

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Dec 07 2022

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

S.C. SUPREME COURT

Appellate 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.

BRIEF OF RESPONDENT BANK OF AMERICA, NATIONAL ASSOCIATION

MCGUIREWOODS LLP

Robert A. Muckenfuss
(S.C. Bar No. 13903)
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 343-2052

Elizabeth Z. Timmermans
(S.C. Bar No. 100288)
Jonathan Y. Ellis (*pro hac vice forthcoming*)
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
Telephone: (919) 755-6576

Kathryn M. Barber (*pro hac vice forthcoming*)
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1227

Attorneys for Respondent

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUES PRESENTED.....	2
STATEMENT OF THE CASE.....	2
I. FACTS AND PROCEDURAL BACKGROUND.....	2
II. THE PRESENT CONTROVERSY	4
A. Hughes Files Suit Based On The Same Claim-Precluded, Untimely Allegations.	4
B. BANA Seeks Sanctions For Hughes’ Frivolous Claims.....	5
C. The Circuit Court Denies BANA’s Motion As Premature.	7
D. The Court of Appeals Reverses The Denial Of Sanctions.....	7
STANDARD OF REVIEW	10
ARGUMENT	10
I. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW BY DISMISSING BANA’S MOTION AS PREMATURE.	11
A. A Motion for Sanctions Filed Within Ten Days Of A Trial Court’s Judgment Is Timely Regardless Of Any Pending Appeal.	11
B. Hughes’ Arguments To The Contrary Are Unpersuasive.....	14
1. <i>Pee Dee Health Care</i> does not support the Circuit Court’s ruling.....	14
2. Differences between FCPSA subsections (A) and (C) are irrelevant to whether an FCPSA motion filed nine days after dismissal is untimely and premature.	18
II. BANA PRESERVED A CHALLENGE TO THE SOLE ISSUE OF TIMELINESS ON WHICH THE CIRCUIT COURT BASED ITS RULING.	21
A. BANA’s Memorandum In Support Of Its Motion For Sanctions Raised The Timeliness Issue And The Circuit Court Ruled On It.	21
B. The Circuit Court’s Ruling Rests Only On Its Erroneous Conclusion That BANA’s Motion Was “Untimely And Premature.”	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apostol v. Gallion</i> , 870 F.2d 1335 (7th Cir. 1989)	13
<i>Atl. Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	23
<i>In re Beard</i> , 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004).....	6, 21
<i>Elam v. S.C. Dep’t of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	22, 23
<i>Faircloth v. Jackie Fine Arts, Inc.</i> , 682 F. Supp. 837 (D.S.C. 1988), <i>rev’d in part on other grounds</i> , <i>Faircloth v. Finesod</i> , 938 F.2d 513 (4th Cir. 1991).....	4, 5
<i>Father v. S.C. Dep’t of Soc. Servs.</i> , 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001), <i>aff’d</i> , 353 S.C. 254, 578 S.E.2d 11 (2003).....	13
<i>Ex parte Gregory</i> , 378 S.C. 430, 663 S.E.2d 46 (2008)	10
<i>Holmes v. E. Cooper Community Hospital, Inc.</i> , 408 S.C. 138, 758 S.E.2d 483 (2014)	9, 11, 12, 13
<i>Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n</i> , 138 S. Ct. 935 (2018).....	4
<i>I’On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	22
<i>Lancaster v. Indep. Sch. Dist. No. 5</i> , 149 F.3d 1228 (10th Cir. 1998)	13
<i>Mattison v. Palmetto State Life Ins. Co.</i> , 197 S.C. 256, 15 S.E.2d 117 (1941)	3
<i>McKinney v. Pedery</i> , 413 S.C. 475, 776 S.E.2d 566 (2015)	23, 24
<i>Pee Dee Health Care, P.A. v. Est. of Thompson</i> , 424 S.C. 520, 818 S.E.2d 758 (2018)	<i>passim</i>

<i>Pitman v. Republic Leasing Co.</i> , 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002).....	9, 12, 21
<i>Pye v. Est. of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006), <i>overruled on other grounds by</i> <i>Paradis v. Charleston Cnty. Sch. Dist.</i> , 433 S.C. 562, 861 S.E.2d 774 (2021)	22
<i>Russell v. Wachovia Bank, N.A.</i> , 370 S.C. 5, 633 S.E.2d 722 (2006)	<i>passim</i>
<i>State v. 192 Coin-Operated Video Game Machines</i> , 338 S.C. 176, 525 S.E.2d 872 (2000)	20
<i>Wogan v. Kunze</i> , 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005), <i>aff'd as modified</i> , 379 S.C. 581, 666 S.E.2d 901 (2008)	5
Statutes	
S.C. Code Ann. § 15-5-90.....	4
South Carolina Frivolous Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 <i>et seq.</i>	<i>passim</i>
S.C. Code Ann. § 15-36-10 (2004).....	20
S.C. Code Ann. § 39-5-140(a)	4
Rules	
Rule 11, SCRCP.....	<i>passim</i>
Rule 59, SCRCP.....	11, 22
Rule 241(a), SCACR	12, 17
Other Authorities	
Jean Hoefler Toal et al., <i>Appellate Practice in South Carolina</i> (3d ed. 2016)	23

INTRODUCTION

Petitioner Philip Francis Luke Hughes asserts fraud claims, as representative of the estate of his mother Jane K. Hughes, against Respondent Bank of America, National Association (BANA). In Hughes’ principal appeal, he asks this Court to abandon 80 years of statutory precedent to hold that those claims survived his mother’s death. As we explain there, those claims are time-barred, claim-precluded, and in any event unpersuasive on the merits. This tag-along appeal concerns BANA’s efforts to obtain sanctions against Hughes for the expense of defending against not only those fraud claims, but several additional frivolous claims that Hughes conceded below were meritless and has since finally abandoned.

