issue and am comfortable that the signature was not put there by Ms. Hafter, but am pleased that you brought it to my attention. It appears that you are confusing your duty to your client with my duty to my client.



We're Here For The People Of South Carolina!

Brad Hewett
 Attorney
 500 Taylor Street, Ste 400, Columbia, SC 29201
 P.O. Box 8113, Columbia, SC 29202
 Office: 803.461.2154 Fax: 803.461.2173

<image003.png>



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From: Muckenfuss, Robert A. [mailto:RMuckenfuss@mcguirewoods.com]

Sent: Friday, March 11, 2016 8:08 AM

To: Brad Hewett <bhewett@mklawgroup.com>

Subject: Re: Hughes v. BANA

Plainly show me what your proposed amendment will be first. You generally state you're going to add additional allegations of fraud against the Bank but I want to see the allegations. You are in Rule 11 territory and so I want to see the specific allegations.

On Mar 11, 2016, at 8:04 AM, Brad Hewett <bhewett@mklawgroup.com> wrote:

Please plainly state whether you "consent" or "do not consent" to the Motion to Amend.

<image001.jpg>

Brad Hewett

Attorney

500 Taylor Street, Ste 400, Columbia, SC 29201

P.O. Box 8113, Columbia, SC 29202

Office: 803.461.2154 Fax: 803.461.2173

<image002.png> <image003.png>



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From: Muckenfuss, Robert A. [mailto:RMuckenfuss@mcguirewoods.com]

Sent: Thursday, March 10, 2016 8:07 PM

To: Brad Hewett <bhewett@mklawgroup.com>

Subject: Re: Hughes v. BANA

I gave you fair warning about this.

On Mar 10, 2016, at 4:23 PM, Brad Hewett <bhewett@mklawgroup.com> wrote:

Robert,

As we discussed, my client denies signing the agreement that you emailed to my office yesterday and will testify to that effect. Under these circumstances, we intend to amend the complaint to include further facts supporting our allegations of fraud. The remainder of the complaint will remain unchanged.

Please advise whether you can consent to the filing of a motion to amend the complaint as stated.
Thanks,

<image001.jpg>

Brad Hewett
Attorney
500 Taylor Street, Ste 400, Columbia, SC 29201
P.O. Box 8113, Columbia, SC 29202
Office: 803.461.2154 Fax: 803.461.2173

<image002.png> <image003.png>



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Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	Civil Action No.: 2017-CP-42-_____
PHILLIP FRANCIS LUKE HUGHES, on	)	
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
vs.	)	
	)	
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff, on behalf of the Estate of Jane K. Hughes, would respectfully show unto the court as follows:

1. Plaintiff Phillip Hughes is the son of John P. Hughes, Sr. (Mr. Hughes) and Jane K. Hughes (Mrs. Hughes) and has standing to bring this claim after being appointed as Personal Representative of the Estate of Jane K. Hughes by the Spartanburg County Probate Court. Prior to her death, Mrs. Hughes was a citizen and resident of Spartanburg County, South Carolina.

2. Bank of America National Association ("BANA") is one of the world's largest financial institutions. Upon information and belief, BANA was at all times relevant to this Complaint a nationally-chartered bank, regulated by the Office of the Comptroller of the Currency, with its principal place of business in North Carolina.

3. That BANA, at all times relevant to this Complaint, was licensed to conduct business in the State of South Carolina and engaged in the business of providing financial services to consumers.

4. The parties to this action and the acts and omissions complained of herein are subject to the jurisdiction of this Court, and venue is proper. Moreover, this is a survival action brought pursuant to South Carolina Code Ann. § 15-5-90, et seq., for financial injuries and damages to Decedent Jane K. Hughes.

FACTUAL ALLEGATIONS

5. At all relevant times, BANA and its agents marketed a purportedly optional financial product promising “mortgage protection” to its clients, including its “Line Protection Plan” (“LPP”). LPP is essentially a specialized insurance limited to paying portions of a mortgage payment under specific conditions, such as unemployment, disability, or accidental death. Such plans are marketed, usually at the time of closing, as an *optional* protection. A “mortgage protection” plan is *not* “Private Mortgage Insurance” (widely referred to as “PMI”), which is *required* by lenders to protect a mortgagee in case of default by a mortgagor.

6. BANA, and other companies, market mortgage protection plans because they are profitable. This profitability resulted in such abuses of unsophisticated customers that Congress established explicit disclosure and authorization requirements to protect citizens from being duped into unknowingly paying for unwanted mortgage protection plans. *See, e.g.*, 15 U.S.C. §§ 1604, 1637(c)(5), 1639(l); 12 C.F.R. § 226.4.

7. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of \$120,000.00, secured by a mortgage (“Mortgage”) on their Spartanburg County homestead. 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.

8. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization (“Authorization”) which allowed BANA to automatically draft loan payments from

the Hughes's BANA bank account.

9. During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." 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. At the time that BANA presented the plan to the Hughes, LPP offered six protection options, with the monthly fee ranging in cost from 4.5% to 13.5% of the minimum monthly payment on the borrowers' credit line.

10. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan.

11. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. The Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. See attached Exhibit A (OPTIONAL LINE PROTECTION PLAN ADDENDUM dated June 13, 2006).

12. In June 2006, Mr. Hughes was age 86. 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. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure,

and was noted to lack decisional capacity in the years subsequent to June 2006.

13. John P. Hughes died on October 22, 2008. Mr. Hughes left his estate to his wife Jane K. Hughes.

14. Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to the 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." The notice also indicated that John P. Hughes was a "protected" borrower.

15. Curiously, the BANA notice to the Hughes also stated that "Going forward, any payments that would have previously been applied to Protection Plan fees will be applied to other amounts owed as described in your loan documents, unless refunded to you. If we apply the payment to other amounts owed and you later determined that you mistakenly paid Protection Plan fees and prefer to have a refund of these amounts, please contact us at 1.866.731.4210."

16. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that Mr. 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. See attached Exhibit B.

17. In response to inquiry from Mrs. Hughes, BANA 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")." See attached Exhibit C.

18. The eight-page "ADDENDUM" provided by BANA 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."

19. In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015.

20. The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006.

21. Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan.

22. To date, Plaintiff has been unable to locate, and BANA has been unable to provide, any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort.

23. Despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of \$28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges.

24. All other charges from BANA 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., "Patron's Mutual," "Travelers Insur").

25. In addition, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit.

26. As neither Mr. or Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA 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:XXXXXXX4374 ID: R# XXXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices.

27. Upon receiving notice of Mr. Hughes's death, on May 6, 2015, BANA 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)."

28. BANA refused and continues to refuse to refund the payments drawn during Mr. Hughes's lifetime.

29. On June 3, 2015, Jane K. Hughes passed away, and Plaintiff was subsequently named as personal representative of her estate.

AS A FIRST CAUSE OF ACTION
(Fraud)

30. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

31. Defendant BANA made the following false and material representations and engaged in the following fraudulent conduct, among others alleged herein:

- a. BANA, with knowledge of the falsity or reckless disregard for the truth of its representation, represented to Mr. and Mrs. Hughes that BANA would draft funds from their account solely for monthly loan payments; and
- b. Through its agreements with Mr. and Mrs. Hughes, BANA represented, with knowledge of the falsity or reckless disregard for the truth of its representation that

the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent.

32. BANA made these representations to the Hughes's with the intent that they be induced to enter into the Agreement with BANA and sign the Authorization to grant BANA access to their account for purposes of drafting funds.

33. The Hughes's had no knowledge of the falsity of BANA's representations and had the right to rely on those representations. Mrs. Hughes used reasonable prudence and diligence by documenting in writing their decision to decline LPP coverage.

34. Decedent Jane Hughes relied on BANA's representations to her detriment, resulting in consequent and proximate injury in that BANA thereafter wrongly used its automatic drafting capability to improperly deduct payments from Hughes's financial account to pay for the Line Protection Plan without their knowledge and despite their rejection of that plan.

35. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A SECOND CAUSE OF ACTION
(Fraudulent Concealment)

36. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

37. Pleading in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled the Hughes's in the Line Protection Plan by not providing any notice to them of the enrollment.

38. Defendant BANA wrongly withdrew monthly payments for the Line Protection Plan from the Hughes's account under the confusing and non-descript transaction of "Ad Insurance

Des:XXXXXX4374 ID: R# XXXXXXXX1070 Indn:Hughes Sr, John P Co 14 ID:XXXXXX4660

Ppd" with the intention that the Hughes's not identify the true nature of the transaction.

39. Because the Hughes's entrusted BANA with authorization to draft monies from their account, and expressly reposed a trust in confidence in BANA with respect to automatic drafting transactions, BANA had a duty to disclose to Mr. and Mrs. Hughes that it unilaterally enrolled them in the Line Protection Program and that BANA was withdrawing payments which were not authorized by the borrowers.

40. Alternatively, BANA had a duty to disclose the withdrawals arising from the fiduciary relationship between the parties.

41. As a result of BANA's concealment, the Hughes's suffered monetary damages in the amount of the unauthorized payments which BANA surreptitiously withdrew from their account.

42. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages. Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

43. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

44. BANA entered into a binding agreement with Mr. and Mrs. Hughes supported by good and valuable consideration which is represented by the Hughes Mortgage, the Agreement, the Authorization, and the Addendum collectively.

45. The Hughes's performed all obligations required of them under the Agreement or otherwise had the performance of any obligation excused.

46. Defendant BANA breached the agreement between it and the Hughes's by enrolling them in the Line Protection Plan without their express agreement, and without having them sign a separate addendum explicitly

47. BANA further breached the agreement by drafting Line Protection Plan payments from the Hughes's financial accounts, thereby exceeding its authority under the agreement between the parties, which is limited only to drafting loan payments.

48. In addition to breaching its contract with Mr. and Mrs. Hughes, BANA acted fraudulently by concealing that it enrolled the Hughes's in its Line Protection Plan without express permission and by drafting unauthorized payments for the product from the Hughes's bank account, which BANA concealed by listing the charge under an ambiguous description not readily identifiable as Life Protection Plan or BANA.

49. BANA had a fiduciary and contractual duty to disclose these facts to Mr. and Mrs. Hughes.

50. As a result of BANA's breach of contract accompanied by fraudulent concealment, Decedent Jane Hughes was damaged in that they unknowingly paid for a benefit that was expressly declined.

51. Due to the fraudulent nature of BANA's actions, BANA is liable for punitive damages, as well as actual and consequential damages Decedent Jane Hughes and Plaintiff suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's fraudulent conduct.

FOR A FOURTH CAUSE OF ACTION
(Violation of South Carolina Unfair Trade Practices Act)

52. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

53. Defendant's actions and/or omissions as described herein violate S.C. Code Ann. § 39-5-10, *et seq.*, which pertains to unfair methods of competition and unfair or deceptive acts or practices, in that Defendant enrolled the Hughes's in the Line Protection Plan without consent and withdrew unauthorized payments from the Hughes's account. Defendant concealed its actions, which were calculated to result in monetary gain for the Defendant at the expense of the Hughes's. Decedent Jane Hughes and Plaintiff thereby suffered an ascertainable loss as a result of the Defendants' actions in violation of the Act, as set forth herein.

54. Unfair methods of competition and unfair or deceptive acts or practices are declared unlawful in S.C. Code Ann. § 39-5-10, *et seq.*:

§ 39-5-20(a). **Unfair Trade Practices.** Unfair methods of competition and unfair or deceptive acts or practices in the conduct or any trade or commerce are hereby declared unlawful.

55. Defendant violated and continues to violate the SCUTPA by engaging in and proposing to engage in unfair trade practices by means of the following unlawful, unfair and fraudulent acts and practices:

- a. Knowingly and intentionally representing, with knowledge of its falsity, that BANA would draft funds from their account solely for monthly loan payments;
- b. Knowingly and intentionally representing that the Line Protection Plan was optional coverage that would only be added to the Hughes's credit line and home equity loan with their consent;
- c. Fraudulently drafting funds from the account for the Line Protection Plan without consent or authorization;

- d. Intentionally disguising the Line Protection Plan withdrawals with an innocuous and non-descript designation in an effort to further conceal the fraudulent withdrawals;
- e. Acting, using, or employing deception, fraud, false pretenses, false promises or misrepresentations and/ or concealed, suppressed or omitted material facts with the intent that customers rely upon such concealment, suppression, or omission, in connection with their authorization to BANA to draft automatic loan payments from BANA bank accounts.

56. The misrepresentations and omissions of the Defendant described herein were likely to deceive, induce, and mislead the Hughes's. BANA did in fact deceive, induce, and mislead the Hughes's.

57. The Defendant knew or should have known that the Hughes's would be deceived, induced, and misled.

58. BANA's actions and omissions as set forth herein evidence a lack of good faith, honesty in fact and observance of fair dealing and observance of fair dealing so as to constitute unconscionable commercial practices, in violation of the South Carolina unfair trade practices laws.

59. The Defendant acted willfully, knowingly, intentionally, unconscionably, illegally, unlawfully, and with reckless indifference when it committed the aforesaid acts of unfair and deceptive trade practices and/or consumer fraud.

60. As a result of the acts of the unfair and deceptive trade practices and/or consumer fraud described above, Decedent Jane Hughes and Plaintiff suffered actual, ascertainable loss for which the Defendant is liable.

61. The unlawful trade practices engaged in by BANA have an adverse impact on the public interest by reason of established procedures being utilized and thereby creating potential for repetition. Plaintiff requests actual damages, treble damages, punitive damages, costs and attorneys' fees under this cause of action.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

62. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

63. Defendant owed a fiduciary duty to the Hughes's to disclose that BANA was withdrawing funds for Line Protection Plan and to honor the Authorization.

64. BANA failed to notify the Hughes's, and instead withdrew monies from the Hughes's account which were neither authorized by nor disclosed to the Hughes's.

65. BANA knowingly withdrew these funds without authorization and intentionally withheld disclosure of same.

66. As a result of this breach by Defendant, Decedent Jane Hughes was damaged in that she unknowingly paid for a benefit that was expressly declined. Plaintiff has suffered pecuniary loss, actual damages, and consequential damages as a result of Defendant's breach of its fiduciary duty.

AS A SIXTH CAUSE OF ACTION
(Conversion)

67. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

68. By withdrawing funds from the Hughes's account for the Line Protection Plan, assumed the Hughes's money without authorization and exercised rights of ownership over the monies to the exclusion of the rights of the Hughes's.

69. BANA converted the Hughes's money in determinate sums.

70. As a result, Decedent Jane Hughes suffered actual damages in the amount of the money withdrawn from her account, without authorization, by BANA. Such improper and illegal withdrawals caused pecuniary loss and financial damage to Plaintiff, by reducing assets that otherwise would have been distributed to the heirs of Decedent Jane Hughes.

AS A SEVENTH CAUSE OF ACTION
(Survival Action)

71. Plaintiff restates and realleges each and every allegation as if repeated herein verbatim.

72. Plaintiff, as Personal Representative of the Estate of Jane Hughes, brings this action pursuant to S.C. Code Ann. § 15-5-90 for the benefit of Decedent Jane Hughes's statutory beneficiaries and heirs.

73. As a result of the above described acts of Defendant, Decedent Jane Hughes suffered pecuniary loss, actual damages, and financial injuries. Defendant's conduct and illegal withdrawals reduced the value of Decedent's estate.

74. Plaintiff, as Personal Representative of Decedent Jane Hughes's Estate, is entitled to recovery for the financial injuries and damages caused by Defendant to Decedent Jane Hughes prior to her death. Plaintiff seeks actual and punitive damages under this cause of action.

JURY TRIAL DEMAND

75. Plaintiff hereby demands that all issues in this case triable before a jury be so tried.

WHEREFORE, Plaintiff prays for judgment against Defendant for actual damages, punitive damages, pre-judgment and post-judgment interest, treble damages, attorneys' fees, the costs of this action, and such other relief as this Court deems just and proper.

Respectfully Submitted,

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July 27, 2017

Exhibit D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
PHILLIP FRANCIS LUKE HUGHES, on	)	Civil Action No.: 2017-CP-42-02834
behalf of the Estate of Jane K. Hughes,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT'S
vs.	)	MOTION TO DISMISS OR STAY
	)	PROCEEDINGS
BANK OF AMERICA NATIONAL	)	
ASSOCIATION,	)	
	)	
Defendant.	)	

INTRODUCTION

Plaintiff Phillip Francis Luke Hughes, as personal representative of the Estate of Jane K. Hughes, respectfully submits the following Memorandum in Opposition of Defendant Bank of America National Association's ("BANA") Motion to Dismiss or, in the Alternative, Stay Plaintiff's Complaint. Plaintiff has stated claims in his Complaint for which relief should be granted and, therefore, Plaintiff's case should not be dismissed.

STATEMENT OF FACTS

Plaintiff previously filed an action in this Court in 2015 based upon the same facts that establish his claim for relief in the current action, and Plaintiff incorporates those facts alleged in his current Complaint herein. Plaintiff's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, Fraud, Fraudulent Concealment, Breach of Contract, and Breach of Contract Accompanied by Fraudulent Acts. Defendant BANA removed the action to federal court, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Plaintiff stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. As such, Plaintiff's

claims of fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent acts have neither been considered nor ruled upon by any court and, for the reasons set forth below, are properly brought before the South Carolina Court of Common Pleas.

STANDARD OF REVIEW

A court must deny a motion to dismiss if the plaintiff has stated facts sufficient to constitute a cause of action. S.C. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007). The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Therefore, a motion to dismiss must be denied if the facts alleged in the complaint, and the inferences that can be drawn therefrom, would entitle the plaintiff to relief under *any* theory. *Doe*, 375 S.C. at 66-67, 651 S.E.2d at 307 (emphasis added).

ARGUMENT

Defendant's motion asserts that Plaintiff's claims are barred by the statute of limitations and, due to the filing of a prior suit based upon the same facts as the current case, the doctrines of *res judicata* and collateral estoppel. In sum, Plaintiff denies that these doctrines apply to Plaintiff's fraud-based claims, which were voluntarily withdrawn from the district court proceedings in order to file them in state court, where Plaintiff seeks to petition for the reevaluation of state precedent pertaining to the survival of fraud claims in South Carolina. Because the District Court could not hear these claims pursuant to South Carolina Appellate Court Rule 244(a), *res judicata* is inapplicable. Likewise, the District Court did not touch upon the issues of whether Plaintiff's fraud-based claims are time-barred and, if so, whether the doctrine of equitable tolling would apply

to preserve the same. Rather, the outcome-determinative issue in the District Court opinion was an issue of fact—that Jane Hughes failed to exercise due diligence to discovery wrongdoing. For the reasons below, that issue is neither dispositive nor particularly relevant to the Court's considerations in the current matter.

I. Plaintiff's Claims are Timely and are not Barred by the Doctrines of *Res Judicata* or Collateral Estoppel.

A. *Res Judicata*

Though Plaintiff's claims in the current matter arise from the same set of facts on which he brought a previous action against BANA, the claims in the current action are not barred under the doctrine of *res judicata*.

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, BANA must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Plaintiff's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

While Plaintiff acknowledges that *res judicata* can potentially bar subsequent actions by the same party when the claims rise from the same transaction or occurrence that was a subject of a prior action, the fraud-based claims could *not* be included in the prior lawsuit after BANA removed the action to federal court, thus prompting Plaintiff to voluntarily dismiss those claims and refile them in state court. Particularly, had Plaintiff pursued those matters in the federal courts, the District Court would have had to dismiss Plaintiff's fraud-based claims pursuant to South

Carolina's survival statute, S.C. Code Ann § 15-5-90, and the state court's interpretation thereof to exclude fraud. Plaintiff seeks reexamination of this interpretation for reasons set forth in Section II, *infra*, which can only be accomplished by pursuing the fraud-based claims in state court. See *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941).

South Carolina Appellate Court Rule 244(a) only allows certification of questions to the South Carolina Supreme Court by the United States District Court on questions unanswered by controlling precedent. Because *Mattison* provides controlling precedent as to the survivability of fraud, Plaintiff could not—after BANA removed the prior action to federal court—challenge the validity of controlling precedent through that action and fully pursue his fraud-based claims. As such, those claims are not barred by the doctrine of *res judicata*, and Plaintiff filed this action in state court to pursue examination of its position in proper legal form.

Additionally, Plaintiff included an action under S.C. Code Ann. § 39-5-20, the South Carolina Unfair Trade Practices Act (SCUTPA). This claim, too, could not be included in the original action against BANA. Plaintiff initially filed a putative class action; SCUTPA actions, however, cannot be classed. S.C. Code Ann. § 39-5-140. Thus, Plaintiff—by bringing the former action on behalf of others similarly situated—could not bring a claim for SCUTPA in the initial suit.

B. Collateral Estoppel and Statute of Limitations

Likewise, the issues decided in the 2015 action against BANA are not precluded from being heard by this court pursuant to the doctrine of collateral estoppel. To successfully establish that collateral estoppel applies to this case, BANA must prove that the issue it claims is precluded was actually litigated and directly determined in the prior action, and that the matter or fact directly at issue was necessary to support the final judgment. *Nelson v. QHG of South Carolina, Inc. et al*,

354 S.C. 290, 306, 580 S.E.2d 171 (S.C. App. 2003). When determining whether the issues raised in the initial suit were actually litigated, the following: “whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” *Id.*

The issue decided on by the United States District Court in dismissing Plaintiff’s claims in his 2015 law suit is whether the facts as pled in the complaint sufficiently established that Jane Hughes exercised due diligence to discover wrongful charges against her account, so as to warrant equitable tolling of the statute of limitations as to the claims of violation of TILA and breach of contract. The District Court decided that the claims brought by Plaintiff were time barred, and determined from the facts as plead did not warrant the invocation of the doctrine of equitable tolling of these remaining causes of action because Mrs. Hughes did not fail to discover the charges despite exercising due diligence.

The issues at hand here, though, were not decided by the District Court: 1) whether Plaintiff filed the fraud-based claims within the statute of limitations and, if not, 2) whether those claims are equitably tolled under South Carolina law. The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. *See Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). Plaintiff asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the Plaintiff, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes’ account for an unselected, optional mortgage service. The discovery rule requires this Court to examine when Plaintiff’s cause of action accrued—an issue not examined by the District Court and a question of fact improperly decided at the pleadings stage. Thus, Plaintiff’s fraud-based claims are not

collaterally estopped.

C. Equitable Tolling

Moreover, Plaintiff asserts that even if the court finds that the statute of limitations for the fraud-based claims has expired, the claim was equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

The issue of whether equitable tolling is applicable to Plaintiff's fraud-based claims and/or SCUTPA claim is not one that the District Court ruled on in its Order, and thus is not precluded from being heard by this Court. In fact, the dispositive issue ruled upon by the federal court was whether Jane Hughes exercised due diligence to discover wrongful charges against her. In deciding that Plaintiff's TILA and breach of contract claims were not equitably tolled, and thus barred by their respective statutes of limitation, the District Court, relying upon *Supermarket of Marlinton v. Meadow Gold Dairies*, applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." The District Court's opinion relied exclusively on this test to decide whether equitable tolling applied and opined that, because the facts did not satisfy the due diligence prong of the test, equitable tolling was not warranted. The District Court notably rendered no opinion as to whether state law would allow any of Plaintiff's claims to be equitably tolled.

South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts, and in order to determine whether Plaintiff's fraud based, state law claims are tolled, this Court must apply a wholly separate standard than that relied upon by the District Court. The

issue of due diligence is not a dispositive one in a state court evaluation of the application of the doctrine. In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control"; this is a far broader consideration than that applied by the District Court. *Id.*

Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Id.* quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App. 2006).

The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision

impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. Surely, death and dementia constitute "extraordinary circumstances beyond [one's] control" so as to justify equitable tolling under *Hooper*.

Additionally, the determination of when the statute of limitations began is properly reserved for a jury. "Whether a claimant knew or should have known that they had a cause of action is question for the jury." *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (S.C. 1993). At this stage in the case, there is conflicting evidence as to when Ms. Hughes knew or should have known that a claim against Defendant existed. Thus, a jury should properly decide the issue.

D. Exceptions to Res Judicata and Collateral Estoppel

Should the Court ultimately determine that the doctrines of *res judicata* or collateral estoppel apply in this case, our courts have found that *res judicata* is not "an 'ironclad' bar to a later lawsuit." *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408, 412 (2011) (citing *Garris v. Governing Bd. of the South Carolina Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). Likewise, "[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Carolina Renewal v. Dept. of Transp.*, 684 S.E.2d 779, 385 S.C. 550 (S.C. App., 2009).

South Carolina has adopted the Restatement (Second) of Judgments Sections 27, 28 and 29, which provide exceptions to the doctrines of *res judicata* and collateral estoppel. Specifically, Section 28 provides exceptions to *res judicata* where a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by

factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Pye v. Aycock*, 325 S.C. 426, 437-30, 480 S.E.2d 455, 460-61 (S.C. App.1997).

Exceptions to the doctrine of collateral estoppel include those enumerated in Section 28 of the Restatement (Second) of Judgements as well as Section 29, which further provides relevant exclusions when the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; or, the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based; or, other compelling circumstances make it appropriate that the party be permitted to relitigate the issue. *Beall v. Doe*, 281 S.C. 363 371, 315 S.E.2d 186, 190-191 (S.C. App. 1984).

Should the court find that either of these doctrines apply in this matter, relevant exceptions—adopted by South Carolina Courts—would allow for the matter to be heard in spite of *res judicata* or collateral estoppel. The case at hand pertains to a claim that could not be heard in the appropriate forum after BANA removed the case to federal court; reconsidering the issue in State Court allows for the reexamination of the issue of whether fraud should remain an exception of the South Carolina statute; and, for reasons set forth in Section II, *infra*, there exists a public need for this issue to be heard in state court.

As such—though Plaintiff maintains that his action is timely and is not subject to the doctrines of *res judicata* or collateral estoppel, even if either or both of these doctrines are applicable in this matter, Plaintiff's claim falls within the exceptions to these rules and should be heard by the State Court of Common Pleas.

II. Plaintiff's Claims for Relief Based on Elements of Fraud Should Survive the death of Jane Hughes.

Defendant argues that a cause of action for fraud does not survive under SC Code Ann. § 15-5-90, South Carolina's general survival statute, and Plaintiff's fraud-based claims should be dismissed. Plaintiff challenges this antiquated exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina enacted legislation to allow for the survival of certain claims that were historically barred by the claimant's death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina enacted the survival statute in 1905, which provided that "any and all injuries to the person or to personal property" survive the death of a party. *Id.* South Carolina's survival statute has remained intact, and the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in *Mattison v. Palmetto State Life Ins. Co.* 197 S.C. 256, 15 S.E.2d 117 (1941). In *Mattison*, the estate brought an action against Palmetto State Life Insurance

Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. *Id.* The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. *Id.*

In determining whether the fraud claim survived, the *Mattison* Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:¹

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The *Mattison* Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death.

The *Mattison* Court further provided that:

It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*. And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

Thus, while the *Mattison* court narrowly interpreted the survival statute, it failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in *Mattison* regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was

¹ The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

personal property. Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, *Mattison*'s principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. *Fraud as an "exception" to the South Carolina Survival Statute*

Since *Mattison*, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); *Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382*, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with *Mattison*'s holding fraud is an *exception* to the rule, as opposed to a *cause of action outside of the statute's scope*.

Despite this tension, the South Carolina Supreme Court has yet to revisit the *Mattison* rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on why fraud should be excepted from the survival statute. Plaintiff, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 *Mattison* analysis in 2018.

B. Public Policy

i. *Clear evidence of mindset defeats policy reasons for exception*

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in *Faircloth* challenged the fraud exception to the South Carolina survival statute as violating the

Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its "feasible attempt for [the] legislative distinction":

[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in *Faircloth* is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that such elderly persons are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder*

Financial Abuse 2015, TRUE LINK, January 2015 at 11 (<https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>). Fraud and financial abuse costs our seniors an estimated total of \$36.48 billion annually. *Id.* Of this, approximately \$16.99 billion is lost to financial exploitation, which is defined as “when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior’s consent to take his or her money.” *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link’s research shows that conditions such as dementia and Alzheimer’s disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as the financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today’s financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the *Mattison* holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina’s survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Plaintiff asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions

Further supporting certification of the question is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow

a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. *See, e.g., Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Plaintiff would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

CONCLUSION

Plaintiff sufficiently stated causes of actions and alleged adequate facts to obtain relief from Defendant. Moreover, Plaintiff's claims are not barred by the statute of limitations, nor the doctrines of collateral estoppel and *res judicata*. Under any reasonable reading of the Complaint and review of the facts available there are numerous substantive issues of disputed fact requiring that this matter proceed to discovery for a proper and fair resolution on a complete record. Finally, Plaintiff prays that the issue of whether the fraud is excluded from South Carolina's survival statute be reconsidered in light of the aforementioned factors. Plaintiff thus prays that this Court deny Defendant's motion and allow this action to proceed.

