2012-212374

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2012-UP-293
Filed May 16, 2012

Deborah J. Clegg, as Personal Representative of the
Estate of Allison Clegg ....Respondent,

v.

Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker,
Jan Horan, and Anna C. Lambrecht, ...Defendants,

Of Whom Douglas A. Lambrecht is the ....Appellant.

PETITION FOR WRIT OF CERTIORARI

John E. North, Jr.
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorney for Petitioner

Other Counsel of Record:

H. Fred Kuhn, Jr.
1501 North Street
PO Drawer 507
Beaufort, SC 29901

G. Richardson Wieters
PO Box 7682
Hilton Head Island, SC 29938

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on June 12, 2012.

INTRODUCTION

The issue presented in this Petition involves the application of the proper standard by which to evaluate frivolity under the current version of the Frivolous Civil Proceedings Sanctions Act, S.C. Code § 15-36-10 ("FCPSA"), and, specifically whether the subjective good faith and competence of counsel will avoid the imposition of sanctions when the claim is found on summary judgment to be without any factual or legal basis. This question has not been precisely addressed by this Court in the context of the current version of the FCPSA that specifically defines the nature of frivolity, provides an objective mechanism for evaluating whether a claim is frivolous, and mandates the imposition of sanctions in certain circumstances.

Of further significance in this case is the complete inconsistency between the finding of the trial court and the Court of Appeals that the negligent entrustment claim pursued against Petitioner was not frivolous and this Court's holding in *USAA*

Property and Cas. Ins. Co. v. Clegg, 377 SC 643; 661 SE 2d 791 (2008), that the same Petitioner could not be "legally liable" for the consequences of his adult son's automobile accident.

Finally, in this case, the specific factual findings and legal conclusions of the trial court in granting summary judgment, which became the law of the case, and that were relied upon in initially granting sanctions, cannot be reconciled with the diametrically opposite factual findings and legal conclusions in its ultimate order denying sanctions.

The Court of Appeals adopted the trial court's findings and conclusions, essentially in their entirety, so references to the findings and conclusions of the trial court encompass those of the Court of Appeals unless otherwise stated.

QUESTIONS PRESENTED

1. Did the Court of Appeals err when it affirmed the trial court's analysis of the frivolity of the Respondent's claims against Petitioner based upon the subjective good faith and competence of Respondent's counsel and not under the objective reasonable attorney standard set out in the FCPSA and under Rule 11?

2. Did the Court of Appeals err when it failed to find that a reasonable attorney would have concluded that there was no factual or legal basis to pursue a negligent entrustment claim against Petitioner when the vehicle allegedly entrusted was owned and operated by his adult, emancipated son and that the claims were frivolous?

3. Did the Court of Appeals err when it disregarded this Court's holding in *USAA Property and Cas. Ins. Co. v. Clegg*, 377 SC 643; 661 SE 2d 791 (2008) that, as a matter of law, the Petitioner could not be found legally liable for negligent entrustment of a vehicle owned and operated by his adult, emancipated son?

4. Did the Court of Appeals err when it affirmed the trial court's Order denying sanctions on the basis of Respondent's subjective good faith when the factual and legal findings upon which that Order was based were not substantiated in the record, irrelevant to the issues, or both?

5. Did the Court of Appeals err when it affirmed the trial court's Order finding that the law of "combining and concurring" negligence provided a basis for a

meritorious claim against Petitioner when there was no negligent act committed by Petitioner?

6. Did the Court of Appeals err when it affirmed the trial court's Order that, but for *Gadson v. Echo Services of South Carolina, Inc.*, 374 S. C. 171, 648 S. E. 2d 558 (2007), the Respondent's claim against Petitioner was legally viable?

STATEMENT OF THE CASE

The May 16, 2012, Opinion of the Court of Appeals for which the Petitioner seeks Certiorari arises from the second appellate proceeding involving the issues presented herein. In both appeals, at issue was whether the Respondent and her counsel should be sanctioned under the FCPSA and Rule 11 for pursuing a claim for negligent entrustment against Petitioner arising from a one car automobile accident in which the Petitioner's adult, emancipated son ("Elliott") was driving his own, and not Petitioner's, automobile.

The facts were not in dispute. On the date of the accident, Petitioner's son, Elliott, was an adult and was living in his own residence and not with Petitioner. (Affidavit Douglas, ¶ 5, R. p. 205; Second Amended Complaint, ¶ 23, R. p. 147; Deposition Elliott, R. p. 702, lines 5-14; Affidavit Elliott, ¶ 6, R. p. 201; Deposition Elliott, R. p. 692, line 19 – R. p. 695, line 24; Complaint, 02-07-CP-1159 ("1159"), p 1- 9, R. p. 79; Complaint, 02-07-1160 ("1160"), p. 1-9, R. p. 89).

The automobile involved in the accident was purchased by Elliott in 2000 and titled in Elliott's name, alone. (Affidavit Douglas, ¶10, Exhibit A, R. p. 206, R. p. 209; Deposition Elliott, R. p. 698, line 18 – R. p. 699, line 14). The automobile was parked at Elliott's mother's home[1] and it was from there Elliott retrieved it and subsequently was involved in the accident. (Deposition Elliott, R. p. 673, line 25 –

[1] Petitioner and Elliott's mother were divorced at the time.