The Circuit Court properly dismissed all of Hughes’ claims as either claim-precluded, time-barred, foreclosed by longstanding precedent and statutory text—or some combination thereof. But the court incorrectly denied BANA’s subsequent motion for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA), S.C. Code Ann. § 15-36-10 *et seq.*, and Rule 11, SCRCP. Although BANA filed its sanctions motion just nine days after the Circuit Court’s dismissal order—within the established ten-day period for filing such post-trial motions—the court ruled that the motion was “untimely and premature” because Hughes’ appeal (of the fraud claims only) remained pending. The Circuit Court viewed the pending appeal as an outright bar to BANA’s motion and suggested that BANA had to wait until the appeal was resolved to move for sanctions.

That ruling rests on a clear error of law. This Court has already held that a post-trial sanctions motion *may* be filed while an appeal is pending, and in fact, if filed under the FCPSA, *must* be filed no later than ten days after notice of entry of judgment. Although the Court has allowed later-filed Rule 11 motions under case-specific circumstances, it has never held that Rule 11 motions *can only* be filed after an appeal concludes or that a trial court cannot entertain an

earlier Rule 11 motion simply because an appeal has been noticed. To the contrary, the Court has held that a Rule 11 motion generally should be raised and resolved as soon as possible and that such a motion is timely (and logically) filed when filed alongside a timely FCPSA motion. None of Hughes' arguments about a party's ability to sometimes delay the filing of such motions undermines BANA's ability to abide by this Court's directives.

The Court of Appeals thus properly reversed the Circuit Court's erroneous dismissal of BANA's motion for sanctions. The Court of Appeals also rightly rejected Hughes' futile attempts to avoid review of that ruling by raising meritless preservation and two-issue rule arguments. This Court should affirm.

ISSUES PRESENTED

1. Did the Circuit Court abuse its discretion by denying as premature BANA's FCPSA and Rule 11 motion for sanctions that BANA filed within ten days of the Circuit Court's dismissal of Hughes' claim-precluded and time-barred complaint?
2. Did the Court of Appeals correctly hold that BANA preserved the issue of its motion's timeliness by asserting the motion was timely in its briefing?
3. Did the Court of Appeals correctly hold that the Circuit Court based its decision on only one ground that BANA properly appealed?

STATEMENT OF THE CASE

I. FACTS AND PROCEDURAL BACKGROUND

This appeal follows a series of state and federal proceedings centered on Hughes' contentions that BANA charged his late parents John and Jane Hughes for insurance coverage they allegedly declined. As discussed in more detail in the briefing on the accompanying merits appeal, Hughes alleges that when his parents obtained a line of credit from BANA in June 2006, they declined optional line protection insurance, but BANA charged them for that coverage anyway.

(R. pp. 9-10.) Although those monthly charges appeared on Hughes’ parents’ bank statements from June 2006 to 2015, Hughes did not pursue a lawsuit based on the purportedly improper charges until 2015. (R. p. 24, ¶ 23.) By then, Hughes’ father had died (in 2008), and his mother had also passed away (in 2015), leaving Hughes to pursue his claims as personal representative of his mother’s estate.¹ (R. pp. 23, ¶ 13; 25, ¶ 29.)

Hughes first filed a 2015 putative class action against BANA on behalf of Jane’s estate in state court, and BANA removed to the United States District Court for the District of South Carolina. (R. p. 44.) Hughes asserted claims for fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of the duty of good faith and fair dealing, and violations of the federal Truth in Lending Act. (R. pp. 84-100.) BANA moved to dismiss all the claims. (R. p. 52.)

Before the federal court could rule on BANA’s motion, Hughes voluntarily dismissed his claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts. (R. pp. 52-53.) In his notice of dismissal, Hughes conceded that this Court’s “controlling precedent”—which establishes that South Carolina’s survival statute excludes fraud-based claims—“may bar recovery for [those] claims by virtue of Jane Hughes’s death.” (R. p. 114.); *see Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 261, 15 S.E.2d 117, 119 (1941). Hughes continued to pursue his non-fraud claims.

The federal district court granted BANA’s motion to dismiss Hughes’ other claims, finding them untimely. The court concluded that Hughes’ claims were time-barred and rejected Hughes’ request for equitable tolling because he could not establish that his parents failed to discover the relevant facts despite exercising due diligence—particularly because those charges appeared on

¹ BANA refunded all the charges incurred after John’s 2008 death. (R. p. 89, ¶ 30.)

his parents' bank statements from 2006 to 2015. (R. p. 120.) The United States Court of Appeals for the Fourth Circuit affirmed, and the United States Supreme Court denied certiorari. (R. pp. 123-27.); *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, 138 S. Ct. 935 (2018).

II. THE PRESENT CONTROVERSY

A. Hughes Files Suit Based On The Same Claim-Precluded, Untimely Allegations.

In 2017, while the Fourth Circuit appeal was pending, Hughes filed this nearly identical suit against BANA in state court. (R. pp. 20-33.) The current action alleged the same facts as his removed federal suit and re-asserted the same fraud-based claims that he had voluntarily dismissed in the first suit. In addition, and based on the same factual allegations, Hughes pled claims under the South Carolina Unfair Trade Practices Act (SCUTPA), for breach of fiduciary duty, and for conversion. (R. pp. 24-31.) Hughes also invoked a survival cause of action under S.C. Code Ann. § 15-5-90 meant to help him enforce the substantive claims. (R. p. 31.)

