RECEIVED
May 12 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge
Dale E. Van Slambrook, Circuit Court Judge
Jessica A. Salvini, Circuit Court Judge
Case No.: 2021-CP-10-03379

---

Appellate Case No. 2025-001304

---

Carolina Neurosurgery & Orthopedics, Inc., ..............................Appellant/Respondent

v.

Michael A. Maucher, Esq. and DeLuca & Maucher, LLP, .... Respondents/Appellants.

---

**FINAL APPELLANTS' BRIEF
OF RESPONDENTS/APPELLANTS**

---

Douglas W. MacKelcan, Esq.
Skyler C. Wilson, Esq.
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Ph: (843) 727-0307
*Attorneys for Respondents/Appellants*

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ... iii

**STATEMENT OF ISSUES** ... 1

**STATEMENT OF THE CASE** ... 1

**STATEMENT OF FACTS** ... 2

**STANDARD OF REVIEW** ... 7

**ARGUMENT** ... 8

**I. This Court should find the circuit court erred in refusing to make findings of fact and conclusions of law when deciding the motion for sanctions because the Act's language is mandatory and findings and conclusions ensure the Court of Appeals can perform its review function** ... 8

**II. This Court should find its own facts and award as a sanction D&M's reasonable attorney's fees and costs because the preponderance of the evidence establishes that at multiple stages of this litigation Carolina Neurosurgery advanced frivolous claims, tried to change allegations to bypass relevant testimony and documents to prolong litigation, and its ultimate claims were found lacking on basic elements** ... 11

**A. The majority of Carolina Neurosurgery's verified original complaint was frivolous because many of the claims were clearly not supported by the facts Dr. Highsmith swore were true** ... 15

**i. Carolina Neurosurgery's negligence claim was clearly not supported by the facts alleged** ... 15

**ii. Carolina Neurosurgery's fraud claims were clearly not supported by the facts alleged** ... 16

**iii. Carolina Neurosurgery's unjust enrichment claim was clearly not supported by the facts alleged** ... 18

**B. Carolina Neurosurgery engaged in litigation tactics not to obtain a determination on the merits, but solely to survive dispositive motions, unnecessarily prolong the case, and the remaining claims were without merit** ... 19

**i. Carolina Neurosurgery's changed allegations contrary to prior sworn representations and testimony warrant imposing sanctions because they indicate the purpose was other than obtaining a determination on the merits of the claims** ... 19

**ii. Carolina Neurosurgery continued to assert that representations about insurance coverage were false despite the insurer, One Beacon, finding that Client was covered and paying Carolina Neurosurgery an amount for each of the services charged to Client** ............................................22

**iii. Carolina Neurosurgery asserted a frivolous claim for attorney's fees for litigating against another person contrary to their representation to the court and a straightforward interpretation of SCUTPA** ...............24

**iv. Carolina Neurosurgery's last, altered claims were manifestly without merit, as determined by the court on summary judgment** ..................26

**C. This Court should award D&M its reasonable attorneys' fees and costs incurred in litigating the case** ..................................................................29

**III. Only if this Court reverses either the Dismissal Order or Summary Judgment Order, this Court should reverse the lower court's order refusing to strike Carolina Neurosurgery's Second Amended Complaint because the pleading was filed without leave or consent.** ........................................................................30

**CONCLUSION** ........................................................................................................34

## TABLE OF AUTHORITIES

### Cases

*Ardis v. Cox*,
314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993)....................16

*Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*,
388 S.C. 394, 697 S.E.2d 551 (2010)....................15

*Church v. McGee*,
391 S.C. 334, 705 S.E.2d 481 (Ct. App. 2011)....................10

*Collins v. Doe*,
352 S.C. 462, 574 S.E.2d 739 (2002)....................8

*Commercial Credit Loans, Inc. v. Riddle*,
334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999)....................12

*Ellis v. Smith Grading & Paving, Inc.*,
294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988)....................18

*Father v. S.C. Dep't of Soc. Servs.*,
345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001)....................13

*Fontaine v. Peitz*,
291 S.C. 536, 354 S.E.2d 565 (1987)....................7

*Glasscock v. Glasscock*,
304 S.C. 158, 403 S.E.2d 313 (1991)....................30