R. p. 674, line 17). At no time before the accident did Petitioner have any information with respect to what Elliott intended to do with the automobile or that he intended to drive it. (Affidavit Douglas ¶ 18, R. p. 207; Affidavit Elliott, ¶ 20, R. p. 202; Affidavit, Douglas ¶ 18, R. p. 207; Deposition Elliott; R. p. 679, lines 17 -25; R. p. 700, lines 20-23; R. p. 703, line 23 – R. p. 704, line 2).

Six months after the accident, the Respondent filed her initial Complaints, both a wrongful death action and a survival action, against Elliott and the Petitioner, alleging that Petitioner owned the automobile involved in the accident, knew that Elliott had a poor driving record, and that his driver's license had been suspended, but negligently entrusted the automobile to him. There was no allegation that alcohol was involved in the accident. The Complaints further alleged that Petitioner was liable for Respondent's damages because Petitioner had failed to prevent Elliott from driving and had failed to warn others of Elliott's alleged dangerous propensities. (Complaint, 1159, p. 2 - 8, R. p. 79; Complaint, 1160 p. 2 - 8, R. p. 89).

Almost two years later, Petitioner served and filed an Amended Complaint in both actions, joining Elliott's mother, his minor sister, and a friend of Elliott's as additional defendants. (Amended Complaint, 1159, R. p.135; Amended Complaint, 1160, R. p.146). In the Amended Complaints, Respondent alleged that Petitioner was the *de facto* owner of the automobile involved in the accident, that Petitioner had negligently entrusted the automobile to Elliott, and that Petitioner was further liable for allowing or permitting Elliott to drive when he knew or should have known that Elliott posed an unreasonable risk of harm to others. Similar allegations were made against the mother, minor sister, and friend of Elliott. (Amended Complaint, 1159, R. p.135; Amended Complaint, 1160, R. p.146).

On June 16, 2004, Petitioner filed his Motion for Summary Judgment with respect to both actions. (Motion for Summary Judgment, 1159, R. p.171; Motion for Summary Judgment, 1160, R. p.173). The other defendants similarly filed motions for summary dismissal on the basis that there was no breach of a legal duty alleged against them. (Motion to Dismiss, Anna, July 9, 2004, R. p 210; Motion to Dismiss, Jan, July 26, 2004, R. p. 211; Motion for Summary Judgment, Rhett, November 22, 2004, R. pp. 213 -214).

On April 17, 2005, before Petitioner's Motions for Summary Judgment were heard, the actions were dismissed pursuant to Rule 40(j) SCRCP. (Dismissal, 1159, R. p. 001; Dismissal, 1160, R. p. 001). On April 19, 2006, pursuant to the Motion of the Respondent, both cases were restored to the trial docket. (Order, April 19, 2006, R. p. 008). On August 10, 2006, a second Amended Complaint was served in both actions asserting essentially the same basis for Petitioner's liability as the prior complaints.

On October 20, 2006, the trial court granted summary judgment to Petitioner.[2] (S.J. Order, R. p. 13). On January 17, 2007, Petitioner timely filed his Motion for Sanctions in each action pursuant to the FCPSA and pursuant to Rule 11, SCRCP. (Motion for Sanctions, R. p. 277). The Respondent appealed the Order granting summary judgment, but after initial briefs were filed, the appeal was dismissed. (Order, R. p. 21).

[2] The claims against the other defendants were also dismissed, except for one against the friend involving the allegation of "racing".

The trial court denied Petitioner's Motion for Sanctions in each action on the basis of the "good faith" and "competence" of Respondent's counsel. (Order, Sanctions, March 1, 2007, R. p. 17). The Petitioner appealed. (Order, May 1, 2007, R. p. 18). On May 13, 2009, the Court of Appeals issued its Opinion, vacating the trial court's Order denying sanctions and remanding the matter to the trial court for further proceedings. The Court of Appeals directed the trial court to evaluate the record with respect to whether and at what point the Respondent should have recognized the frivolity of her claims. (Opinion, May 13, 2009, R. p. 23)

After remand, on January 8, 2010, the trial court entered a lengthy order, reciting its factual and legal findings supporting its conclusion that a reasonable attorney would have known the claims against Petitioner were not viable from the outset, and that sanctions were warranted under the FCPSA and Rule 11. (Order, January 8, 2010, R. p. 27)

Thereafter, in ruling on the Respondent's Rule 59(e) Motion, the trial court completely reversed its prior factual findings and conclusions and denied sanctions based upon the "good faith", "competence", and "demeanor" of Respondent and her attorneys.[3] (Order, July 28, 2010 R. p. 47).

Petitioner timely filed his Motion to Alter or Amend the Order and, when it was denied, again appealed to the Court of Appeals. (Motion to Alter or Amend, R. p. 554; Order, September 14, 2010, R. p. 77). In a perfunctory Opinion, dated May 16, 2012, the Court of Appeals, without any stated analysis, merely adopted the findings of the trial court and affirmed its Order denying sanctions. The Petitioner's

[3] Because the case was adjudicated on summary judgment, there was no opportunity for the trial court to have actually observed any of the litigants or witness in order to evaluate their "demeanor".