BANA again moved to dismiss, now based on res judicata as well as statutes of limitations and the non-survivability of the fraud-based claims. (R. pp. 44-46.)

At oral argument on BANA's motion to dismiss, Hughes' counsel effectively admitted that none of Hughes' claims were viable—and that he knew or should have known as much. Hughes' counsel recognized again that “controlling binding precedent” barred the fraud-based claims. (R. p. 327.) He also stated that he was “inclin[ed] to concede” that the breach of fiduciary duty and conversion claims “may be barred by collateral estoppel and res judicata” and thus agreed to “forego those claims.” (R. p. 329.)

Finally, Hughes conceded the SCUTPA claim too. SCUTPA provides that a claim may be brought “individually, but not in a representative capacity,” S.C. Code Ann. § 39-5-140(a)—*i.e.*, not by a personal representative of an estate. *See Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp.

837, 845 (D.S.C. 1988), *rev'd in part on other grounds, Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991); *Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). Hughes' counsel stated that he "may have just missed this [rule] in the research," adding that: "[i]f there's a case on point where once you die, your unfair trade claim dies with you, [he] would again concede the point that there's controlling precedent." (R. p. 330.)

Accepting Hughes' concessions that all his claims were foreclosed by either res judicata or controlling precedent, the Circuit Court granted BANA's motion to dismiss. The court held that Hughes' claims were barred by the doctrine of res judicata, were untimely and not subject to equitable tolling, and (as to the fraud-based and SCUTPA claims) did not survive his parents' deaths. (R. pp. 283-93.)

Following the Circuit Court's decision, Hughes abandoned his claims for breach of fiduciary duty and conversion as well as his SCUTPA claim. He appealed only as to the dismissal of his fraud-based claims. (R. pp. 437-38, 470.) The Court of Appeals affirmed the Circuit Court's dismissal, and this Court granted certiorari. That appeal remains pending.

B. BANA Seeks Sanctions For Hughes' Frivolous Claims.

Nine days after the Circuit Court entered its order dismissing Hughes' claims, BANA moved for sanctions under both Rule 11 and subsection (A) of the FCPSA, seeking to recover the costs and fees incurred in defending against this second action. (R. pp. 293, 301.)

Subsection (A) of the FCPSA provides that an attorney may be sanctioned for (1) "filing a frivolous pleading, motion, or document"; (2) "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts"; or (3) "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law" or where

“there is no good faith argument that exists for the extension, modification, or reversal of existing law.” S.C. Code Ann. § 15-36-10(A)(4). Subsection (B) provides that if a person violates subsection (A), “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.* § 15-36-10(B)(2). In contrast to subsections (A) and (B)’s focus on specific frivolous filings, subsection (C) allows for sanctions if an entire claim or defense is found frivolous “[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.” *Id.* § 15-36-10(C)(1).

Rule 11, SCRCP, similarly provides that an attorney’s signature on a pleading or motion “constitutes a certificate . . . that to the best of his knowledge, information and belief there is good ground to support it.” “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.” *Id.*

BANA argued that Hughes and his counsel knew his second suit was time-barred and precluded and SCUTPA expressly barred his suit, and that there was no good-faith argument for reversing this Court’s precedent on survival of fraud claims. (R. pp. 345-53.) In its Memorandum in Support of its Motion for Sanctions, BANA also asserted that the Circuit Court “retain[ed] jurisdiction to consider BANA’s Motion for Sanctions despite Plaintiff appealing th[e] Court’s order on BANA’s Motion to Dismiss.” (R. p. 343 n.1.) BANA cited as support for that assertion this Court’s decisions in *Pee Dee Health Care, P.A. v. Est. of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018), and *In re Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004). (R. p. 343 n.1.)

C. The Circuit Court Denies BANA’s Motion As Premature.

In a three-page order, the Circuit Court denied BANA’s motion. (R. pp. 5-7.) The court devoted most of its order to reciting the matter’s procedural history. In its sixth numbered paragraph, the court described BANA’s arguments supporting its request. (*See* R. p. 6 (“Defendant argued that Plaintiff and his counsel knew that the statute of limitations and *res judicata* barred the subject lawsuit . . .”).) In its seventh numbered paragraph, the court described Hughes’ arguments against sanctions—principally, that sanctions should not be granted because the court had not previously awarded sanctions when BANA raised the issue at the motion to dismiss hearing. (*See* R. p. 7 (“Plaintiff and his counsel objected . . . 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. . . . Although Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against Plaintiff or his counsel at that time.”).)

After recounting the procedural history and the parties’ arguments, the Circuit Court explained its basis for denying the motion in its eighth numbered paragraph. The Court reasoned that “the matter has not yet been fully adjudicated” because it remained on appeal. (R. p. 7.) “Accordingly,” the court concluded, “Defendant’s Motion for Sanctions is untimely and premature.” (R. p. 7.)

D. The Court of Appeals Reverses The Denial Of Sanctions.

BANA appealed. (R. pp. 498-99.) Hughes opposed, arguing that the Circuit Court correctly held BANA’s motion to be premature and that BANA did not preserve the timeliness issue for appeal. (R. p. 633.) Hughes also asserted that the Circuit Court had based its ruling not just on its view that BANA’s motion was premature but also on the fact that sanctions were

mentioned at the motion to dismiss argument but not granted. (R. p. 635.) Because BANA did not appeal this purported other basis for the Circuit Court’s decision, Hughes argued, the “two-issue rule” precluded BANA’s appeal. (R. p. 635.)