Respectfully Submitted,

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Exhibit E

ELECTRONICALLY FILED - 2018 Mar 23 12:46 PM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

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

v.

Bank of America National Association.....Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Appellant") hereby appeals the order of the Honorable R. Keith Kelly, dated March 19, 2018, granting the motion to dismiss on behalf of Respondent Bank of America National Association.

Copies of the order granting the motion to dismiss on behalf of Respondent are attached hereto and incorporated herein as Exhibit A.

Respectfully Submitted,

By: 
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March 26, 2018

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cc: The Honorable Hope Blackley

Exhibit F

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
 2) COMMON PLEAS
 3 COUNTY OF SPARTANBURG) OF THE SEVENTH
 4) JUDICIAL CIRCUIT
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PHILLIP FRANCIS LUKE HUGHES,
 ON BEHALF OF THE ESTATE OF
 JANE K. HUGHES,
 Plaintiff,
 vs.
 BANK OF AMERICA NATIONAL
 ASSOCIATION,
 Defendant.

TRANSCRIPT OF RECORD
 2017-CP-42-02834

February 22, 2018
 Spartanburg, South Carolina

B E F O R E:

HONORABLE R. KEITH KELLY, Judge.

A P P E A R A N C E S:

BRADLEY DAVIS HEWITT, ESQUIRE
 For Plaintiff

ROBERT A. MUCKENFUSS, ESQUIRE
 For Defendant

ELIZABETH MARION ZWICKERT-TIMMERMAN, ESQUIRE
 For Defendant

Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

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EXHIBITS

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NO EXHIBITS PROFFERED

PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

THE COURT: Okay. The first matter is -- the first matter is Phillip Francis Luke Hughes, the Plaintiff, et al. versus Bank of America National Association.

MR. HEWITT: Good morning, Your Honor.

MR. MUCKENFUSS: Good morning.

THE COURT: All right. I have read everything that has been submitted.

MR. HEWITT: Thank you.

THE COURT: Yes, sir.

MR. MUCKENFUSS: Thank you, Your Honor. Robert Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of America, Your Honor. This is our motion to dismiss.

I think the arguments in our motion are fairly straight forward and I won't go through, Your Honor, I know you've read the briefs. But essentially, this is an identical case to a case that was filed previously in 2015 in state court, was removed to federal court. At that time the federal court questioned jurisdiction.

I think in this case plaintiff's counsel doesn't -- he admits it's an identical case in terms of the facts and circumstances that are alleged. Essentially it was a bank product line protection plans insurance. And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death.

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
 2 obviously, should be dismissed. They admit that in
 3 terms of the prior precedent. And unless the Court has
 4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
 10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
 13 the full facts and procedural history, as the Court has
 14 read the memorandums submitted to the court. And I
 15 recognize there is controlling binding precedent on the
 16 primary issues in this case, which are the fraud based
 17 claims. That the lower court is handcuffed as to what
 18 it can do based in part on a 1941 decision and does
 19 state that those fraud claims when you die, die with
 20 you.

21 There's a 2002 opinion as well. I think that's
 22 the Ferguson case, which cited to Madison further for
 23 the support that your fraud based claim simply cannot
 24 continue on. We're one of seven states that hold that
 25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
2 estoppel may be in play, there are exceptions. The
3 State has adopted the restatement of judgment. And
4 provisions 27, 28 and 29 find that when you deal with
5 interests of public policy and fundamental unfairness
6 that the Court can refuse to apply collateral estoppel
7 and res judicata.

8 And we've made clear through certain studies that
9 we've cited about what is happening to senior citizens
10 in this country in terms of exploitation and fraudulent
11 schemes, that one in three -- over one in three senior
12 citizens are subject to fraudulent exploitation and
13 schemes. And the victims of that conduct -- and that
14 it's costing the country over 36 billion dollars each
15 year, that there are policy reasons in play. Not to
16 mention; you have Jane and John Hughes, who were
17 defrauded of several thousand dollars by Bank of
18 America.

19 And just very quickly, although it's in the, the
20 brief, the factual context for this entire case is a
21 2006 transaction with Bank of America. Jane and John
22 Hughes were 86 years old at the time. Owned their home
23 outright and took out a line of credit with Bank of
24 America. I don't know why. If they were sold a bill of
25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
2 it.

3 And during that transaction, they were offered an
4 optional line of protection plan where if they died or
5 became disabled or unemployed, which they already were,
6 it might provide some assurance that they would not have
7 to make some of the monthly payments. They declined
8 that expressly. It's commemorated. They both signed
9 it, we don't want this product, we don't need this
10 product. They checked the box that we -- do not charge
11 us for it.

12 Soon after the closing, John Hughes died. And
13 Jane Hughes was diagnosed with dementia, a-typical
14 psychosis, cataracts, which required surgery and some
15 degree of blindness, renal insufficiency. She broke her
16 hip, went to a nursing home. Was noted to lack
17 decisional capacity. So she had a precipitous decline
18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
20 by Bank of America. It was a \$28-a month charge. It
21 was buried in a nondescript, ambiguous line item charge
22 that didn't say anything about Bank of America. It was
23 an abbreviated insurance charge with some serial numbers
24 attached. She had no idea. She was in a nursing home,
25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
2 a test, less restrictive.

3 And so I've said all that to say this, that I
4 think that the decision for the Court is fairly straight
5 forward on the fraud claims, and that we endeavor to
6 change the law in this state, which has been a law,
7 really a common law created since 1941 in a very
8 different world when you didn't have to worry about
9 certain types of identity theft, perhaps when people
10 could trust their banks.

11 And as a relevant aside, I know these allegations
12 made by the Hughes family are true. We've been
13 approached by other families. It happened to me as a
14 former Bank of America customer. Right about the same
15 time, right when I get married and purchased my first
16 house, we're financing through Bank of America and I
17 found a few months after the closing I was getting
18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
20 address it with Bank of America right then and there.
21 Ms. Hughes did not. And so that's the context as to why
22 we're here.

23 And so I know what the Court decision will be in
24 terms of the disposition. My hope is that it would be
25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1 federal level, which is why we're here today.

2 So unless the Court has any questions, I do
3 appreciate your time.

4 THE COURT: No, I don't have any.
5 Anything?

6 MR. MUCKENFUSS: Very briefly, Your Honor. I
7 think it is appropriate for this Court to apply issue
8 preclusion in addition to the fact that there is no
9 claim in South Carolina for fraud post death. But it is
10 appropriate issue preclusion as to equitable estoppel
11 decision by the federal court would apply to all of
12 these claims.

13 That's different than claim preclusion, but the
14 federal court very specifically held that the plaintiffs
15 in this case, the plaintiffs in this case did not
16 exercise the due diligence that would be required. It's
17 cited in the South Carolina case that's on point for
18 that standard.

19 So there is not a different federal standard to
20 the standard that South Carolina courts will apply. So
21 we would ask that when the case is dismissed, that it's
22 dismissed on the fact that there's clear precedent,
23 obviously, you know, bringing these claims, in addition
24 to issue preclusion on the equitable estoppel, equitable
25 tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

13
14 --- THIS ENDS REQUESTED TRANSCRIPT ---
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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook.
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS)

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)
Jane K. Hughes,)

Plaintiff,)

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

Civil Action No.: 2017- CP-42-02834

NOTICE OF SUPPLEMENTAL EXHIBITS
IN SUPPORT OF BANK OF AMERICA,
N.A.'S MOTION FOR SANCTIONS

Defendant Bank of America, N.A. ("BANA"), by and through its undersigned counsel, hereby gives notice of filing supplemental exhibits in further support of its Motion for Sanctions requesting this court to award sanctions against Plaintiff, Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Plaintiff") and his counsel Brad Hewett of the Mike Kelly Law Group, LLP ("Plaintiff's Counsel") pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Civil Proceedings Act, S.C. Code Ann. §15-36-10, *et seq.* Attached as Exhibit 1 is a true and correct copy of the Initial Brief of Appellant, filed in the State of South Carolina Court of Appeals yesterday, on May 29, 2018, wherein Plaintiff is appealing this Court's March 20, 2018 Order of Dismissal which dismissed his Complaint in its entirety. Additionally, attached as Exhibit 2 is a Supplemental Affidavit of Elizabeth Timmermans, which includes a more detailed summary of the fees and costs BANA has incurred in defending against Plaintiff's frivolous lawsuit.

Dated this 30th day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of May, 2018, the foregoing BANK OF AMERICA, N.A.'S NOTICE OF SUPPLEMENTAL EXHIBITS was electronically filed with the Clerk of the South Carolina Court using the E-Filing system, and has been served upon counsel by mailing a true and accurate copy with sufficient postage prepaid, and by electronic mail, to the following:

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/s/ Robert A. Muckenfuss
Robert A. Muckenfuss

Exhibit 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAY 29 2018

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

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

v.

Bank of America National Association Respondent.

INITIAL BRIEF OF APPELLANT

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<u>Ferguson v. Charleston Lincoln Mercury, Inc.</u> , 349 S.C. 558, 564 S.E.2d 94 (2002).....	14, 15
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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.
- II. WHETHER THE DOCTRINE OF RES JUDICATA BARS A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT WHICH LACKED THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.
- III. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

STATEMENT OF THE CASE

This case arose from fraudulent charges made by of Bank of America National Association ("BANA") against the account of John and Jane Hughes. Appellant Phillip Francis Luke Hughes 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, BANA filed a Motion to Dismiss pursuant to SCRCP Rule 12(b)(6).

Prior to initiating the present action, Appellant filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the same transactions and occurrences that establish his claim for relief in the current action. Appellant's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice,

of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Appellant dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims in his 2017 Complaint because 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 Rule 244(a), SCACR. (See, February 22, 2018 Hearing Tr. at 11:1-25)

Respondent moved to dismiss Appellant'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. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018 and subsequently granted Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. Order of March 20, 2018. Appellant filed a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR, challenging the lower court's dismissal of the fraud-based claims alleged in Appellant's 2017 Complaint. See, Notice of Appeal. On March 29, 2018, Respondent filed a Motion for Sanctions against counsel for Appellant, seeking more than \$70,000.00 in attorneys' fees for the filing of the 2017 Complaint, which resulted in a dismissal prior to any discovery and after a single hearing.

STATEMENT OF THE FACTS

On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of \$120,000.00, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. 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. Compl. ¶ 7. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft loan payments from the Hughes's BANA bank account. Compl. ¶ 8.

During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." 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. Compl. ¶ 10. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. Jane and John Hughes designated their election to decline the purportedly optional Line Protection Plan by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. Compl. ¶ 11.

In June 2006, John Hughes was age 86. Compl. ¶ 12. He died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. Compl. ¶ 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. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and was noted to lack decisional capacity in the years subsequent to June 2006. Compl. ¶ 12.

Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA 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." The notice also indicated that John P. Hughes was a "protected" borrower. Compl. ¶ 15. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA 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. Compl. ¶ 17.

In response to inquiry from a family member of Mrs. Hughes, BANA 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")." Compl. ¶ 18. The eight-page "ADDENDUM" provided by BANA 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." Compl. ¶ 18. In any event, BANA 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. Compl. ¶ 19, 20.

Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was being charged to them for such a plan. Compl. ¶ 21. To date, BANA has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort. Compl. ¶ 22.

However, despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of \$28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. Compl. ¶ 23. Notably, all other charges from BANA 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"). Compl. ¶ 24. None of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit. Compl. ¶ 25.

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA 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# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices. Compl. ¶ 26. Upon receiving notice of Mr. Hughes's death, on

May 6, 2015, BANA 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).” Compl. ¶ 27. BANA refused to refund the payments drawn during Mr. Hughes’s lifetime and has been unable to produce any documentation supporting that Mr. Hughes elected to enroll in the Line Protection Plan. Compl. ¶ 22, 28.

On June 3, 2015, Jane K. Hughes passed away, and Appellant was subsequently named as personal representative of her estate. Compl. ¶ 29. Appellant filed a prior action in this Court in 2015 based upon the facts and transaction set forth above. The 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the action to federal court under federal question and diversity jurisdiction, and filed a motion to dismiss in lieu of an answer. Prior to the District Court’s decision on the motion, Appellant stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. Appellant refiled his fraud-based claims in state court due to the District Court’s lack of jurisdiction to hear a key issue essential to those claims, and to allow this Court to revisit the survivability of fraud claims in South Carolina.

STANDARD OF REVIEW

This is an appeal, made pursuant to Rule 201, SCACR, from an Order of Dismissal issued by the lower court based on the trial judge’s grant of Respondent BANA’s Rule 12(b)(6) Motion to Dismiss.

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014) (citing Rydde v. Morris, 381 S.C. 643,

646, 675 S.E.2d 431, 433 (2009)). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* Furthermore, the court should not dismiss a complaint merely because the court doubts that the plaintiff will prevail in the action. *Spence v. Spence*, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (2006).

ARGUMENT

I. THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA’S SURVIVAL STATUTE.

The South Carolina survival statute allows for the survival of *any and all* injuries to the person or personal property. The trial court dismissed Appellant’s fraud-based claims, in part, based upon a court-created exception to the South Carolina survival statute which excludes fraud as a surviving cause of action. Appellant challenges this antiquated and arbitrary exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. *Mattison v. Palmetto State Life Ins. Co.*

South Carolina’s survival statute provides that “[c]auses of action for and in respect to any and all injuries and trespasses to and upon real estate and *any and all* injuries to the person or to personal property” shall survive the death of a party, whether the claim is on behalf of or against the deceased, “. . . any law or rule to the contrary notwithstanding.” S.C. Code Ann. § 15-5-90 (1976) (emphasis supplied). The statute, enacted in 1905, allows for the survival of certain claims that were historically barred by a claimant’s death. *Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina’s survival statute has remained intact, and

the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). In Mattison, the estate brought an action against Palmetto State Life Insurance Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. Id. The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. Id.

In determining whether the fraud claim survived, the Mattison Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:¹

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to *personal property*, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding.

1932 Code § 419 (emphasis added).

The Mattison Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death.

The Mattison Court further provided that:

It is readily seen that under the above quoted Section, there are but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all injuries to the person or to *personal property*.

¹ The current survival statute is codified at S.C. Code Ann. § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

While the Mattison court asserted that the survival statute must be liberally interpreted, the court failed to do exactly that. Instead, the court narrowly interpreted the statute and, in doing so, failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in Mattison regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was personal property.² Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, Mattison's principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. Fraud as an "exception" to the South Carolina Survival Statute

Since Mattison, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); Brewer v. Graydon, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with Mattison's holding—that fraud falls outside the scope of the statute—by implying that fraud ostensibly falls within the

² S.C. Code Ann. § 15-1-40 (1976) provides that "[t]he words 'personal property,' as used in this Title, include *money*, goods, chattels, things in action and evidences of debt." (emphasis added).

purview of the survival statute, and would survive but for the *exception* created by Mattison. See Ferguson at 564, 564 S.E.2d at 96 (“The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions.”); Brailsford v. Brailsford, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (Upholding a dismissal of a fraud-based action upon “[a]pplying this State’s longstanding exception to the survivability statute for fraud.”); Layne Workers at 352, 247 S.E.2d at 349 (Identifying fraud as an “exception” to the general rule of survivability).

A review of the interpretation of the survival statute by South Carolina courts, as it pertains to fraud, reveals decades of precedent founded in error. The most recent South Carolina Supreme Court opinion relying upon the Mattison-created exception, Ferguson, strongly implies that fraud falls within the scope of the survival statute, but is excluded as a result of the Mattison opinion. See Ferguson at 564, 564 S.E.2d at 96. The Mattison opinion, however, states in no uncertain terms that fraud “does not come within either of the instances where a cause of action survives” under the statute. Mattison at 256, 15 S.E.2d at 119. Bizarrely, Mattison serves as the foundation upon which the Ferguson opinion rests, yet the language of the Ferguson opinion directly contradicts that of Mattison.

Whether a cause of action for fraud is a common law exception to the survivability statute or whether it falls outside the scope of the statute’s language is an important distinction. The survival statute, currently and when Mattison was decided, expressly provides that causes of action that fall within the scope of the statute survive, “any law or rule to the contrary notwithstanding.” Id.; S.C. Code Ann § 15-5-90 (1976). Over the years, the Mattison court’s interpretation of the survival statute as not extending to actions of fraud has evolved into a common law rule excepting

fraud. The result of that evolution is a "law or rule to the contrary" that is untenable under the plain language of the survival statute.

Despite this irreconcilable disconnect, the South Carolina Supreme Court has yet to revisit the Mattison rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on *why* fraud should be excepted from the survival statute; rather, opinions simply offer that fraud *is* excepted based upon the Mattison opinion. Appellant, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 Mattison analysis in 2018.

B. Public Policy

i. Clear evidence of mindset defeats policy reasons for exception.

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its "feasible attempt for [the] legislative distinction":

[F]raud is a tort that requires a special quality of proof, and the states of mind of the victim (e.g., whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in Faircloth is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where

the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy.

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that elderly persons, like Jane Hughes, are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span: *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK, January 2015 at 11 (<https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>). Fraud and financial abuse costs our seniors an estimated total of \$36.48 billion annually. *Id.* Of this, approximately \$16.99 billion is lost to financial exploitation, which is defined as “when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior’s consent to take his or her money.” *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link’s research shows that conditions such as dementia and Alzheimer’s disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as much financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the Mattison holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Appellant asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

Further supporting the issue at hand is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. See, e.g., Jandera v. Lakefield Farmers' Union, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); Micheletti v. Moidel, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Appellant would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

II. THE DOCTRINE OF RES JUDICATA DOES NOT BAR A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT LACKING THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

Appellant does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated by the District Court. However, because the District Court lacked jurisdiction to either overturn Mattison or certify the question of whether fraud survives to the South Carolina Supreme Court, the fraud-based claims presented in the current action are not barred under the doctrine of *res judicata*.

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata*, Respondent must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Appellant's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata*.

Appellant acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit." Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). However, the issue of whether fraud should continue to be exempted from the survival statute could not be adjudicated in the prior lawsuit. Respondent removed the action to federal court based on federal question jurisdiction over the TILA claim, and diversity jurisdiction over Appellant's state law remaining claims. Under the Erie doctrine, the District Court must apply South Carolina

substantive law in deciding state law issues. See, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Due to the existing South Carolina precedent surrounding the issue of the survivability of fraud, the federal court would be required to apply that precedent and dismiss Appellant's claims of fraud. Likewise, under Rule 244(a), SCACR, the District Court could not certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. See, Rule 244(a), SCACR.

Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Appellant's challenge to the fraud exception to survivability. Requiring Appellant to pursue his fraud-based claims in the federal court, therefore, would inevitably lead to dismissal of the claims pursuant to S.C. Code Ann § 15-5-90, and the state court's interpretation thereof, to exclude fraud without the opportunity to have a central issue decided in this case. Appellant seeks reexamination of this interpretation for reasons set forth in Section I, *infra*, which can only be accomplished by pursuing the fraud-based claims in state court. Because the issue of survivability could not have been raised in the prior proceeding in any meaningful capacity, Appellant's fraud-based claims are not barred by the doctrine of *res judicata*.

South Carolina takes the position that "*res judicata* is not 'an 'ironclad' bar to a later lawsuit." Judy at 167, 712 S.E.2d at 412. Likewise, South Carolina has adopted the Restatement (Second) of Judgments Section 28, which provides exceptions to circumstances in which *res judicata* typically would apply. Specifically, Section 28 outlines factors under which a new determination of an issue is warranted, including differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves

party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (S.C. App.1997).

The circumstances of the current action, even if barred by traditional principles of *res judicata*, survive under Section 28 of the Restatement (Second) of Judgments. As set forth in the survivability argument, *infra*, the issue of the survivability of fraud is one that directly impacts public interest as well as persons not party to the initial action. Appellant, in fact, originally sought to pursue the initial lawsuit as a class action so as to protect the interests of similarly situated parties. Appellant additionally did not have adequate opportunity to fully adjudicate the issue of the survivability of fraud in the initial action, because the District Court was not the proper forum for deciding that issue. Notably, Section 28 specifically addresses the fact that state and federal courts may retain exclusive jurisdiction over particular issues and provides direction in instances where an initial case is heard in federal court, and a subsequent action is heard in state court. See, Restatement (Second) of Judgments § 28 (1982), cmt. e.

Accordingly, the doctrine of *res judicata* does not bar the lower court from hearing Appellant's fraud-based claims, as the issues brought before the court through those claims were neither ruled upon by the District Court, nor could they have been. As such, Appellant respectfully asks this Court to reverse the lower court's finding that *res judicata* acts to bar the fraud-based claims set forth in Appellant's 2017 complaint.

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

Finally, the lower court, in error, opined that Appellant's fraud-based claims are barred by the statute of limitations and that equitable tolling did not apply to Jane Hughes. A review of the Order on Motion to Dismiss demonstrates the lower court's failure to view the facts as set forth in the complaint, or derive inferences therefrom, in the light most favorable to the non-moving party. Accordingly, Appellant asks this court to review the matter, *de novo*, and apply the appropriate standard of review in finding that Appellant's claims are not time-barred.

A. Statute of Limitations

In its discussion of the issue of whether Appellant's claims are barred by frauds three-year statute of limitations, the lower court relied upon a single fact within the complaint—that the alleged deductions from the bank account of Jane and John Hughes began in June 2006. Order of March 20, 2018 at 9. In essence, the trial court determined that a single deduction from a bank account, without considering any additional facts alleged in the complaint, constitutes sufficient notice to put Mr. and Mrs. Hughes on notice of an invasion of their rights. *Id.* The court did *not* consider—in rendering a decision regarding the statute of limitations, in its statement of facts alleged, or at any point in its written opinion—facts alleged in the complaint which tend to negate the lower court's finding of fact, including:

- As of June 2006, Jane Hughes was 85 years old and John Hughes was 86 years old. (Compl. ¶ 12).
- Mrs. Hughes, from June 2006 until her death, underwent major heart surgery, suffered from dementia, and experienced vision impairments and cataracts, which ultimately required surgery. Mrs. Hughes additionally suffered a broken hip that required hospitalization and extensive rehabilitation, and was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, and heart failure, and she was noted to lack decisional capacity in the years leading up to her death. (Compl. ¶ 12).

- The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (Compl. ¶ 20). In fact, before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan. (Compl. ¶ 21).
- The charges surreptitiously made to the Hughes account by Respondent were ambiguously listed and appeared amid numerous other monthly charges. (Compl. ¶ 23). All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "Bk of America" and other insurance transactions were clearly identified with the name of the charging company. (Compl. ¶ 24).

The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. See, Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). The discovery rule requires this Court to examine when Appellant's cause of action accrued; this issue of fact was improperly examined by the lower court and decided at the pleadings stage. Appellant asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the non-moving party, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes' account for an unselected, optional mortgage service. Accordingly, the trial court erred in determining that Appellant's fraud-based causes of action began to accrue in June 2006.

B. Equitable Tolling

Even if the lower court properly determined that Appellant's claims are barred by the statute of limitations, it erred in finding that equitable tolling does not apply in this case. Viewing the facts and drawing all inferences in the light most favorable to the Appellant, the statute of limitations should be equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

First, the lower court's Order suggests that, under the doctrine of *res judicata*, Appellant is barred from asserting the doctrine of equitable tolling in relation to its fraud-based claims brought in state court, because the District Court determined that other claims raised by Appellant in a prior suit were not tolled under the federal application of the doctrine. Order of March 20, 2018 at 5. As set forth in Section II, *infra*, *res judicata* does not bar Appellant from bringing his fraud-based claims in state court. Likewise, *res judicata* does not prevent Appellant from asserting that, based on South Carolina's standard of application of the doctrine of equitable tolling, Appellant's claims should be equitably tolled. The District Court never ruled on any issue pertaining to Appellant's fraud-based claims; it certainly did not determine whether, under state law, equitable tolling would serve to toll the statute of limitations on those fraud-based claims.

Nor does the issue of whether Appellant's fraud-based claims should be equitably tolled constitute an action that could have been litigated before the District Court. Because those claims, under existing precedent, do not survive death, Appellant lacked standing to raise an equitable tolling argument before the District Court as it might pertain to the claims of fraud. In order for Appellant to seek a determination on the issue of equitable tolling, the Court must first revisit the issue of the survivability of fraud, and find in Appellant's favor. Because the District Court could not make a determination on the survivability issue, the lower court erred in finding that District Court's Order nonetheless serves as an adjudication of the issue of whether Appellant's fraud-based claims are time-barred.

Moreover, the federal standard applied by the District Court in determining whether Appellant's breach of contract and TILA causes of action should be equitably tolled is not the standard applied by South Carolina Courts. The District Court applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of

limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." Order of February 13, 2017 at 4. South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts and, in order to determine whether Appellant's fraud-based state law claims are tolled, the lower court should have—but did not—review the facts of this case under that more lenient standard.

In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control." *Id.* Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Id.*, quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.*, quoting Rodriguez v. Superior Court, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Id.*, quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006).

Although the lower court cited to the "extraordinary circumstances" language in the

Hooper opinion, it went on to summarily find that “because Plaintiff’s parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff’s allegations on the face of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.” Order of March 20, 2018 at 9-10.

The assertions in the order below that “nothing was hidden” from John and Jane Hughes, that Appellant did not plead that BANA engaged in any conduct that prohibited John or Jane Hughes from filing suit, and that the charges were not hidden, demonstrate the lower court’s failure to view all of the facts alleged in the complaint. The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. BANA withdrew these charges even though the couple expressly denied the Line Protection Plan service, failed to report the charges on the couple’s finance statement (as required under the Truth in Lending Act), and withdrew the monthly fee “under the confusing and non-descript transaction . . . with the intention that the Hughes’ not identify the true nature of the transaction.” Compl. ¶ 38. Surely, death and dementia, constitute “extraordinary circumstances beyond [one’s] control” so as to justify equitable tolling under Hooper; this is especially so when viewed in combination with Respondent’s surreptitious, illegal activities and position as a fiduciary.

The trial court, by failing to take into account any of the facts favorable to Appellant in its determination of the equitable tolling issue, concluded that, as a matter-of-fact, Jane Hughes was put on notice of the charges against her account by Respondent. Order of March 20, 2018 at 9. Not only does the lower court's order fail to apply the appropriate standard of review and improperly determine an issue of fact for the jury, it furthers the agenda of those seeking to perpetrate fraud against the elderly. As discussed in Section I(B), *infra*, elderly individuals are highly susceptible to fraud, in part due to their inevitable cognitive decline. The lower court's finding that equitable tolling is not warranted where an elderly victim, suffering from dementia and impaired vision, fails to notice a nominal and non-descript monthly draft on her bank statement, essentially offers potential fraudsters not only another reason to target those most in need of the state's protection, but also a viable method of doing so without penalty.

CONCLUSION

In sum, Appellant has raised timely claims for fraud in a forum appropriate to address the issue of whether fraud-based claims should survive under South Carolina's survival statute, codified at S.C. Code Ann § 15-5-90. The lower court erred by finding that Appellant's claims are barred by the statute of limitations and the doctrine of *res judicata*, and further erred by failing to apply the appropriate standard of review and consequently refusing to apply equitable tolling in extraordinary circumstances. Finally, though the lower court's determination that fraud does not survive death follows South Carolina's existing precedent, Appellant urges this Court to reconsider the exception in light of public policy concerns arising since the 1941 Mattison opinion.

Respectfully Submitted,

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Attorneys for Appellant

May 29, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

RECEIVED
MAY 29 2018
SC Court of Appeals

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

v.

Bank of America National Association.....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant upon counsel of record for the Respondent by causing them to be deposited in the United States Mail, postage prepaid, on May 29, 2018, addressed to Robert A. Muckenfuss, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and Elizabeth M.Z. Timmermans, 434 Fayetteville St. Suite 2600, Raleigh, NC 27601.

May 29, 2018

MIKE KELLY LAW GROUP, LLC

By:


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Attorneys for Appellant

Exhibit 2

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

PHILLIP FRANCIS LUKE)

HUGHES, on behalf of the Estate of)

Jane K. Hughes,)

Plaintiff,)

Civil Action No.: 2017- CP-42-02834

vs.)

BANK OF AMERICA NATIONAL)
ASSOCIATION)

Defendant.)