Petition for Rehearing was similarly denied in summary fashion without any stated analysis.

ARGUMENT

1. THE COURT IMPROPERLY EVALUATED THE FRIVOLITY OF THE CLAIMS AGAINST PETITIONER BASED UPON THE SUBJECTIVE "GOOD FAITH" AND "COMPETENCE" OF RESPONDENT'S COUNSEL AND NOT ON THE OBJECTIVE "REASONABLE ATTORNEY" STANDARD MANDATED BY THE FCPSA AND RULE 11.

In its Order granting summary judgment, the trial court found that the claims against Petitioner were without factual or legal merit.

> There is no evidence which could reasonably being (sic) construed by a jury that [Douglas] either owned the vehicle in question at the time of the accident or had control over it which would support a negligent entrustment cause of action. Furthermore, the evidence is uncontroverted that at the time of the accident the Defendant Elliott Lambrecht was an emancipated adult. As such, neither parent had a duty to control the conduct of their son and there is no evidence which indicates they exercised any dominion or control over him on the date and time of the accident which could rise to an inference that he was acting as their agent at the time of the accident.

Order, R. p. 13

Those findings are the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 489 S.E.2d 470 (1997). Accordingly, on remand, the only task of the trial court was to evaluate whether, under the standards of the FCPSA and Rule 11, a reasonable attorney, who knew the facts and the law that the Respondent knew or should have known, would have concluded that the claims were clearly without merit and at what point that conclusion should have been reached.

Under the FCPSA, the standard by which to determine frivolity is specific and clear. If a reasonable attorney would have believed the Respondent's claims to be either: 1) legally unwarranted; or 2) not founded in fact, or both, they are, by definition, frivolous. The specific language, in pertinent part, of the relevant section of the FCPSA defining frivolity is:

> (C)(1)(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;[4]
>
> (C)(1)(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.

Rather than evaluate the record with respect to what a reasonable attorney, knowing the facts and the law, would have concluded about the legal viability of Respondent's claims, the trial court and the Court of Appeals in its *de novo* review based their opinion that the claim against Petitioner was not frivolous on Respondent's "good faith" belief in the validity of the claims. (R. p. 47)

Both the trial court and the Court of Appeals paid lip service to the correct standard, but it is patently clear that it was the Respondent's subjective "good faith" which was the basis to deny sanctions. In its Order at page 9, the trial court found that "there is evidence supporting *the good faith belief* that Defendant exercised ownership or control over the Mazda vehicle". (Order, R. p. 55). On page 13 of the Order, the trial court states "in the instant case there is evidence to support the **reasonable and good faith belief** that it was the Defendant who held the attributes of ownership and control". (Order, R. p. 59). On page 13, the trial court finds "that the claim of negligent entrustment was **brought both in good faith and was reasonable**". (Order, R. p. 59). On page 19, the trial court finds that **"it is both**

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[4] At no point did the Respondent argue that the applicable law should be modified, extended or reversed.

reasonable and in good faith to assert that ....." (Order, R. p. 65). (Order, R. p. 66). The same "good faith" standard is referenced at pages 15, 20, 21, 22, and 23 of the Order. (R. p. 61; R. p. 67; R. p. 68; R. p. 69).

Finally, in its conclusion, on page 25 of the Order, the trial court holds: "I find that the case was brought by experienced, competent lawyers who in good faith believed the facts of the case warranted bringing the lawsuit under the theory it was pursued". (Order, R. p. 71).[5] The same rationale was the sole basis for the denial of Petitioner's Rule 59(e) Motion. (Order, R. p. 77)

Not only does the concept of "good faith" not appear in the FCPSA sections relevant to Petitioner's request for sanctions, under South Carolina law, whether under the various prior versions of the FCPSA or Rule 11, "good faith" is not a subjective analysis, but is measured on the objective basis of what a "reasonable attorney" would conclude based upon his investigation of the law and the facts. A "reasonable belief" in the merits and continuing merits of a claim can be substantiated only on the basis of supporting law and the existence of favorable facts.

In *Rutland v. Holler, et al,* 371 S. C. 91, 637 S. E. 2d 316 (Ct. App. 2006), sanctions were upheld when the Court found, "it is inconceivable that Rutland *reasonably believed* (emphasis supplied) that his claims against Respondents were valid." *Id.* at 98, 320. In *Russell v. Wachovia Bank*, 370 S. C. 5, 17, 633 S. E. 2d 722, 728 (2006) sanctions were upheld from the point after which the litigant had access to affidavits and other evidence which should have led her to realize that the

[5] This was the language employed by the trial court in its first order denying sanctions, which was remanded by the Court of Appeals for purposes of evaluating frivolity based on the correct standard articulated under the FCPSA.

facts did not support her claims. In *In Re Young*, 366 S. C. 180, 621 S. E. 2d 359 (2007), this Court disciplined an attorney for violation of Rule 3.1 when he pursed a claim for which he had not done any research and for which he could not explain the legal basis for pursuing.