The Court of Appeals rejected Hughes’ arguments and the Circuit Court’s timeliness conclusion and reversed. (R. pp. 628-43.) The Court of Appeals held first that BANA preserved the timeliness issue for appeal in its Memorandum in Support of Motion for Sanctions by asserting that the Circuit Court “retain[ed] jurisdiction to consider” the motion despite the pending appeal. (R. p. 634.) Although BANA made that argument briefly in a footnote, the Court of Appeals held that assertion was enough to preserve the issue, especially because South Carolina’s “jurisprudence pairs its insistence on preservation with a hesitance to make it a straitjacket.” (R. p. 634.) The court rejected Hughes’ contention that BANA was required to also file a Rule 59(e) motion to effect preservation. (R. p. 634.) The court reasoned that, although such a motion would have made its review easier, BANA’s mention of the timeliness question in its arguments before the Circuit Court was sufficient to preserve the issue. (R. p. 634.)

The Court of Appeals also found Hughes’ “two-issue rule” argument to be “without merit.” (R. p. 635.) The court rejected Hughes’ contention that, by referencing in its seventh paragraph the earlier discussion of sanctions at the motion to dismiss argument, the Circuit Court did anything more than explain “the history of the case.” (R. pp. 635-36.) The Court of Appeals explained that “the circuit court’s eighth numbered paragraph makes the reasoning for the order abundantly clear”: because Hughes had appealed, the Circuit Court viewed the motion for sanctions as “untimely and premature.” (R. p. 636.) The Court of Appeals saw “no reason to go outside of the clear line of logic in that paragraph” to find other grounds for the decision. (R. p. 636.)

Turning to the sole basis for the Circuit Court’s decision, the Court of Appeals concluded that the Circuit Court had erred in dismissing BANA’s motion as premature. The Court of Appeals acknowledged the lack of appellate decisions interpreting the current version of FCPSA’s subsection (A), but held that this Court’s decision in *Holmes v. E. Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014), along with the Court of Appeals’ decision in *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), suggested “that a circuit court at least has the authority to issue sanctions under [subsection (A) of] the FCPSA within ten days after entry of the judgment” and “might lose jurisdiction to do so after” ten days. (R. pp. 639-40.) The Circuit Court thus made an error of law by holding that it could not consider BANA’s motion for sanctions under FCPSA’s subsection (A) and Rule 11 until Hughes’ appeal concluded. (R. p. 640.)

The Court of Appeals further held that this Court’s decision in *Pee Dee Health Care* did not change this result. (R. p. 640.) The Court of Appeals observed that *Pee Dee Health Care* held that Rule 11 sanctions could be imposed following an appeal and remittitur, while FCPSA sanctions under subsection (C) could not. (R. p. 640.) But the Court of Appeals did not read that decision “to hold that a motion filed *before* an appeal is decided is untimely.” (R. p. 640.) (emphasis in original). The court found persuasive Justice Kittredge’s concurrence, which reasoned that 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.” (R. p. 640.) (quoting *Pee Dee Health Care*, 424 S.C. at 541, 818 S.E.2d at 770 (Kittredge, J., concurring)). And the Court of Appeals reasoned that, because the FCPSA sanctions could timely be considered before the appeal resolved, so too could the Rule 11 sanctions. (R. p. 640.)

Finally, the Court of Appeals acknowledged that its holding might put some courts in the “awkward position” of granting sanctions because a plaintiff alleged claims “contrary to clear precedent, only to see [this Court] reverse that precedent.” (R. pp. 640-41.) But it reasoned that the Legislature addressed this concern in the FCPSA by requiring “not *success*, but *reasonableness*” to defeat a motion for sanctions. (R. p. 642.) (emphasis in original). The statute’s wording “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.” (R. p. 642.) The court stated that “[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.” (R. p. 642.) The court also noted that “federal courts have consistently taken a similar approach.” (R. p. 641.) (collecting cases). The Court of Appeals thus reversed and remanded the case for consideration of the merits of BANA’s motion for sanctions.

After the Court of Appeals denied Hughes’ petition for rehearing en banc (R. pp. 644, 652), this Court granted Hughes’ petition for a writ of certiorari.

STANDARD OF REVIEW

This Court reviews a decision about sanctions, including the timeliness of the sanctions motion, for abuse of discretion. *See Pee Dee Health Care*, 424 S.C. at 538 n.11, 818 S.E.2d at 768 n.11. “An abuse of discretion occurs where the decision is controlled by an error of law.” *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008).

ARGUMENT

BANA acted promptly to preserve its right to pursue sanctions against Hughes for his claim-precluded and time-barred claims—several of which he did not even appeal. The Court of

Appeals correctly held that BANA’s motion for sanctions based on those frivolous filings was not premature. This Court should affirm.

I. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW BY DISMISSING BANA’S MOTION AS PREMATURE.

The Circuit Court’s ruling that BANA’s motion for sanctions under FCPSA and Rule 11 was “untimely and premature” constitutes an error of law. This Court’s precedents authorize parties to seek sanctions under either provision within ten days after a trial court’s entry of judgment, including while an appeal is pending, and nothing in Hughes’ arguments warrants departing from that precedent.

A. A Motion for Sanctions Filed Within Ten Days Of A Trial Court’s Judgment Is Timely Regardless Of Any Pending Appeal.

Under this Court’s settled precedent, a motion for sanctions under the FCPSA and Rule 11 may be filed within ten days of notice of entry of judgment, regardless whether an appeal of that judgment is pending. A post-trial motion for sanctions under the FCPSA, in fact, *must* be filed within that period or the court loses jurisdiction. And while a Rule 11 motion may sometimes be sought following appeal and remittitur to the trial court, an earlier motion will often be preferable and—particularly where filed alongside a motion for sanctions under the FCPSA—is, at least, permissible.

