THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Judge James B. Jackson, Jr., Special Circuit Court Judge

Appellate Case No. 2024-001266

Anne Wiggins Smith, Appellant,

v.

John L. Wiggins, III, individually and as Trustee of the John L. Wiggins, Jr. Revocable Trust, and Margaret Eugenia Utsey Wiggins, Individually and as Trustee of the Margaret Eugenia Utsey Wiggins Revocable Trust, Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal follows from a case originally filed with the Orangeburg County Probate Court on August 24, 2017. In her Complaint, Plaintiff makes claims for accounting, breach of fiduciary duty, negligence, constructive trust, and attorney's fees and costs. (R. p. 51) The Probate Court transferred the case to Circuit Court sua sponte by Order dated September 7, 2017. (R. p. 1). Defendants timely filed an Answer denying Plaintiff's claims on or about November 16, 2017. (R. p. 59). Plaintiff timely filed her Reply on December 14, 2017. (R. p. 67). Defendants were originally represented by Adam T. Silvernail, but due to health issues, Defendants' current attorney was substituted as counsel on June 25, 2018. On July 24, 2018, Plaintiff served her first set of Interrogatories and Requests for Production on Defendants. The parties entered into a Scheduling Order on August 17, 2018. (R. p. 2). Defendants served their responses to Plaintiffs First Interrogatories and Request for Production on September 25 and 26, 2018.

Defendants filed their first Motion for Summary Judgment on October 4, 2018, (R. p. 69) and on the same date served Interrogatories and Request for Production on Plaintiff. On October 19, 2018, Plaintiff requested that Defendants supplement certain responses to Plaintiff's First Interrogatories and Request to Produce. As part of the discovery process, Plaintiff also issued several subpoenas, and a Motion to Quash Subpoena was filed by Defendants on October 31, 2018, asking the Court to quash the subpoena sent to Morgan Stanley. (R. p. 72).

Defendants filed a Motion to Compel on December 17, 2018, (R. p. 80) and on February 1, 2019, this case was referred to Judge James B. Jackson, Jr., as Special Circuit Court Judge. (R. p. 5). Plaintiff served her second set of Interrogatories and Request for Production on Defendants on February 27, 2019.

On June 20, 2019, Defendants filed a Motion for Temporary Restraining Order requesting the Court prevent Plaintiff and her attorney, F. Glenn Smith, from contacting First National Bank of South Carolina or any of its employees, officers, or directors regarding the litigation. (R. p. 98). Plaintiff filed her Reply and exhibits requesting the Motion be denied. (R. p. 113). A hearing was held on July 10, 2019, and an Order was issued on July 19, 2019, restraining Plaintiff or her attorneys from contacting First National Bank of South Carolina. (R. p. 8).

On July 29, 2019, a hearing was held on Defendant's Motion to Quash Subpoena and Motion for Summary Judgment. The hearing on Defendant's Motion to Compel was continued because Plaintiff had responded to Defendants' Interrogatories and Requests for Production, and Defendants needed additional time to review the responses. Defendant's Motion for Summary Judgment was ultimately denied by the Court on October 14, 2019. (R. p. 11). Defendants filed a Motion to Reconsider on October 15, 2019. (R. p. 248).

On November 14, 2019, Plaintiff served her Third Supplemental Request to Produce on Defendants.

On February 19, 2020, attorneys for the parties had a phone conference with the Court to discuss the taking of the deposition of Defendant Margaret E. U. Wiggins. The deposition went forward on February 21, 2020, and an Order was signed on March 2, 2020, which set out the ground rules the parties followed at the deposition. (R. p. 17).

On February 25, 2020, an Answer and Counterclaim was filed on behalf of Defendant Margaret Eugenia Utsey Wiggins, individually and as Trustee of the Margaret Eugenia Utsey Wiggins Revocable Trust. (R. p. 250). Plaintiff timely filed her Reply on March 5, 2020. (R. p. 257).

On June 11, 2020, Plaintiff served a Fourth Supplemental Request to Produce which replaced Plaintiff's Third Request to Produce. Plaintiff sent Defendants' counsel a letter on August 26, 2020, requesting responses to Plaintiff's last Request to Produce. Ultimately, Plaintiff filed a Motion to Compel on September 22, 2020. (R. p. 259).