In all of these cases, the common thread is that there must be evidence in the record that would demonstrate that the litigant had sufficient facts and had conducted sufficient research and investigation to support an objectively "reasonable" belief in the existence and continuing existence of a meritorious claim. The subjective "good faith" belief of an attorney has never been a sufficient basis to pursue a claim that objectively had no merit. Simply put, the consideration of the subjective good faith of counsel is not an appropriate analysis in ruling on the right to sanctions under the FCPSA and does not excuse the pursuit of a meritless claim.

The standard is the same under Rule 11. *Gibbes v. Rose Hill Plantation Development Company,* 794 F. Supp. 1327 (D. S.C. 1992) Even the most sincere of beliefs[6] in a claim will not preclude the imposition of sanctions if a reasonable attorney, viewing it objectively, would find it without merit.

> The "empty head and pure heart" defense will not excuse objectively unreasonable conduct. (citation omitted) Counsel's good faith beliefs that are unreasonable in light of clear law and dispositive authority will not immunize him from Rule 38 sanctions. (citation omitted). Nor does an honest belief in the merits of a claim excuse an appellate brief that "ignores significant issues and facts while deploying a smokescreen of irrelevant and tangential issues."

In Re Perry, 918 F. 2d 931, 934, 935 (Fed. Cir. 1990).

[6] If a subjective standard were employed, it would be essentially impossible to impose sanctions no matter how frivolous the claim if the attorney asserted his "belief" in it.

In its frivolity analysis, in addition to applying the incorrect standard, the trial court actually recanted the factual findings it made at the summary judgment stage. Directly contrary to its findings in the Order granting summary judgment that the claim had no factual or legal basis, the trial court denied sanctions on the basis that: 1) that Petitioner "had physical control over the vehicle", (Order, p. 10, R. p. 56); 2) that Petitioner was the *de facto* owner of his son's automobile, (Order, p. 12, R. p. 58); 3) that Petitioner "was the one who either owned or controlled" the Mazda (Order, p. 11, R. p. 57); and 4) that Petitioner "represented to USAA (his insurer) that he was the owner" of his son's automobile (Order, p. 13, R. p. 59).[7]

The applicable law and the material facts do not change depending upon the purpose for which they are being considered. When summary judgment was granted, the factual and legal findings in that Order became the law of the case. Those findings cannot be "undone" in order to avoid the imposition of sanctions.

In addition to improperly employing the subjective good faith standard to evaluate frivolity, the trial court considered the "conduct and demeanor" of the "parties and their counsel" and "the earnestness and good faith of Plaintiff and her attorneys" as material in determining whether the negligent entrustment claim was frivolous. (Order, R. p. 71).

Those considerations are absolutely without any basis under Rule 11 and the FCPSA and are the antithesis of the objective legal analysis that the FCPSA mandates the court to conduct and the objectivity with which the judiciary is to

[7] The obvious explanation for these entirely inconsistent findings is that the trial court signed an Order denying sanctions that was verbatim what was prepared by the attorneys to be sanctioned. (Affidavit, John E. North Jr., R. p. 592).

function. Whether Respondent pursued her frivolous claims "earnestly" and whether her conduct and demeanor was admirable have absolutely no place in an objective analysis of whether or not the Petitioner was entitled to sanctions for the more than four year pursuit of unfounded claims against him. It is patently unreasonable to excuse the pursuit of a frivolous claim, with the attendant burden on the defendant, because the plaintiff is earnest and admirable. This Court should grant Certiorari to specifically articulate and clarify the manner in which frivolity is to be determined under the current version of the FCPSA and Rule 11.

2. UNDER THE REASONABLE ATTORNEY STANDARD MANDATED BY THE FCPSA, AND UNDER RULE 11, THE CLAIMS PURSUED BY THE RESPONDENT WERE FRIVOLOUS.

As set forth above, in its order on summary judgment, the trial court held that there was **no** evidence that could be "reasonably" construed by a jury[8] that Petitioner owned or controlled his son's vehicle and that, as a matter of law, Petitioner had no legal duty to control his son's actions.

If a claim is pursued that a "reasonable attorney" would find not factually or legally meritorious, the claim is frivolous under the standard established by the FCPSA.[9] If it is frivolous, the trial court "shall" impose sanctions. (S.C. Code § 15-36-10(C)(1). Under Rule 11, an attorney must conduct a pre-filing investigation and his signature is a certification that there are good grounds to support the claim. It is not necessary to demonstrate bad faith in order to establish a violation of Rule 11,

[8] If a juror could not "reasonably" conclude that the claims had factual or legal merit, it is inconceivable that the Respondent and her attorneys should not have reached the same conclusion.

[9] As set forth in Petitioner's briefs in this matter, the FCPSA provides guidance in terms of what a reasonable attorney factors are to be considered in the reasonable attorney analysis, including the complexity of the case, the number of parties, and the time for discovery. None of those factors would militate against sanctions in this case.

but only to demonstrate that the claim had "no chance of success under existing precedent". *Gibbes v. Rose Hill Plantation Development Company,* 794 F. Supp. 1327, 1340 (D. S.C. 1992) *See, also: In Re Beard,* 359 S.C 351, 597 S.E. 2d 835 (Ct. App. 2004) *cert. denied.*

In this case, the negligent entrustment case pursued by the Respondent for four years had no viability from the outset. Under *American Mutual Fire Insurance Company v. Passmore*, 275 S.C. 618, 274 S.E. 2d 416 (1981), only one who owns or controls the use of an automobile can be liable under a negligent entrustment theory. Because the Petitioner did not own or have any legal right to control the use of his adult son's automobile, he could not be held liable for his adult son's accident.