1. As for the FCPSA, this Court has held that “[m]otions made pursuant to the FCPSA are post-trial motions” analogous to a motion under Rule 59(d) and (e), SCRCF, that must be filed within ten days of the trial court’s entry of judgment. *Holmes*, 408 S.C. at 160, 758 S.E.2d at 495; *see Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (“[A] motion for sanctions must be filed within ten days of the notice of entry of judgment.”). This rule stems from the principle that, “[a]bsent specific statutory language vesting the trial judge with continuing jurisdiction,” the judge ordinarily lacks “jurisdiction to consider a motion for sanctions beyond ten

days after entry of the judgment.” *Pitman*, 351 S.C. at 432-33, 570 S.E.2d at 189-90; *see Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (“Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”). Because the FCPSA has no specific language vesting the trial court with continuing jurisdiction, an FCPSA motion must be filed no later than ten days after judgment. *See Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (citing *Pitman*, 351 S.C. at 432, 570 S.E.2d at 189); *see also* S.C. Code Ann. § 15-36-10.

The filing of a notice of appeal during that ten-day post-trial period does not deprive the circuit court of jurisdiction to decide a timely filed FCPSA motion nor make such motions premature. *See Holmes*, 408 S.C. at 161, 758 S.E.2d at 496 (“[T]his Court 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.”). Rule 241(a), SCACR, provides that, “[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal” and does so “for the duration of the appeal.” But as the Court explained in *Holmes*, the rule “does not deprive the lower court of jurisdiction to consider” timely post-trial motions filed under Rule 59. *Id.* at 161, 758 S.E.2d at 496. And the same is true for the trial court’s ability to “determine whether a [dismissed] claim is frivolous” on a timely post-trial motion for sanctions under the FCPSA. *Id.* at 160, 758 S.E.2d at 495; *see id.* at 160-62, 758 S.E.2d at 495-96.

That the FCPSA requires circuit courts to ask whether “a reasonable attorney” would have had “a good faith or reasonable argument” “for the extension, modification, or reversal of existing law” confirms this view. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). The FCPSA does not require a litigant to have succeeded in making a certain argument; his argument must simply have been reasonable and made in good faith. The eventual outcome of any merits arguments on appeal thus

does not prevent the trial court from making that reasonableness determination. Nor does it require the court to wait to make that determination until an appeal is resolved.

2. This Court applies a more permissive standard to Rule 11 motions that allows (but does not require) them to be filed later than FCPSA motions in some circumstances. *See Pee Dee Health Care*, 424 S.C. at 525, 818 S.E.2d at 760 (finding that a post-appeal motion for sanctions under Rule 11 was timely, but a post-appeal FCPSA motion was not). Unlike the strict ten-day deadline for FCPSA motions, Rule 11 motions must only be filed with reasonable promptness under the circumstances. *See id.* at 537, 818 S.E.2d at 767. But, importantly, this Court has held that a Rule 11 motion is timely if filed during the time period that applies to an FCPSA motion. *See Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11 (“[S]ince the motion made pursuant the FCPSA is proper it is only logical that the Rule 11 motion was timely[.]”).

This approach makes sense because “[t]he criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA].” *Father v. S.C. Dep’t of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001), *aff’d*, 353 S.C. 254, 578 S.E.2d 11 (2003). Thus, like FCPSA motions, Rule 11 motions may be resolved while an appeal is ongoing. Indeed, federal courts take this view about Federal Rule of Civil Procedure 11 motions. *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 award attorneys’ fees while the court of appeals addresses the merits . . . because there is no concurrent exercise of power on the same subject and little overlap of issues.”).

3. If a litigant like BANA wishes to file both an FCPSA and Rule 11 motion, it thus only makes sense that she would do so within ten days of the relevant order, thereby ensuring that

both motions are timely and can be assessed together. Delaying filing until after the appeal would make the FCPSA motion untimely. *Holmes*, 408 S.C. at 160, 758 S.E.2d at 495. And it would leave the Rule 11 motion’s timeliness in doubt depending on how the court viewed the circumstances of the case. It is only reasonable, therefore, for a litigant to protect her ability to seek sanctions by promptly moving under both the FCPSA and Rule 11 within ten days of the trial court’s judgment.

That is exactly what happened here. BANA acted promptly to ensure it could seek sanctions for Hughes’ frivolous filing asserting claim-precluded, time-barred, meritless claims—half of which Hughes did not even appeal. BANA filed its sanctions motion nine days after the Circuit Court’s dismissal order, making it timely under the FCPSA despite the pending appeal. And because the motion was timely under the FCPSA and was filed with reasonable promptness, it was also timely for purposes of Rule 11. The Circuit Court abused its discretion by ruling otherwise.

B. Hughes’ Arguments To The Contrary Are Unpersuasive.

Hughes attempts to escape this straightforward result by arguing that (1) *Pee Dee Health Care* authorizes a circuit court to abstain from deciding any Rule 11 motion for sanctions while an appeal is pending, and (2) the ten-day deadline for motions for sanctions under the FCPSA applies only to motions seeking sanctions under subsection (C) of the FCPSA, not under subsection (A). Neither argument is persuasive.

1. *Pee Dee Health Care* does not support the Circuit Court’s ruling.