Defendants served Plaintiff with responses to her discovery requests on December 9, 2020, and Plaintiff requested a hearing on the previously filed Motion to Compel because the responses were insufficient. On February 3, 2021, Plaintiff filed a Motion requesting she be allowed to communicate via video conferencing with her mother, Defendant Margaret E. U. Wiggins. Defendants filed their response on February 17, 2021. (R. p. 274). A hearing on Plaintiff's Motion for Video Conferencing was heard on March 1, 2021. On May 21, 2021, Plaintiff served her Fifth Supplemental Request to Produce on Defendants.

Defendants filed a Motion for Temporary Restraining Order on May 7, 2021, (R. p. 294) and a hearing was held on this motion on May 26, 2021. An Order was issued on June 16, 2021, which restrained Plaintiff and her attorney, F. Glenn Smith, from communicating with third parties about the lawsuit or the family business, Wiggins Family Properties, LLC. (R. p. 19)

A hearing was held on Plaintiff's Motion to Compel on July 27, 2021. As a result of the hearing, the Court required Defendants to supplement their responses to certain requests to produce and to produce additional documents. Defendants did provide additional discovery, and after some back and forth over the contents of the Order, an Order from the hearing on Plaintiff's Motion to Compel was filed on February 28, 2022. (R. p. 30).

On or about September 10, 2021, Defendants Noticed the Deposition of F. Glenn Smith, who is Plaintiff's husband and attorney in this matter. Plaintiff filed a second Motion to Compel on September 14, 2021, based on Defendant's failure to respond to Plaintiff's Fifth Request for

Production. (R. p. 319) Plaintiff filed a Motion to Quash the Notice of Deposition of F. Glenn Smith on October 12, 2021, (R. p. 334) and this Motion was initially granted without a hearing by Order dated November 10, 2021. (R. p. 26). Defendants filed a Motion to Alter or Amend the Order granting Plaintiff's Motion to Quash on November 22, 2021. (R. p. 406). Defendants also filed a Motion to Dismiss on January 18, 2022. (R. p. 479). A hearing was held on February 23, 2022, on Defendants' Motion to Dismiss and Motion to Reconsider the Court's October 12, 2021, Order granting Plaintiff's Motion to Quash. As a result of the February 23, 2022, hearing, a Scheduling Order was signed on May 23, 2022. (R. p. 34). The Court also denied Defendants' Motion to Reconsider and clarified that Mr. Smith would not be deposed and ultimately would not be allowed to testify as a witness in this case.

A status conference was held on July 18, 2022, and Plaintiff's attorney F. Glenn Smith filed a Motion for Sanctions on July 18, 2022. (R. p. 492).

Defendant filed a Motion to Dismiss for Failure to Prosecute on July 25, 2023, (R. p. 586) and a Motion for Summary Judgment on October 6, 2023. (R. p. 659). These Motions were heard on October 10, 2023, and Defendants' Motion to Dismiss for Failure to Prosecute and Motion for Summary Judgment were granted by Order filed November 28, 2023. (R. p. 26). Plaintiff filed a Motion to Reconsider on December 8, 2023, and provided a copy of the Motion to Judge James B. Jackson Jr., on December 13, 2023. (R. p. 733). Plaintiff's Motion to Reconsider was denied by Order of the Court filed July 17, 2024. (R. p. 48). This appeal followed.

FACTS

John L. Wiggins, Jr., father of Plaintiff Anne W. Smith and Defendant John L. Wiggins, III, created the John L. Wiggins, Jr., Revocable Trust on October 6, 1998. (R. p. 893). On the same date, the Margaret E. U. Wiggins Revocable Trust was created by Mr. Wiggins' wife who is also the mother of Plaintiff and Defendant John L. Wiggins, III. (R. p. 905). John L. Wiggins, Jr., died testate on June 26, 2003, and his Estate was probated in Orangeburg County. At his death, Mr. Wiggins' Estate was transferred to his trust, and the trust was divided into a Martial Trust and the Children's Share. Defendant Margaret E. U. Wiggins was the beneficiary of the marital trust. Plaintiff is a beneficiary of the Children's Share and a remainder beneficiary of the Marital Trust. Defendant John L. Wiggins, III, is trustee of both the John L. Wiggins, Jr., Revocable Trust, and the Margaret E. U. Wiggins Revocable Trust. The provisions of both the John L. Wiggins Jr. Revocable Trust and the Margaret E. U. Wiggins Revocable Trust were essentially the same when the Trusts were created. Margaret E. U. Wiggins has amended her Trust at least twice after it was created.