*Harbin v. Blair*,
2019 WL 13129354 (S.C. Com. Pl. October 9, 2019)....................16

*Harbin v. Blair*,
2022 WL 2826361 (S.C. Ct. App. filed July 20, 2022)....................16

*Holmes v. East Cooper Community Hosp., Inc.*,
408 S.C. 138, 758 S.E.2d 483 (2014)....................14

*Johnston v. S.C. Dep't of Lab., Licensing, & Regul.*,
365 S.C. 293, 617 S.E.2d 363 (2005)....................8

*Koulpasis v. State Farm Fire & Cas. Co.*,
2020 WL 3548809 (D.S.C. June 30, 2020) ....................................................................32

*Labruce v. City of N. Charleston*,
268 S.C. 465, 234 S.E.2d 866 (1977) ....................................................................11

*O'Reilly Plumbing & Constr., Inc. v. Lionsgate Disaster Relief, LLC*,
2020 WL 6393902 (D.V.I. Nov. 2, 2020)....................................................................32

*Patton v. Miller*,
420 S.C. 471, 804 S.E.2d 252 (2017) ....................................................................31

*Robinson v. Code*,
384 S.C. 582, 682 S.E.2d 495 (Ct. App. 2009)....................................................................7

*Russell v. Wachovia Bank, N.A.*,
370 S.C. 5, 633 S.E.2d 722 (2006) ....................................................................22

*Sellers v. Nicholls*,
432 S.C. 101, 851 S.E.2d 54 (Ct. App. 2020)....................................................................7

*Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.*,
394 S.C. 97, 713 S.E.2d 650 (Ct. App. 2011)....................................................................7, 9

*Skipper v. Perrone*,
382 S.C. 53, 674 S.E.2d 510 (Ct. App. 2009)....................................................................11

*Skydive Myrtle Beach, Inc., v. Horry County*,
426 S.C. 175, 826 S.E.2d 585 (2019) ....................................................................31

*Sloan v. Friends of Hunley, Inc.*,
369 S.C. 20, 630 S.E.2d 474 (2006) ....................................................................31

*Spreeuw v. Barker*,
385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009)....................................................................12

*United States ex rel. Mathews v. Healthsouth Corp.*,
332 F.3d 293 (5th Cir. 2003) ....................................................................32

*Woodson v. DLI Properties, LLC*,
406 S.C. 517, 753 S.E.2d 428 (2014) ....................................................................10

**Statutes and Rules**


S.C. Const. art. V, § 5 .......... 10

S.C. Code Ann. § 15-36-10(C)(1) .......... *passim*

S.C. Code Ann. § 15-36-10(D) .......... 11

S.C. Code Ann. § 15-36-10(E) .......... 8, 12, 14

S.C. Code Ann. § 15-36-10(G)(1) .......... 29

S.C. Code Ann. § 15-36-10(H) .......... 9

S.C. Code Ann. § 15-36-10(I) .......... 8

S.C. Code Ann. § 39-5-140 .......... 25

Rule 1, SCRCP .......... 33

Rule 7(a), SCRCP .......... 31

Rule 9(b), SCRCP .......... 16

Rule 11(a), SCRCP .......... *passim*

Rule 11(c) SCRCP .......... *passim*

Rule 15, FRCP (Comm. Notes – 2009 Amd.) .......... 31, 32

Rule 15(a), SCRCP .......... 21, 22, 31

Rule 52(a), SCRCP. .......... 9


**Other**


6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 1483 (3d ed. 2010) .......... 32

## STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in refusing to make findings of fact or conclusions of law on the motion for sanctions when the Act's language is mandatory on what the Court must consider and findings facilitate the appellate review?

II. Did the Circuit Court err in denying sanctions, and should this Court award D&M's requested sanctions, when Carolina Neurosurgery advanced frivolous claims no reasonable attorney would believe were warranted, changed allegations to delay the case and avoid detrimental evidence, and the claims were essentially found meritless?

III. If this Court reverses either the order granting summary judgment or the order granting the motion to dismiss, should this Court also reverse the lower court's order denying D&M's motion to strike an amended pleading when that pleading was filed without consent or leave of court?