SUPPLEMENTAL AFFIDAVIT OF ELIZABETH TIMMERMANS

I, Elizabeth Timmermans, declare under penalty of perjury as follows:

1. I am over eighteen (18) years of age, a resident of North Carolina, have personal knowledge of the facts recited herein, and I am competent to give this Declaration.
2. I am a member of McGuireWoods LLP and counsel for Defendant Bank of America, N.A. ("Bank of America"). I am an attorney of record in the above-captioned case, and, as such, I am familiar with all pleadings that have been filed as a part of this litigation; and I am fully familiar with the facts set forth below.
3. I submit this Supplemental Affidavit in further support of Bank of America's Motion for Sanctions, and request for Bank of America's recovery of its attorneys' fees incurred due to Plaintiff's frivolous lawsuit.
4. According to firm billing records, McGuireWoods LLP has billed Bank of America \$76,556.02 in costs and legal fees through April 30, 2018 with regard to defending Bank of

America in the 2017 Lawsuit. This amount includes fees associated with analyzing the Complaint, briefing Bank of America's Motion to Dismiss, preparing for the hearing on Bank of America's Motion to Dismiss, traveling to and attending the hearing on Bank of America's Motion to Dismiss, drafting the proposed order granting Bank of America's Motion to Dismiss, and drafting the Motion for Sanctions.

5. Bank of America reserves the right to seek additional costs and fees associated with the briefing, traveling for, and arguing the Motion for Sanctions and defending against Plaintiff's baseless appeal filed on March 27, 2018.

6. According to firm billing records, the following attorneys and paralegals devoted the billable time indicated below, through May 1, 2018, to defend against the 2017 Lawsuit and in seeking sanctions:

<u>Name, Position</u>	<u>Billable Hours Worked</u>	<u>Rate(s)</u>
Bryan Fratkin, Partner	17.4	\$598.00
Robert Muckenfuss, Partner	4.9	\$554.00 and \$582.00
Tanisha Reed, Counsel	124.2	\$418.00
Elizabeth Timmermans, Partner	33.6	\$357.00
Antoine Robinson, Paralegal	23.2	\$201.00

7. According to firm billing records, Robert Muckenfuss, an attorney and the supervising partner on this case, devoted at least 4.9 hours of his billable time to defend against Plaintiff's frivolous claims at rates of \$554.00 per hour prior to February 1, 2018 and \$582.00 per hour after February 1, 2018 during the course of working on this matter.

8. According to firm billing records, Bryan Fratkin, an attorney and partner who provided services in this action, devoted at least 17.4 hours of his billable time to defend against

Plaintiff's frivolous claims at a rate of \$598.00 per hour during the course of working on this matter.

9. According to firm billing records, Tanisha Reed, an attorney and counsel who provided services in this action, devoted at least 124.2 hours of her billable time to defend against Plaintiff's frivolous claims at a rate of \$418.00 per hour during the course of working on this matter.

10. According to firm billing records, Elizabeth Timmermans an attorney and partner who provided services in this action, devoted at least 33.6 hours of her billable time to defend against Plaintiff's frivolous claim at a rate of \$357.00 per hour during the course of working on this matter.

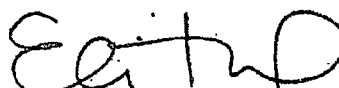
11. According to firm billing records, Antoine Robinson, a paralegal who provided services in this action, devoted at least 23.2 hours of his billable time to assist in the defense against Plaintiff's frivolous claims at a rate of \$201.00 per hour during the course of working on this matter.

12. The total hourly fees incurred through end of April 2018 is \$81,789.00. In addition there are \$458.13 in costs billed for this matter for travel expenses and court costs. In total, the fees and costs incurred defending against this baseless suit is \$82,247.13. However, the amount billed to Bank of America for this time period was \$76,556.02.

13. It is my opinion that the rates charged by McGuireWoods LLP and ultimately billed to Bank of America, as listed above, are reasonable for lawyers and paralegals of similar experience in Charlotte, North Carolina.

I declare under penalty of perjury under the laws of the State of South Carolina that the foregoing is true and correct.

Dated: May 29, 2018

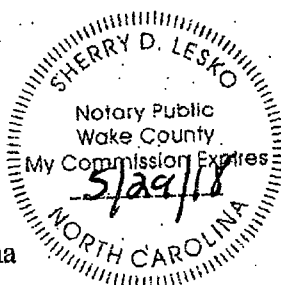


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Eztimmermans@mcguirewoods.com

Attorney for Defendant Bank of America, N.A.

State of North Carolina
County of Wake

Sworn to and subscribed to
before me on this 29th day of
May, 2018 in Wake County, North Carolina



Sherry D. Lesko
Notary Public

Commission Expires: 5/29/18

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Bank of American National Association Appellant,

v.

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

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Defendant Bank of America National Association ("Appellant" or "BANA"), hereby appeals the Order of the Honorable Grace Gilchrist Knie, dated July 3, 2018, denying the Appellant's Motion for Sanctions against Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes.¹

A copy of the order denying Appellant's Motion for Sanctions is attached hereto and incorporated herein as Exhibit A.

¹ On March 27, 2018, Hughes filed a notice of appeal with this Court, appealing the trial court's dismissal of his case against BANA based on grounds of *res judicata*, statute of limitations, and long-standing precedent. *Hughes v. Bank of America Nat'l Assoc.*, Appellate Case No: 2018-000568 (S.C. Ct. App. Mar. 27, 2018). That appeal involves the same parties in the same underlying case, and that appeal has been fully briefed at this time.

Respectfully submitted, August 1, 2018

MCGUIREWOODS LLP

By: /s/ Robert A. Muckenfuss

Robert A. Muckenfuss

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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Bank of American National Association Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon counsel of record for the Respondent causing it to be deposited in the United States Mail, postage prepaid, on August 1, 2018, addressed to Brad D. Hewett and D. Michael Kelly, 500 Taylor Street, Post Office Box 8113, Columbia, South Carolina 29202.

August 1, 2018

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS NONJURY

3
4 PHILLIP FRANCIS LUKE HUGHES, ON BEHALF
OF THE ESTATE OF JANE K. HUGHES,)

5
6 PLAINTIFF,)

7 VS.)

8 BANK OF AMERICA NATIONAL ASSOCIATION,)

9 DEFENDANT.)

TRANSCRIPT

OF

RECORD

2017-CP-42-2834

10 June 1st, 2018
11 Spartanburg, South Carolina

12
13
14 B E F O R E:

15 THE HONORABLE GRACE GILCHRIST KNIE, Judge.

16
17 A P P E A R A N C E S:

18 MIKE KELLY and BRADLEY DAVIS HEWETT
ESQ.
Attorneys for the Plaintiff

19
20 ROBERT A. MUCKENFUSS and ELIZABETH MARION ZWICKERT
TIMMERMANS
21 ESQ.
Attorneys for the Defendant

22
23
24 PAMELA E. GREEN
Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(WHEREUPON, there were no exhibits marked or testimony taken during this hearing.)

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P R O C E E D I N G S

THE COURT: So, I will call the case. There are, apparently, four matters on the docket for this morning.

The first is Civil Action Number 2017-CP-42-2834 is, is Phillip Francis Luke Hughes, et al, versus Bank of America.

MR. HEWETT: Good morning, Your Honor.

THE COURT: Good morning.

MR. MUCKENFUSS: Good morning.

MS. TIMMERMAN: Good morning, Your Honor.

THE COURT: Good morning.

And if you-all identify yourselves for the record when you're called upon to make argument, and, traditionally, I don't limit you on time, but I will note that this is scheduled for 30 minutes.

Okay. And so the, the moving party is Bank of America. Is that correct?

MS. TIMMERMAN: Yes, Your Honor.

THE COURT: Okay. And so, what I will do then is I will let Bank of America's counsel make their arguments. I will then let the Plaintiff's counsel make their arguments, and then I will let Bank of America respond to anything new that may have been brought up.

(Pause.)

THE COURT: All right. So, let me pull up this case.

1 (Pause.)

2 THE COURT: Okay. I see that the motion was filed on
3 March the 29th, and then there have been additional
4 filings this week, Memorandum in Support, Memorandum in
5 Opposition. I just want to make sure that both sides have
6 received the other's filings.

7 MR. HEWETT: Yes, Your Honor.

8 MS. TIMMERMANS: Yes, Your Honor.

9 THE COURT: Okay. All right.

10 (Pause.)

11 THE COURT: Okay. Counsel, I'm happy to hear from you.

12 MS. TIMMERMANS: Good morning, Your Honor.

13 I'm Elizabeth Timmermans with McGuirewoods. This is my
14 colleague, Robert Muckenfuss. Also with McGuirewoods.
15 We're here on behalf of Defendant, Bank of America, this
16 morning.

17 And as Your Honor notes, we're here on Bank of
18 America's Motion for Sanctions under Rule 11, and under the
19 South Carolina Frivolous Civil Proceedings Sanctions Act
20 seeking to recover fees and costs relating to a lawsuit that
21 was recently dismissed by this Court on multiple grounds
22 including the fact that a -- an identical lawsuit had been
23 filed and dismissed in 2015 involving identical allegations,
24 parties, et cetera.

25 There's no question, under the standard here, Your

1 Honor, that Counsel's conduct and Plaintiff's Counsel is
2 sanctionable. Under the Rule 11 and the Frivolous
3 Proceeding Act Standard, the, the Plaintiff and Counsel may
4 be sanctioned where the claims are not warranted by existing
5 law, and there's no good faith basis for a reversal or
6 modification of existing law.

7 Counsel has conceded -- Plaintiff and Counsel have
8 conceded that none of their claims are warranted by existing
9 law. There's six claims at issue in this litigation that
10 I'll get into, Your Honor. None of them are warranted by
11 existing law.

12 The issue for Your Honor this morning is whether three
13 out of those six have a good faith basis for modification or
14 reversal under existing law. They concede that the other
15 three do not have a good faith basis. And, honestly, Your
16 Honor, at this point, we are three years into this case.
17 We've won two Motions to Dismiss. My client had expended
18 significant fees and counsel has conceded that all six
19 claims are barred under existing law. So, if there's --
20 sanctions are not recoverable here, I'm not sure what the
21 case would look like where sanctions could be recovered to
22 be frank.

23 I'll give Your Honor a brief history, procedural
24 history, of the case. I know that we've briefed that in our
25 various filings, but, with the Court's indulgence, I'll walk

1 through some of the relevant procedural history here.

2 In 2015, Plaintiff filed an identical lawsuit in this
3 Court on behalf of his mother's estate. So, he's bringing
4 this lawsuit in 2015 and the current lawsuit in a
5 representative capacity on behalf of his deceased parents.

6 He claims that, in connection with a 2006 loan, Bank of
7 America, without his Plaintiff -- his parent's permission,
8 signed him up for a voluntary insurance product in 2006, and
9 that charges relating to that product showed up on their
10 bank statements every month from 2006 to 2015. In the
11 complaints, in 2015, and the complaint here, Plaintiff
12 concedes that those charges were in the monthly bank
13 statements every single month for about \$28.00.

14 They also concede that, in 2015, Ms. Hughes reached
15 out, prior to her passing, to Bank of America. Informs them
16 that Mr. Hughes had passed away back in 2008. And so, Bank
17 of America refunded all of the payments after his death.

18 So, this lawsuit, and the prior lawsuit, deal with a
19 very small period of charges from 2006 through 2008. And,
20 in the prior 2015 lawsuit that was filed in this Court,
21 Plaintiff brought claims for the Truth in Lending Act, TILA,
22 breach of contract, breach of duty of good faith and fair
23 dealing, and three fraud claims, breach of contract
24 accompanied by fraud, fraud, and fraudulent concealment.

25 Bank of America removed the lawsuit to Federal Court,

1 and Plaintiff then amended his complaint three times. So,
2 he got four chances in this Court and in Federal Court to
3 plead claims that could survive. Bank of America briefed
4 three separate Motions to Dismiss, and, in each one, Bank of
5 America moved, under Statute of Limitations grounds, one
6 year for TILA, three for the State claims, and that all the
7 fraud claims were barred under South Carolina Survival Act
8 Statute due to his parent's death. Under South Carolina
9 precedent and the statute, those claims did not survive his
10 parent's death.

11 After briefing the last Motion to Dismiss, Bank of
12 America sent Counsel and served Plaintiff with a proposed
13 Rule 11 motion as to the fraud claims since it was clear,
14 under the statute and precedent in this Court, multiple
15 Supreme Court opinions, that the fraud claims were barred.
16 As a result of that Rule 11 Motion, Counsel dismissed the
17 claims, and actually acknowledged, in the Federal Court
18 dismissal, that the claims were barred under South Carolina
19 Law.

20 In 2017, Judge Lewis, across the street, dismissed
21 Plaintiff's complaint in its entirety finding that Statute
22 of Limitations barred the claims, and equitable tolling
23 didn't apply because the Plaintiffs had established no due
24 diligence by his parents since the charges showed up in
25 monthly bank statements.

1 Plaintiff, the next day, appealed to the Fourth
2 Circuit, which affirmed the dismissal, after de novo review
3 on Statute of Limitations and equitable tolling, and then
4 Plaintiffs sought review by the Supreme Court of the United
5 States in December, 2017, but his Writ Petition was denied.

6 During his Federal Court appeal, after filing the
7 Fourth Circuit appeal, but prior to the Fourth Circuit
8 opinion, Plaintiff filed an identical lawsuit in this case,
9 the same allegations, the same insurance product relating to
10 the same issues that were pending in the 2015 case, and had
11 been dismissed by the Lower Court. Plaintiff brought claims
12 for breach of fiduciary duty, conversion, Unfair Trade
13 Practices Act violations, and then he repled the same fraud
14 claims that he dismissed after receiving the Rule 11 Motion
15 in Federal Court, fraud, fraudulent concealment, breach of
16 contract accompanied by fraud.

17 Plaintiff and his Counsel absolutely knew that these
18 claims were barred by -- on various grounds, and conceded as
19 much at the Motion to Dismiss hearing before Judge Kelly in
20 this Court a few months ago. He, I believe, used the exact
21 words, exercise in futility, and Judge Kelly agreed.

22 On March 20th, Judge Kelly dismissed all six claims
23 on multiple grounds. He held that all six claims were
24 barred by res judicata based on the Federal action, the 2015
25 lawsuit, all six claims were barred by the three year

1 Statute of Limitations, and equitable tolling did not apply.
2 for the reasons set forth by the Federal Court, and that the
3 fraud based claims, the three fraud claims and the Unfair
4 Trade Practices claim, which was based on fraud allegations,
5 did not survive the death of Plaintiff's parents under the
6 Survivability Statute and long standing precedent in South
7 Carolina.

8 Finally, Judge Kelly held that the Unfair Trade
9 Practices claim was barred for a fourth independent reason.
10 Under the clear terms of the statute, it can't be brought in
11 a representative capacity, and Plaintiff is here on behalf
12 of his mother's estate, and conceded at the hearing that he
13 was proceeding in a representative capacity.

14 On March 27th, the Plaintiff appealed. Importantly,
15 they only appealed as to the three fraud claims. They
16 concealed (sic) that the three other claims, Unfair Trade
17 Practices, breach of fiduciary duty, and conversion, should
18 not be appealed, that there was no basis for trying to
19 appeal that. And, on March 29th, Bank of America filed this
20 Motion for Sanctions based on Plaintiff trying to proceed
21 multiple times on futile grounds.

22 Again, Your Honor, what Plaintiff has to establish for
23 you today is that there's a good faith basis for modifying
24 existing law in South Carolina because they concede that all
25 claims are barred for various reasons. As, as I noted,

1 three out of the six claims in this lawsuit, Unfair Trade
2 Practices, breach of fiduciary duty, and conversion, there's
3 no dispute. Plaintiff does not address them in opposition
4 to Bank of America's Sanction Motion. The only time they
5 show up is in a footnote admitting that he pled those
6 claims.

7 So, right there, Your Honor, we have a concession that
8 sanctions should be awarded on three out of the six claims,
9 and Your Honor is able to go claim by claim and award
10 sanctions on each claim. So, three have been established.

11 Plaintiff's counsel also conceded, at the Motion to
12 Dismiss hearing, that the conversion and breach of fiduciary
13 duty claims were barred by res judicata. They're quotes
14 that set forth that yes, he acknowledges it and would
15 withdraw the claims and not proceed on them anymore based on
16 clear res judicata.

17 In the Holmes case before the Supreme Court, with an
18 opinion by Judge Toal in 2015 -- 2014 made clear that where
19 a party proceeds on claims that are clearly barred by res
20 judicata, that is sanctionable conduct. Furthermore,
21 Plaintiff's Counsel admitted at the hearing that he hadn't
22 read the Unfair Trade Practices Statute despite moving under
23 that claim and seeking treble damages against Bank of
24 America, and, on the clear face of the statute, it states
25 that no claims may be brought in a representative capacity,

1 and Plaintiff's Counsel admitted at the hearing that, even
2 as of the date of the hearing, he'd not read the statute,
3 and didn't know what the case law was on that. And the
4 Brubaker Court, the Fourth Circuit, the Brubaker Court
5 found -- held that where a cursory review of a statute would
6 put you on notice as to the viability of your claims, and
7 you failed to do that, Plaintiff and Counsel can be
8 sanctioned for that.

9 Finally, Plaintiff's Counsel and Plaintiff do not
10 dispute that those key claims are barred under the Statute
11 of Limitations, which the Federal Court already analyzed in
12 2015. Of course, when you refile claims under the same
13 Statute of Limitations in 2017, a good faith -- you do not
14 have a good faith basis that those claims would survive
15 independently of the res judicata analysis.

16 Also, the appeal, as I noted, filed on March 27th,
17 ignores these three claims, the Unfair Trade Practices,
18 breach of fiduciary duty, and conversion claims, and the
19 Rustand (phonetic) Court, I'm sorry, the Rutland course --
20 Court, in 2006, the Court of Appeals noted that it was a
21 factor where a claim was not appealed or an appeal was
22 withdrawn, it was evidence that there was no good faith
23 basis to proceed with those claims and the conduct was
24 sanctionable.

25 So, on those three claims, Your Honor, we would, we

1 would note that there is no dispute that the conduct is
2 sanctionable. Opposing Counsel does not dispute it in the
3 opposition. He ignores those three claims entirely, and
4 focuses only on the three fraud claims.

5 Now, as to those three fraud claims, Your Honor, Judge
6 Kelly dismissed those on three separate grounds, res
7 judicata, Statute of Limitations, and fraud survivability
8 under the, under the current Survival Act. And I would note
9 that, again, they don't address Statute of Limitations at
10 all in their opposition. They focus on res judicata and the
11 fraud -- the Survival Act Statute. They ignore the Statute
12 of Limitations issue entirely. And, for that reason, their
13 conduct, again, is sanctionable. They're conceding that.

14 Now, they do try to argue this -- there's a good faith
15 basis for overturning the law on the fraud survivability
16 issue. They set forth that the law, in their mind, the
17 survivability Act and 70 years of precedent analyzing that
18 act are "antiquated" or "founded in error."

19 So, without citation to any case law, Plaintiff's
20 Counsel's contending that he and his client can avoid
21 sanctions despite knowing the futility of the claims because
22 they believe that the General Assembly, the South Carolina
23 Supreme Court, on numerous occasions, South Carolina Court
24 of Appeals, had, frankly, been getting it wrong for seven
25 years.

1 The history of the fraud Survivability Act, however,
2 establishes that Plaintiff could not argue the good faith
3 basis that he has a basis to modify the law, and that the
4 lawsuit is -- a lawsuit is a proper mechanism to that.

5 Just to give Your Honor a, a brief history of the
6 statute and why that flies in the face of his good faith
7 argument, before 1932, all tort claims expired at death
8 under common law. So, there's no exception. No claims
9 survive. In 1932, the General Assembly passed Survival Act
10 allowing exception to the common law in two cases, injuries
11 to real estate, and injuries to person and personal
12 property. In 1941, the Supreme Court held that that
13 exception did not extend to fraud in the Madison case, which
14 counsel acknowledges is out there and is binding precedent
15 on this Court.

16 In 1942, 1952, and 1962 the General Assembly renewed
17 the Survival Act without modification. So, it declined to
18 extend that exception further.

19 In 2002, Judge Toal and the Supreme Court, in Ferguson
20 opinion, affirmed the Survivability Rule and that it doesn't
21 apply to the fraud claims. They expire at death. And then,
22 in 2008, the Brailsford Court, the Supreme, I'm sorry, the
23 Court of Appeals did a detailed analysis of the history
24 relating to the Survival Act and why fraud based claims do
25 not survive.

1 Plaintiff acknowledges all of this. He concedes it.
2 He admitted in his Motion to Dismiss briefing at the hearing
3 and in his opposition briefing that there is decades of
4 precedent. He just claims that it's error, and that conduct
5 is sanctionable because a reasonable attorney would know
6 that this 70 years of analyzing a statute is binding
7 precedent that there's no good faith -- there's no good
8 faith basis for modification.

9 Furthermore, coming to Court to rewrite a statute is
10 not the proper avenue. The Constitution -- South Carolina's
11 Constitution clearly says you can't do that. He needs to go
12 to the General Assembly and lobby and try to get the statute
13 changed to expand the exception to cover fraud because,
14 again, the, the default is nothing survives. The General
15 Assembly made a very limited exception for certain sort --
16 sorts of Court claims, not including fraud, which is clear
17 from the law.

18 And then briefly, Your Honor, opposing Counsel and
19 Plaintiff claimed that they are not trying to rewrite the
20 Res Judicata Statute or Res Judicata Law. They just don't
21 think it applies to them.

22 The clear law in South Carolina is that a claim is
23 barred under res judicata where the same parties, same
24 transaction, or occurrence are at issue, and there's been an
25 adjudication. This Court has already determined that res

1 judicata applies to the fraud claims.

2 Plaintiff is now trying to argue that because he
3 believes the fraud claims could not have been brought in
4 Federal Court that res judicata does not apply. However,
5 Plaintiff did bring the claims in Federal Court. He brought
6 all three fraud claims in Federal Court, and the law's
7 crystal clear that, where any claim is brought or could have
8 been brought, res judicata applies and you don't get another
9 bite at the apple.

10 In addition to Plaintiff bringing the three fraud
11 claims in the prior action, he also argues for a new res
12 judicata law where, when a State Law claim is so clearly
13 barred, is so clearly barred, that the Federal Court can not
14 certify it to the Supreme Court under South Carolina's
15 Appellate Rules, that res judicata can not apply to those,
16 those State Law claims. Plaintiff cites no authority for
17 that and there is none. That would be a rewrite of the res
18 judicata law, and would have an absurd holding in that res
19 juda (sic) could never apply where there is a Federal Court
20 ruling on State Law issues.

21 Your Honor, just a few more items to address. I will
22 note that, in an effort to distract the Court from the
23 standard here, which is whether there's a good faith basis
24 to modify controlling law, they, they lash out a bit at what
25 they perceive as to be Bank of America's bad conduct.

1 relating to trying to settle this case. In addition to a
2 violation of Rule 408, I would set forth that Bank of
3 America trying to work with opposing counsel, after already
4 being through two years of litigation on identical lawsuits,
5 shows a level of reasonableness that weighs in favor of Bank
6 of America and against opposing counsel where they also show
7 that they didn't even bother responding to any efforts.

8 I'll also note that Counsel claims that because Judge
9 Kelly did not sua sponte issue sanctions at the Motion to
10 Dismiss hearing, that that is somehow binding on Your Honor.
11 Of course, there was no sanctions motion pending at that
12 time, and there is no duty or obligation for Judge Kelly to
13 sua sponte note that he's awarding sanctions at a Motions to
14 Dismiss hearing. My colleague, Robert, Mr. Muckenfuss, who
15 argued at that hearing, noted that we believed the conduct
16 was sanctionable, but that we had not filed a motion yet.

17 The last point, Your Honor, opposing counsel takes
18 issue with the amount of fees that we've set forth, and I've
19 submitted two affidavits relating to fees, the hours, the
20 rights, et cetera, and I will note this case was filed in
21 July, 2017. We received notice of it very quickly. We
22 started analyzing and researching, briefing the pending
23 appeal, and the impact on the new case. We briefed a
24 detailed Motion to Dismiss. We argued that Motion to
25 Dismiss. We prepared a proposed order per Judge's -- Judge

1 Kelly's instructions. We prepared a Motion for Sanctions.

2 I understand that opposing Counsel's position is this
3 should of been easy for us to brief cause they already sued
4 us on the exact same issues. I would represent that I don't
5 think that argument weighs in his favor as to the sanctions.
6 And, to the extent Your Honor believes that the, the
7 requested fees are high, every Court whose analyzed the fees
8 in other cases has gone ahead and fashioned whatever order
9 the Court deems to be reasonable. So, that would not be a
10 bar. That could be something that Your Honor could modify
11 if found to be unreasonable, which we would represent, based
12 on the significant work we've done, is very reasonable for
13 the work we've had to do.

14 Your Honor, if you have any other -- any questions, I'm
15 happy to answer them. Otherwise, I will, I will rest at
16 this time.

17 THE COURT: What is the amount that you're asking for
18 in attorney fees and costs?

19 I saw a figure of \$70,000. That was just a loose
20 figure in the memorandum, and then I'm looking for your
21 specific affidavit of fees and costs right now, but I can
22 not find that filing.

23 MS. TIMMERMAN: Yes, Your Honor. On May 30th---

24 THE COURT: There were several filings on May 30th.

25 MS. TIMMERMAN: Yes, we filed, at 2:55PM, a Notice of

1 Supplemental Exhibits, and we attached Plaintiff's appellate
2 brief we'd just gotten, and my affidavit of costs, and I
3 am -- pull that number for you. It's Exhibit 2 to that
4 filing, Your Honor, again at 2:55PM.

5 THE COURT: I see that.

6 Okay.

7 MS. TIMMERMANS: And it is for \$76,556, Your Honor, and
8 we are, of course, are happy to submit any other information
9 that might be of assistance to the Court on the fees, rates,
10 the work done, et cetera.

11 THE COURT: All right. Thank you, ma'am.

12 MS. TIMMERMANS: Thank you.

13 Yes, sir.

14 MR. KELLY: Your Honor, I'm Mike Kelly, attorney for
15 Mr. Hughes. I'm here along with Brad Hewett. I'm the owner
16 of Mike Kelly Law Group, and the reason I'm here today is
17 because my firm's reputation is on the line.

18 My understanding is if you sanction, sanction us, that
19 that, as a matter of form, will be reported to Office of
20 Disciplinary Counsel. And so I thought it was im --
21 certainly important enough, after 40 years of practicing the
22 law, serving as President of the South Carolina Bar, having
23 offices in three cities -- I've been in five locations
24 different this week. So, just because I'm 66 years old
25 doesn't mean I'm slowing down. So, I thought it was

1 important.

2 The way this case began is Luke Hughes is a long time
3 friend of mine. Luke Hughes is a Spartanburg boy. His
4 parents lived up here. Luke got a job, after Law School, at
5 Nelson Mullins Riley & Scarborough, where he worked
6 ironically, with who -- with Ann Kelly, who had then become
7 my wife ten years until she passed away. Luke left Nelson
8 Mullins, went down to Myrtle Beach, and we remained in
9 touch, and he refers us cases of consumer nature,
10 occasionally high end personal injury cases, things of that
11 nature. Luke is kind of a general practitioner.

12 Luke is very well thought of in the Horry County Bar,
13 has a long and distinguished career as a lawyer, and so he
14 called me and told me about, when his mother passed or what
15 his mother -- before she passed. He found out that Bank of
16 America had been charging them this money monthly without
17 them knowing it for years and years and years.

18 I find it ironic and a little bit, a little bit over
19 the top that they're trying to sanction Luke Hughes and Mike
20 Kelly when they're the ones that initiated the wrong doing.

21 We originally filed the action in Federal Court. I did
22 not stay involved day-to-day because that's not really what
23 I do at the firm there. The Director of Litigation, Brad
24 Hewett, has been with me 11 years. He and I said let's file
25 something because this is atrocious what they've done to the

1 Hughes family. And so I put the ball in Brad's Court.

2 So, I looked at it, believed this case had merit. Brad
3 looked at it and believed it had merit. Doug Rosinski, who
4 works of counsel with our firm on bigger cases, we certainly
5 thought this was a case of great merit. That's the third
6 lawyer, reasonable attorney, and then Jamie Smith, who wrote
7 this brief, is an attorney who worked heavily on this case
8 both on a Federal side and the State side. So, we have five
9 lawyers there that think that our positions have merit.

10 If you -- if the Court needs me to, I can -- think I
11 can get a hundred more affidavits, if not 500 more
12 affidavits, that we were reasonable in our approach to this
13 case. I think Bank of America is a wrongdoer, and yet
14 they're trying to take \$70,000 from me.