Beginning in July of 2004, within a year of Mr. Wiggins' death, Defendant Margaret E. U. Wiggins began loaning Defendant John L. Wiggins, III, funds from the John L. Wiggins, Jr., Trust. *See* Marital Trust Loan Agreement (R. p. 918). The loans were used for personal needs such as adding onto Defendant John L. Wiggins, III's home and for his daughter's wedding. (R. p. 836, line 20-p. 837, line 5) To make the loans money was moved from the John L. Wiggins, Jr., Trust into the Margaret E. U. Wiggins Revocable Trust. Defendant Margaret E. U. Wiggins then had a check written to Defendant John L. Wiggins, III, from the Margaret E. U. Wiggins Trust for the amounts he needed. (R. p. 839, lines 7-20). Over 10 years after the loans began, a Loan Agreement was entered into on August 5, 2014. (R. p. 731-732). An analysis done by the accounting firm,

McGregor & Company, LLP, on August 25, 2014, shows the principal balance of the loans at $146,103.00 and the accrued interest as $17,169.00. (R. p. 668). The written loan agreement secures the repayment of the loan against Defendant John L. Wiggins, III's interest in both his father's and mother's Trusts.

After the McGregor & Company report was sent to Plaintiff, her attorney, Mr. Smith, began sending requests for more information to Defendant John L. Wiggins, III. Plaintiff sent "about twenty eight letters and about forty emails asking for reports [she was] due as a beneficiary of both" trusts. (R. p. 711-712).

On December 22, 2015, Defendants transferred 3,613 shares of stock in FNB Corporation from the Margaret E. U. Wiggins Revocable Trust to the John L. Wiggins Jr. Trust to repay the loans made to Defendant John L. Wiggins, Jr. (R. p. 731). The Margaret E. U. Wiggins Revocable Trust essentially purchased the debt of Defendant John L. Wiggins Jr., through this transaction.

Defendant Margaret E. U. Wiggins died on September 4, 2022, and her Estate has been filed with the Orangeburg County Probate Court in Case No. 2022-ES-38-00669. The Margaret E. U. Wiggins Revocable Trust is the residuary beneficiary in her Last Will and Testament.

ARGUMENT

Standard of Review

When a case originates in the Probate Court, the standard of review used on appeal depends upon "whether the underlying cause of action is at law or in equity." *In re Estate of Hyman*. 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004). "If the proceeding in the probate court is in the nature of an action at law, [the Appellate Court] may not disturb the probate [court]'s findings of fact unless a review of the record discloses there is no evidence to support them." *In re Estate of Cumbee*, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). "In a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial [court]." *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997). "If probate proceedings [are] equitable in nature, the [appellate] court, on appeal may make factual findings according to its own view of the preponderance of the evidence." *In re Howard*, 315 S.C 356, 361-62, 434 S.E.2d 254, 257-58 (1993). The claims raised in Plaintiff's Complaint are both legal and equitable in nature. This appeal stems from the lower Court's decision to grant Defendants' Motion to Dismiss for Failure to Prosecute and Motion for Summary Judgment. These decisions each have their own standard of review which is discussed below.

I. THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN ON PLAINTIFF'S CLAIM ON SEPTEMBER 5, 2015.

Summary judgment is a "drastic remedy" that is only appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011) (recognizing that summary judgment must "be cautiously invoked to ensure that a litigant is not improperly deprived of a trial."). In determining the existence of a genuine issue of fact, a court must view "the evidence and all reasonable inferences drawn from it . . . in the light most favorable

to the nonmoving party," *S. Glass & Plastics Co. Inc. v. Kemper*, 399 S.C. 483, 490, 732 S.E.2d 205, 209 (Ct. App. 2012), and determine whether a verdict for the nonmoving party "would be reasonably possible under the facts," *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 149, 533 S.E.2d 597, 600 (Ct. App. 2000). Summary judgment is not warranted "where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331 (2002). It is also inappropriate even when the evidentiary facts are not in dispute "if there is disagreement concerning the conclusion to be drawn from those facts." *Id.*

In their Motion for Summary Judgment, Defendants contend that the one-year Statute of Limitations set out in S.C. Code Ann. §62-7-1005(a) began to run on September 5, 2014, and bars Plaintiff from filing this action after September 5, 2015. (*See generally* R. p. 659 and 665). Section 62-7-1005(a) requires a beneficiary to file suit within one year of being provided with a report that adequately discloses the existence of a potential claim for breach of trust. The relevant question under the statute is when was Plaintiff provided a report that adequately disclosed the existence of her claim? Section 62-7-1005(b) states that "[a] report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence."