Hughes asserts that in *Pee Dee Health Care*, this Court “ratified a circuit court’s decision to abstain from issuing sanctions during the pendency of an appeal.” Petr.’s Br. 11. The Court

did no such thing. Far from supporting the Circuit Court’s ruling, the *Pee Dee Health Care* Court’s actual holding and reasoning demonstrate the Circuit Court’s legal error.

a. In *Pee Dee Health Care*, this Court held that a motion for sanctions under Rule 11 was timely when filed nine days after remittitur from appeal (and more than two years after the trial court’s judgment), but that a motion for sanctions under subsection (C) of the FCPSA filed at the same time was untimely. *See* 424 S.C. at 525, 527-29, 818 S.E.2d at 760, 762-63. Consistent with the discussion above, the Court held that the FCPSA motion should have been filed within ten days of the summary judgment order that led to the appeal. *Id.* at 529-30, 818 S.E.2d at 763 (citing *Russell*, 370 S.C. at 20, 633 S.E.2d at 730). Because it was not filed within that time frame, the FCPSA motion was untimely. *Id.*

The Court looked at the Rule 11 motion differently. This Court observed that, unlike the FCPSA, Rule 11 lacks any “any time limit for filing a motion for sanctions” and “South Carolina appellate courts have never interpreted Rule 11 to include” one. *Id.* at 530, 818 S.E.2d at 763. Instead of imposing a strict ten-day limit, the Court identified “a number of important considerations a circuit court must make when determining” whether a Rule 11 motion is untimely—namely, (1) whether the court “retains jurisdiction over the case”; (2) the “multiple purposes of Rule 11,” including deterring abusive litigation; (3) whether the movant “neglect[ed]” the request “for an unreasonable and unexplained length of time”; and (4) overall concerns of “reasonableness.” *Id.* at 531-33, 536-37, 818 S.E. 2d at 764-65, 767. The Court emphasized “that early filing—and quick resolution—of legal claims is always to be promoted.” *Id.* at 533, 818 S.E.2d at 765. But under the specific circumstances of the case—one involving three different pending appeals and already “protracted litigation”—the Court determined that it was not unreasonable for counsel to delay seeking sanctions until after remittitur. *Id.* at 534, 818 S.E.2d

at 766. The Court found reasonable, in particular, the movant’s explanation that “his experience with [the opposing party] throughout the protracted litigation led him to believe that [an earlier] sanctions motion would only exacerbate the already contentious litigation.” *Id.*

In sum, the Court held in *Pee Dee Health Care* that in *some* cases Rule 11 motions *may* be timely, even if filed after remittitur from appeal at a time when jurisdiction is returned to the trial court. If that delayed filing time is reasonable under the circumstances, the motion will not be considered too *late*. The Court did not give litigants like BANA any assurance that every Rule 11 motion filed after remittitur would be considered timely. To the contrary, the Court emphasized the general rule favoring early filing. And the Court certainly did not hold that a Rule 11 motion *must* be filed after remittitur, under all circumstances, or is somehow “untimely” if filed sooner. In other words, *Pee Dee Health Care* did not say that Rule 11 motions filed within ten days of an order would be too *early*—or disavow the Court’s previous holding that a Rule 11 motion made alongside a timely FCPSA motion is itself timely. *See Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11.

Pee Dee Health Care thus does not support Hughes’ view that a litigant must always wait until after remittitur to seek Rule 11 sanctions. Rather, its flexible test for timeliness is exactly the opposite of the new, strict rule Hughes proposes. And applying that test, typically used to decide whether a motion is *late*, to the question of whether BANA’s motion was too *early*, shows that BANA’s Rule 11 motion, promptly filed with its FCPSA motion while the court retained jurisdiction to hear post-trial motions and in an effort to recover fees for partially abandoned claims and deter Hughes from continued litigation abuse, was reasonable and timely.

b. The Court did note in *Pee Dee Health Care* that, had counsel moved for sanctions while the appeals were pending, the circuit court “likely . . . would not have heard the sanctions

motion . . . based on the impression the motion dealt with ‘matters decided in the order[s],’ which would arguably be stayed pending the resolution of the appeals.” *Id.* at 536, 818 S.E.2d at 766 (citing Rule 241(a), SCACR)). No Justice expressed a view on whether that “impression” would have been correct, though Justice Kittredge went further in concurrence to state that if a sanctions motion “relates to the matters on appeal, then further proceedings in the trial court are stayed, pending resolution of the appeal.” *Id.* at 542, 818 S.E.2d at 770 (Kittredge, J., concurring). But the salient point is that neither the majority nor Justice Kittredge suggested that a motion for sanctions under Rule 11 filed while an appeal is pending would have been—or should be—*dismissed* as premature or untimely.

To the contrary, Justice Kittredge affirmatively stated that, even if the motion might be stayed, “[t]he better practice under th[o]se circumstances would be to file [the] Rule 11 motion not later than ten days following entry of judgment in the trial court.” *Id.* That approach, he explained, would both allow the Rule 11 motion “to be considered in tandem with a motion for sanctions under the FCPSA” and, even if stayed, provide the parties “notice of any alleged sanctionable conduct as the appeal proceeds.” *Id.* Nothing in the Court’s majority opinion undermined that guidance.

Justice Kittredge’s approach is especially sensible where, as here, the Rule 11 motion not only accompanies a motion under FCPSA but concerns multiple matters *unrelated* to those on appeal. Hughes only appealed his fraud-based claims. *Supra* at 5. So no precedent related to the potential frivolousness of his conversion, breach of fiduciary duty, or SCUTPA claims would change (or even be addressed) on appeal. The Circuit Court could thus have easily resolved whether those claims were frivolous without touching on the matters on appeal. In contrast, had BANA waited to file its motion, it not only risked losing its chance to pursue Rule 11 (and FCPSA)

sanctions on any basis, but especially risked losing its chance to pursue Rule 11 (and FCPSA) sanctions based on those non-appealed claims. Because the appeal would not even touch on those claims, it is not hard to imagine a court later viewing it as unreasonable to delay seeking sanctions for those claims. It certainly was reasonable for BANA to avoid a risky delay of that kind.