15 I told you how the case began. It's been vigorously
16 fought. We believe, as our brief says, that we really think
17 it's time for the fraud exception to be revisited as so
18 eloquently written in our brief, which I'm sure Your Honor
19 has read. Fraud of the elderly and overreaching is of
20 mammoth proportions. We'd liked the opportunity to have the
21 Court of Appeals and/or the Supreme Court to ultimately
22 overturn that non-exception to fraud.

23 We think this is a fraud case all day long. I've been
24 doing things like this for a long, long time. When Ken
25 Suggs and Mike Kelly were practicing law together, we got

1 rid of contributory negligence, and we think it's time to
2 get rid of this fraud not surviving someone's death.

3 we voluntarily withdrew the fraud claim, which we
4 thought was our strongest claim in Federal Court, knowing
5 that we would need a Court to overturn previous precedent,
6 and we think the time is right to do that. Suppose you
7 sanction me, Your Honor, and then our Courts of Appeals --
8 our case is successful, which I'm hoping and praying it is,
9 and I've been sanctioned for this.

10 Back in the Greentree class action for attorney
11 preference violations, which went to the United States
12 Supreme Court twice, it took us 12 years. We were
13 threatened with sanctions constantly, and we ended up -- the
14 case settled, it was consumer fraud, for 32 million dollars.

15 I don't know where this case is going, but we obviously
16 have had our challenges. But we still believe, as much as
17 we did on day one, that this case has merit.

18 we do think a change in the law is warranted, and
19 several times opposing counsel referenced the fact that this
20 is a legislative determination. I would respectfully
21 disagree. We're in this posture because the Madison case
22 needs to be overturned for two, two, three subsequent cases
23 that have been commented on and never was analyzed. It's
24 time for reanalysis of this doctrine, which we think is
25 archaic, anticonsumer, and just plain ain't right.

1 Finally, I'll stand on my brief that \$70,000 to file a
2 Motion to Dismiss, to argue a motion in 15 minutes, prepare
3 an order, is not \$70,000 worth of legal work, and at least
4 not in my world.

5 THE COURT: Okay. Anything else before I hear from
6 Bank of America once again?

7 MR. HEWETT: Not at this time, Your Honor.

8 THE COURT: Okay. Thank you.

9 Yes, ma'am.

10 MS. TIMMERMANS: Your Honor, very briefly.

11 Our issue is not that Counsel and Plaintiffs pursued
12 the 2015 action that they believed have merit. That's not
13 our issue here. We disagreed with them and we've ultimately
14 prevailed on the Motion to Dismiss.

15 Our issue is that, based on res judicata, a ruling on
16 Statute of Limitations, and very clear fraud statute, and
17 the South Carolina Unfair Trade Practices Act Statute, they
18 proceeded with a 2017 case on identical claims knowing that
19 it was, in their own words, an exercise in futility, and
20 I -- we're not saying that Plaintiff can't bring claims.
21 There -- they have an opportunity to bring claims outside of
22 the fraud. They're not left with nothing.

23 Their breach of contract, conversion claims, et cetera,
24 they could of brought if they brought them in a timely
25 manner in the 2015 lawsuit. So, the fraud survivability

1 issue does not leave them without any recourse, but it does
2 require them to bring the other claims within the relevant
3 Statute of Limitations.

4 Counsel also noted the contributory negligence versus
5 comparatory (sic) negligence issue, and I would put forth,
6 Your Honor, that that is a very different issue. That is a
7 common law construct.

8 Here we're dealing with a statute that is creating an
9 exception to common law, and controlling precedent analyzing
10 the Legislature's intent with that statute. Those are two
11 very different issues. And to the extent they want to
12 modify the Legislative -- the statute, they need to go to
13 the General Assembly and lobby, lobby their legislator to do
14 that. This courtroom is not the proper place for that under
15 the Constitution.

16 And I would just note, Your Honor, that, again, this
17 Court may award sanctions both to Plaintiff and to
18 Plaintiff's counsel, and, again, this is nothing to do with
19 the 2015 action that -- just their decision to refile a
20 futile case again in 2017.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Anything else?

24 MR. HEWETT: Nothing that's not already in our brief,
25 Your Honor.

1 THE COURT: Okay. Well, thank you both, both sides for
2 your efficiency and professionalism. I can tell that
3 you-all have put so much work into this on both sides, and I
4 am taking this under advisement. You will receive
5 instructions from me, from my assistant, Ms. Searcy, and it
6 may be -- I try to take things in the order that I've heard
7 them for the week, and it wasn't your fault that you came in
8 on a Friday, but, hopefully, I will get the instructions out
9 to you within the next 15 to 20 days.

10 Thank you-all.

11 MR. HEWETT: Thank you, Your Honor.

12 THE COURT: Nice to see you all.

13 MR. KELLY: Thank you, Your Honor.

14 MS. TIMMERMANS: Thank you, Your Honor.

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17 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the
Seventh Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas Nonjury for
Spartanburg County, South Carolina, on the 1st day of June,
2018.

I do further certify that I am neither of kin, counsel
nor interest to any party hereto.

July 11th, 2018

PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
2) COMMON PLEAS
3 COUNTY OF SPARTANBURG) OF THE SEVENTH
4) JUDICIAL CIRCUIT
5 PHILLIP FRANCIS LUKE HUGHES,)
6 ON BEHALF OF THE ESTATE OF)
7 JANE K. HUGHES,)
8)
9 Plaintiff,) TRANSCRIPT OF RECORD
10) 2017-CP-42-02834
11 vs.)
12)
13 BANK OF AMERICA NATIONAL)
14 ASSOCIATION,)
15 Defendant.)
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25)

12 February 22, 2018
13 Spartanburg, South Carolina

15 B E F O R E:
16 HONORABLE R. KEITH KELLY, Judge.

17 A P P E A R A N C E S:
18 BRADLEY DAVIS HEWITT, ESQUIRE
19 For Plaintiff
20 ROBERT A. MUCKENFUSS, ESQUIRE
21 For Defendant
22 ELIZABETH MARION ZWICKERT-TIMMERMANS, ESQUIRE.
23 For Defendant

24 Julie A. Ashbrook,
25 Circuit Court Reporter
 Seventh Judicial Circuit

I N D E X

WITNESSPAGE

MOTION TO DISMISS

By Mr. Muckenfuss

4

REPLY TO MOTION TO DISMISS

By Mr. Hewitt

10

FURTHER ARGUMENT

By Mr. Muckenfuss

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COURT TAKES UNDER ADVISEMENT

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CERTIFICATE OF REPORTER

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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

PHILLIP FRANCIS LUKE HUGHES VS. BANK OF AMERICA

THE COURT: Okay. The first matter is -- the first matter is Phillip Francis Luke Hughes, the Plaintiff, et al. versus Bank of America National Association.

MR. HEWITT: Good morning, Your Honor.

MR. MUCKENFUSS: Good morning.

THE COURT: All right. I have read everything that has been submitted.

MR. HEWITT: Thank you.

THE COURT: Yes, sir.

MR. MUCKENFUSS: Thank you, Your Honor. Robert Muckenfuss and Elizabeth Zwickert-Timmermans for Bank of America, Your Honor. This is our motion to dismiss.

I think the arguments in our motion are fairly straight forward and I won't go through, Your Honor, I know you've read the briefs. But essentially, this is an identical case to a case that was filed previously in 2015 in state court, was removed to federal court. At that time the federal court questioned jurisdiction.

I think in this case plaintiff's counsel doesn't -- he admits it's an identical case in terms of the facts and circumstances that are alleged. Essentially it was a bank product line protection plans insurance. And they were, in that case there was a punitive class

1 action that was asserted. That case ended up being
2 dismissed by Judge Lewis in federal court, essentially
3 pulling that the statute of limitations had run.

4 There were arguments about equitable tolling.
5 Judge Lewis rejected those arguments. That case was
6 appealed to the Fourth Circuit. The Fourth Circuit
7 issued a procuring opinion affirming Judge Lewis. Then
8 They sought it further to the U.S. Supreme Court and
9 that was denied.

10 In re-filing this case, it appears to survive res
11 judicata. And so I'm gonna break it down into two
12 pieces, Your Honor. There's the fraud claim, which I
13 think is a different issue. But first I just want to
14 deal with the res judicata issue. This is a classic
15 case of res judicata. No one disputes, the plaintiff
16 doesn't dispute that it's identical parties. It's the
17 same circumstances, facts that are alleged.

18 They're actually identical claims. They add, I
19 think added a couple of new claims out of the cause --
20 out of the case. One's breach of fiduciary duty. They
21 also reassert the fraud claim, but they still have a
22 breach of contract claim, breach of contract accompanied
23 by fraudulent inducement.

24 In terms of res judicata, it's the same claims.
25 It's claims they could have brought in the previous

1 case. And so for res judicata, as Your Honor I'm sure
2 is well aware, if there are, you know, the same or
3 similar facts and circumstances and those claims were
4 brought in the previous case or could have been brought
5 in the previous case under claim preclusion, they would
6 be barred in this case. They would also be barred under
7 an issue preclusion analysis.

8 So in the previous case Judge Lewis analyzed
9 equitable tolling of the statute of limitations. She
10 cited a South Carolina appellate case, a federal case,
11 in addition to Federal case law on the Fourth Circuit,
12 rejecting their equitable tolling argument, which was --
13 the argument was that there was a fraudulent concealment
14 of this charge for the line of protection plan.

15 Judge Lewis rejected that, stating that these
16 charges, you know, were on the statements from June of
17 2006 all the way up until it was refunded by the bank.
18 The Fourth Circuit affirmed that. So in terms of claim
19 preclusion and issue preclusion, all of those claims
20 asserted in this lawsuit would be barred and should be
21 dismissed.

22 Now, the fraud claim, it's somewhat
23 extraordinary, Your Honor, that -- so in the previous
24 case plaintiff's counsel realized that in South Carolina
25 fraud claims were an exception to the survivability

1 statute and, you know, claims that would survive death.
2 And it's been the law in South Carolina since the 1940s
3 that claims that sounded fraud cannot be brought and yet
4 don't survive death.

5 Now, the plaintiff's counsel will voluntarily
6 dismiss that claim in the federal case acknowledging
7 that it's stated law in South Carolina. It appears what
8 they're trying to do, and to be honest, Your Honor, I
9 mean this lies close to a sanctionable type of
10 circumstance. We have not brought a motion for
11 sanctions, but plaintiff's counsel admits that he cannot
12 pursue a claim, a fraud claim. He justifies it by
13 simply stating that he is seeking to change the law to
14 have Supreme Court precedent overturned in South
15 Carolina.

16 That's, that's dangerous area. And, obviously I
17 think for, for plaintiff's counsel -- I think for
18 purposes of today in front of this Court, Your Honor,
19 from a constitutional standpoint for a trial court,
20 obviously you have no jurisdiction to overturn the prior
21 Supreme Court case.

22 And I would note in terms of the prior case law,
23 this is not just a 1941 case, the Madison case. This is
24 a 2002 Supreme Court case. So in 2002 the South
25 Carolina Supreme Court reaffirmed the rule in South

1 Carolina that fraud claims don't survive death. And in
2 2008 the Court of Appeals again affirmed the
3 long-standing rule in South Carolina that you can't
4 bring a fraud claim.

5 So I, honestly that claim has to be dismissed. I
6 think the plan for plaintiff's counsel is to appeal it
7 and try to argue in the Court of Appeals, ultimately the
8 Supreme Court that they should overturn prior precedent.
9 I think that's, that's an issue for the appellate courts
10 to deal with, not for the trial court. Now, for those
11 reasons the fraud claim should be dismissed, the other
12 claims should be dismissed in this case.

13 I would also finally, Your Honor, note for the
14 South Carolina Fair Trade Practices Act claim, again,
15 that, like the fraud claim, is clear in South Carolina.
16 And this is a statutory rule that you can't bring an
17 unfair trade practices claim in a representative
18 capacity. And that's in the statute. So the
19 plaintiff's counsel in that situation would have to, I
20 think, convince the general assembly to change the law.

21 So there are two causes of action in this case
22 that are clear on the face of -- and the Supreme Court
23 precedent in 2002 and also in the statute, that you
24 cannot bring those claims. In addition, the unfair
25 trade practices claim is based on fraud allegation, and

1 that would also be barred by the survivability exception
2 that we discussed before.

3 Attempts to distinguish the equitable tolling
4 issue, Your Honor, is a red herring. I think there's an
5 attempt by plaintiff's counsel to suggest that res
6 judicata shouldn't apply because the equitable tolling
7 analysis that Judge Lewis applied is different than what
8 is South Carolina court and that's absolutely not true.

9 If you look at the Fourth Circuit opinion, the
10 Fourth Circuit cites a number of cases that cite the
11 same type of standard South Carolina courts have
12 applied. In other words, you know, an extraordinary
13 circumstance acts that would prevent a plaintiff from
14 discovering. And I would note that the plaintiff
15 specifically alleged in the federal case that there was
16 fraudulent concealment and the Fourth Circuit noted
17 that.

18 So in a situation where they actually allege Bank
19 of America engaged in fraudulent concealment, they would
20 have to bring forth some evidence or some argument that
21 that was the case. They couldn't. Judge Lewis rejected
22 those arguments and dismissed the case. So the Fourth
23 Circuit noted that. The standard in South Carolina is
24 no different.

25 So for that reason res judicata should apply,

1 those claims should be dismissed. And the fraud claim,
2 obviously, should be dismissed. They admit that in
3 terms of the prior precedent. And unless the Court has
4 any other questions, Your Honor.

5 THE COURT: No, sir, I think that's it.

6 Yes, sir.

7 MR. HEWITT: Your Honor, good morning.

8 THE COURT: Good morning.

9 MR. HEWITT: Brad Hewitt here for the estate of
10 Jane Hughes.

11 THE COURT: Yes, sir.

12 MR. HEWITT: And I'm certainly not one to recite
13 the full facts and procedural history, as the Court has
14 read the memorandums submitted to the court. And I
15 recognize there is controlling binding precedent on the
16 primary issues in this case, which are the fraud based
17 claims. That the lower court is handcuffed as to what
18 it can do based in part on a 1941 decision and does
19 state that those fraud claims when you die, die with
20 you.

21 There's a 2002 opinion as well. I think that's
22 the Ferguson case, which cited to Madison further for
23 the support that your fraud based claim simply cannot
24 continue on. We're one of seven states that hold that
25 fraud based claims die when the claimant dies.

1 And so I recognize this may be at this stage in
2 the proceeding an exercise of futility in terms of what
3 the Court can do on fraud based claims, but those claims
4 were not adjudicated at the federal level. Res judicata
5 nor collateral estoppel apply to forbid those claims
6 from going forward. We could not go forward with them,
7 but upon realizing that there was a disallowance based
8 in part on the Madison case, we withdrew the claims.

9 And they could not be certified back to the
10 Supreme Court by the Federal Court, so there was nothing
11 that the Federal Court could do, nor could we move
12 forward, so we withdrew them and chose in part the
13 proper course of action, which is to challenge the state
14 of the law through the Circuit Court and ultimately
15 through the appellate courts. That is the intention.

16 So I know where this case is going at this level
17 in terms of the fraudulent claims and we set forth the
18 policy reasons as to why we are endeavoring to do that.
19 I've committed to this family to see this case through.
20 You've seen through the procedural history where we have
21 unsuccessfully applied to the Fourth Circuit and the
22 United States Supreme Court to visit at least the TILA
23 claims and the breach of contract claims. But there was
24 no adjudication. There was no full and fair opportunity
25 to litigate the issues of fraud.

1 I'm inclined to concede the point on the
2 remaining stated four claims of the conversion and
3 breach of fiduciary duty, that they may be barred by
4 collateral estoppel and res judicata analysis. I would
5 tend to perhaps agree, but the crux of this case is to
6 challenge the state of the law on the fraud claims.

7 And so even if the Court -- and I don't mean to
8 try to make the Court's job any easier, as I understand
9 a dismissal is likely forthcoming. What my request
10 would be, Judge Kelly, is that an order of dismissal be
11 limited on the grounds that there is controlling
12 precedent in place that forbids the fraud based claims,
13 rather than founded on any statute of limitations
14 argument or collateral estoppel or res judicata
15 defenses. So I think that the order can be confined to
16 that ruling.

17 If the Court is so inclined to explore those
18 issues, I have made clear why we think they don't apply
19 in the memo, that they were not adjudicated. That there
20 were discovery inhibitions, procedural disadvantages.
21 That they were not fully and fairly explored. I think
22 that -- and I haven't seen much in the way of argument
23 that they were because they were withdrawn. There was
24 no discovery at those levels.

25 And so even beyond that, Judge, if you were

1 inclined to believe that res judicata and collateral
2 estoppel may be in play, there are exceptions. The
3 State has adopted the restatement of judgment. And
4 provisions 27, 28 and 29 find that when you deal with
5 interests of public policy and fundamental unfairness
6 that the Court can refuse to apply collateral estoppel
7 and res judicata.

8 And we've made clear through certain studies that
9 we've cited about what is happening to senior citizens
10 in this country in terms of exploitation and fraudulent
11 schemes, that one in three -- over one in three senior
12 citizens are subject to fraudulent exploitation and
13 schemes. And the victims of that conduct -- and that
14 it's costing the country over 36 billion dollars each
15 year, that there are policy reasons in play. Not to
16 mention, you have Jane and John Hughes, who were
17 defrauded of several thousand dollars by Bank of
18 America.

19 And just very quickly, although it's in the, the
20 brief, the factual context for this entire case is a
21 2006 transaction with Bank of America. Jane and John
22 Hughes were 86 years old at the time. Owned their home
23 outright and took out a line of credit with Bank of
24 America. I don't know why. If they were sold a bill of
25 goods or if they just needed money because they were

1 outliving their retirement. That's possible. They did
2 it.

3 And during that transaction, they were offered an
4 optional line of protection plan where if they died or
5 became disabled or unemployed, which they already were,
6 it might provide some assurance that they would not have
7 to make some of the monthly payments. They declined
8 that expressly. It's commemorated. They both signed
9 it, we don't want this product, we don't need this
10 product. They checked the box that we -- do not charge
11 us for it.

12 Soon after the closing, John Hughes died. And
13 Jane Hughes was diagnosed with dementia, a-typical
14 psychosis, cataracts, which required surgery and some
15 degree of blindness, renal insufficiency. She broke her
16 hip, went to a nursing home. Was noted to lack
17 decisional capacity. So she had a precipitous decline
18 in her mental condition and her physical condition.

19 She was unaware that she was ever being charged
20 by Bank of America. It was a \$28-a month charge. It
21 was buried in a nondescript, ambiguous line item charge
22 that didn't say anything about Bank of America. It was
23 an abbreviated insurance charge with some serial numbers
24 attached. She had no idea. She was in a nursing home,
25 in and out of hospitals.

1 What became known to the family was by way of a
2 letter from Bank of America in March of 2017, about
3 seven years after her husband had died, that we are
4 gonna stop charging you for this product, a product that
5 they had never signed up for. A family member got that
6 letter, did some due diligence, if you will, put two and
7 two together and quickly realized they had rejected it
8 and been absconded of several thousand dollars and then
9 came to see us and we filed suit shortly thereafter.

10 And so the Court knows the discovery rule in this
11 state for fraud is when they were aware of the
12 misconduct. And so for the purposes of the statute of
13 limitations argument, this case was timely filed. If
14 the Court were so inclined to find that it were not,
15 then that's where we go into a equitable estoppel
16 argument, that based on her condition she certainly had
17 no knowledge of the misconduct.

18 And what the Federal Court did, Judge Lewis, and
19 ultimately the Fourth Circuit, was they, they looked
20 into equitable estoppel. That was the, the thrust of
21 our argument. But they applied a federally created rule
22 that was more restrictive than what our court uses,
23 which is based in part on the Hooper case in 2009 which
24 looks at all the circumstances. There's no due
25 diligence requirement. And so it's to avoid technical

1 forfeitures and to allow trials on the merits. So it's
2 a test, less restrictive.

3 And so I've said all that to say this, that I
4 think that the decision for the Court is fairly straight
5 forward on the fraud claims, and that we endeavor to
6 change the law in this state, which has been a law,
7 really a common law created since 1941 in a very
8 different world when you didn't have to worry about
9 certain types of identity theft, perhaps when people
10 could trust their banks.

11 And as a relevant aside, I know these allegations
12 made by the Hughes family are true. We've been
13 approached by other families. It happened to me as a
14 former Bank of America customer. Right about the same
15 time, right when I got married and purchased my first
16 house, we're financing through Bank of America and I
17 found a few months after the closing I was getting
18 charged for things I didn't sign up for.

19 Now, I had the physical and mental fortitude to
20 address it with Bank of America right then and there.
21 Ms. Hughes did not. And so that's the context as to why
22 we're here.

23 And so I know what the Court decision will be in
24 terms of the disposition. My hope is that it would be
25 confined to controlling precedent and that it would not

1 be founded on any statute of limitations, collateral
2 estoppel, res judicata type issues. For that matter,
3 the statute of limitations, according to this state
4 under *Johnston versus Bowing*, is an issue for the jury
5 to decide as to when the party knew or should have known
6 of the wrongdoing.

7 And so considering we're one of the few remaining
8 states that hold the way we do with fraud, any illusion
9 to this being sanctionable type conduct to me is far
10 fetched. You know, the way the law gets changed in
11 terms of common law is you challenge it.

12 So I think I would tend to agree that the
13 conversion claim, breach of fiduciary claims are
14 probably foreclosed and that we would forego those
15 claims. As to unfair trade, if there is -- and I may
16 have just missed this in the research. And it may be
17 clear in the legislation. If there's a case on point
18 where once you die, your unfair trade claim dies with
19 you, I would again concede the point that there's
20 controlling precedent. And this is being brought in a
21 represented capacity obviously.

22 And so the challenge in this case is to try to
23 change the stat of the law in South Carolina for fraud
24 based claims and this is the only way I know how to do
25 it. There was adjudication of these claims on the

1. federal level, which is why we're here today.

2. So unless the Court has any questions, I do
3. appreciate your time.

4. THE COURT: No, I don't have any.

5. Anything?

6. MR. MUCKENFUSS: Very briefly, Your Honor. I
7. think it is appropriate for this Court to apply issue
8. preclusion in addition to the fact that there is no
9. claim in South Carolina for fraud post death. But it is
10. appropriate issue preclusion as to equitable estoppel
11. decision by the federal court would apply to all of
12. these claims.

13. That's different than claim preclusion, but the
14. federal court very specifically held that the plaintiffs
15. in this case, the plaintiffs in this case did not
16. exercise the due diligence that would be required. It's
17. cited in the South Carolina case that's on point for
18. that standard.

19. So there is not a different federal standard to
20. the standard that South Carolina courts will apply. So
21. we would ask that when the case is dismissed, that it's
22. dismissed on the fact that there's clear precedent,
23. obviously, you know, bringing these claims, in addition
24. to issue preclusion on the equitable estoppel, equitable
25. tolling argument that in addition -- that would be

1 applied to the fraud based claims, not just the non
2 fraud based claims. All of those claims would be
3 dismissed based on the fact that the court rejected the
4 equitable tolling argument by the plaintiffs. Thank
5 you, Your Honor.

6 THE COURT: Thank you. All right, gentlemen.
7 Watch your e-mail addresses and we'll get something to
8 you.

9 MR. MUCKENFUSS: Okay.

10 MR. HEWITT: Thank you, Your Honor.

11 MR. MUCKENFUSS: Thank you, Your Honor.

12 (Whereupon, hearing concluded at 9:19 a.m.)

13
14 --- THIS ENDS REQUESTED TRANSCRIPT ---
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COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Ashbrook, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 22nd day of February, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Ashbrook.
Julie A. Ashbrook
Circuit Court Reporter
Seventh Judicial Circuit

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No. 2018-001443

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

v.

Bank of America National Association Appellant.

CERTIFICATION OF COUNSEL

Pursuant to Rule 210(g), of the South Carolina Appellate Court Rules, the undersigned,
an attorney in this matter for the Appellant, certifies that this Record on Appeal includes all
matters proposed to be included by the parties and not any other material.

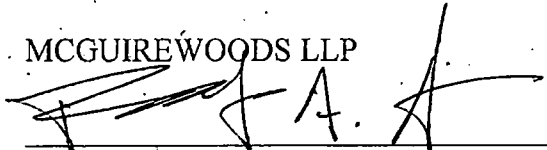
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December 7, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
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Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes..... Respondent,

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INTRODUCTION

In 2015, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, through his counsel of record ("Plaintiff's Counsel" or "Counsel"), sued defendant Bank of America, N.A. ("BANA") in federal court relating to charges associated with an insurance product. Plaintiff's Counsel brought several claims and eventually voluntarily dismissed his fraud-based causes of action, recognizing that binding precedent barred his claims since they did not survive his mother's death. The federal court dismissed the remainder of the claims, finding that they were barred by the applicable statute of limitations. Plaintiff's Counsel appealed the dismissal to the Fourth Circuit, which affirmed the lower court decision, and then to the Supreme Court of the United States, which denied his petition for *writ of certiorari*.

Undeterred, Plaintiff's Counsel sued BANA again on nearly identical allegations in the Court of Common Pleas of South Carolina. During proceedings on BANA's Motion to Dismiss, Plaintiff's Counsel *conceded* that his claims were destined to fail; he testified that he knew his non-fraud based claims were barred by *res judicata* on the issue of statute of limitations, and that he had not read the text of the South Carolina Unfair Trade Practices Act ("SCUTPA") to determine whether Plaintiff could bring claims in a representative capacity.

Not surprisingly, Plaintiff's Counsel lost again in the Court of Common Pleas, which also found that all of Plaintiff's claims were barred by the same statute of limitations previously applied by the federal court in the prior lawsuit; that all of his claims were also barred by *res judicata*; that the fraud-based claims were barred by South Carolina's survival statute; and that Plaintiff's unfair trade practices claim was also barred because the plain language of the statute did not allow such claims to be brought in a representative capacity. Plaintiff's Counsel despite conceding his claims were untenable, appealed the dismissal to this Court.

Plaintiff's Counsel's decision to proceed with claims that he conceded were barred on the basis of statute of limitations, *res judicata*, and the plain language of the germane statute violated Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the Frivolous Civil Proceedings Sanctions Act § 15-36-10 ("FCPSA"). Based on Counsel's egregious behavior, BANA filed a Motion for Sanctions on March 29, 2018, within ten days of the dismissal of Plaintiff's complaint. BANA sought to recover the mounting costs of defending against Plaintiff's frivolous claims.

The Court of Common Pleas denied the Motion for Sanctions on a procedural basis. It held that because the matter was currently pending before the South Carolina Court of Appeals, it had not yet been fully adjudicated and thus the Motion for Sanctions was both untimely and premature. The Supreme Court of South Carolina, however, has held that a motion for sanctions under Rule 11 must be filed in a timely fashion, *before* final resolution in the appellate court. Likewise, the FCPSA does not require that parties wait for a final resolution in the appellate court before filing a motion for sanctions and requires only that parties file the motion within ten days of the entry of judgment. Because BANA's Motion for Sanctions was filed within ten days after the dismissal of the Plaintiff's Complaint (and before an entry of judgment was entered), the Motion for Sanctions was timely.

In addition to being timely filed, BANA's Motion for Sanctions under Rule 11 and the FCPSA was meritorious and should have been granted. Plaintiff's Counsel actively pursued claims barred by the statute of limitations, the doctrine of *res judicata*, and the plain language of South Carolina's statutes. For these reasons, the Court of Common Pleas' denial of the Motion for Sanction based on timeliness should be reversed and remanded to the Court of Common Pleas for appropriate further proceedings.

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Court of Common Pleas err as a matter of law in concluding that BANA's Motion for Sanctions under Rule 11 was premature and untimely? (Yes.)
- II. Did the Court of Common Pleas err as a matter of law in concluding that BANA's Motion for Sanctions under the FCPSA was premature and untimely? (Yes.)
- III. Should the Court of Common Pleas Grant BANA's Motion for Sanctions? (Yes.)

STATEMENT OF THE CASE

A. 2015: Plaintiff First Pursues Frivolous Claims Against BANA, Which Are Dismissed With Prejudice.

In 2015, Plaintiff sued BANA on behalf of his mother's estate (the "2015 Lawsuit"). Plaintiff alleged that for nine years, from 2006 into 2015, BANA charged Plaintiff's parents \$28.40 per month for an optional insurance product. (R. p. 84, ¶ 25)¹ Plaintiff alleged that each charge appeared on the Hughes' monthly bank statements, listed as "Ad Insurance" and under the name of Plaintiff's father. (*Id.*) Plaintiff's father died in 2008, and his mother passed away in 2015. (R. pp. 83, ¶ 14, 86, ¶ 32.) After learning of their passing, BANA refunded all of the charges made after Plaintiff's father's death. (R. p. 85, ¶ 30).