Defendant's claim that the one-year statute began to run on September 5, 2014, is based on an email sent by Plaintiff's attorney, F. Glenn Smith, to Jack D. Cordray. (*See* R. 671). This email references a report which indicates loans were made from the trust to Defendant John L. Wiggins III. (R. p. 668). The report shows the principal balance of the loans and the outstanding interest due, but it does not give any explanation of the terms of the loan or any other details about the

loans. The Marital Trust Loan Agreement, dated August 5, 2014, indicates that the Agreement applies to a loan or loans originally agreed to between Defendant John L. Wiggins, III and Defendant Margaret E. U. Wiggins in 2004. (R. p. 918). This document is clearly created to provide terms for whatever handshake agreement was entered into between mother and son for the loans he received from the John L. Wiggins, Jr., Trust. The Marital Trust Loan Agreement is not referenced in Mr. Cordray's Affidavit or included with the report that Mr. Smith references in his September 5, 2014, email.

Upon receiving the report, Plaintiff began to seek more information to assist her in determining what action she may need to take. Plaintiff states that prior to August 9, 2014, she had access "to the bank statements and checks on the account of the Marital Trust." (R. p. 713). Defendants provided an email from Defendant John L. Wiggins, III to Plaintiff's counsel, F. Glenn Smith, dated December 30, 2015, which provides bank statements for the time period from August 1, 2014, through November 30, 2015. After that date, she was no longer provided with bank statements on the account.

Without the Marital Trust Loan Agreement and the additional information that was sought by Mr. Smith, Plaintiff could not know what actions she should take or how to proceed. Mr. Cordray's Affidavit indicates that he received "29 letters" from Mr. Smith beginning in November of 2014. (R. p. 665). These letters make it clear that Plaintiff was actively seeking additional information through her attorney and not receiving it. Plaintiff indicates in her Affidavit that Mr. Smith sent "about twenty eight letter and about forty emails asking for reports" and as late as January 2, 2017, she was receiving "not even the courtesy of an acknowledgement." (R. 711-712). She further states that she was not notified of the deposit of $167,320.47 in December of 2015, "until after this action was instituted by way of a discovery response." (R. p. 713). Plaintiff's

expert, Mr. Burkett, needed information related to the value of the shares in FNB Corporation to determine if the loans made to Defendant John L. Wiggins, III, complied with the terms of the Loan Agreement. (R. p. 732). Plaintiff was not provided with valuation information for FNB Corporation when the loans were disclosed in 2014. It is inequitable to allow Defendant Wiggins to use his own delay in providing information to prevent Plaintiff from determining what action she needs to take, including filing suit.

In the case cited in the Order Granting Defendants' Motion for Summary Judgment, the one-year statute of limitation was found to begin where the parties received a letter that "explained the depletion of the accounts" at issue and further "expressed the [Trustee's] contrition for its delay" after receiving a request for information from a beneficiary. *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 361, 555 S.E.2d 406 (2001). This is different from the case at issue because Defendant John L. Wiggins III did not provide any explanation for the loans in the disclosure provided to Plaintiff. The only way for Plaintiff to get more information on the loans made to Defendant John L. Wiggins, III was for him to provide it and the number of times that Plaintiff's attorney had to request additional information shows how complicated that process was made by Defendant John L. Wiggins, III.

Here, the documentation provided to the Court when viewed in the light most favorable to Plaintiff, shows that the one-year Statute of Limitations did not begin to run on September 5, 2014, because Defendants refused to provide the additional information requested by Plaintiff. It would be inequitable to allow a Defendant to use his own failure to provide information as a shield against being held accountable for breaching his fiduciary duties. Summary judgment is a drastic remedy, and it is not appropriate where evidence exists supporting Plaintiff's contention that the Statute of

Limitations had not run when she filed her Complaint. Based on this information, the lower Court should have denied Defendants' Motion for Summary Judgment.