The record in this case is clear and unambiguous about what the Respondent knew of the material facts and applicable law and when they were known. The Respondent filed her Complaints six months after the accident. In those Complaints, the Respondent alleged that Petitioner owned the automobile involved in the accident and that he negligently entrusted it to his son, Elliott. (Complaints, 1159, 1160 ¶ 20 – 37, R. pp. 82 - 85; R. pp. 92 - 95).

Had Respondent investigated the facts in the six months between the accident and filing the Complaints, she could have easily determined that Elliott, and not Petitioner, owned the automobile involved in the accident and that Elliott was of legal age, thus rendering her negligent entrustment claim without a factual basis.

Without regard to the required pre-filing investigation and research, within three months after filing the Complaints, Respondent was served with discovery responses that provided a copy of the Certificate of Title for the automobile, which showed Elliott as the owner. (Responses to Plaintiff's Request for Production, R. p. 104). Notwithstanding that information, six months later, in February, 2003, Respondent took the sworn statements of Elliott's mother and his minor sister. (Deposition, Jan, Exhibit 1, R. pp 736 - 739; Deposition, Anna, Exhibit 1, R. pp.747 - 744). The statements established that Elliott had been living on his own since the summer of 2001 and that, on the date of the accident, he was nineteen years old. (Deposition Jan, Exhibit 1, p. 5, R. p. 738, lines 4 - 23, p. 6, R. p. 739, lines 4-10). The statements additionally established that, prior to the accident, Elliott's vehicle had been in his sister's possession for some time, and that it was from his mother's home that Elliott took the automobile on the evening of the accident. (Deposition Anna, Exhibit 1, p. 7, R. p. 746, lines 11 – 14; p. 13, R. p. 747, lines 3- 15)[10]

In May, 2004, after knowing that Petitioner's adult, emancipated son owned the automobile involved in the accident, Respondent filed Amended Complaints alleging that Petitioner was the *de facto* owner of the automobile involved in the accident. That allegation, as a matter of law, gave no more viability to the negligent entrustment claim.

Under South Carolina law, the title holder of a vehicle is *prima facie* its owner and the presumption of ownership can only be rebutted in cases involving insurance coverage when the person with all other incidents of ownership fails to hold title resulted from "mere technicalities". *Unisun Insurance Company v. First Southern Insurance Company*, 319 S.C. 419, 424, 462 S. E. 2d 260, 262 (1995)

[10] Douglas and Elliott's mother Jan were divorced and living in separate households.

reh. denied. Not only did this case not involve insurance coverage, the evidence was unrebutted that Elliott not only held title, but all other incidents of ownership.

In June, 2004, Petitioner filed his Motion for Summary Judgment supported by his own Affidavit and that of Elliott, affirming Elliott's legal age and emancipation at the time of the accident, the ownership of the automobile, Petitioner's lack of physical possession or control of the automobile, and his lack of any knowledge concerning Elliott's intention to drive on the night of accident. (Affidavit Douglas, R. pp. 205 - 209; Affidavit Elliott, R. pp. 200 - 204). Petitioner also filed and served his supporting brief setting forth the legal elements of a negligent entrustment claim and the relevant facts which showed that no such claim could be pursued against Petitioner.

Despite knowledge of these facts and the law, Respondent continued to pursue the litigation, deposing all parties. It is inconceivable that an objective and reasonable attorney would believe the negligent entrustment claim was viable when Elliott owned the automobile and was an emancipated adult.

The deposition testimony was completely consistent with the facts that were known or available to the Respondent from the outset. Elliott testified consistently with the other witnesses and consistently with his and Petitioner's prior Affidavits that: 1) the automobile had been purchased by and titled to him; 2) that he made all the payments and paid for repairs; 3) that only he controlled the use of the automobile; 4) that he had allowed his sister to use it, and; 5) that, when he picked up the automobile, it was at his mother's home where it had been for some time. He further testified that Petitioner did not know that he planned to pick up the automobile or drive it. (Deposition Elliott, R. p. 698, line18 – R. p. 699, line 22; R. p. 679, lines17 – 20; R. p. 700, lines 20 – 23).

In April, 2006, after all discovery was complete, Respondent moved to reinstate the cases to the active roster. Thereafter, in August, 2006, the Respondent filed second Amended Complaints in which the same allegations were made as the previous versions, and additionally alleged that Petitioner "controlled" the use of Elliott's vehicle. (Second Amended Complaints, R. pp. 215 – 238).

This new allegation did not provide any further legal basis for the negligent entrustment claim and was completely without factual or legal support. The right to control the use of a vehicle is a legal right or power incident to the ownership of the vehicle. Because Elliott owned the automobile, only Elliott had the right to control its use. *Broadwater v. Dorsey*, 344 MD 548, 688 A. 2d 436 (MD, 1997) [right of control of a vehicle belongs to title holder].