In the 2015 Lawsuit, Plaintiff's Counsel brought claims for violation of the Truth in Lending Act ("TILA") and for breach of contract, fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and breach of duty of good faith and fair dealing. (*See* R. 79-108, generally.) Plaintiff's Counsel thereafter voluntarily dismissed the fraud-based claims,

¹ The 2015 Lawsuit was captioned, *Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, and all others similarly situated; JoAnne Hafter, and all others similarly situated v. Bank of America, National Association*, Civil Action No. 7:15-cv-05083-MGL in the U.S. District Court for the State of South Carolina, Spartanburg Division.

acknowledging that such claims were barred in South Carolina because they did not survive the death of his parents.² (See R. pp. 109-111.)

The United States District Court for the District of South Carolina dismissed the remaining case in 2017 and ruled that all of Plaintiff's claims were barred by the applicable one-year and three-year statutes of limitations for TILA and breach of contract, respectively. Noting that the insurance charges appeared on Ms. Hughes' monthly statements from 2006 to 2015, the court held that equitable tolling did not apply because "any argument they failed to discover the purported wrongdoing by Defendant...is bereft of any merit." (See R. p. 116.) The Fourth Circuit Court affirmed after a *de novo* review, and the Supreme Court of the United States denied Plaintiff's petition for writ of certiorari. See *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

B. 2017: Shortly After The 2015 Lawsuit Was Dismissed, Plaintiff Files The Nearly Identical 2017 Lawsuit In The Court Of Common Pleas Of South Carolina, Which Is Also Dismissed With Prejudice.

Not happy with the first result, Plaintiff's Counsel *again* sued BANA in 2017 in South Carolina Court of Common Pleas on behalf of his client (the "2017 Lawsuit"): (See R. pp. 16-29.) The factual allegations were nearly identical to the federal lawsuit that had been previously adjudicated to the Supreme Court level. The 2017 lawsuit included the fraud-based claims that Plaintiff's Counsel had previously voluntarily dismissed (fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts), but also included *new* claims, all of which could have been brought in the original action, all of which are based on the same allegations that had already

² BANA served Plaintiff and Counsel with a Rule 11 motion because his fraud-based claims did not survive the deaths of Plaintiff's mother. (See R. p. 296, ¶ 3.) It was only then that Plaintiff and Counsel agreed to "voluntarily" dismiss Plaintiff's clearly untenable fraud claims. Plaintiff also admitted in his opposition to BANA's motion to dismiss that breach of duty of good faith and fair dealing was not a separate cause of action. (See R. p. 153.)

been adjudicated, and all of which are admittedly barred by the statute of limitations and *res judicata*. (*Id.*) In particular, Plaintiff's Counsel asserted causes of action for violation of the South Carolina Unfair Trade Practices Act, §39-5-10 ("SCUTPA"), breach of fiduciary duty, and conversion. (*Id.*)

BANA moved to dismiss his claims on the basis that all of his claims were barred by *res judicata* and the three-year statute of limitations; the fraud-based claims were barred by binding South Carolina precedent holding that fraud claims do not survive death; and the SCUTPA claim was barred by the clear statutory language stating that such claims could not be brought in a representative capacity. (*See R.* pp. 44-62.)

At the hearing on BANA's motion to dismiss, Plaintiff's Counsel *conceded* that numerous of his claims should be dismissed on the basis of collateral estoppel and *res judicata*:

I'm inclined to concede the point [that the claims of] conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and *res judicata* analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(*R.* p. 530, lines 1-16, *R.* p. 535, lines 12-15).

Plaintiff's Counsel also admitted that he failed to read the SCUTPA statute before asserting a cause of action under the act. (*R.* p. 535, lines 12-21 ("As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent. And this is being brought in a represented capacity obviously."))

Predictably, Judge R. Keith Kelly of the Court of Common Pleas confirmed what Plaintiff's Counsel conceded and the federal court had already decided in the 2015 Lawsuit—that Plaintiff's

claims were without merit. On March 20, 2018, the court dismissed Plaintiff's action on multiple grounds, holding that: (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's SCUTPA claim was not allowed in a representative capacity; (3) all of Plaintiff's claims were barred by the doctrine of *res judicata*; and (4) all of Plaintiff's claims were also barred by the applicable statute of limitations and were not subject to equitable tolling. (See R. pp. 5-15.)

Judge Kelly stated:

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

(R. p. 8.) Likewise, Judge Kelly held that Plaintiff's claims were barred by the statute of limitations, reasoning:

In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit.

(R. p. 9.)

Plaintiff's Counsel appealed the dismissal to this Court. (See R. pp. 273-274.) However, he did not appeal the dismissal of the conversion, breach of fiduciary duty, or SCUTPA claims—

apparently conceding the lack of merit in those claims. (*See generally*, Initial Brief of Appellant, Appellate Case No. 2018-000568).

C. 2018: BANA Filed Its Motion For Sanctions To Recover Its Costs Associated With Defending Plaintiff's Frivolous Claims in the 2017 Lawsuit.

On March 29, 2018, nine days after the Court of Common Pleas' dismissal order, BANA filed a Motion for Sanctions under the FCPSA and Rule 11 to recover costs and fees incurred defending against Plaintiff's numerous frivolous claims. (R. pp. 286-294.)

At the hearing on the Motion for Sanctions, Plaintiff's Counsel did not dispute that he knowingly brought claims barred by *res judicata* and the statute of limitations. Nor did he argue that there should be a change in relevant law as to the statute of limitations and *res judicata*. Instead, he only argued that the "time is right" to "overturn previous precedent" as to the survivability exception for fraud claims and that sanctions would hurt his firm's reputation. (*See* R. p. 514, lines 3-17; R. p. 511, lines 15-17.) Plaintiff's Counsel made no substantive arguments as to why sanctions were not appropriate for the admittedly frivolous claims of conversion, breach of fiduciary duty, or violation of SCUTPA. (*See generally*, R. pp. 494-518.)

After hearing oral argument, the Court denied the Motion for Sanctions on procedural grounds as both "untimely and premature" because the case was currently pending before the South Carolina Court of Appeals and thus had "not yet been fully adjudicated."³ (R. p. 3.) BANA timely filed its Notice of Appeal with this Court on August 1, 2018. (R. pp. 490-493.)

³ The Court noted in its Order that Judge Kelly, at the hearing on BANA's motion to dismiss, had considered the "same conduct for which Defendant presently seeks sanctions" yet not granted sanctions. (R. p. 3.) This aside was not entirely correct: in fact, BANA's counsel did not *ask* for sanctions at the merits hearing. (*See* R. p. 525, line 7-12.) Equally important, the Court's denial of sanctions was on timeliness grounds, nothing else. The fact that the merits court below, in granting BANA's motion to dismiss, was not asked to grant sanctions and did not do so is irrelevant here.

STANDARD OF REVIEW

In this matter, the timing of the filing of the Motion for Sanctions is not in dispute. The Order on the Motion for Sanctions findings show that “[o]n March 29, 2018 [BANA] filed this Motion for Sanctions pursuant to SCRCF Rule 11 and S.C. Code Section 15-36-10 of the FCPSA, seeking sanctions against Plaintiff and his counsel for filing the August 15, 2017, survival action.” (R. p. 2, at ¶5). The trial court ruled on the Motion for Sanctions based on procedural grounds, deciding that the motion was “untimely and premature.” (R. p. 3, at ¶8). Accordingly, where, as here, the court made a determination of law based on an undisputed fact, the proper standard of appellate review is *de novo*. “When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.” *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (S. C. 2000); *see also Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (S.C. Ct.App. 2004)(accord). In such cases, the appellate court is “not required to defer to the circuit court’s legal conclusions.” *Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (S.C. 2006); *Goldston*, 358 S.C. at 167 (“[w]hen an appeal involves stipulated or undisputed facts ... the appellate court does not have to defer to the trial court’s findings.”); *see also In re Estate of Boynton*, 355 S.C. 299, 301–302, 584 S.E.2d 154, 155 (S.C. Ct.App.2003)(“In such cases, the appellate court owes no particular deference to the trial court’s legal conclusions.”)

Further, the court seemingly interpreted the FCPSA statute and the South Carolina Rules of Civil Procedure in finding the motion to be untimely. That “[s]tatutory interpretation is a question of law [that is also] subject to *de novo* review.” *Smith v. State*, 412 S.C. 472, 476, 772 S.E.2d 286, 289 (S.C. Ct. App. 2015), citing *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (S.C. 2010). Because the Court of Common Pleas made a determination of law (the timeliness of the Motion for Sanctions under Rule 11 and the FCPSA)

to undisputed facts, the Court is “free to review whether the trial court properly applied the law to those facts” with a *de novo* review. *WDW Props.*, 342 S.C. at 10, 535 S.E.2d at 632.

ARGUMENT

The South Carolina Supreme Court has held that motions for sanctions brought pursuant to Rule 11 must be filed in a timely fashion, before the final resolution of the appellate court. The FCPSA similarly does not require that parties delay in bringing a Motion for Sanctions until final resolution of the appellate court and provides only that a party must file its Motion for Sanctions within ten days of the entry of judgment. Thus, under South Carolina law, BANA’s Motion for Sanctions, filed within ten days of the dismissal order, was timely and ripe for consideration.

BANA’s Motion for Sanctions was further supported by the evidence and applicable law—Plaintiff’s Counsel conceded that he brought claims he knew were barred by the statute of limitations and *res judicata* (and made no argument that the law should be changed on these grounds).

For these reasons, the Court of Common Pleas’ decision to deny BANA’s Motion for Sanctions should be reversed and remanded for appropriate further proceedings.

I. BANA’S MOTION FOR SANCTIONS WAS FILED IN A TIMELY FASHION AND IS RIPE FOR CONSIDERATION.

A. The Motion For Sanctions Was Timely Pursuant To Rule 11.

The South Carolina Court of Appeals has held that motions for sanctions brought pursuant to SCRCR Rule 11 must be filed in a timely fashion and that waiting until the appeal is complete is not timely. *See* S. C. App. Ct. R. 205 (“Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.”); *see also Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 571, 795 S.E.2d 40, 48 (S.C. Ct. App. 2016), *reh’g denied* (Feb. 21, 2017) (finding that Rule 11 sanctions motion was untimely when it

was filed after conclusion of the appeal).

In *Pee Dee Health Care*, the South Carolina Court of Appeals provided a thorough analysis of the appropriate timing of a Rule 11 motion for sanctions. In this case, the defendant waited until after the appellate court issued a remitter of the action before filing its Rule 11 Motion for Sanctions. 418 S.C. at 571, 795 S.E.2d at 48. The court determined that the “delay in filing the motion for sanctions until final resolution of the merits appeal” was untimely and “failed to come in line with the underlying purposes of Rule 11.” *Id.* at 570–71, 795 S.E.2d at 48. The court noted that although “[s]ome courts recognize the ability of a party to file a [Rule 11] motion for sanctions at the end of litigation or after a judgment,” it was “unable to find any authority to support the proposition that a party can wait until the entire case has finished.” *Id.* The court further explained that while it would not read any specific time limits into the rule, “a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule.” *Id.* With this reasoning, it determined that the defendant’s “delay in filing the motion for sanctions until final resolution of the merits appeal” rendered the motion untimely. *Id.*

In making its decision, the South Carolina Supreme Court relied on the Third Circuit’s discussion of the negative consequences of allowing such a delay in filing a Rule 11 motion. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988). In *Lingle*, the Third Circuit discussed the timing and purpose of Rule 11 motions, noting that “timely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter.” *Id.* at 99. The Third Circuit also stated that “concurrent resolution of the challenges to the merits and the imposition of sanctions avoids the invariable demand on two

separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions." *Id.*

Similarly here, BANA complied with the South Carolina Supreme Court's mandate by filing its motion for sanctions within "a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule." *Pee Dee Health Care*, 418 S.C. at 571, 795 S.E.2d at 46. Waiting until Plaintiff's appeal was resolved would be contrary to the court's direction and be deemed untimely under *Pee Dee Health Care*. Consequently, BANA's Motion for Sanctions was neither untimely nor premature, and thus should be heard on the merits by the Court of Common Pleas.

B. The Motion For Sanctions Was Timely Under The FCPSA.

The FCPSA, Section (A) provides that an attorney may be sanctioned for "filing a frivolous pleading, motion or document" (§15-36-10(A)(4)(a)), "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts" (§15-36-10(A)(4)(b)), or "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law." (§15-36-10(A)(4)(c)).

The statute does not require that the parties delay in bringing the motion until final resolution of the appellate court. Instead, the South Carolina Supreme Court requires that the FCPSA motion be filed within ten days of the entry of judgment. *See Russell v. Wachovia Bank*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (S.C. 2006) (providing that "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) (noting that "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment").

Here, BANA filed its Motion for Sanctions on March 29, 2018, nine days after the Court

of Common Pleas entered its Order of Dismissal with prejudice of all of Plaintiff's claims on March 20, 2018, and before the Clerk entered a notice of entry of judgment.⁴ Accordingly, BANA's Motion for Sanctions was timely filed under the FCPSA. *See In re Beard*, 359 S.C. at 357.

The fact that Plaintiff's appeal was pending at the time BANA filed its Motion for Sanctions does not change this outcome. In *Holmes v. East Cooper Comty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (S.C. 2014), the court held that the trial court properly decided the defendant's motion for sanctions under the FCPSA, notwithstanding that the plaintiff's appeal was pending at the time. In *Holmes*, the plaintiff appealed the court's order dismissing her case, and a few days later, the defendant moved the trial court for sanctions pursuant to the FCPSA. *Holmes*, 408 S.C. at 148–49, 758 S.E.2d at 489. The trial court awarded sanctions under the Act, and the plaintiff appealed. *Id.* at 160, 758 S.E.2d at 489. On appeal, the plaintiff argued that the trial judge should have delayed ruling on sanctions until after her appeal of the dismissal was decided. *Id.* at 160, 758 S.E.2d at 495. The Supreme Court of South Carolina disagreed, holding that the trial court retained jurisdiction to consider the motion for sanctions despite the pending appeal of the dismissal order. *Id.* at 161, 758 S.E.2d at 496. The court reasoned that “the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion,” and thus, it was appropriate for the court to rule on the motion for sanctions.” *Id.*

Because the trial court retained jurisdiction after the filing of the Order of Dismissal, BANA properly filed its Motion with the Court of Common Pleas. Accordingly, the Court of Common Pleas' denial of BANA's Motion for Sanctions should be reversed. *See Rutland v.*

⁴ As of the date of this filing, the Clerk has not entered a notice of entry of judgment on the dismissal order.

Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (S.C. Ct. App. 2006) (“[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCF, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment.” (alteration in original)).

II. THE COURT OF COMMON PLEAS SHOULD HAVE GRANTED SANCTIONS

In addition to being timely filed, BANA’s Motion for Sanctions under Rule 11 and the FCPSA was meritorious and should have been granted.

Under Rule 11, the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, for making frivolous arguments without proper investigation, or for filing a pleading in bad faith. *See, e.g., Ex parte Gregory*, 378 S.C. 430, 437–39, 663 S.E.2d 46, 50–51 (S.C. 2008) (“Under Rule 11(a), SCRCF, a party and/or the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments . . . [or] for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it.”).

Similarly, the FCPSA states that “[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document if . . . (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

Here, Plaintiff’s Counsel is subject to sanctions under Rule 11 and the FCPSA because he actively pursued claims barred by the statute of limitations, the doctrine of *res judicata*, and the plain language of South Carolina’s statute.

In particular, Plaintiff's Counsel knew that all of Plaintiff's claims in this case were barred by the three-year statute of limitations, which the District Court of South Carolina and the Fourth Circuit had already applied to dismiss the 2015 Lawsuit. Unhappy with the outcome in federal court, Plaintiff simply re-filed his dismissed allegations with the Court of Common Pleas in the 2017 Lawsuit and added new claims that could have been brought in the previous action.

Indeed, Plaintiff's Counsel admitted that he "previously filed an action in...2015 based upon the same facts that establish his claim for relief" in the current action. (R. p. 255.) Thus, Counsel already knew that Plaintiff's claims were barred not only by the three-year statute of limitations, but also by *res judicata*. Counsel even admitted at the motion to dismiss hearing in the Court of Common Pleas that the claims were barred by *res judicata* and volunteered to forego the newly added claims:

I'm inclined to concede the point [that the claims of] conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and res judicata analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(R. p. 530, lines 1-16, R. p. 535, lines 12-15 (emphasis added)). At no point did Counsel raise an argument for a change in the relevant law with regard to the statute of limitations or *res judicata*.

Judge R. Keith Kelly of the Court of Common Pleas dismissed Plaintiff's action on multiple bases, including because the action was barred by the statute of limitations and *res judicata*. The court reasoned that "Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the

District Court” and thus was barred by *res judicata*. (R. p. 8.) Likewise, Judge Kelly held that all of Plaintiff’s claims were barred by the statute of limitations, explaining that in the 2015 Lawsuit, the “District Court held that Plaintiff’s claims were time-barred under a three year statute of limitations. Here, all of Plaintiff’s claims have a statute of limitations period of three years. Thus, if Plaintiff’s claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.” (R. p. 5.)

In addition to being frivolous based on *res judicata* and the statute of limitations, Plaintiff’s SCUTPA claim is also frivolous for a third reason: the plain text of the statute bars claims brought in a representative capacity. As the Court of Common Pleas noted in its Order on Motion to Dismiss, the “plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act.” (R. p. 12).

Counsel’s defense to pursuing this frivolous SCUTPA claim despite this clear language is that Counsel did not read the statute before suing BANA and seeking treble damages. Even after BANA briefed this issue in its 2017 Motion to Dismiss, Counsel still declared sanctionable ignorance at the hearing:

As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.

(R. p. 535, lines 12-21.)

Here, simply reading the statute that Plaintiff proceeded under would have made clear to Counsel that the SCUTPA claim was frivolous for yet another reason, and their failure to do so is sanctionable under Rule 11 and the FCPSA. *See Ex parte Gregory*, 378 S.C. at 437–39, 663 S.E.2d at 50–51 (S.C. 2008) (“[A]ppellant failed to properly investigate the matter prior to filing it, and

that the action was frivolous.”); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1373 (4th Cir. 1991) (“To be reasonable, the prefiling factual investigation must uncover some information to support the allegations in the complaint.”).

At the hearing on the Motion for Sanctions, Plaintiff’s Counsel focused only on his fraud-based claims, but offered no justification or excuse for bringing the claims for conversion and breach of fiduciary duty - claims that he knew were all barred by the statute of limitations and *res judicata*; and offered no justification or excuse for bringing the claim for violation of SCUTPA – a claim clearly barred by the plain language of the statute. Nor did Counsel argue for a change in the relevant law regarding the statute of limitations and *res judicata*. Rather than refute BANA’s argument that these claims Counsel filed were obviously and admittedly frivolous, Counsel simply noted that his reputation was at stake, stating: “[T]he reason I’m here today is because my firm’s reputation is on the line.” (R. p. 511, line 14 – R. p. 512, line 1.)

Simply put, Counsel did not address or offer a justification for bringing the claims for conversion, breach of fiduciary duty, and violation of SCUTPA because he could not. There was no justification for bringing these knowingly frivolous claims and Plaintiff’s Counsel should be sanctioned pursuant Rule 11 and the FCPSA.

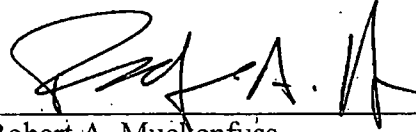
CONCLUSION

This Court should rule that the Defendant’s Motion for Sanctions was timely and remand this matter to the Court of Common Pleas for appropriate further proceedings, including the entry of appropriate sanctions, and grant any such other relief as is just and reasonable.

Respectfully submitted, December 27, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No. 2018-001443

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v.

Bank of America National Association Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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v.

Bank of America National Association Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER DEFENDANT PROPERLY PRESERVED FOR APPELLATE REVIEW ITS ARGUMENTS REGARDING THE LOWER COURT'S RULINGS ON DEFENDANT'S MOTION FOR SANCTIONS.
- II. WHETHER THE LOWER COURT'S DENIAL OF SANCTIONS WAS SUPPORTED BY UNAPPEALED FINDINGS, THUS BARRING DEFENDANT'S APPEAL UNDER THE TWO ISSUE RULE.
- III. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DEFENDANT'S RULE 11 MOTION FOR SANCTIONS PREMATURE AND UNTIMELY.
- IV. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN FINDING DEFENDANT'S MOTION FOR SANCTIONS UNDER THE FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT PREMATURE AND UNTIMELY.
- V. WHETHER, BASED ON THE MERITS OF THE PARTIES' ARGUMENTS, THE LOWER COURT PROPERLY DENIED DEFENDANT'S MOTION FOR SANCTIONS.

STATEMENT OF THE CASE

On August 15, 2017, Respondent filed a survival action on behalf of the Estate of Jane K. Hughes in the Spartanburg County Court of Common Pleas alleging fraud and other fraud-based causes of action, breach of fiduciary duty, and conversion against Appellant Bank of America National Association ("BANA"). (See R. at 16-29). The claims raised in Respondent's Complaint arose from fraudulent charges made by BANA against the account of John and Jane Hughes. In June 2006, Mr. Hughes and Mrs. Hughes opened a \$120,000.00 line of credit through BANA, secured by a mortgage on their Spartanburg County home. (R. at 17, ¶ 7). Thereafter, between June 2006 and March 2015, BANA illegally withdrew monies from the Hughes's account for a mortgage insurance product that the couple expressly declined, in writing, at the loan closing. (R.

at 18, ¶ 11; 20, ¶ 23; 30-31). Each of BANA's withdrawals was for a relatively small amount, and the line-item descriptions of the transactions were ambiguous and did not identify the actual purpose of the charge. (R. at 20, ¶ 23). At the time the fraudulent transactions began, Mr. and Mrs. Hughes were 86 and 85 years old respectively. (R. at 18-19, ¶ 12).

John Hughes died in October 2008. (R. at 19, ¶ 13). Jane Hughes was then in poor health and after June 2006 suffered from, among other ailments, blindness, dementia, and impaired cognition and decisional capacity; she died June 3, 2015. (R. at 18-19, ¶ 12; 21, ¶ 29). Shortly before Mrs. Hughes passed away, in March 2015, BANA mailed a letter addressed to Mr. and Mrs. Hughes to notify the couple that the mortgage insurance plan was being cancelled, and they would no longer be charged for the product. (R. at 19, ¶ 14). BANA subsequently established that it had been charging the Hughes's account for the declined mortgage insurance in John Hughes's name, although he had been deceased for over six years. (R. at 19 ¶ 16; 32). BANA refused to refund the money withdrawn between June 2006 and October 2008 or to provide any documentation that John Hughes ever elected to receive the insurance product. (R. at 20-21, ¶¶ 22, 28).

Prior to initiating the August 2017 complaint against BANA, Respondent filed an action in the Spartanburg County Court of Common Pleas on November 16, 2015 based upon these transactions and occurrences. Respondent's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice, of the three fraud-based claims against BANA, leaving the breach of contract and TILA claims before the

District Court. The federal court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

After dismissing the fraud-based claims pending in the 2015 federal action, Respondent re-filed those claims in his 2017 Complaint because 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 Rule 244(a), SCACR. (See R. at 529: 1-25).

On December 21, 2017, in lieu of an answer, BANA moved to dismiss Respondent'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 Appellant and Respondent on the Motion to Dismiss. During oral argument, BANA's counsel, Robert Muckenfuss, raised to the court his belief that the pursuit of claims under the 2017 Complaint by Respondent'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 525: 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 BANA's allegations of sanctionable behavior, and stayed silent on the issue both at the hearing and in his Order. (See R. at 5-14, 519-538).

Respondent appealed the lower court's dismissal of his fraud-based claims, filing a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR. (See R. at 273-274). Two days later, on March 29, 2018, BANA responded by filing a Motion for Sanctions against

Respondent and his counsel, seeking more than \$70,000.00 in attorneys' fees and costs. (R. at 292, ¶ 31). The parties argued the motion before Judge Knie on June 1, 2018, and the court subsequently denied BANA's motion. The court entered its Order on BANA'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 3, ¶¶ 7-8). Following this denial, BANA filed a Notice of Appeal with this Court on August 1, 2018, initiating the present appeal. (See R. at 290-291).

STANDARD OF REVIEW

Appellant brings this appeal pursuant to Rule 203 of the South Carolina Rules of Appellate Practice from an Order issued by the lower court denying its Motion for Sanctions under Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the Frivolous Civil Proceedings Sanctions Act ("FCPSA").

"The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity." Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct.App. 2011). In reviewing an equity matter, an appellate court reviews findings of fact by the lower court *de novo*, taking its own view of the evidence. Ex parte Gregory, 378 S.C. 430, 436-37, 663 S.E.2d 46, 50 (2008). However, if the

appellate court agrees with the lower court's factual findings, then it reviews the court's decision on whether to impose sanctions under an abuse of discretion standard. Pee Dee Health Care, P.A. v. Estate of Thompson, No. 2017-000681, 2018 WL 4101089, at *8, n.11 (S.C. Aug. 29, 2018); Se. Site Prep, LLC at 104, 713 S.E.2d at 654.

Appellant asserts that the lower court issued a decision of law based on undisputed fact and asks this Court to review that decision *de novo*. BANA Br. at 8. However, where the appellate court agrees with the trial court's factual determinations in a decision to award sanctions, it consistently applies an abuse of discretion standard if review. See Pee Dee Health Care P.A. at *8, n.11 ("If the appellate court agrees with the factual findings, then it reviews . . . for an abuse of discretion"); Se. Site Prep, LLC at 104, 713 S.E.2d at 653-654 (citing Ex parte Gregory at 438, 663 S.E.2d at 50 ("the abuse of discretion standard plays a role in the appellate review of a sanctions award")); Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court). The court will "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. at *8, n.11; see also, Stoney v. Stoney, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 487 n.2 (2018). 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 at 104, 713 S.E.2d at 654.

ARGUMENT

I. BANA FAILED TO PRESERVE THE ISSUES IT SEEKS TO RAISE ON APPEAL.

In its Order on Motion for Sanctions, the court, among other findings, determined that the motion is untimely and premature. BANA objects to this finding, arguing that its motion was timely and ripe for consideration. Specifically, BANA asks this Court to review whether the lower court erred as a matter of law in concluding that 1) BANA's Motion for Sanctions under Rule 11 was premature and untimely; and 2) BANA's Motion for Sanctions under the FCPSA was premature and untimely. BANA Br. at 3. Appellant lastly raises the third, very vague issue of "[s]hould the Court of Common Pleas grant BANA's Motion for Sanctions?" Id. Because BANA failed to preserve any of these three issues for appeal, this matter is not properly before court, and BANA's appeal is rightfully denied.

A. BANA Failed to Preserve the Issues of Timeliness Under Rule 11 and the FCPSA.

The lower court held that BANA's Motion for Sanctions was "untimely and premature" sua sponte. The record below is devoid of any argument by either party as to whether the filing was timely and/or premature; BANA cannot, and does not attempt to, establish where in its designated matters it raised the issues now before this Court. Neither in BANA's Motion for Sanctions, its Memorandum in Support thereof, nor its oral argument, does BANA even make a standard note that it timely filed the Motion for Sanctions. Fatally, before filing its Notice of Appeal, BANA 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 BANA filed its Motion for Sanctions in an untimely and premature fashion.

"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 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 not only to circumstances where a party raises an issue but the judge fails to enter a ruling on that issue; a party must also 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 at 29, 602 S.E.2d 782-83 (citing Hoefer Toal, et al, Appellate Practice in South Carolina 59–60 (2d ed. 2002)) (Waller, J., dissenting) (emphasis added). BANA had the opportunity to raise its objection to the lower court’s ruling on timeliness through a Rule 59(e) motion and failed to do so. Because BANA never raised to the circuit court the issues and arguments now on appeal, they are not properly preserved and thus not properly presented to this Court for meaningful 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.”).

B. BANA Failed to Preserve the Issue of “Should” BANA’s Motion Be Granted?

The final issue BANA raises on appeal is whether the lower court should grant its Motion for Sanctions. This stated issue not only fails to comply with Rule 208(b)(1)(B), SCACR, requiring that the statement be “concise and direct as to each issue,” but it, too, was not preserved for appeal.