II. THE LOWER COURT INCORRECTLY FOUND THAT PLAINTIFF FAILED TO PROSECUTE HER CASE.

"Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an abuse of discretion." *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). The decision to dismiss a case for failure to prosecute "should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal." *Id*. at 63, 626 S.E.2d at 904. The Fourth Circuit has set out four factors to consider prior to dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990). Here, the lower Court incorrectly found that Plaintiff failed to prosecute her case and most importantly failed to consider any sanctions less harsh than outright dismissal.

Applying the four factors set out in *Hillig* to the facts in this case supports the reversal of the lower court's decision to grant Defendants' motion to dismiss. First, there is nothing in the record that shows Plaintiff personally took any action or failed to take any action that prevented this case from moving to final hearing and being decided on the merits. Plaintiff appears to have cooperated fully with her attorneys as evidenced by the Affidavits she signed as part of the motions that were heard in this case. Plaintiff personally appeared at almost all the hearings and otherwise took appropriate action to make sure her claims could be heard.

Defendants claim to have been prejudiced by incurring attorneys' fees and having to deal with the various aspects of litigation, including providing documents requested through discovery. However, the majority of the information requested in discovery was information that should have been provided to Plaintiff because of her relationship to the Trusts. Defendant John L. Wiggins, III, would have experienced the same inconvenience of providing paperwork and financial information whether this suit was filed or not. The Trusts themselves too would have incurred similar expenses to fulfill their responsibilities to Plaintiff. Additionally, the difficulty of going through litigation is what parties in a lawsuit have to endure and is not caused by the alleged failure on the part of Plaintiff to actively pursue her case. The fact that Defendants were experiencing such inconvenience is evidence of Plaintiff pursuing her claims in an appropriate manner. Defendants would not have had to expend monies on legal fees if Plaintiff was not taking action on her case.

Looking at the third factor, the presence of a drawn out history of deliberately proceeding in a dilatory fashion, the record shows that while this case has gone on for a long period of time, Plaintiff has been actively pursuing her claim. Factors outside Plaintiff's control and issues related to discovery contributed to the length of time the case was pending. The record shows numerous discovery requests issued, multiple motions filed by both parties related to discovery issues including Motions to Compel and Motions to Quash, and multiple hearings during the pendency of the action. Plaintiff has been hampered by Defendants' failure to properly respond to discovery and provide the documents that Plaintiff's expert needed to assess Defendant's actions. The record here shows action, not inaction, on the part of Plaintiff.

Defendant's attempt to take the deposition of Mr. Glenn Smith became a time consuming process as the Notice of Deposition was served on or about September 10, 2021, and a Motion to

Quash was filed on October 12, 2021. (R. p. 334). An Order was issued on November 10, 2021, which granted the Motion to Quash and prohibited Mr. Smith from testifying as a witness in the case. (R. p. 26). Defendants filed a Motion to Reconsider asking for a hearing on the issue. The hearing was finally held on the Motion on February 23, 2022, and the Motion to Reconsider was denied. Just the issue of trying to take one deposition consumed almost 6 months.

Plaintiff served numerous discovery requests on Defendants and had to file Motions to get them to comply fully with the Requests. At the July 27, 2021, hearing on Plaintiff's Motion to Compel, the Court required Defendants to provide Plaintiff with some of the additional information requested. (R. p. 30). In the midst of the discovery issues, Plaintiff took the deposition of Defendant Margret E. U. Wiggins on February 21, 2020. (*See generally* R. p.804).

Plaintiff also was actively having her expert, Ronald Burkett, review the information in her possession along with what was provided by Defendants. Plaintiff reported to the Court on February 23, 2022, that Plaintiff's original expert, Missy Johnson at Elliott Davis, had discovered a conflict in late 2021 after going through the information provided to her by Plaintiff. (R. p. 860, lines 8-15). Because of this conflict, Plaintiff retained Ronald Burkett at Burkett, Burkett & Burkett. (R. p. 860, lines 20-21). On June 30, 2022, Mr. Burkett sent Plaintiff a request for additional information to try to help understand inconsistencies in the information that had been reviewed. (R. p. 925). The May 23, 2022, Scheduling Order in this case required Plaintiff to "name an expert and provide an expert report to Defendants by June 30, 2022." (R. p. 34). Plaintiff complied as she had previously named Mr. Burkett as her expert, and Plaintiff further provided a report from Mr. Burkett, by way of his letter, which outlined the additional information he needed. Mr. Burkett further provided an Affidavit dated October 3, 2023, which outlines the large amount of information he had reviewed. (R. p. 730-731). This same affidavit indicates what areas Mr.