Two months later, the trial court granted summary judgment. At the latest, by February, 2003, the Respondent and her attorneys should have known that the negligent entrustment claim against Petitioner was not viable because Elliott, an adult, and not Petitioner, owned the automobile and the legal ownership of the vehicle and his emancipation gave Elliott and not Petitioner the legal right to control its use. [11]

Ultimately, four years after the cases were initiated, and after they had been dismissed and reinstated, the Respondent was unable to direct the trial court to any material fact that was inconsistent with what Respondent knew or should have

[11] There was never any evidence that alcohol was involved the accident, which additionally negates the viability of a negligent entrustment claim.

known since the outset of the litigation. Respondent could cite no law which would give her a viable claim against Petitioner. There was no additional discovery done between the time that the cases were reinstated and the trial court's grant of summary judgment wherein the court determined that there was no evidence to support the Respondent's claims.

All of the attorneys for Petitioner's co-defendants immediately, upon being sued on the same theory of liability as asserted against Petitioner, and prior to any discovery, filed motions for summary dismissal on the basis that the allegations of the Amended Complaints did not give rise to any legal duty that was breached. (Motion to Dismiss, Anna, July 9, 2004, R. p 210; Motion to Dismiss, Jan, July 26, 2004, R. p. 211; Motion for Summary Judgment, Rhett, November 22, 2004, R. pp. 213 -214).

The trial court agreed that the claims were meritless and dismissed them. As discussed more fully herein after, this Court in *USSA v. Clegg,* agreed, finding that Petitioner had no legal liability for his son's accident. If four attorneys, the trial court, and the Supreme Court find that the claims had no factual or legal merit, that is a sufficient basis to conclude that no reasonable attorney would have pursued and continued to pursue the claims.

South Carolina has imposed sanctions or disciplinary action when an attorney failed to conduct an investigation prior to commencing suit, *Ex Parte Gregory*, 378 S. C. 430, 663 S. E. 2d 46 (2008), when the litigant had access to information which should have led her to realize that the facts did not support her claims and that they were without merit, *Russell v. Wachovia Bank*, 370 S. C. 5, 17, 633 S. E. 2d 722, 728 (2006), and when suit was commenced without research, with no factual basis, and for which the attorney could not explain the legal basis, *In Re Young*, 366 S. C. 180, 621 S. E. 2d 359 (2007).

Neither the trial court nor the Court of Appeals made any attempt to distinguish this case, in which sanctions were denied, from *Ex Parte Gregory, Russell,* and *In Re Young* in which sanctions were granted or discipline imposed for pursuing claims without a factual or legal basis or for which no adequate investigation and research was undertaken. This Court should grant Certiorari to consider the propriety of sanctions under the undisputed facts and law applicable to this case.

3. THE DENIAL OF SANCTIONS CONFLICTS WITH THIS COURT'S OPINION IN *USAA PROPERTY AND CAS. INS. CO. V. CLEGG,* 377 SC 643; 661 SE 2d 791 (2008) HOLDING THAT THERE WAS NO VIABLE CLAIM FOR NEGLIGENT ENTRUSTMENT AGAINST PETITIONER.

The finding that a reasonable attorney could have concluded that there was a factual basis for pursuing negligent entrustment and negligence claims against Petitioner even though he did not own and had no legal right to control the use of his emancipated son's automobile is directly contrary to the holding of this Court in the *USAA* case.

In that case, the issue was whether Petitioner's insurance company owed him a duty of defense to the Clegg claims. In finding that it did not, the Supreme Court held:

> Elliott was an emancipated child at the time of the accident and this is no statutorily-imposed obligation for Lambrecht to be responsible for damages caused by Elliott's negligence.
>
> * * * *
>
> Furthermore, the undisputed facts established that Elliott, not Lambrecht, owned the vehicle involved in the accident. Thus we do not believe that

> Lambrecht could be held "legally liable" . . . .for Elliott's negligence based on these cases.[12]

Id. at 659, 799.

The fact of Elliott's age and the status of the title to Elliott's vehicle were readily discoverable from the outset. Those facts were sufficient for this Court to rule that Petitioner could not be held "legally liable" "from the onset of the litigation". Contrary to this Court's ruling, the trial court's ruling, that was affirmed by the Court of Appeals, is that an objectively reasonable attorney in South Carolina would believe that a parent could be held liable for automobile accident involving a vehicle owned and operated by his adult, emancipated son. Most lay persons know that is not the case.

The *USAA* case cannot be reconciled with the trial court's conclusion that an objectively reasonable attorney would have believed the Respondent's claims to have a factual and legal basis and this Court should grant Certiorari to reconcile the result and to provide to Petitioner the remedy to which he is entitled.

4. THE PURPORTED EVIDENTIARY BASIS FOR RESPONDENT'S "GOOD FAITH BELIEF" IN THE CLAIMS AGAINST PETITIONER ARE NOT IN THE RECORD, IRRELEVANT TO THE ISSUES, OR BOTH.

As addressed above, the factual findings and legal conclusions of the trial court in its Order on summary judgment and its initial Order granting sanctions are completely at odds with those in its Order denying sanctions. Rather than the correct objective reasonable lawyer standard, the trial court seized upon purported evidence in the record that could have provided Respondent with a subjective good faith belief in the claim.