As set forth above, for an issue to be preserved for appeal, it must be raised *and* ruled upon by the lower court. *Pye* at 564, 633 S.E.2d at 510. Now, BANA asks this Court to decide its Motion for Sanctions on the merits while contending that the circuit court denied its motion strictly on procedural grounds—timeliness. BANA Br. at 7. BANA’s own brief inherently precludes it from asking this Court to issue a determination as to whether it offered a meritorious argument, as BANA claims that the lower court failed to issue a ruling on the merits. *Id.* Based on this contention, and because BANA did not ask the court to reconsider its decision pursuant to Rule 59(e), the question of whether BANA should prevail on the merits is not properly preserved and presented to this Court for appellate review.

Because BANA failed to protect any of the three issues it stated on appeal—none of which was both raised to and ruled upon by the lower court—by filing a Rule 59(e) motion, it failed to preserve the issues for appellate review. Therefore, BANA’s arguments are not properly before this Court for consideration, for the first time, on appeal.

II. THE TWO ISSUE RULE PRECLUDES BANA'S APPEAL ON THE ISSUES OF TIMELINESS.

Even if BANA had properly preserved the stated issues on appeal relating to the timeliness of its Motion for Sanctions, those issues are nonetheless precluded under the two issue rule. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (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. (citing Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

BANA's argument that the lower court's denial of sanctions rests solely on its finding that the motion was untimely and premature is an inaccurate representation of the findings and considerations set forth in the court's Order. BANA Br. at 7, n.3. In addition to its determination that the underlying case had not yet been fully adjudicated, the lower court relevantly included in its findings that BANA previously raised the issues for which it seeks sanctions, as well the question of sanctions, to Judge Kelly at the parties' hearing on BANA's Motion to Dismiss. (R. at 3, ¶ 7). BANA briefly mentions this finding in a footnote, deeming it an inaccurate “aside” by the lower court and irrelevant to the issues on appeal, and emphasizes that BANA did not specifically ask for sanctions at the merits hearing. BANA Br. at 7, n.3. It is BANA's contention, however, and not the lower court's finding, that is inaccurate.

BANA's argument on appeal provides that the lower court “noted in its Order that Judge Kelly, at the hearing on BANA's motion to dismiss, had considered the ‘same conduct for which Defendant presently seeks sanctions’ yet not granted sanctions.” BANA Br. at 7, n.3. In fact, the Order does not state that Judge Kelly “had considered” the issue of sanctions, nor does it state that BANA expressly asked for sanctions at the hearing on its Motion to Dismiss. True to its modus operandi, BANA pulled this quotation out of context to better fit its narrative on appeal that the

lower court erred to its detriment. Actually, this language is pulled from the court's summary of *Respondent's argument* in its Order denying sanctions, stating that "Plaintiff and his counsel . . . argu[ed], in part, that the Court, when *presented with the opportunity to consider* the same conduct for which Defendant presently seeks sanctions on prior occasion, declined to award sanctions"¹ (R. at 3, ¶ 7) (emphasis added). BANA misrepresents the circuit court's summary as a finding of fact by the court, then attempts to discount its accuracy and relevancy to this appeal. Simultaneously, BANA turns a blind eye to the actual findings issued by the court in response to Respondent's argument that Judge Kelly's unwillingness to act on BANA's prior accusations of misconduct implies that the conduct did not warrant sanctions—notably the *only* argument by either party supported by findings of fact in the Order—stating that:

[BANA], 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 [BANA] raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against Plaintiff or his counsel at that time.

(R. at 3; ¶ 7).

In rewriting the circuit court's Order on its Motion for Sanctions, BANA glosses over the significance of the lower court's discussion of Respondent's argument regarding Judge Kelly's disinterest in BANA's allegations of sanctionable conduct. Significantly, this is the only argument made by either party that the lower court expounded upon in its Order. (R. at 2-3, ¶¶ 6-8). The Order briefly lists each of BANA's arguments in support of a sanctions award, without issuing factual findings or otherwise describing the factual basis for BANA's position. (R. at 2, ¶ 6). Conversely, the Order sets forth the issue of the court previously declining to award sanctions to

¹ Under both Rule 11 and the FCPSA, the court may impose sanctions upon its own motion. See Rule 11(a), SCRCP; S.C. Code Ann. § 15-36-10(B)(2).

the exclusion of Respondent's other, numerous arguments, and proceeds to make factual findings supportive of Respondent's position. (R. at 3, ¶ 7). The decision to include one, but not all, of Respondent's objections in its Order—especially in light of the court's provided factual support—indicates that the lower court assigned particular relevance to the issue, obviating the need to recount the remaining arguments he asserted. Accordingly, the Order on Motion for Sanctions fairly indicates that the lower court denied BANA'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 BANA raised the matter during oral argument. (See R. at 385-386).

Although BANA describes the lower court's discussion of Judge Kelly's reaction to accusations of sanctionable conduct as an "aside," its intentional inclusion in the Order implies otherwise. BANA, however, would have this Court adopt its myopic interpretation of the Order: that the lower court denied sanctions "on timeliness grounds, nothing else" and that Paragraph 7 of Order is "irrelevant." BANA Br. at 7-8, n.3. In fact, nowhere in its Order does the lower court state that its denial stemmed strictly from its finding that the Motion for Sanctions was untimely and premature, and BANA offers no basis for its conclusion that the court placed an "aside" prominently in the body of its Order. Rather than reading the order in a manner consistent with the deference due to the court, BANA chooses to disregard the language in its Order that is unfavorable to its argument. The conclusion drawn from an objective reading of the Order, however, is that the lower court denied BANA's Motion for Sanctions based on *two* considerations: 1) Judge Kelly did not impose sanctions against Respondent or his counsel when BANA previously raised the issue before him; *and* 2) the matter is pending before the Court of Appeals and has not yet been fully adjudicated. (R. at 3, ¶¶ 7-8).

Because the lower court denied BANA's Motion for Sanctions on two grounds, and BANA raised only the timeliness issue on appeal, the two issue error preservation rule bars BANA's arguments, making the lower court's deferral to Judge Kelly's inaction, whether right or wrong, the law of this case. See Atl. Coast Builders & Contractors, at 329, 730 S.E.2d at 285. Though BANA may attempt to argue that the issue of "[s]hould the Court of Common Pleas Grant BANA's Motion for Sanctions" encapsulates the issue of whether the lower court properly considered Judge Kelly's reaction to Respondent's arguments in reaching its decision, such an argument is contrived. BANA specifically represents that the court did *not* rely on this consideration in reaching its conclusion and goes so far as to say that "[t]he fact that the merits court below, in granting BANA's motion to dismiss, was not asked to grant sanctions and did not do so is irrelevant here." BANA Br. at 7-8, n.3. It is thus apparent that BANA intended its final issue on appeal to consider solely the merits of its argument for sanctions—not whether the lower court erred in considering Judge Kelly's response to allegations of sanctionable conduct in reaching its decision to deny BANA's motion.

Accordingly, even had BANA properly preserved the issues stated on appeal, because it neglected to appeal the lower court's findings as they relate to Judge Kelly, that unappealed ruling becomes the law of this case for appellate purposes. BANA's arguments are therefore procedurally barred under South Carolina's longstanding two issue rule, precluding consideration of BANA's appeal.

III. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT BANA'S MOTION FOR SANCTIONS WAS PREMATURE.

Assuming, *in arguendo*, that BANA properly preserved the issues raised on appeal, and that the court denied BANA's motion entirely on the grounds that it was untimely and premature, the court's decision should nonetheless be affirmed.

A. A Finding that BANA's Motion for Sanctions Under Rule 11 was Premature Falls Within the Lower Court's Discretion and Must Be Upheld on Appeal.

In support of its position that the lower court erred as a matter of law in concluding that its Motion for Sanctions under Rule 11 was premature and untimely, BANA submits an argument based exclusively on the appellate court opinion issued in Pee Dee Health Care, P.A. v. Estate of Thompson, 418, S.C. 557, 795 S.E.2d 40 (Ct.App. 2016), in which the court determined that a defendant's delay in filing a motion for sanctions until final resolution of the plaintiff's merits appeal rendered the motion untimely. BANA Br. at 10-11. BANA likewise reasons that waiting to file its Motion for Sanctions until Respondent's merits appeal is decided would be contrary to the "South Carolina Supreme Court's mandate" set forth in Pee Dee Health Care requiring a party to file a Rule 11 motion within a reasonable time of discovering the alleged improprieties. *Id.* at 11. On the contrary, the South Carolina Supreme Court *reversed* the holding relied upon by BANA, and determined that, in certain circumstances, filing a Rule 11 motion after the resolution of a merits appeal *is* reasonable. Pee Dee Health Care, P.A. v. Estate of Thompson, No. 2017-000681, 2018 WL 4101089, at *9 (S.C. Aug. 29, 2018). Based on the Supreme Court's recent decision in Pee Dee Health Care, BANA cannot viably argue that the lower court abused its discretion in denying its Motion for Sanctions.

The Supreme 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 Supreme Court found no abuse of discretion based on several considerations: 1) whether the court maintains jurisdiction over the case; 2) timing of the motion in light of Rule 11's objectives; 3) laches; and 4) reasonableness. *Id.* In finding that the lower 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 Supreme Court ultimately determined that the filing of the litigant's Rule 11 motion was timely. *Id.* 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).

Likewise, in the instant case, Respondent filed an appeal challenging the merits of a lower court decision prior to BANA moving for sanctions. Respondent posed the same question considered in Pee Dee Health Care to Judge Knie during oral argument on BANA's motion for sanctions—"Suppose you sanction me, Your Honor, and then our Court of Appeals case . . . is successful"? (R. at 514: 3-9). Indeed, BANA seeks sanctions against Respondent and his counsel for filing pleadings it alleges to be frivolous, while Respondent pursues an appeal of the Order of Dismissal relied upon by BANA to support its argument. Judge Knie'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. See Pee Dee Health Care, P.A. at *6-7. In the event that Judge Knie prematurely deemed Respondent's filings frivolous and granted an award of sanctions, and Respondent successfully appealed its claims, further litigation would inevitably ensue. In fact, the Pee Dee Health Care opinion 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.* at *7.

The lower court's decision not to issue a ruling on the merits of BANA's sanctions motion pending Respondent's appeal, under the factors set forth by the Supreme Court in Pee Dee Health Care, does not preclude BANA from refiling a Rule 11 motion at the conclusion of Respondent's appeal should it prevail in that action. The jurisdiction of the lower 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. at *5 (citing Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct.App. 2001)). The lower 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. at *5. The Pee Dee Health Care decision indicates that this jurisdiction continues until the timing of a Rule 11 motion would be precluded under the doctrine of laches for unreasonable and unexplained delay resulting in prejudice to an adversarial party. Id. at *8. Thus, should the final outcome of Respondent's appeal warrant reconsideration by the lower court on the issue of Rule 11 sanctions, BANA may refile its motion at that time.

In light of the South Carolina Supreme Court's opinion in Pee Dee Health Care, BANA cannot establish that the lower court abused its discretion by deciding that BANA's motion was premature in light of Respondent's pending appeal. Though the law would not have prohibited the lower court from deciding BANA's motion at the time of filing, Pee Dee Health Care indicates that a lower court may reasonably decline to issue a decision until its order on the merits is upheld on appeal. Id. at *7, 9. Thus, BANA's brief fails to viably assert that the circuit court ruling is predicated on an error of law.

B. The Lower Court Did Not Abuse Its Discretion in Concluding that BANA's Motion for Sanctions Under the FCPSA was Premature.

The circuit court likewise declined to award sanctions to BANA pursuant to its request for attorney fees and costs under FCPSA. BANA asserts that because it filed its FCPSA motion within ten days of the lower court's order dismissing Respondent's Complaint, the motion was timely, and emphasizes that the South Carolina Supreme Court requires FCPSA motions to be filed within ten days of the entry of judgment.² BANA Br. 11. While it is true that our courts require that a motion under certain provisions of the FCPSA be filed within ten days of a final order or judgment, BANA'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 lower court's discretion to conclude that BANA's Motion for Sanctions was premature under Rule 11, the court's dismissal of BANA's FCPSA claim should likewise be upheld.

In support of its position that a FCPSA motion for sanctions must be filed within ten days of the notice of entry of judgment, BANA relies on two cases decided under a dated version of the FCPSA, Russell v. Wachovia Bank, 370 S.C. 5, 633 S.E.2d 722 (2006) and In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct.App. 2004). In In re Beard, the Court of Appeals noted that the general time limit to bring an action under a statute is three years unless the "statute imposing [the action] prescribes a different time limitation." In re Beard at 358, 597 S.E.2d at 838 (citing S.C. Code Ann. § 15-3-540 (1976)). The court determined that the language of FCPSA § 15-36-30 stating that "[t]he entitlement of the aggrieved person must be determined by the trial judge *at the*

² BANA notes, in error, that its motion is timely because the Clerk has yet to enter a notice of entry of judgment. BANA Br. at 12, n.4. In fact, the clerk entered its notice on March 20, 2018. (See R. at 271-272; see also, Rule 54(a), SCRCF (defining "judgment" to include any decree or order which dismisses the action as to any party)).

conclusion of a trial upon motion of the aggrieved party . . .” clearly implied a time limitation to bring motions under the Act. Id. (citing S.C. Code Ann. § 15-36-30 (Supp. 2003) (emphasis in original)). The court interpreted this language to mean that a motion under that version of the FCPSA constitutes a post-trial motion, analogous to a motion raised under Rule 59(d) or (e), SCRCF, and thus subject to the same ten day filing limitation. Id. at 357-358, 597 S.E.2d at 838. Because case law provides that a trial judge loses jurisdiction over a case when the ten day period to file post-trial motions has lapsed, the trial judge also loses jurisdiction over FCPSA motions, and therefore such motions must be filed within the ten day time frame to constitute a timely filing. Id. (citing Pitman v. Republic Leasing Co., 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct.App.2002)). Similarly applying since-repealed provisions of the FCPSA and relying on In re Beard and Pitman, the South Carolina Supreme Court opined in the Russell case that a motion for sanctions must be filed within ten days of notice of an entry of judgment. Russell at 21, 633 S.E.2d at 730.

Before the legislature substantially revised the FCPSA in 2005, § 15-36-30 of the Act provided the only mechanism under which a party could move for sanctions and established that a motion for sanctions must be determined by the trial judge at the conclusion of trial; § 15-36-40 further provided that, to prevail, a party seeking sanctions had the burden of proving that the proceedings terminated in his favor. See S.C. Code Ann. Former §§ 15-36-30 and 15-36-40; see also, 1988 Act No. 432, Section 6. Effective July 1, 2005, the legislature amended the FCPSA, repealing §§ 15-36-20 – 15-36-50 and adding substantially different provisions; the revised version of the Act governs the matter at hand. See 2005 Act No. 27, Sections 5 and 12. Of note, the revised Act, distinct from the version considered in In re Beard and Russell, contains two provisions under which a party may move for sanctions:

- 1) 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). Subsection (A)(4) of the Act provides that an attorney may be sanctioned for "filing a frivolous pleading, motion or document" (§ 15-36-10(A)(4)(a)); "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts" (§ 15-36-10(A)(4)(b)); or "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law" (§ 15-36-10(A)(4)(c)).
- 2) Alternatively, Section 15-36-10(C)(1) states that "[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict" the court shall determine if a claim or defense was frivolous upon motion of the prevailing party, and shall sanction an attorney or a party if a reasonable attorney under the same circumstances would believe that "under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law" (§15-36-10(C)(1)(a)); "his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party" (§15-36-10(C)(1)(b)); or "the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings were based" (§15-36-10(C)(1)(c)).

Subsection (C)(1) of the current version of the FCPSA is substantially similar to the repealed § 15-36-30 in that both provisions provide for compulsory sanctions when, upon motion by a prevailing party at “the conclusion of trial,” the court finds that an opposing party violated the Act. The inclusion, in subsection (C)(1), of the same “at the conclusion of trial” language contained in former § 15-36-30, implies a limitation on when a FCPSA motion may be raised under this provision. Our courts have, in fact, determined that a FCPSA motion brought pursuant to § 15-36-10(C)(1) must be brought within ten days of the notice of entry of judgment. See Pee Dee Health Care at *3-4 (South Carolina appellate courts have interpreted the FCPSA’s subsection (C)(1) to require a party to file its motion for sanctions within ten days of the entry of judgment); see also, Holmes v. East Cooper Community Hosp., Inc., 408 S.C.138, 160, 758 S.E.2d 483, 489 (2014) (citing to § 15-36-10(C)(1) to support the determination that an FCPSA motion is a post-trial motion).

Thus, although Respondent does not dispute that a motion pursuant to § 15-36-10(C)(1) is a post-trial motion and must be filed within ten days of the entry of a notice of judgment, BANA does not contend that it is entitled to sanctions under this subsection of the FCPSA.³ Rather,

³ Although BANA’s Motion for Sanctions alleged violations by Respondent and his counsel of S.C. Code Ann. § 15-36-10(C)(1), BANA does not pursue this allegation on appeal. (See R. at 292, ¶ 29). Notably, Respondent argued to the lower court against an award of sanctions under subsection (C)(1), in part, because the plain language of (C)(1) does not provide for an award of sanctions after dismissal of a case pursuant to a motion to dismiss, like the one filed by BANA; rather, a motion under subsection (C)(1) is only available “[a]t the conclusion of trial and after a verdict for or a verdict against damages has been rendered or *a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict.*” § 15-36-10(C)(1)(emphasis added); see also R. at 378-379. Ironically, BANA maintains the argument that Respondent should be sanctioned for asserting a cause of action under the South Carolina Unfair Trade Practices Act (“SCUTPA”) because the statute does not provide for such claims to be brought in a representative capacity. BANA Br. at 14, 16 (“simply reading the statute that Plaintiff proceeded under would have made clear to Counsel that the SCUTPA claim was frivolous, and their failure to do so is sanctionable”). It further characterizes counsel’s decision not to appeal the dismissal of the SCUTPA action as “apparently conceding the [claim’s] lack of merit.” Id. at 7.

BANA specifically alleges that Respondent acted in violation of § 15-36-10(A)(4)(a)(ii) for “filing a frivolous pleading . . . [that] a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.” See BANA Br. at 13; S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Under the FCPSA, a motion alleging a violation of subsection (A)(4) is properly raised pursuant to subsection (B)(2) of the Act—not (C)(1). See S.C. Code Ann. § 15-36-20(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. Based on the unmistakable likenesses between subsection (B)(2) and Rule 11, the absence of any statutory language limiting when a (B)(2) motion might be brought, and the Supreme Court’s recent decision in Pee Dee Health Care, Respondent urges this court to conclude that BANA’s Motion for Sanctions pursuant to subsection (B)(2) was not a post-trial motion subject to the ten day filing limitation, and therefore the lower court did not abuse its discretion by denying the motion as premature.

Respondent takes the position that the timeliness of a motion raised pursuant to § 15-36-10(B)(2) should be determined under the same factors applied to Rule 11 motions as set forth in the Pee Dee Health Care opinion. The amended version of the FCPSA clearly distinguishes motions brought under subsection (C)(1) from those made pursuant to subsection (B)(2), whose language markedly parallels that of Rule 11(a). Unlike sanctions imposed pursuant to subsection

Applying BANA’s rationale here to its own actions, BANA apparently concedes that its claim for sanctions under § 15-36-10(C)(1) lacks merit and unwittingly imputes frivolity to the claim, which was impermissible under the plain language of the provision.

(C)(1), 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 § 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 further 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. See Section III(A), supra. This language within § 15-36-10(C)(1) bears a striking resemblance to the “at the conclusion of a trial” provision in since-repealed § 15-36-30—language that, per the In re Beard opinion, “clearly implies a time limitation for motions under the FCPSA” and on which the court hinged the conclusion that motions filed under the FCPSA are subject to the same ten day limitation as post-trial motions rather than the default three-year statute of limitations. See In re Beard at 358, 597 S.E.2d at 838. Since the legislature’s significant revisions to the FCPSA, our courts have relied on In re Beard and its progeny to characterize motions raised under (C)(1) as post-trial motions. See Pee Dee Health Care at *3-4; see also, Holmes at 160, 758 S.E.2d at 489. However, where § 15-36-10(B)(2) does not contain any limitation comparable to the “at the conclusion of trial” language fundamental to the holding

of In re Beard, BANA's attempt to also apply the same line of cases to subsection (B)(2) motions is untenable.

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. In addition to drafting (B)(2) without the same limiting language included in (C)(1), the legislature repealed § 15-36-40—which placed upon a party moving under the FCPSA the burden of proving that the proceedings terminated in the party's favor—and added § 15-36-10(D). Section 15-36-10(D) provides that, before sanctions may be imposed against a party alleged to have violated (A)(4), the party has thirty days to take mitigating or corrective action, including “filing a motion to withdraw the pleading, motion, document, or argument”—actions which, procedurally speaking, must occur *before* the conclusion of trial or dismissal of the case. See S.C. Code Ann. § 15-36-10(D). 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, the 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, BANA'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 the Supreme 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 lower court did not abuse its discretion

by denying BANA's Motion for Sanctions as untimely and premature under Rule 11, as described in Section III(A), supra, it did not abuse its discretion in denying BANA's request for sanctions under the FCPSA.

C. Even If This Court Reverses the Lower Court's Ruling on the Issue of Timeliness, BANA's Motion for Sanctions is Properly Denied.

BANA finally asks this Court to reverse the lower court's Order denying its Motion for Sanctions and remand the matter to be "heard on the merits by the Court of Common Pleas." See BANA Br. at 11. Yet, before remanding to the lower court, BANA asks this Court to decide the issue of "Should the Court of Common Pleas Grant BANA's Motion for Sanctions?" Not only are BANA's requests duplicative and contradictory, but it also failed to preserve this issue for appeal. See Section I(B), supra. Thus, Respondent maintains its position that this issue is not properly before the Court, but offers his response *in arguendo*.

i. *BANA's own conduct should preclude an award of sanctions.*

Whether attorney's fees should be awarded under Rule 11, SCRCP, or under the FCPSA, is treated as a decision in equity. Se. Site Prep, LLC at 104, 713 S.E.2d 650, 653. The trial court has discretion to award or deny sanctions under Rule 11 or the FCPSA, and will not be disturbed on appeal unless the conclusions reached by the lower court are without reasonable factual support. Ex parte Gregory at 438, 663 S.E.2d at 51.

BANA moved for sanctions against Respondent and his counsel, alleging that they violated Rules 11 and the FCPSA by filing an unviable complaint; ironically, BANA brought this motion, in part, pursuant to S.C. Code Ann. § 15-36-10(C)(1), whose plain language barred BANA's claim. See n.3, supra. Respondent raised this argument before the lower court, and BANA subsequently opted not to appeal the issue of whether the lower court "should" award sanctions under subsection (C)(1) of the FCPSA. In spite of this, BANA brazenly cites to Respondent's decision to not appeal

the dismissal of his causes of action for conversion, breach of fiduciary duty, and violation of SCUTPA as “conceding the lack of merit in those claims,” and takes the stance that concession of a claim is indicative of sanctionable conduct. BANA Br. at 7, 16. Moreover, BANA seeks sanctions against Respondent for filing a cause of action under SCUPTA, where the statute disallows such actions to be brought in a representative capacity, and reiterates this argument on appeal. All the while, BANA operates with the knowledge that it similarly brought a claim for sanctions under subsection (C)(1) of the FCPSA that was clearly precluded by the plain language of the statute. Thus, per BANA’s own definition, it engaged in sanctionable activity in pursuit of sanctions against Respondent and continues to do so on appeal.

Not only did BANA initiate a claim for sanctions clearly barred by statute, it continues to accuse Respondent’s counsel of failing to properly investigate claims prior to filing the 2017 Complaint via this appeal, in which BANA raises unpreserved issues and applies an incorrect standard of review. Clearly, BANA failed to properly investigate the viability of its arguments before filing its Notice of Appeal. Yet, BANA audaciously appeals to this Court for a decision that the lower court “should” award sanctions against Respondent, apparently considering itself beyond reproach. Equity and principles of estoppel militate a denial of BANA’s hypocritical request.

- ii. *Prior to BANA filing its Motion for Sanctions, the Court previously declined to impose sanctions based on BANA’s allegations of misconduct by Respondent.*

The FCPSA allows the court, in its discretion, to initiate an action for sanctions under S.C. Code Ann. § 15-36-10(A)(4) absent any motion by a party. See S.C. Code Ann. § 15-36-10(B)(2). Similarly, Rule 11 provides that a court may, upon its own motion, impose sanctions on a party. See Rule 11(a), SCRPC. Before BANA filed its Motion for Sanctions, during oral argument before Judge Kelly at the February 22, 2018 hearing on Defendant’s Motion to Dismiss, BANA’s counsel

accused Respondent and his counsel of engaging in sanctionable conduct. (R. at 525: 5-16). Attorney Robert Muckenfuss argued before the court that, although BANA had not moved for sanctions at that time, he believed that Respondent and his counsel entered “dangerous area” by re-filing fraud claims in the 2017 complaint, and their attempt to overturn precedent by through court proceedings came “close to a sanctionable type of circumstance.” Id. Yet, Judge Kelly, who read both parties’ briefs and heard oral argument on BANA’s motion and Respondent’s rebuttal, declined to entertain counsel’s accusations either at the hearing or in his Order of Dismissal. The fact that the Court did not take the initiative to pursue sanctions or otherwise reprimand Respondent or his counsel, despite BANA’s allegations, is telling. That BANA’s in-court accusations prompted no response from the Court indicates that, perhaps, Respondent’s complaint and counsel’s conduct was not, in fact, as egregious as BANA would represent and did not constitute a “sanctionable type of circumstance.”

The lower court considered Judge Kelly’s decision to not award sanction when issuing its own denial. (R. at 3, ¶ 7). The court made no legal error in doing so. See S.C. Code Ann. § 15-36-10(E)(7) (stating that, in determining if an attorney or party violated the FCPSA, the court shall consider factors the court considers just, equitable, or appropriate under the circumstances); See also, Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (stating in an equity case, an appellate court is not required to disregard the findings of the trial judge who was in a better position to judge credibility). Although BANA chooses to pretend that the findings regarding Judge Kelly were an “aside,” in fact, they establish a fair factual consideration for the denial of BANA’s Motion for Sanctions. Likewise, in reaching a decision as to whether the court, on remand, should award sanctions, this Court properly considers Judge Kelly’s reaction to BANA’s allegations of misconduct.

iii. *Respondent's counsel did not act unreasonably nor in bad faith.*

In light of its own flawed filings and procedural errors, BANA's attempts to place a burden of perfection upon Respondent's counsel are untenable. Neither Rule 11 nor the FCPSA suggests that a party cannot make an error without being subject to sanctions for pursuing a frivolous action or argument, and "the mere loss of a case does not subject a party . . . to a suit by the winner for sanctions. If it did, the Court System could not function." Se. Site Prep, LLC at 104, 713 S.E.2d at 653. The law does not hold a lawyer to a standard of brilliance in predicting the outcome of a case; rather, it only requires a lawyer to be competent. Id. Under Rule 11(a), [t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the *best of his knowledge, information and belief* there is good ground to support it; and that it is not interposed for delay. . . ." Rule 11(a), SCRCP (emphasis added). The FCPSA's language requires only that "a reasonable attorney under the same circumstances" would believe his claim was "clearly not warranted" under existing law, or that a good faith argument exists for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

BANA advised the lower court it does not take issue with the fact that Respondent and his counsel pursued claims they believed to have merit, but that "based on res judicata, a ruling on Statute of Limitations, and a very clear fraud statute, and the South Carolina Unfair Trade Practices Act Statute, they proceeded with a 2017 case on identical claims knowing that it was, in their own words, an exercise in futility. . . ." (R. at 515: 10-19). Not only is this representation misleading, it is apparent that BANA seeks sanctions against Respondent's counsel simply because the lower court ruled in BANA's favor—not because counsel engaged in sanctionable conduct. However, counsel may not be subject to sanctions for losing a claim—such consequences would chill the

court system. Instead, BANA must show that counsel engaged in clearly unreasonable misconduct, and it cannot meet that burden.

At oral argument on BANA's Motion for Sanctions, Respondent's counsel presented to the circuit court that five attorneys—three attorneys at Mike Kelly Law Group, LLC, a fourth attorney with whom counsel regularly consults, and Respondent, who is an attorney himself—reviewed the case at issue before filing, and all five attorneys believed the case to have merit. (R. at 512: 12-17, 513: 2-9). BANA liberally pulls out of context counsel's statement that "there is controlling binding precedent on the primary issues in this case . . . [t]hat the lower court is handcuffed as to what it can do based in part on a 1941 decision . . . [a]nd so I recognize this may be at this stage in the proceeding an exercise in futility in terms of what the Court can do on fraud based claims" (R. at 528: 14-18, 529: 1-3). Counsel for respondent did *not* represent to the lower court that this proceeding is futile; he acknowledged that the circuit court cannot overturn South Carolina Supreme Court precedent and that an argument to overturn precedent before the lower court would not generate the intended relief.