## STATEMENT OF THE CASE

For nearly four years, Appellant/Respondent Carolina Neurosurgery, a medical practice owned and operated by Jason Highsmith, M.D., has pursued numerous baseless claims trying to force a law firm and lawyer to pay for a shared client's medical costs totaling more than $125,000. Carolina Neurosurgery also sued the client—who an attorney in Respondents/Appellants' office represented pro bono—abandoning that case on the eve of trial and then asserting as damages against the law firm and lawyer Carolina Neurosurgery's approximate $90,000 of attorney's fees incurred in its failed suit against the client.

Thankfully, the lower courts realized the claims were without merit, dismissing the majority on motion to dismiss and the remainder at summary judgment on the most basic aspects. Nevertheless, Respondents/Appellants were required to defend themselves and incurred over $100,000 in attorney's fees and costs. Carolina Neurosurgery should have been made to pay those costs for pursuing frivolous claims under Rule 11, SCRCP, and Section 15-36-10 of the South Carolina Code, but the circuit court denied the request without any findings or an opposing

response. This Court should reverse the circuit court, find its own facts, and award sanctions against Carolina Neurosurgery.

## STATEMENT OF FACTS

Client was injured in a car accident on December 14, 2018. Shortly thereafter, he retained attorney Mike Maucher and the law firm DeLuca & Maucher (collectively, D&M) to pursue claims against the at-fault driver. Before the accident, Client was a patient of Dr. Highsmith. Client chose to return to Dr. Highsmith to treat the injuries he sustained in the car accident.

At the behest of Carolina Neurosurgery, D&M sent Carolina Neurosurgery a letter of protection on December 20, 2018, that stated:

> Please accept this correspondence as our Law Firm's agreement to protect any claim which you may have out of any settlement proceeds we may receive arising out of the incident referred to above. The above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding balance.

**R. p. 1111**.

Dr. Highsmith began treating Client for the car-accident injuries on January 2, 2019. **R. p. 1113**. On January 3, 2019, Client executed Carolina Neurosurgery's Financial Policy. **R. p. 1114**. Under the section entitled "If you have insurance," the Financial Policy provides that Carolina Neurosurgery "will file with [the patient's] primary insurance." **R. p. 1114**. The Financial Policy also provides that the patient may be responsible for all of part of the balance not paid by the insurance company. **R. p. 1114**. At the time, Client had primary health insurance through Blue Cross/Blue Shield. **R. p. 1119**.

On January 21, 2019, Tina Bennett, a paralegal with D&M, responded to an inquiry from Kiara Goodwine, Carolina Neurosurgery's employee, regarding the "limits" for Client, explaining the at-fault carrier was from North Carolina and would not disclose policy limits without a medical

authorization, and they were unable to discover how much liability coverage the at-fault driver had. **R. p. 1116**. However, Bennett informed Goodwine that Client had $100,000 in UIM coverage on a Safeco Policy and carried $1,000,000 in "Occupational Accident Coverage" on a One Beacon policy. **R. p. 1116**.

Hours later the same day, Bennett emailed Goodwine and explained Client advised her that he required surgery. **R. p. 1115**. As a result, Bennett requested all of Client's treatment be filed with his private health insurance company. Further, that it "would be best for everyone involved if we NOT do the treatment under an Assignment/Letter of Protection." **R. p. 1115**. Goodwine responded, "Okay thanks for the update." **R. p. 1115**.

On March 7, 2019, D&M sent a revised Letter of Protection to Carolina Neurosurgery, stating:

> Please accept this correspondence as our Law Firm's agreement to protect any portion of your bill not paid by private health insurance out of any settlement proceeds we may receive arising out of the incident referred to above. The above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding balance.

**R. p. 1118**. That same day, Client completed a Health Insurance Verification form for his upcoming surgery, providing Carolina Neurosurgery with his BlueCross/BlueShield insurance information and the document was signed by Goodwine. **R. p. 1119.**

Dr. Highsmith performed Client's first surgery on March 15, 2019 (First Surgery) and charged Client $58,697.41. **R. p. 1113**. For the First Surgery, Carolina Neurosurgery did not submit any bills to BlueCross/BlueShield, despite the language in the Letter of Protection and Client providing his insurance information. **R. p. 1121**.