[12] The cases referenced involved a parent's liability for an emancipated adult child driving a non-owned vehicle.

Even if subjective good faith was relevant, which it is not, as pointed out in pages 32 through 40 of Petitioner's Brief, the "evidence" upon which the trial court relied to find that Respondent had a good faith belief in her claims was either an incorrect statement of the law or factual findings completely unsupported by the record. Space precludes articulating each and every one of those unsubstantiated facts, but, by way of example, this Court should consider the following.

The trial court cites S. C. Code § 56-1-10(3) for the proposition that, despite his failure to have title, Petitioner was, in fact, the "owner" of his son's vehicle because he was entitled to the "use and possession" of it. (Order, R. p. 55)

Not only was there not one shred of evidence or legal basis to conclude that Petitioner "was entitled" to use or possess his adult son's automobile, the trial court incorrectly paraphrased the statute on which it relied for this finding.

The statute actually provides that:

> (3) "**Owner" means a person**, other than a lienholder, **having the property or title** to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security.

Accordingly, the statute relied upon by the trial court provides just the opposite of its finding. The owner of a vehicle is the one who has title to it – in this case Elliott and not Petitioner - except in instances in which title is held by another as security for a loan – which is irrelevant in this case.

The insurance policy upon which the trial court relied as evidence that Petitioner was the owner of his son's car is not in the record and the trial court's conclusion, based on that insurance policy, that Petitioner "represented" that he was the true owner of his son's automobile is completely without a factual or legal basis. What is in the record with respect to Petitioner's interaction with his insurer is consistent with the otherwise undisputed fact that Petitioner's son owned the automobile involved in the accident. The Affidavit of Salvage (R. p. 707) relied upon by the trial court as Petitioner's "representation" that he owned his son's vehicle, identifies **Elliott Lambrecht** – not Petitioner – as the owner of the vehicle and was signed by Petitioner under oath.

At page 11-12 of its Order denying sanctions, (R. p. 57 – 58), completely contrary to its finding on summary judgment, the trial court held that Petitioner had "physical control over the vehicle itself, as it was normally kept at his house". However, the record demonstrates that Elliott's automobile was parked at Petitioner's home for only two to three weeks when Elliott was not driving it. (R. p. 714, line 16 – R. p. 715, line 10). After that period, the vehicle was picked up by Elliott's sister with Elliott's permission, and then parked in the driveway of her home until Elliott picked it up on the day of the accident. (R. p. 207; R. p. 19; R. p. 673, line 21 – R. p. 674, line 25). There is no factual or legal basis for concluding that the owner of property upon which a vehicle owned by another is temporarily parked has the right to control its use.

Directly contrary to the trial court's summary judgment finding that Petitioner had no control over his son's vehicle, in denying sanctions, the trial court found that "Elliott needed the Defendant's permission for the use of the Mazda" and that the only reasonable conclusion from that fact was that "the Defendant was the one who either owned or controlled the use of he Mazda". (R. p. 56 – 57)

Each witness who testified on this point stated that it was Elliott and not Petitioner who decided who could use the vehicle and it was Elliott's permission and not Petitioner's that was required. R. p. 746, lines 17 - 22 (Anna); R. p. 728, lines 10 - 15 (Douglas); R. p. 673, lines 9 – 20; R. p. 705, line 25 – 706, line 23 (Elliott). There was no evidence to the contrary.

This Court should grant Certiorari to evaluate the propriety of sanctions based upon the actual record in this proceeding evaluated under the proper standard.

5. THE CONCEPT OF "COMBINING AND CONCURRING NEGLIGENCE" IS NOT APPLICABLE WITHOUT A NEGLIGENT ACT COMMITTED BY PETITIONER.

In the trial court's Order, it bases its findings on the theory of "combining and concurring negligence" and references S.C. Code § 56-1-480 which makes it unlawful for a person to "authorize" or "knowingly permit" a vehicle "owned" by him or "under his control" to be driven by a person not authorized to do so or in "violation" of the motor vehicle statute.

This statute is clearly inapplicable since Petitioner neither owned nor controlled his adult son's automobile. Accordingly, he could not have violated the statute. Without a negligent act by Petitioner, a theory of "combining and concurring negligence" is completely irrelevant to Petitioner's liability for his son's accident.

6. *GADSON V. ECHO SERVICES OF SOUTH CAROLINA*, 374 S. C. 171, 648 S. E. 2d 558 (2007) IS IRRELEVANT TO WHETHER RESPONDENT'S CLAIMS ARE FRIVOLOUS.

In its Order, the trial court found that *Gadson v. Echo Services of South Carolina, Inc.*, 374 S. C. 171, 648 S. E. 2d 558 (2007), changed the law in South Carolina and suggested that, but for that change, the Respondent had a viable negligent entrustment claim. *Gadson* is simply irrelevant.

Any negligent entrustment case must be based upon the defendant's ownership or legal right to control the vehicle involved in the accident. *Gadson* only dealt with whether negligent entrustment liability could be based on entrusting to a person who, for any reason, posed a danger to others, or whether it was limited to entrusting to one under the influence of alcohol. Since Petitioner neither owned nor controlled the use of his son's vehicle, and since alcohol was never alleged to be a factor in the accident, *Gadson* was irrelevant. No matter which way the *Gadson* issue was resolved, Petitioner had no liability under a negligent entrustment claim.