Counsel advised that Respondent seeks to "challenge the state of the law through the Circuit Court and ultimately through the appellate courts" which is a necessary course of action to overturn binding case law. (R. at 529: 13-15). Respondent provided the lower court with a detailed analysis as to why this change in precedent is necessary, and reiterated the rationale in response to BANA's Motion for Sanctions. (See R. at 264-269; see also, R. at 380-383). And, despite BANA's contention that Respondent seeks this relief in light of a "very clear fraud statute," the survival statute referred to by BANA does not touch on the fraud cause of action; that fraud does not survive death is an exception based strictly on the South Carolina Supreme Court's

interpretation of that statute in 1941. See Mattison v. Palmetto State Life Ins. Co. 197 S.C. 256, 15 S.E.2d 117 (1941); see also, S.C. Code Ann. § 15-5-90 (1976).

BANA further contends that Respondent's counsel "knew" that the 2017 Complaint was barred by the doctrine of *res judicata*, ignoring the lengthy argument presented by counsel to the circuit court both in response to BANA's Motion to Dismiss and its Motion for Sanctions as to why *res judicata* does not apply to the 2017 claims. (See R. at 257-258, 262-264; see also, R. at 383-385). Respondent appealed the lower court's Order of Dismissal as it applies to the issue of *res judicata* of his fraud-based claims and maintains its position that *res judicata* does not apply to those claims. Though BANA suggests to this Court on appeal that Respondent's filing was unreasonable under *res judicata* principles, so as to warrant an award of sanctions, BANA's attorney, Robert Muckenfuss, at oral argument on BANA's motion to dismiss, admitted to the lower court that "[i]n re-filing this case, it appears to survive *res judicata*." (R. at 523: 10-11). Moreover, BANA's counsel, a mere day before oral argument, sent an unsolicited email to Respondent's counsel requesting a demand in an attempt to settle the case.⁴ (See R. at 390-391). Counsel's attempt is inconsistent with, and serves to negate, its contention that Respondent's

⁴ Although BANA, at oral argument, accused Respondent of violating Rule 408, SCRE by disclosing this communication, the rule clearly allows such evidence to be used for reasons beyond proving liability for or invalidity of a claim or its amount. See Rule 408, SCRE; see also, Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435, 455 (D. Md. 2002) ("For those who see within Evid. Rule 408 the reflection of their own ingenuity at having discovered a means to lie, threaten, or coerce with impunity to negotiate a settlement advantageous to their clients, the sanctuary they perceive is illusory."). In the instant proceeding, Respondent does not introduce BANA's request for a demand to prove the validity of claims since dismissed; rather, Respondent means to show that BANA's allegation, that Respondent's counsel filed a frivolous claim destined to be dismissed on the pleadings at the following day's proceedings, is disingenuous.

counsel knowingly filed a pleading clearly not warranted or brought in bad faith—conduct so egregious that it would entitle BANA to upwards of \$70,000.00 in attorney fees and costs.

After hearing BANA's argument to the court on the doctrine of *res judicata*, and having read BANA's brief filed only two days prior, Respondent's counsel did agree to forgo the claims of breach of fiduciary duty, conversion, and SCUTPA. (R. at 535, ll. 12-20). However, agreeing to forego a claim after being advised of opposing counsel's position, and where the parties agree that the claims otherwise appear viable, does not amount to knowingly engaging in misconduct or even engaging in unreasonable conduct. In fact, the FCPSA considers withdrawal of pleadings, after being notified of an allegation that the pleading violates the statute, to be an appropriate response that a party may take before the court will impose sanctions. See S.C. Code Ann. § 15-36-10(D). Pursuant to the FCPSA, when a motion is raised under its provisions, the court is to take into account such a response in deciding whether a party has violated provisions of this section, as well as factors such as the complexity of the claims and previous violations of the section, of which Respondent's counsel has none. See S.C. Code Ann. § 15-36-10(E)-(F). In this instance, BANA moved for sanctions against Respondent's counsel *after* counsel agreed to forego certain claims in response to BANA's argument for dismissal and after the circuit court dismissed Respondent's pleadings. That Respondent cured the conduct alleged by BANA to be sanctionable before BANA moved for sanctions serves to further establish Respondent's continued efforts to act reasonably and in good faith—not in the egregious pursuit of clearly frivolous claims as BANA would have this Court believe.

- iv. *BANA failed to give adequate notice of its intent to seek sanctions on certain grounds.*

Finally, BANA contends that, in response to its Motion for Sanctions, Respondent's counsel "did not address or offer a justification for bringing the claims for conversion, breach of

fiduciary duty, and violation of SCUTPA” and “[a]t no point did Counsel raise an argument for a change in the relevant law with regard to the statute of limitations.” In fact, prior to receiving an electronic notification that BANA filed a memorandum supporting its eight-page Motion for Sanctions *the day before oral argument*, Respondent had no notice of BANA’s intent to raise these issues as grounds for sanctions. (See R. at 370-371). As such, an imposition of sanctions based on these grounds would not have passed constitutional muster and would be improper.

Both the FCPSA and Rule 11, SCRCF entitle a party to notice of the conduct alleged to have constituted a violation of the rules and an explanation for the basis of the potential sanction imposed so as to have an opportunity to respond. See § 15-36-10(D); Burns v. Universal Health Servs. Inc., 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct.App. 2000) (“We hold that a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11, SCRCF”). “In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.” Id. (quoting Griffin v. Griffin, 348 N.C. 278, 500 S.E.2d 437, 438 (1998)).

In its Motion to Dismiss, BANA provided as its basis for seeking sanctions case law affirming a sanctions award “where, like here, a plaintiff pursues claims barred both by res judicata and binding legal precedent” (R. at 292, ¶ 30). BANA’s Motion for Sanctions concentrated on Respondent’s fraud-based claims and argument for overturning precedent barring those claims. (R. at 289-290, ¶¶ 18-22). Though it made note of Respondent’s claims for breach of fiduciary duty, conversion, and violation of SCUTPA, as well as the lower court’s dismissal of the action based, in part, on the statute of limitations, the detailed Motion for Sanctions offers no indication that BANA sought sanctions on these grounds, nor does it provide any basis for doing so. (See id.). Because BANA specifically alleged that claims “barred by both res judicata and binding legal

precedent” are the sort of claims warranting sanctions, Respondent had notice only of BANA’s intent to seek sanctions based upon its fraud-based claims, which the lower court found to be barred by *both* res judicata and binding precedent and which BANA’s motion contended met both criteria.

Thus, relying on BANA’s Motion for Sanctions for notice, Respondent included in its opposing argument justifications for filing its fraud-based claims, why Respondent reasonably sought to modify existing law related to these issues, and why res judicata did not bar Respondent from bringing fraud-based claims. (See generally R. at 372-389). Having no notice of BANA’s intent to seek sanctions based on other grounds until one day before oral argument, Respondent did not have adequate opportunity to respond, and an award for sanctions by the court pertaining to these newly raised issues would be improper. BANA now relies on Respondent’s lack of response to issues of which he had no notice for its argument that the lower court should issue an award of sanctions, and in doing so, raises a meritless appeal. BANA Br. at 13-16.

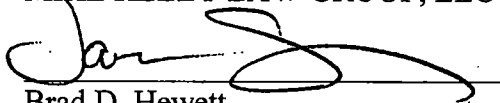
CONCLUSION

In sum, BANA asks this Court to address on appeal issues which it failed to preserve or which otherwise are precluded under South Carolina’s two-issue rule. Further, BANA asks this Court to determine how the lower court should rule on remand, and in doing so relies on an attack against Respondent for failing to respond to BANA’s allegations of sanctionable conduct, where BANA failed to provide notice of its intent to raise such complaints. All the while, BANA has unapologetically engaged in the very conduct for which it seeks sanctions against Respondent, and should be precluded from raising its claims through principals of equity and estoppel. Because BANA’s appeal is not properly before this court, and because the lower court made no reversible error, Respondent urges this Court to deny BANA’s appeal.

Respectfully Submitted,

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December 28 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834
Appeals Tracking No: 2018-001443

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

v.

Bank of America National Association Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant and Final Reply Brief
of Appellant complies with Rule 211(b), SCACR.

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South Carolina Appellate Court Rule 201 3

INTRODUCTION

Respondent Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ("Hughes"), has pursued years of litigation against Bank of America, N.A. ("BANA") that he concedes is frivolous. The trial court dismissed each of Hughes' claims on multiple grounds: that the claims did not exist in South Carolina, that all claims were time barred, and that all claims were barred by *res judicata* and collateral estoppel. Despite this, the court later ruled that BANA's resulting Motion for Sanctions (the "Motion") was both "untimely and premature" and that BANA must wait until the conclusion of Hughes' appeal to move for sanctions. Therefore, the narrow issue before this Court is whether BANA's Motion was filed in a timely manner and should be considered on the merits by the lower court.

In opposition to BANA's appeal, Hughes first claims that BANA failed to preserve the timeliness issue because BANA neglected affirmatively to assert that its Motion was timely during lower court proceedings. To the contrary, BANA *did* affirmatively state that its Motion was timely in its Memorandum in Support of its Motion. Furthermore, even if BANA had not staked out this position—which was implicit in its very decision to pursue the Motion—BANA is not required to argue preemptively that its Motion was timely.

Hughes also argues that this Court should affirm that the Motion was both untimely and premature because Hughes' merits appeal of the dismissal of his claims was pending before the South Carolina Court of Appeals at the time of BANA's Motion. In fact, courts in South Carolina have expressly found that under the FCPSA, parties are not obligated to wait for the resolution of pending appeals and that the statute further requires that a motion for sanctions be filed within ten days of judgment in the lower court. Similarly, a Rule 11 motion must be filed in a timely fashion, which may be before a final resolution in the appellate court. As a result, BANA's Motion, seeking sanctions under the FCPSA and Rule 11, was timely and not premature.

Hughes further claims that the lower court considered BANA's "request" for sanctions at the Motion to Dismiss merits hearing and opted not to grant them, which Hughes claims constitutes a second and independent basis for the court's decision to deny BANA's Motion for Sanctions. A review of the hearing transcript, however, demonstrates that BANA's Counsel explicitly disclaimed it was moving for sanctions at that juncture. A review of the order granting BANA's Motion to Dismiss confirms that the trial court did not deny a purported request for sanctions when ruling on BANA's Motion to Dismiss.

Finally, Hughes argues that he did not receive sufficient notice of the basis for BANA's Motion. Hughes did not raise this issue in the lower court and it was not a part of the lower court's order, and Hughes therefore waived this argument. Furthermore, Hughes and his Counsel were on clear notice that BANA was seeking sanctions based on Hughes' second round of frivolous litigation as evidenced by the parties' communications, BANA's Motion and supporting memorandum, Hughes' opposition to the Motion, and the attendance of Hughes' Counsel at the Motion hearing.

Because BANA's Motion was timely, the decision of the trial court should be reversed and remanded for appropriate further proceedings.

ARGUMENT

I. HUGHES MISSTATES THE STANDARD OF REVIEW

Hughes claims that an abuse of discretion standard applies, reasoning that when "the appellate court agrees with the trial court's factual determinations in a decision to award sanctions, it consistently applies an abuse of discretion standard [of] review." (Hughes Br. 11) The trial court, however, made a determination of law (the timeliness of the Motion for Sanctions under Rule 11 and the FCPSA) to undisputed facts (when the Motion for Sanctions was filed), and thus,

the Court is “free to review whether the trial court properly applied the law to those facts” with a *de novo* review. *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (S. C. 2000); *see also Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (S.C. Ct.App. 2004) (accord). In such cases, the appellate court is “not required to defer to the circuit court’s legal conclusions.” *Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (S.C. 2006). Based on a *de novo* review of law, the trial court’s denial of BANA’s Motion for Sanctions should be reversed and the case remanded for appropriate further proceedings.

II. BANA PROPERLY PRESERVED ALL ISSUES FOR APPEAL

Hughes argues that BANA failed to “preserve” the issues it seeks to raise on appeal because it did not affirmatively assert that its Motion was timely in lower court proceedings. (Hughes Br. 12–14)

Contrary to Hughes’ contention, BANA *did* argue that its Motion was timely in its Memorandum In Support of Motion for Sanctions, explicitly stating that:

This court retains jurisdiction to consider BANA’s Motion for Sanctions despite Plaintiff appealing this Court’s order on BANA’s Motion to Dismiss. *See* SCACR Rule 205; *see also Pee Dee Health Care v. Estate of Thompson*, 418 S.C. 557, 571, 795 S.E.2d 40, 48 (S.C. 2016) (rejecting argument that sanctions motion should not be filed until after conclusion of the appeal); *In re Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (noting that “a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment”).

(R. p. 335, n.2)

Even if BANA had not made clear its position that the Motion was timely—which is implicit in BANA’s decision to file the Motion in the first place—the outcome would not change. South Carolina Appellate Court Rule 201 provides that “[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision” and does not require that parties have argued or briefed issues ultimately ruled on by the lower court. Indeed, appellate courts routinely

review decisions by trial courts that were made on a *sua sponte* basis. See, e.g., *Reliford v. Mitsubishi Motors Credit of Am., Inc.*, No. 2004-UP-537, 2004 WL 6336777, at *1 (S.C. Ct. App. Oct. 21, 2004) (considering the appeal of the lower court's *sua sponte* grant of summary judgment for the defendant on statute of limitations grounds). As a result, BANA was not required to preemptively argue that its Motion was timely filed.

Hughes' argument that BANA was obligated to file a Rule 59(e) motion prior to seeking an appeal of the trial court's Order is incorrect. Courts have held that, if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review. *Spence v. Wingate*, 381 S.C. 487, 489-90, 674 S.E.2d 169, 170 (2009). Rule 59(e) is not applicable where, like here, an issue was ruled upon by the lower court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." (emphasis in original)); *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006).

Hughes further argues that the issue regarding whether the trial court should have granted BANA's Motion on the merits is not properly before this Court because the trial court never reached the merits. However, BANA is not asking this Court to reach the merits since that was never ruled on by the lower court. The only issue ruled on by the lower court was the timeliness

of the sanctions motion. BANA requests that the trial court be reversed on this point and the matter remanded for a determination on the merits. (App. Br. 1, 9, 17)

III. THE LOWER COURT'S DECISION WAS NOT BASED ON JUDGE KELLY'S SUPPOSED CONSIDERATION OF SANCTIONS

Hughes argues that Judge R. Keith Kelly considered BANA's "request" for sanctions at the Motion to Dismiss hearing and opted not to grant them, which Hughes claims constitutes a second and independent basis for Judge Grace Gilchrist Knie's subsequent decision to deny BANA's Motion for Sanctions. (Hughes Br. 15–18) Hughes' position is incorrect on multiple fronts.

First, as noted in BANA's Appellant Brief, BANA's counsel never requested sanctions at the merits hearing but instead described the behavior of opposing counsel as "sanctionable." (See R. p. 525, lines 7-12) In fact, BANA's counsel specifically clarified that BANA had "not brought a motion for sanctions" at that time (which was before the ruling dismissing Hughes' claims on multiple grounds). (R. p. 525, lines 10–12) Likewise, Judge Kelly's Order on the Motion to Dismiss did not rule on sanctions, and he was under no obligation to *sua sponte* grant sanctions. (See R. pp. 5-15)

Second, even if BANA's Counsel had requested sanctions at the merits hearing, the trial court did not base its decision on this issue. Judge Knie's Order explicitly states that "[t]his matter is currently pending before the South Carolina Court of Appeals as Appellate Case Number: 2018-000568, and has not yet been fully adjudicated. Accordingly, Defendant's Motion for Sanctions is untimely and premature." (R. pp. 1-4 (emphasis added)) The trial court merely noted that BANA's counsel raised the issue of sanctions at the hearing in the course of describing Hughes' argument against sanctions—not as a basis for its ruling. [*Id.* (noting that "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 . . . declined to award sanctions.”).

Third, even assuming that Judge Knie’s decision was based on a “prior decision to decline to issue an award of sanctions,” as Hughes claims; (Hughes Br. at 17), this Court should overturn the trial court’s decision as error. In fact, BANA’s counsel never requested that Judge Kelly impose sanctions, and Judge Kelly never ruled on the issue. Thus, it would be reversible error for the trial court to deny the motion on these grounds. *See Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (a decision regarding sanctions can be overturned if the decision is controlled by an error of law or is based on unsupported factual conclusions).

BANA’S MOTION WAS TIMELY UNDER THE FCPSA AND RULE 11

1. BANA’s Motion For Sanctions Was Timely Under The FCPSA

Hughes argues that BANA’s Motion for Sanctions was premature under the FCPSA because it was filed while his appeal was pending. The FCPSA, however, does not require that parties delay in bringing a motion for sanctions until final resolution of an appeal, and in the context of post-judgment sanctions, courts require that the motion be filed within ten days of the judgment.

The FCPSA provides that an attorney may be sanctioned for “filing a frivolous pleading, motion or document” (§15-36-10(A)(4)(a)), “making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts” (§15-36-10(A)(4)(b)), or “making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law.” (§15-36-10(A)(4)(c)).

The FCPSA also provides an avenue for sanctions after the resolution of the case. Pursuant

to § 15-36-10(C)(1)(a) and (c), an attorney and party shall be sanctioned under the FCPSA if, “[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party,” the court finds that: “(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law” or “(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.” S.C. Code Ann. § 15-36-10(C)(1)(a) and (c).

The South Carolina Supreme Court has held that “sanctions may be awarded under FCPSA regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the Act.” *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (S.C. 2014).

The FCPSA does not require that parties delay in bringing a motion for sanctions until final resolution of the appeal, and Hughes points to no authority for this point. To the contrary, courts that have considered the timing of a motion under the FCPSA have held that the motion must be brought at the latest, within ten days of entry of judgment. Indeed, “[m]otions made pursuant to the FCPSA are post-trial motions, and thus, a party has ten days after the filing of a court order to file a motion pursuant to the FCPSA.” *See Holmes*, 408 S.C. at 160–61, 758 S.E.2d at 495. Courts reason that “because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed

within ten days of judgment.” *Id.* (citing *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006)).

Here, the trial court dismissed Hughes’ Complaint in its entirety and, as Hughes concedes, “entered its [notice of entry of judgment] on March 20, 2018.” (Hughes Br. at 22 n.2) BANA moved for sanctions on March 29, 2018, nine days after the trial court disposed of Hughes’ case—within the timeframe required for filing a motion for sanctions after an entry of judgment by *Rutland* and *Holmes*. Accordingly, BANA’s Motion under the FCPSA was timely filed, and the trial court’s decision should be reversed and remanded for further consideration of the merits of the Motion.

2. BANA’s Motion For Sanctions Was Timely Under Rule 11

Hughes argues that the Supreme Court’s very recent remand in *Pee Dee Health Care, P.A. v. Estate of Thompson* renders BANA’s Motion for Sanctions untimely and premature. (Hughes Br. 19) Contrary to Hughes’ reading of *Pee Dee*, the South Carolina Supreme Court largely upheld the Court of Appeals’ prior decision that a Rule 11 Motion must be brought within a reasonable time after the discovery of the sanctionable behavior—further justifying the timeliness of BANA’s Motion for Sanctions under Rule 11. *Pee Dee*, 818 S.E.2d 758, 767 (S.C. 2018).

In *Pee Dee*, the Supreme Court opined that “we cannot disagree with the court of appeals’ holding ‘that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties.’” *Id.* Accordingly, the Supreme Court held that “we agree with the court of appeals. . . . that a Rule 11 motion is untimely if the circuit court—considering all relevant circumstances in the context of the litigation—determines the motion was not filed in a reasonable period of time after the discovery of the alleged misconduct.” *Id.*

The Supreme Court then determined that it was reasonable for counsel in *Pee Dee* to wait for the resolution of three pending appeals before filing a motion for sanctions because counsel's specific circumstances justified the delay. *Id.* at 766. In particular, counsel for the defendant believed that a "sanctions motion would only exacerbate the already contentious litigation, further delaying a decision on the merits and costing his client more money." *Id.* Based on these specific circumstances, the Supreme Court found that it was not unreasonable for the defendant's counsel to wait until the resolution of the appeals to file a motion for sanctions, noting that counsel had made the understandable determination that filing the sanctions motion before then would not serve the purpose of "detering future litigation abuse, but rather would only encourage more abusive behavior." *Id.* at 766.

In reaching this decision, the South Carolina Supreme Court clarified that its determination regarding timeliness of the motion for sanctions "[began] with the premise that early filing—and quick resolution—of legal claims is always to be promoted." *Id.* at 765. Nothing in *Pee Dee* suggested that a party was *obligated* to wait until the resolution of any pending appeals before filing a motion for sanctions. To the contrary, the court implied that a party would have to provide separate justification if it waited until resolution of an appeal to file a Rule 11 motion. *Id.* at 766.

Consistent with the Supreme Court's decision in *Pee Dee*, BANA's Motion was timely filed in accordance with the Supreme Court's mandate that a Rule 11 Motion be pursued "within a reasonable time of discovering the alleged improprieties." *Id.* at 767. For BANA to wait until after the appeals process to file its Motion would risk a ruling that its delay was unreasonable under the circumstances, especially where BANA intended for its Motion to serve as an immediate

deterrent of further litigation abuse.¹ *Id.*; see also *Griffin v. Sweet*, 136 N.C. App. 762, 765, 525 S.E.2d 504, 506 (2000) (finding that the plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety where he waited over thirteen months after the supreme court denied the defendants' petition for discretionary review); *Rice v. Danas, Inc.*, 132 N.C. App. 736, 514 S.E.2d 97 (1999) (finding that the motion for sanctions was not timely filed where the defendant claimed it was aware of the plaintiff's sanctionable conduct prior to filing its answer but waited until after the jury verdict to file its motion for sanctions).

Because BANA's Motion was filed within a reasonable time of Hughes and his Counsel's sanctionable behavior, the Motion was timely and should be considered on the merits.

IV. HUGHES WAIVED ANY ARGUMENT THAT HE DID NOT HAVE SUFFICIENT NOTICE OF BANA'S MOTION

Hughes claims that BANA did not give "adequate notice of its intent to seek sanctions on certain grounds"—in particular, that BANA failed to provide notice that it was pursuing sanctions against Hughes regarding his breach of fiduciary duty, conversion, and SCUTPA claims, and on the basis that he filed claims knowing they were barred by the statute of limitations. (Hughes Br. 37) He does not dispute that BANA provided notice of each of these issues in its Memorandum in Support of its Motion, which was filed on May 28, 2018, but argues that BANA should have also made these arguments in its underlying Motion, filed on March 29, 2018.² [*Id.*]

Hughes did not raise this issue in the lower court and it was not a part of the lower court's order; and Hughes therefore waived this argument. As Hughes points out in his response (Hughes

¹ It would also be unreasonable to require BANA to file a motion for sanctions under the FCPSA pursuant to the ten-day time limit and then require that BANA wait to file a separate Rule 11 motion until after the resolution of Hughes' appeal.

² Hughes also concedes that BANA provided sufficient notice that it was pursuing sanctions against Hughes based on his frivolous fraud claims.

Br. 13), issues and arguments are preserved for appellate review only when they are raised to and/or ruled upon by the lower court. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *Pye*, 369 S.C. at 564, 633 S.E.2d at 510 (holding that because an issue was raised for the first time on appeal and was not ruled upon by the trial judge, it was not preserved for review). Despite submitting an opposition to BANA's Motion and attending the hearing on the Motion, Hughes never argued that the Motion should be denied because he was not afforded sufficient notice under the FCPSA and Rule 11. (*See generally* R. pp. 372-451; R. pp. 494-518) The trial court likewise did not deny BANA's Motion on this basis. (*See* R. pp. 1-4) Accordingly, Hughes' notice argument cannot be considered now.

Furthermore, Hughes and his Counsel had sufficient notice of BANA's Motion. Under the FCPSA, a "person is entitled to notice and an opportunity to respond before the imposition of sanctions." S.C. Code Ann. § 15-36-10(D). In particular, a court or party proposing a sanction pursuant to the FCPSA must "notify the court and all parties of the conduct constituting a violation, and upon notification, the attorney, party, or pro se litigant...has thirty days to respond to the allegations." *Id.* Under Rule 11, "a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11, SCRCP." *Burns v. Universal Health Servs. Inc.*, 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct. App. 2000).

BANA complied with the requirements under the FCPSA and Rule 11. BANA's filed its Motion on March 29, 2018, two months before the hearing. The Motion clearly described Hughes' sanctionable conduct, including his decision to bring claims that were barred by the statute of limitations (R. pp. 287-288); claims for conversion and breach of fiduciary duty that he conceded were barred by *res judicata* and collateral estoppel (R. p. 290); and a claim under SCUTPA, which was barred by the clear language of the statute (R. pp. 288-289). BANA also discussed each of

these issues in its Memorandum, which was filed on May 28, 2018, four days before the hearing on the Motion. Hughes and his Counsel clearly had sufficient opportunity to respond: Hughes' Counsel filed an Opposition on May 30, 2018 and also attended the hearing on the Motion. (See generally R. pp 328-369; R. pp. 372-451; R. pp. 494-518) The trial court did not issue its decision until July 3, 2018—more than three months after BANA initially filed its Motion. The foregoing afforded Hughes with more than sufficient notice and opportunity to respond to BANA's Motion.³

The one case cited by Hughes only underscores this point. In *Burns v. Universal Health Servs. Inc.*, the court found that the sanctioned party was not provided with sufficient notice where “[n]o motion for sanctions was filed prior to the hearing” and the only notice provided was an oral motion for sanctions at the conclusion of a hearing on the defendant's motion to dismiss. 340 S.C. 509, 512, 532 S.E.2d 6, 8 (Ct. App. 2000). In contrast here, BANA filed a Motion for Sanctions and Memorandum in Support—which set forth significant detail and justification for imposing sanctions—and each party was given an opportunity to be heard at the Motion hearing.

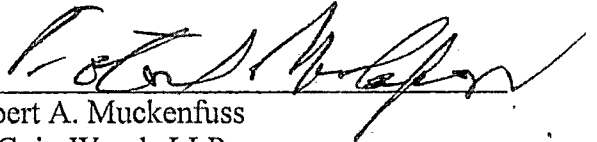
CONCLUSION

For the reasons set forth above and in BANA's Appellant Brief, this Court should rule that BANA's Motion for Sanctions was timely and remand this matter to the trial court for appropriate further proceedings, including the entry of appropriate sanctions, and grant any such other relief as is just and reasonable.

³ Even before BANA filed its Motion, BANA made clear to Hughes' Counsel on multiple occasions that it believed his and his client's conduct was sanctionable. In particular, BANA's Counsel sent Hughes' Counsel a demand on March 21, 2018, informing Hughes' Counsel that BANA would file a sanctions motion if Hughes' Counsel refused to cover BANA's costs of defending Hughes' repeated, baseless lawsuits. BANA's Counsel also made clear during the federal proceedings that it considered Hughes' pleadings to constitute sanctionable behavior under Rule 11. Hughes even argues in his own Opposition that BANA's Counsel requested sanctions during the hearing on the Motion to Dismiss before Judge Kelly in February 2018.

Respectfully submitted, January 29, 2019,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834
Appellate Case No. 2018-001443

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SC Court of Appeals

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

v.

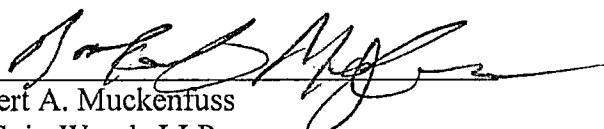
Bank of America National Association Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Reply Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

January 29, 2019

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Bank of America National Association, Appellant.

Appellate Case No. 2018-001443

Appeal From Spartanburg County
Grace Gilchrist Knie, Circuit Court Judge

Unpublished Opinion No. 2021-UP-354
Submitted March 1, 2021 – Filed October 13, 2021

REVERSED AND REMANDED

Robert A. Muckenfuss, of Charlotte, North Carolina, and
Elizabeth Marion Zwickert Timmermans, of Raleigh,
North Carolina, both of McGuireWoods LLP, for
Appellant.

D. Michael Kelly and Bradley Davis Hewett, both of
Mike Kelly Law Group, LLC, and Jamie Nicole Smith,
all of Columbia, for Respondent.