Burkett needs more information in. (R. p. 732). Specifically, Mr. Burkett needs more information to determine what Account 32 and Account 20 were being used for and what happened with the money that was put into said accounts. The funds in these two accounts amount to $144,674.00, which is not an inconsequential amount. (R. p. 732). Mr. Burkett's affidavit shows that he has reviewed a large amount of documentation on Plaintiff's behalf and is evidence of Plaintiff's efforts to move her case forward.

The fourth factor will be discussed further in Plaintiff's subsequent ground for appeal. The decision to dismiss a case for failure to prosecute is a fact intensive decision, and the actions taken by Plaintiff show she was properly pursuing her case and trying to bring it before the Court for a hearing on the merits. S*ee McComas v. Ross*, 368 S.C. 59, 64, 626 S.E.2d 902, 905 (Ct. App. 2006).

III. THE LOWER COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER SANCTIONS LESS HARSH THAN OUTRIGHT DISMISSAL.

Even if the facts supported a finding that Plaintiff failed to prosecute her case, the Court abused its discretion by failing to consider any sanctions other than outright dismissal. No where in its Order or in the hearings prior to the Order does the Court evaluate the effectiveness or any other sanctions available to it. If the Court felt that Plaintiff was not following the Scheduling Order or otherwise acting as required, the Court could have imposed a monetary sanction based on the fees Defendants incurred in filing their Motion to Dismiss in lieu of outright dismissal. The Court could have also considered imposing sanctions in the form of excluding certain types of evidence from being introduced by Plaintiff. The Court's November 28, 2023, Order makes no mention of alternative sanctions or whether they may have been effective.

Recently, this Court found dismissal of a party's case for failure to prosecute was an abuse of discretion because other sanctions were available but not considered. *See S.C. Public Interest*

Foundation v. Richland County, 436 S.C. 271, 280, 871 S.E.2d 599, 604 (Ct. App. 2021). In *SC Public Interest Foundation*, the Circuit Court granted a Defendant's Motion to Dismiss for Failure to Prosecute because the Plaintiff failed to conduct discovery prior to the deadline set out in a Scheduling Order. *Id.* at 274, 871 S.E.2d at 601. Despite the Appellate Court noting that it had "concern about the lack of action in prosecuting this case." *Id.* at 278, 871 S.E.2d at 603, the dismissal was overturned. The Appellate Court could not find any South Carolina case that upheld a dismissal for failure to prosecute for the pre-trial issues that occurred in *SC Public Interest*. *Id.* at 279, 871 S.E.2d 603. Here the issues cited by Defendants in their Motion to Dismiss are all pre-trial and warrant at worst sanctions less harsh than outright dismissal.

The preference for less harsh sanctions than dismissal follows with the general preference for having cases decided on their merits. *See eg. Mictronics. Inc. v. SC Dept. of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223 (Ct. App. 2001) ("This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities."). The imposition of a monetary sanction could have addressed Defendants' claims of financial prejudice while also dealing with any violation of the Court's Order. In situations related to disputes over discovery Orders, where one party claims another has failed to follow a court's Order, the initial sanctions are typically financial, and the dismissal or the striking of pleadings is normally only done as a last resort. Alternatively, the lower Court could have decided to use limitations on the introduction of evidence as a sanction. As previously discussed, Plaintiff was actively pursuing her claim, but even if the Court believed differently, the Court is required to consider imposing sanctions less harsh than dismissal. The lower Court's failure to do so is a clear abuse of discretion.

CONCLUSION

The Court abused its discretion by dismissing Plaintiff's claim for failure to prosecute because the facts do not support the decision, and the Court failed to consider any other sanctions outside of outright dismissal. The Court should have denied Defendants' Motion for Summary Judgment because the Statute of Limitations on Plaintiff's claims did not start to run on September 5, 2014. For the foregoing reasons, the court should reverse the ruling of the Circuit Court and deny Defendants' Motion for Summary Judgment and Motion to Dismiss.

April 30, 2025

Respectfully Submitted,

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