As for BANA's request for sanctions based on the fraud claims that were appealed, the reasoning in *Pee Dee Health Care* suggests that, at most, the Circuit Court should have simply stayed the sanctions motion—not dismissed the entire motion as premature. The Circuit Court could have resolved the parts of the motion that did not impact the appeal and stayed the others. Or, if the court shared Hughes' purported concerns about “streamlin[ing] court dockets and facilitat[ing] court management,” Petr.'s Br. 10, it could have stayed all proceedings on the sanctions motions until appellate proceedings were complete. In the meantime, BANA would have preserved its right to seek sanctions and provided Hughes notice of his sanctionable conduct. *See id.* at 541, 818 S.E.2d at 769 (Kittredge, J., concurring). In any event, nothing in *Pee Dee Health Care* supports the Circuit Court's legal conclusion that BANA's motion was filed too early or otherwise justifies its dismissal.

2. Differences between FCPSA subsections (A) and (C) are irrelevant to whether an FCPSA motion filed nine days after dismissal is untimely and premature.

The fact that BANA moved for sanctions under subsection (A) of the FCPSA, rather than under subsection (C), also does not justify the Circuit Court's ruling. Hughes argues that motions for sanctions under FCPSA subsection (A) are not subject to the ten-day limit this Court has consistently applied to the FCPSA, because no decision addressing the timeliness of a FCPSA motion has addressed subsection (A) specifically. Even if Hughes were correct that the strict ten-day deadline did not apply to subsection (A) motions, it would create only the possibility that

BANA *could* have waited to file its motion for sanctions under the FCPSA, not that it was *required* to do so. In any event, Hughes is wrong.

Hughes contends that because FCPSA subsection (C) allows litigants to bring motions “[a]t the conclusion of a trial” targeting an entire “claim or defense” as frivolous, while subsections (A) and (B) do not refer to “the conclusion of a trial,” subsection (A) motions are not post-trial motions subject to the usual 10-day limit. Petr.’s Br. 13-14. Instead, Hughes asserts, subsection (A) reads more like Rule 11, so the timeliness of subsection (A) motions should be determined based on the equitable factors *Pee Dee Health Care* set forth for Rule 11 (factors Hughes wrongly argues preclude a pre-appeal Rule 11 motion). *Id.* In effect, Hughes argues that if an appeal is noticed, a litigant cannot file either a Rule 11 or FCPSA subsection (A) sanctions motion until after the appeal concludes—but *must* file any FCPSA subsection (C) sanctions motion within ten days. That regime makes no sense. The better reading of the law is that the same ten-day limit applies to all FCPSA motions. And, most importantly, just as Rule 11 never *requires* delay, but instead permits and encourages earlier motions, subsection (A) allows sanctions motions at any point after the sanctionable conduct has occurred—and up to ten days after the judgment.

The differences between subsections (A) and (C) are fully explained by the fact that subsection (A) motions are not permitted only post-trial but may also be filed *before* the conclusion of trial, where warranted. Subsection (A) focuses on specific frivolous pleadings, rather than entire claims or defenses. Because such frivolous filings could be made at any point in an action, well before a trial ends or verdict is reached, subsection (A) allows litigants to bring sanctions motions *sooner* than the end of trial—if, for example, a baseless discovery motion is filed in the middle of an action, long before the action is likely to conclude. But subsection (A)’s language does not show that litigants can bring such motions at any time *post*-trial.

Subsections (A) and (B)'s similarity to Rule 11 does not change this conclusion, especially because Rule 11 motions can also be brought before a trial concludes. *See, e.g., Pee Dee Health Care*, 424 S.C. at 541, 818 S.E.2d at 769-70 (Kittredge, J., concurring) (noting that Rule 11 does not prevent "filing a Rule 11 motion for sanctions every time a party believes a violation has occurred"). These provisions simply reflect the Legislature's effort to broaden the FCPSA to allow sanctions based on frivolous pleadings, whenever filed pretrial. It does not reflect any legislative intent to change the longstanding rule that FCPSA motions under any subsection must be brought, at the latest, within ten days of notice of judgment.

Confirming this view is the fact that this Court, before 2005, recognized the ten-day requirement for FCPSA motions, even though the FCPSA has never expressly included that requirement.² *Russell*, 370 S.C. at 17, n.8 & 20, 633 S.E.2d at 728, n.8 & 730. It did so based not on any express limitation in the statute, but on the general rule that "a trial judge loses jurisdiction over a case" after that period. *Id.* "The legislature is presumed to be aware of this Court's interpretation of its statutes." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000). Had the Legislature wished to create a different timing

² Before 2005, the FCPSA provided that:

Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

- (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and
- (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (2004).

requirement for subsection (A) motions, it would have said so explicitly. *Cf. Pitman*, 351 S.C. at 432-33, 570 S.E.2d at 189-90 (“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.”).

Because the FCPSA lacks any express language saying that subsection (A) claims cannot be filed before an appeal concludes, this Court should not create a new standard for one subsection of the FCPSA that differs from its longstanding, consistent treatment of the statute. This Court should especially avoid creating any standard barring litigants from promptly filing FCPSA motions after a dismissal order is entered, as BANA did here. Because the Circuit Court made an error of law by imposing such a standard on BANA, an error the Court of Appeals properly corrected, this Court should affirm.

II. BANA PRESERVED A CHALLENGE TO THE SOLE ISSUE OF TIMELINESS ON WHICH THE CIRCUIT COURT BASED ITS RULING.

Hughes’ preservation and two-issue rule arguments do not warrant a different result. The Court of Appeals correctly held that BANA preserved the timeliness issue for appeal and that the timeliness issue was the sole basis for the Circuit Court’s denial of BANA’s sanctions motion. Hughes fails to demonstrate error in either determination.