PER CURIAM: In 2015, Respondent Phillip Hughes, on behalf of the estate of his mother, Jane Hughes (Jane), filed suit in circuit court for alleged "fraudulent conduct" by Appellant Bank of America. Respondent alleged that his parents, John Hughes and Jane, declined an insurance product offered by Appellant when opening a line of credit there in 2006. According to Respondent, Appellant nonetheless at some point started charging \$28.40 a month, purportedly to pay for the insurance. Respondent brought an array of claims, including, *inter alia*, one under the federal Truth in Lending Act and state law claims for fraud, fraudulent concealment, and breach of contract.¹

The case was removed to federal court on Appellant's motion. Later, Respondent sought "[d]ismissal [w]ithout [p]rejudice for its claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts" because "there is controlling precedent [from the South Carolina Supreme Court] that may bar recovery for these particular claims by virtue of Jane Hughes's death." The leftover claims against Appellant were dismissed by the federal district court in an order dated February 13, 2017.

Respondent then returned to state court with a state-law action including claims for fraud, fraudulent concealment, breach of contract accompanied by a fraudulent act, violation of the South Carolina Unfair Trade Practices Act (SCUTPA), breach of fiduciary duty, and conversion, as well as a survival action. At a hearing on Appellant's subsequent motion to dismiss, Respondent conceded that dismissal of the conversion and breach of fiduciary duty claims was likely proper. Respondent told the court that "the crux of this case is to challenge the state of the law on the fraud claims." Specifically, Respondent challenged the now 80-year-old and rarely-elaborated-upon decision by our supreme court in *Mattison v. Palmetto State Life Ins. Co.* that fraud "does not come within either of the instances where a cause of action survives" under the state's survival statute. 197 S.C. 256, 261–62, 15 S.E.2d 117, 118–19 (1941).

On March 20, 2018, Judge R. Keith Kelly issued an order "grant[ing] Appellant's] Motion to Dismiss, with prejudice," holding that "the claims are barred by the doctrine of *res judicata*." The circuit court added: "In addition to *res judicata*, [Respondent]'s fraud-related claims are all barred as those claims did not survive the death of the [Respondent]'s parents; the SCUTPA statute itself does not allow [Respondent] to bring a claim in a representative capacity; and all of [Respondent]'s claims are barred by the applicable statutes of limitations."

¹ Jane Hughes died in 2015, seven years after her husband's death.

Respondent appealed. This court heard oral arguments in December 2020. Respondent requested and received permission to "argue against precedent" at oral arguments in that case.²

On March 29, 2018, Appellant filed a Motion for Sanctions against Respondent and Respondent's counsel. Appellant argued that sanctions were appropriate under Rule 11, SCRCP, and the Frivolous Civil Proceedings Sanctions Act (FCPSA) because Respondent's claims were frivolous given the existence of the fraud exception and the other objections to the initial case that Appellant had raised.³ Respondent opposed the sanctions. Respondent argued that he "brought the action in good faith," because the effort was intended to change the law regarding the fraud exception.⁴

Judge Grace Gilchrist Knie held a hearing on Appellant's motion on June 1, 2018. On July 3, the circuit court rejected Appellant's motion for sanctions, relying on the proceedings underway in this court. "This matter is currently pending before the South Carolina Court of Appeals . . . and has not yet been fully adjudicated. Accordingly, [Appellant]'s Motion for Sanctions is untimely and premature." This appeal followed.

ISSUES ON APPEAL

1. Did Appellant preserve for review its arguments that its motions for sanctions were not premature and untimely?
2. Are Appellant's arguments prohibited under the two-issue rule?
3. Did the circuit court err when it found the motion for sanctions under Rule 11 was premature and untimely?

² Our summary of the previous case is drawn largely from this court's decision in *Hughes v. Bank of America Nat'l Ass'n*, Op. No. 2021-UP-341 (S.C. Ct. App. filed September 29, 2021).

³ Appellant additionally filed a nearly 20-page memorandum in support of its motion.

⁴ Appellant and Respondent have also disputed whether the exact amount of Appellant's purported attorney's fees is plausible. That issue is not relevant to this appeal.

4. Did the circuit court err when it found that the motion for sanctions under the FCPSA was premature and untimely?
5. Should the circuit court have granted the motions for sanctions?

STANDARD OF REVIEW

Appellant and Respondent disagree on the standard of review for this case. Appellant argues this court should review the case de novo. Respondent argues that the appropriate standard of review is for an abuse of discretion. We agree with Respondent.

As Respondent notes, South Carolina's appellate courts have repeatedly said that rulings regarding sanctions are equitable decisions. Recently, our supreme court reiterated the standard.

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) (emphasis added) (citations omitted). *See also id.* at 537, 818 S.E.2d at 767 ("In light of all these considerations, we turn to the circuit court's decision to grant the Rule 11 motion in the face of Pee Dee Health's timeliness challenge. *We review the decision for abuse of discretion.*" (emphasis added)); *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (pre-2005 statute⁵) ("[W]here 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."); *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 663 S.E.2d 722, 729 (2006) (pre-2005 statute) ("On appeal, the imposition of

⁵ The FCPSA was amended in 2005. That is relevant to some parts of this suit. As a result, we will note when cases related to the FCPSA are based on the pre-2005 version of the act.

sanctions pursuant to this rule will not be disturbed absent an abuse of discretion.").

Appellant attempts to distinguish this case by highlighting the undisputed facts. Appellant then points to cases like *Goldston v. State Farm Mutual Automobile Insurance Co.*⁶, *WDW Properties v. City of Sumter*⁷, and *Dreher v. Dreher*⁸ for the proposition that in such cases, the appropriate standard of review is de novo. However, none of these cases involved motions for sanctions, which is a specific set of equitable remedies. See *Goldston*, 358 S.C. at 166, 594 S.E.2d at 516 ("In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. However, '[w]hen an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.'" (emphasis added) (citation, alteration omitted) (quoting *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003))).

Practically, there is not a great deal of difference between the two standards in analyzing the current case. Under either benchmark, because the facts in this case are clear, this court is essentially attempting to determine if the court got the law wrong. See *Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions."). In any event, the correct standard to use to analyze this case is to determine whether the circuit court abused its discretion.

Additionally, to the extent we must construe statutes, "[d]etermining the proper interpretation of a statute is a question of law, and th[e] appellate c]ourt reviews questions of law de novo." *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

LAW/ANALYSIS

We first decline the implicit invitation of both Appellant and Respondent to get involved in their feud over whether sanctions are or are not *justified* on the merits. The essence of the circuit court's ruling can be found in this paragraph of its order: "This matter is currently pending before the South Carolina Court of

⁶ 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004).

⁷ 342 S.C. 6, 535 S.E.2d 631 (2000).

⁸ 370 S.C. 75, 634 S.E.2d 646 (2006).

Appeals . . . and has not yet been fully adjudicated. Accordingly, Defendant's Motion for Sanctions is *untimely and premature*." (Emphasis added). Furthermore, despite Appellant's arguments in its initial brief, it stated in its reply brief that it "requests that the [circuit] court be reversed on this point and the matter remanded for a determination on the merits." Therefore, the issue before this court is whether the circuit court was correct in its belief that ruling on Appellant's motion would be "untimely and premature," not whether the circuit court should have imposed sanctions if it had reached the merits.⁹ On the grounds of timeliness, the circuit court's decision was controlled by an error of law. Therefore, we reverse the circuit court's decision and remand the case to the circuit court.

I. Preservation

Respondent first argues that Appellant did not preserve the issue of timeliness for appeal, claiming Appellant did not raise the issue before the circuit court and did not file a Rule 59(e), SCRCF motion afterward. Appellant counters that it did address the issue of timeliness when requesting sanctions. We agree with Appellant.

"South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)). "The losing party must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). As our supreme court explained in *I'On*: "This principle underlies the long-established preservation requirement that the losing party generally must both *present his issues and arguments to the lower court* and

⁹ Even if Appellant had not conceded this point, the final disposition of the merits of the motion for sanctions is best left to the circuit court, subject to review by this court and our supreme court. *Cf. Brubaker v. City of Richmond*, 943 F.2d 1363, 1374 (4th Cir. 1991) ("The district court is in the best position to determine whether sanctions should be imposed and, if so, how much. 'Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.'" (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990))). Because of Appellant's concession on this issue, we will not address the third issue raised by Appellant, or the fifth question as we have framed it, that essentially asks this court to engage on the merits.

obtain a ruling before an appellate court will review those issues and arguments." *Id.* (emphasis added).

That requirement arguably includes a duty to file a Rule 59(e) motion if necessary when the circuit court digresses from what the parties have argued and rules *sua sponte* on another issue. *Cf. Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). However, "[a]s long as the judge had an opportunity to rule on an issue, and did so, it is not 'incumbent upon . . . counsel to harass the judge by parading the issue before him again.'" Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185–86 (3d ed. 2016) (quoting *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995)).

Appellant did not file a Rule 59(e) motion in this case following the circuit court's ruling. However, Appellant *did* mention timeliness in its Memorandum in Support of Motion for Sanctions, dated May 29, 2018. The reference came in passing and in a footnote, but it was a reference: "This court retains jurisdiction to consider [Appellant]'s Motion for Sanctions despite [Respondent] appealing this Court's order on [Appellant]'s Motion to Dismiss." (Citations to rule and case law omitted.) This might well be the bare minimum of what an appellant must do to preserve an issue for appeal. But this state's jurisprudence pairs its insistence on preservation with a hesitance to make it a straitjacket. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner."); *cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (Toal, C.J., concurring in result and dissenting in part) (regarding two-issue rule) ("[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice"); *id.* at 329, 730 S.E.2d at 285 (stating the majority "share[d] Chief Justice Toal's] concerns about a hypertechnical application of a procedural bar to appellate arguments").

It would certainly have made the consideration of this case easier if Appellant had filed a Rule 59(e) motion asking the circuit court to reconsider its decision. But because there was *some* mention of timeliness in Appellant's arguments before the circuit court, we find that the issue was preserved. *Cf.*

Herron, 395 S.C. at 470, 719 S.E.2d at 644–45 ("[B]ecause Appellant can point to *no instance* where [an issue] was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless." (emphasis added)).

II. Two-Issue Rule

Similarly, Respondent argues that the circuit court's order included at least two grounds for declining to approve sanctions, and so the appeal is not preserved pursuant to the two-issue rule. This argument is without merit.

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 the law of the case. This [c]ourt has explained that the two issue rule is applicable in situations not involving a jury

Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (citations and parenthetical omitted), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018).

In the current case, Respondent argues that in the seventh numbered paragraph of the circuit court's order—which came right before the paragraph declaring the motion for sanctions untimely—the circuit court laid out a second reason for its ruling. That paragraph in its entirety reads:

[Respondent] and his counsel objected to the granting of [Appellant]'s Motion for Sanctions, arguing, in part, that the Court, when presented with the opportunity to consider the same conduct for which [Appellant] presently seeks sanctions on a prior occasion, declined to award sanctions against [Respondent] or his counsel. The [Appellant], 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 [Appellant] raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against [Respondent] or his counsel at that time.

Respondent's reading of this paragraph as anything other than a part of the court's explanation of the history of the case is strained at best. Respondent notes that "this is the only argument made by either party that the lower court expounded upon in its Order" and later notes: "The decision to include one, but not all, of Respondent's objections in its Order—especially in light of the court's provided factual support—indicates that the lower court assigned particular relevance to the issue, obviating the need to recount the remaining arguments he asserted." Even if we agreed with Respondent on those characterizations—and we do not—that puts far more import into the paragraph than the circuit court could reasonably have been expected to intend.

As Appellant notes, the circuit court's eighth numbered paragraph makes the reasoning for the order abundantly clear: "This matter is currently pending before the South Carolina Court of Appeals . . . and has not yet been fully adjudicated. *Accordingly*, Defendant's Motion for Sanctions is untimely and premature." (Emphasis added). We find no reason to go outside of the clear line of logic in that paragraph in an attempt to divine whether other portions of the order played into the thinking of the circuit court. For that reason, we reject Respondent's argument.

III. Timeliness¹⁰

Appellant argues that the circuit court erred in finding "untimely and premature" its motion for sanctions under the FCPSA and Rule 11, SCRCF. We agree in part, but we also agree with Respondent that Appellant has abandoned one of its arguments in this appeal.

We begin by looking at the structure of the FCPSA; we then consider whether Appellant abandoned one of its grounds for relief under the FCPSA on appeal; and finally, we consider whether the remaining claims were premature and untimely.

A. The Frivolous Civil Proceedings Sanctions Act

It will be helpful for our discussion of the FCPSA, and whether Appellant's arguments are timely under the act, to first consider how the act is structured and how that affects Appellant's arguments. The FCPSA begins with requirements for

¹⁰ Because the arguments on timeliness on both statutory grounds and Rule 11, SCRCF, are linked, we consider them together.

filings in a civil lawsuit, and outlines when *papers or arguments* in a case are frivolous. *See* S.C. Code Ann. § 15-36-10(A) (Supp. 2020). Section 15-36-10(B) lays out the potential sanctions that a party can face when subsection (A) is violated, including specifically subsection (A)(4):

If a document is signed in violation of this section, or an attorney or pro se litigant has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.

Id. at (B)(2) (Supp. 2020).

Section 15-36-10(C) then outlines the procedure for finding an *entire claim or defense frivolous* after the court has rendered its decision. The remainder of section 15-36-10 (Supp. 2020) largely deals with procedural matters, the types of sanctions that can be imposed, and other details.

Considering this format reveals the act's creation of at least two separate bases for a motion for sanctions: those under subsection (A), and those under subsection (C). The former is meant specifically to deal with filings or arguments in a civil suit. The latter is meant to deal with situations in which an entire claim or defense was unwarranted. Appellant in this case cited both subsections in its initial motion for sanctions, giving it a colorable argument that it had made an argument for both. However, it did not continue to do so before this court.

B. Appellant Abandons One of Its Arguments

Respondent asserts that Appellant has abandoned its argument under subsection (C) in this appeal. We agree.

"Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004). "[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001).

We have reviewed Appellant's initial brief before this court, and it appears to omit any discussion of subsection (C) of the FCPSA. This is not a mere oversight; as explained above, motions under subsection (A) and subsection (C) are not the same thing. They address different abuses of South Carolina's civil courts. Arguing that the circuit court improperly deemed one of the reasons for sanctions untimely is not the same as arguing that the circuit court improperly deemed the other reason untimely. Indeed, Appellant repeatedly commingles the concepts for the two different arguments in its brief when citing our supreme court's precedents, including cases decided under subsection (C)—but while Appellant argues in its initial brief that Respondent violated subsection (A), it never makes the same explicit claim vis a vis subsection (C).

In its reply brief, Appellant does cite to subsection (C), but it never addresses Respondent's allegations that it abandoned the argument under subsection (C). Nor can Appellant do so. Its failure to even mention subsection (C) in its initial brief means that the argument was abandoned on appeal. *See Glasscock*, 348 S.C. at 81, 557 S.E.2d at 692 ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

C. Timeliness of the Remaining Claims

We now consider whether the circuit court was mistaken in finding that the remaining arguments were untimely under the FCPSA and Rule 11, SCRCPP.

"[T]his [c]ourt has held that the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion." *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 161, 758 S.E.2d 483, 496 (2014). "[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCPP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment." *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002).

Our research has not revealed any authority in which South Carolina courts have considered sanctions solely under subsection (A) of the post-2005 FCPSA. Appellant nonetheless relies on opinions under the former version of the statute, or those regarding subsection (C). Respondent argues that most of these cases are not relevant because of those flaws, and that the new subsection (A) is meant to mirror Rule 11, SCRCPP.

Appellant emphasizes the result of *Holmes*. There, our supreme court upheld sanctions the circuit court awarded while an appeal was still pending. 408 S.C. at 160–62, 758 S.E.2d at 495–96. "Motions made pursuant to the FCPSA are post-trial motions. **See S.C. Code Ann. 15-36-10(C)(1) (Supp. 2012)** As such, a party has ten days after the filing of a court order to file a motion pursuant to the FCPSA." *Id.* at 160, 758 S.E.2d at 495 (emphasis added). However, unlike the remaining arguments in this case, the *Holmes* court specifically decided the issue under subsection (C). *Id.*

In *Pitman*, this court considered whether a circuit court could impose sanctions on one of the parties under the previous version of the FCPSA after the ten-day period for posttrial motions had passed. 351 S.C. at 431–33, 570 S.E.2d at 188–90. The circuit court had imposed sanctions despite the fact that the party requesting them had "waited until almost two months after the grant of summary judgment to move for sanctions under the Act." *Id.* at 432, 570 S.E.2d at 189. This court vacated the award, holding that the FCPSA's mere existence—and its relationship to equity—could not overcome the limits on the circuit court's jurisdiction:

We cannot accept [Respondent]'s argument that because proceedings under the Act sound in equity, the trial judge retains jurisdiction to consider a motion for sanctions limited only by the equitable defenses of estoppel and laches. *Absent specific statutory language vesting the trial judge with continuing jurisdiction*, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment.

Id. at 432–33, 570 S.E.2d at 189–90.

While *Pitman* was decided before the 2005 amendments to the FCPSA, we note that no language in the current subsection (A) of section 15-36-10 extends the jurisdiction of the circuit court over this case. Even if we were to accept Respondent's argument that the equitable considerations that undergird Rule 11 could be imputed to subsection (A), our court has already specifically rejected the argument that the rules of equity are the appropriate limits on the court's authority.

Taken together, *Holmes* and *Pitman* suggest that a circuit court at least has the authority to issue sanctions under the FCPSA within ten days after entry of the judgment and that a circuit court might lose jurisdiction to do so after the passage

of ten days. For those reasons, we conclude that the circuit court erred when it found it could not consider a motion for sanctions before the conclusion of Respondent's appeal. Because that error of law controlled the circuit court's ruling, it constitutes an abuse of discretion. *See Gregory*, 378 S.C. at 437, 663 S.E.2d at 50 ("An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.").

Respondent relies heavily on our supreme court's decision in *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018). In *Pee Dee Health Care*, the court held that sanctions under Rule 11 could be imposed following remittitur, but that sanctions under subsection (C) of the FCPSA could not. *Id.* at 524–25, 818 S.E.2d at 760. Rejecting the arguments under the FCPSA, the court found that "South Carolina appellate courts have interpreted *this subsection* to require a party to file its motion for sanctions under the FCPSA within ten days of the entry of judgment." *Id.* at 529, 818 S.E.2d at 763 (emphasis added). However, the supreme court found that "Rule 11 clearly does not include a ten-day time limit." *Id.* at 531, 818 S.E.2d at 764. Instead, the court listed "a number of important considerations a circuit court must make when determining whether a motion for sanctions under Rule 11 is untimely." *Id.* at 531–37, 818 S.E.2d at 764–67.

However, we do not read *Pee Dee Health Care* to hold that a motion filed *before* an appeal is decided is untimely. Indeed, we find persuasive a portion of Justice Kittredge's concurrence: "The better practice under these circumstances would be to file a Rule 11 motion not later than ten days following entry of judgment in the trial court." *Id.* at 541, 818 S.E.2d at 770 (Kittredge, J., concurring).

Further, because the circuit court can timely consider sanctions under the FCPSA in this matter before an appeal, sanctions under Rule 11 can be decided in the same case. *See Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11 (stating that because a motion for sanctions under the FCPSA was "proper[,] it is only logical that the Rule 11 motion was timely according to *Ex parte Beard*. *See The Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (stating that criteria for Rule 11 sanctions are essentially the same as those for sanctions under the FCPSA).").

We understand the awkward position that could, at first glance, confront circuit courts facing similarly-situated motions for sanctions under our holding in this case. Respondent's practical argument that a circuit court could rule that a

plaintiff or defendant had violated the FCPSA or Rule 11 by filing a case contrary to clear precedent, only to see our supreme court reverse that precedent, resonates with us. But we believe that concern should not govern our decision here for a couple of reasons.

First, while we have found little law from other jurisdictions on this issue, we note that federal courts have consistently taken a similar approach. *See, e.g., Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) ("Attorney's fees awards are collateral matters over which the district court retains jurisdiction."); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("A district court may resolve the merits while the court of appeals deliberates about bond, may award attorneys' fees while the court of appeals addresses the merits, and so on, because there is no concurrent exercise of power on the same subject and little overlap of issues. True, a decision reversing the judgment on the merits would affect or nullify the award of fees, but the subjects are distinct."); *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1328 (4th Cir. 1987) (noting, tersely, that one party "question[ed] the jurisdiction of the district court to award attorney's fees under Fed. R. Civ. P. 11 after [the] notice of appeal has been filed. We find that the court does retain such jurisdiction.")¹¹; *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983) ("The district court retained the power to award attorneys' fees after the notice of appeal from the decision on the merits had been filed."), *superseded on other grounds by rule*, Fed. R. Civ. P. 54 advisory committee's note to 1993 amendment; *Obin v. Dist. No. 9 of Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 583 (8th Cir. 1981) (noting that two previous decisions of the court "served to clarify that the district courts retained jurisdiction to pass upon a claim for attorney's fees even though one of the parties has filed a notice of appeal on the merits of the litigation"); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction."), *superseded on other grounds by 1993 amendment to Fed. R. Civ. P. 11*.

¹¹ The Fourth Circuit Court of Appeals noted that the United States Supreme Court's holding in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), cast doubt on its own precedent that suggested the opposite. "This court is bound by the Supreme Court's reasoning in *White*." *Langham-Hill Petroleum, Inc.*, 813 F.2d at 1331.

Second, in reference to the FCPSA in particular, the legislature appears to have considered and responded to that concern. The standard under the FCPSA is not *success*, but *reasonableness*. See *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) ("We conclude the Act creates substantive rights and imposes new obligations by effectively changing the standard for imposing sanctions to a 'reasonable attorney' standard."); S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (providing for sanctions if "a *reasonable* attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a *good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law*" (emphases added)); *id.* at (C)(1)(a) (providing for sanctions if "a *reasonable* attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a *good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law*" (emphases added)).

The wording of the statute suggests that the legislature considered that a plaintiff or defendant might make a good-faith or reasonable argument to reverse precedent, only to see the appellate courts decide that the precedent should stand nonetheless. Some legal issues are close, and the common law continues to evolve. A circuit court can timely consider prior to appeal a motion for sanctions under the FCPSA precisely because the benchmarks in the legislation do not hinge on the ultimate outcome of the litigation. Whether a litigant has made a reasonable, good-faith argument sufficient to avoid sanctions is an inquiry a circuit court should make based on the case and the facts before it.

We stress that this is a decision on the *timeliness* of Appellant's motion, not the *merits* of that motion. Whether this is a case in which Respondent's argument against precedent was reasonable—win or lose—is something that the circuit court should first have the opportunity to consider. Because of its understandable error on timeliness, the circuit court did not do that the first time. We remand this action so that it may.

CONCLUSION

For the reasons stated above, we reverse the decision of the circuit court and remand for the circuit court's consideration of the motion for sanctions under subsection (A) of the FCPSA and Rule 11, SCRPC.

REVERSED AND REMANDED.¹²

KONDUROS, GEATHERS, and MCDONALD, JJ., concur.

¹² We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Oct 26 2021
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No.: 2018-001443

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

v.

Bank of America National Association Appellant.

PETITION FOR REHEARING *EN BANC*

Respondent respectfully moves this Honorable Court for a rehearing *en banc* pursuant to South Carolina Appellate Rules 219 and 221. Respondent respectfully submits that the circuit court's decision that Appellant's Motion for Sanctions under Rule 11, SCRCP, and Section 15-31-10(A) of the Frivolous Civil Proceedings Sanctions Act (FCPSA) was premature and untimely was reasonably based, fell within the discretion of the circuit court, and did not, nor could it have risen to an abuse of discretion on the facts of this case as a matter of law. Thus, the proper standard for reversing the circuit court has either been overlooked or misapprehended by this Court and

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reconsideration, after rehearing on this issue, is necessary and appropriate for a fair resolution of the issue.

Critically, concluding 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. “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 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).

“Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments.” *Queen’s Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). “[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986)). Here, as discussed below, Appellant neither “enabled” the circuit court to properly consider the timeliness issue, nor was it sufficiently specific to permit a fair consideration by the court.

I. Appellant failed to preserve the issue of timeliness.

Appellant failed to submit even the bare minimum of what was required to preserve this issue for 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. Appellant 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. Allowing a

sophisticated litigant like Appellant to redefine the standard for “issue preservation” to a mere mention of a general topic in a footnote risks the unraveling of long existing standards.

Appellant, 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 before this Court is devoid of any attempt by Appellant to present the issues and arguments of timeliness to the circuit court. The inclusion of a footnote vaguely referencing jurisdiction in Appellant’s Memorandum in Support of Motion for Sanctions is not the equivalent of addressing the issue of timeliness and cannot suffice as satisfying the existing standards of issue preservation.

The nebulous footnote in Appellant’s Memorandum in Support of Motion for Sanctions did not serve to inform the circuit court about the issue of timeliness. Appellant undeniably failed to raise the issue of timeliness at any point to the circuit court, and a passing footnote about jurisdiction cannot salvage preservation of the issue.

II. The circuit court acted well within its discretion by declining to award sanctions.

The circuit court, in concluding that Appellant’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. 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 (2008) (citing *Father v. South Carolina Dep’t of Soc. Servs.*, 353 S.C. 254 (2003)). 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 (1996)) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the

lower court). As there is no factual dispute regarding the filings below, the proper consideration is *not* whether a footnote could be read in a particular way, but instead whether the circuit court abused its discretion. *See also, e.g., Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018) (circuit court did not abuse its discretion in declining to award sanctions before the appeal was decided).

Moreover, as this Court has 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. This Court also acknowledged that its holding can leave circuit courts in an awkward position. Given such awkwardness, the rulings in *Ex parte Gregory* and *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.

"Rule 11 permits a trial court to award sanctions 'upon its own initiative,' Rule 11, SCRPC, and there is no stated restriction on when the trial court must do so." *Id.* 242 S.C. at 538, 818 S.E.2d at 768. In *Pee Dee Health Care*, the Supreme Court of South Carolina held that there is no abuse of discretion should the circuit court wait for the resolution of a pending appeal before ruling on sanctions. The court 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.

This Court was persuaded by the concurrence in *Pee Dee Health Care*, in which Justice Kittredge 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. Justice Kittredge also provided 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. The current ruling conflicts with the holding of *Pee Dee Health Care*. *Ex parte Gregory* and *Pee Dee Health Care* establish that the circuit court did not abuse its discretion and provide further support for reconsidering this Court's current decision.

III. This court did not properly apply the two issue rule.

Respondent respectfully submits that the Court misapprehended or overlooked arguments precluding Appellant's appeal under the two issue rule. "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 v. Lott*, 387 S.C. 339, 346-347, 692 S.E.2d 900, 904 (citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); *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 Appellant's Motion for Sanctions indicates 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 Appellant, "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 Appellant but declined to impose sanctions. Rule 11's allowance for a trial court to award sanctions upon its own initiative in combination with Judge Kelly's refusal after considering the same issues further supports that the circuit court's denial of Appellant'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 Appellant's arguments. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012).

Respondent does not challenge the Court's opinion that Appellant has abandoned its argument under subsection (C) of the FCPSA. Finally, Respondent does not challenge the Court's ruling to decline ruling on the merits of whether sanctions are justified.

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October 26, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Oct 26 2021
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No.: 2018-001443

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

v.

Bank of America National Association Appellant.

PROOF OF SERVICE

The undersigned, attorneys in this matter for the Respondent, certifies that we have this 26th day of October 2021, served copies of the Petition for Rehearing *En Banc* upon counsel of record for the Appellant by causing them to be deposited in the United States mail, first class postage paid addressed to Robert A. Muckenfuss/Elizabeth M.Z. Timmermans, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and 501 Fayetteville St., Suite 500, Raleigh, NC 27601.

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October 26, 2021

The South Carolina Court of Appeals

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

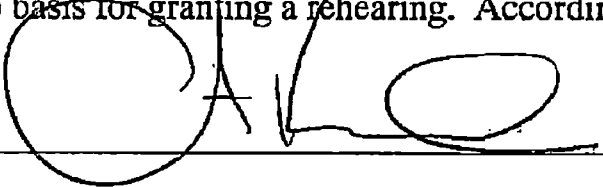
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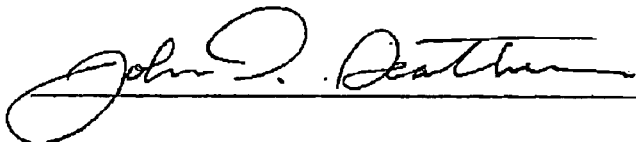
Bank of America National Association, Appellant.

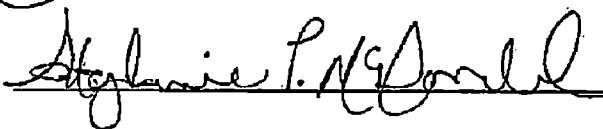
Appellate Case No. 2018-001443

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

FILED
Jan 11 2022

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