CONCLUSION

The Petitioner was required for more than four years to incur the time and expense of defending claims which were found by the trial court to have no legal or factual basis and for which summary judgment was granted. This Court, in the *USAA* case, agreed that the Petitioner could have no liability for the consequences of his adult son's automobile accident in which he was driving his own car and yet, sanctions were denied.

In the remand of this case, the Court of Appeals directed the trial court to make a detailed analysis of the record under the objective reasonable attorney standards of the FCPSA and Rule 11. Instead of performing that analysis, the trial court based its denial of sanctions, for the second time, on the erroneous subjective good faith standard. To reach its conclusion, the trial court revisited the merits of the Respondent's claims based on irrelevant facts or those not found in the record, and simply reversed its prior findings and conclusions. That result cannot be reconciled with the trial court's conclusion on summary judgment that "[t]here is no evidence which could reasonably being (sic) construed by a jury that [Douglas] either owned the vehicle in question at the time of the accident or had control over it which would support a negligent entrustment cause of action."

When it adopted the trial court's Order without further analysis, the Court of Appeals perpetuated that error. This Court should grant Certiorari to clearly articulate to litigants and attorneys the circumstances and findings which distinguish a frivolous claim from one with sufficient merit to avoid the imposition of sanctions under the current version of the FCPSA and Rule 11 and to correct the inconsistency between this Court's previous findings and the ruling of the Court of Appeals.

DOUGLAS A. LAMBRECHT, Petitioner

By John E. North, Jr.
John E. North, Jr.
North & Black, P.C.
Regions Bank Building
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)

Attorney for the Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Roger M. Young, Presiding Judge

Case Nos. 2006 CP-07-1125
2006 CP-07-1126

Deborah J. Clegg, as Personal Representative of the
Estate of Allison Clegg, ...Respondent,

v.

Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker,
Jan Horan, and Anna C. Lambrecht, ...Defendants,

Of Whom Douglas A. Lambrecht is the ....Appellant.

PROOF OF SERVICE

I certify that I served a copy of the Petition for Writ of Certiorari by first class U.S. Mail, postage prepaid, on the attorney for the Respondent, H. Fred Kuhn, Jr., 1501 North Street, PO Drawer 507, Beaufort, SC 29901 and upon Jenny Abbott Kitchings, Clerk of the SC Court of Appeals, PO Box 11629, 1015 Sumter Street, Columbia, SC 29211 on the 29th day of June, 2012.

John E. North, Jr.

John E. North, Jr.
North & Black, P.C.
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)

Attorney for Petitioner

NORTH & BLACK, P.C.
Attorneys at Law
Regions Bank Building
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel) (843) 379-0900 (fax)

June 29, 2012

RECEIVED
JUL 02 2012
S.C. Supreme Court

Ms. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
1015 Sumter Street
Columbia, SC 29211

Re: Clegg, Deborah, Respondent, v. Lambrecht, (Douglas), Appellant
Case Nos. 2006-CP-07-1125 and 1126
Case Tracking #: 2010175326

Dear Ms. Kitchings:

Enclosed please find two copies of the Petition for Writ of Certiorari filed in the above reverenced action, together with two copies of a Proof of Service with regard to same.

Please see that these materials are filed and a time stamped copy returned to us in the enclosed postage prepaid envelope.

Thank you for your assistance.

Very truly yours,

J North

John E. North, Jr.

JEN/p
c: Daniel E. Shearouse, Clerk
H. Fred Kuhn, Jr.

NORTH & BLACK, P.C.
Attorneys at Law
Regions Bank Building
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel) (843) 379-0900 (fax)

June 29, 2012

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
1231 Gervais Street
Columbia, SC 29211

RECEIVED
JUL 02 2012
S.C. Supreme Court

Re: Clegg, Deborah, Respondent, v. Lambrecht, (Douglas), Appellant
Case Nos. 2006-CP-07-1125 and 1126
Case Tracking #: 2010175326

Dear Mr. Shearouse:

Enclosed please relative to the above-referenced action an original and seven copies of Petition for Writ of Certiorari, two copies of the Appendix relevant to same, Proof of Service, and our check for the filing fee in the amount of $100.

Please see that these materials are filed and a time stamped copy of the Petition and Proof of Service returned to me in the enclosed, postage prepaid envelope.

Thank you for your assistance.

Very truly yours,

JNorth

John E. North, Jr.

Check# 1029
$100.00
COA# 2010-175326

JEN/p
c: H. Fred Kuhn, Jr.
Ms. Jenny Abbott Kitchings, Clerk, SC Court of Appeals

The Supreme Court of South Carolina

John E. North, Jr.
Regions Bank Bldg.
916 Bay Street, Ste. 100
Beaufort SC 29902

07/02/2012

RECEIPT #64747

Case No:	2012-212374
Case Short Title:	Clegg, Deborah v. Lambrecht, Elliot(3)
Event:	
Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	1029
Check/Money Order Date:	06/28/2012
Comments:	CLEGG, DEBORAH V. LAMBRECHT,(DOUGLAS)