A. BANA’s Memorandum In Support Of Its Motion For Sanctions Raised The Timeliness Issue And The Circuit Court Ruled On It.

BANA raised the timeliness issue to the Circuit Court by stating that “[t]he court retain[ed] jurisdiction to consider BANA’s Motion for Sanctions despite Hughes appealing this Court’s order on BANA’s Motion to Dismiss.” (R. p. 343 n.1.) BANA cited as support for this assertion (1) *Pee Dee Health Care, supra*, for the proposition that this Court has “reject[ed] argument[s] that sanctions motion[s] should not be filed until after conclusion of the appeal,” and (2) *In re Beard, supra*, for the proposition that an FCPSA sanctions motion “must be filed within ten days of the

notice of entry of judgment.” (R. p. 343 n.1.) BANA thus put before the Circuit Court the issue of whether it could consider a sanctions motion filed within ten days of its dismissal order but while an appeal was pending. And the Circuit Court ruled on that issue, reaching the opposite (and incorrect) conclusion that it could not consider such an “untimely and premature” motion. (R. p. 7.) The very issue Hughes has now appealed all the way to this Court was thus “raised [to] and ruled upon by the trial court.” *Pye v. Est. of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006), *overruled on other grounds by Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021).

Hughes does not explain why BANA’s straightforward reference to an issue that the Circuit Court then directly addressed and ruled on does not suffice to preserve that issue. He contends that BANA’s argument should be disregarded because it was only a “vague reference in a footnote.” Petr.’s Br. 15. And he asserts that BANA therefore had to file a Rule 59(e), SCRPC motion to effect preservation because, in Hughes’ view, the trial court ruled on an issue never presented to it. Petr.’s Br. 15-16. But the very authority on which Hughes relies shows that Rule 59(e) motions are required only to preserve an argument that was “raised, but not ruled on.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); *see I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“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 motion to alter or amend the judgment in order to preserve the issue for appellate review.” (emphasis added)). Hughes concedes that the issue here was ruled on. Petr.’s Br. 16. That concession ends the inquiry.

Hughes asserts that post-trial motions are also required “when the trial court grants relief not requested or rules on an issue never raised at trial.” Petr.’s Br. 16 (quoting *Elam*, 361 S.C. at 29, 602 S.E.2d at 782). But that quotation comes from Justice Waller’s *dissent* in *Elam*, not from

the majority opinion, which only required Rule 59 motions when the trial court fails to rule on a raised issue. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. In any event, BANA did raise the issue. And even if a footnote argument were insufficient to preserve an issue that a court never passed on—though Hughes cites no authority for that suggestion, *see* Petr.’s Br. 15—the Circuit Court did rule on the issue. As the Court of Appeals held, when “the judge had an opportunity to rule on an issue, and did so, it [was] not incumbent upon counsel to harass the judge by parading the issues before him again.” (R. p. 634.) (quoting Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 185-86 (3d ed. 2016)).

Hughes’ preservation argument thus provides no basis to disturb the Court of Appeals’ judgment.

B. The Circuit Court’s Ruling Rests Only On Its Erroneous Conclusion That BANA’s Motion Was “Untimely And Premature.”

Finally, Hughes’ two-issue rule argument is likewise meritless. The two-issue rule provides that “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.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (citation omitted). The rule does not apply here, because the Circuit Court based its decision on a single ground: its (incorrect) view that BANA’s motion was “untimely and premature.” (R. p. 7.) There was no other basis for the Circuit Court’s denial of the motion, and thus no second issue that BANA failed to appeal.

By briefly describing the sanctions discussion at the motion to dismiss argument and noting Hughes’ contention that BANA’s motion should be denied because the court previously did not issue sanctions, the Circuit Court merely described the procedural background of the case and the basis for Hughes’ argument against sanctions. *See McKinney v. Pedery*, 413 S.C. 475, 489, 776

S.E.2d 566, 573 (2015) (rejecting application of the two-issue rule where “court merely made factual findings summarizing the testimony presented at [a] hearing”). The Circuit Court drew no conclusions from the fact that the trial court previously did not award sanctions when BANA mentioned them at argument. It simply recognized the historical fact.

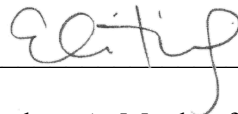
The only actual reasoning or legal conclusion the Circuit Court drew was based on the pending appeal and its effect on BANA’s motion. The Circuit Court stated: “This matter is currently pending before the South Carolina Court of Appeals as Appellate Case Number: 2018-000568, and has not yet been fully adjudicated. *Accordingly*, Defendant’s Motion for Sanctions is untimely and premature.” (R. p. 7.) (emphasis added). The straightforward logic of the Circuit Court’s decision reflects that the pending appeal, and the Circuit Court’s incorrect view that a sanctions motion was premature before that appeal’s resolution, was the only ground for its ruling. Because the Court of Appeals correctly held that the Circuit Court got that ruling wrong, this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: December 7, 2022

Respectfully submitted,



Robert A. Muckenfuss
(S.C. Bar No. 13903)
MCGUIREWOODS LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 343-2052
Fax: (704) 444-8707
RMuckenfuss@mcguirewoods.com

Elizabeth Z. Timmermans
Jonathan Y. Ellis (*pro hac vice forthcoming*)
MCGUIREWOODS LLP
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
Telephone: (919) 755-6576
Fax: (919) 755-6595
EZTimmermans@mcguirewoods.com
JEllis@mcguirewoods.com

Kathryn M. Barber (*pro hac vice forthcoming*)
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1227
Fax: (804) 698-2227
KBarber@mcguirewoods.com

Attorneys for Respondent