As Client's personal injury case developed, it was determined that: (1) the at-fault driver did not have sufficient insurance coverage to fully cover Client's medical treatment; (2) one of

Client's other additional policies was inapplicable; and (3) the other additional policy was subject to subrogation and only applicable after Client's primary private health insurance had been exhausted.

On April 29, 2019, D&M notified Carolina Neurosurgery via email of the foregoing issues, stating:

> Because the at-fault party only had $30,000.00 and [Client's] Underinsured Motorist Coverage does not apply, **ALL of the treatment [Client] has received (and will continue to receive) must be filed under his private health insurance.** We cannot honor anymore treatment under a Letter of Protection. Please note [Client] file accordingly.

**R. p. 1120**. (emphasis in original).

On May 2, 2019, Dr. Highsmith performed additional surgery on Client, charging him an additional $62,451.87 (Second Surgery). **R. p. 1113**. In total, Carolina Neurosurgery charged Client $125,409.28. **R. p. 1113**. Despite receiving explicit instructions regarding claim submission and payment on several occasions prior to both surgeries, Carolina Neurosurgery did not file claims with Client's private health insurance. On January 3, 2020, Bennett wrote Goodwine and reminded her of the Letters of Protection and that it appeared Client's health insurance did not pay any of Carolina Neurosurgery's bills. **R. p. 1121**. Bennett explained the recovery, being only $30,000, was insufficient to pay the medical bills and they needed to discuss how to allocate that amount amongst everyone. **R. p. 1121**.

Because Client has been unable to pay for Carolina Neurosurgery's services, Carolina Neurosurgery initiated a debt collection action against him on May 21, 2021.[1] But Carolina Neurosurgery simultaneously demanded D&M pay for Client's medical bills. D&M attempted to

[1] *Carolina Neurosurgery and Orthopedics, Inc. v. Demaskey*, 2021-CP-08-01088.

tender payment to Carolina Neurosurgery out of the settlement proceeds they received, and Carolina Neurosurgery refused it. **R. p. 1121**.

*Lawsuit*

Carolina Neurosurgery sued D&M on July 22, 2021, asserting claims for (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) violation of the S.C. Unfair Trade Practice Act; (4) fraud; (5) constructive fraud; (6) unjust enrichment; and (7) negligence.

D&M moved to dismiss Carolina Neurosurgery's claims, which was granted in part, and the only remaining claims were for (1) breach of contract and (2) violation of the SC Unfair Trade Practice Act. **R. pp. 1122**. That order made numerous findings of fact and conclusions of law that Carolina Neurosurgery opted not to immediately appeal. **R. pp. 1122-37**. After significant written discovery and multiple depositions, D&M moved for summary judgment on August 22, 2023, asking the court to grant judgment based on the pleadings and discovery up to that date. **R. p. 175**.

Two weeks later, in an obvious effort to avoid summary judgment, Carolina Neurosurgery moved to amend the complaint to change the theories of recovery and add two claims: negligent misrepresentation and promissory estoppel. **R. p. 177**. Carolina Neurosurgery asked the court to approve it filing a specific proposed amended complaint. **R. p. 177**. Over D&M's objections, the court granted leave to amend. **R. p. 306; R. p. 35**. Rather than filing the proposed amended complaint, however, Carolina Neurosurgery filed an altered version from what the court approved that meaningfully changed the allegations. **R. p. 653**. D&M raised the error to Carolina Neurosurgery's counsel, who withdrew the improperly filed amended complaint and filed the one the court authorized. **R. pp. 662-76**. But in violation of Rule 15, Carolina Neurosurgery filed a second amended complaint with the changed allegations. **R. p. 677**. D&M moved to strike the pleading, which the court declined without explanation. **R. p. 37**.

Notably, despite amending the complaint multiple times, Carolina Neurosurgery always maintained that representations about the One Beacon coverage were false. However, in July 2023, Carolina Neurosurgery submitted Clients' full medical bills to One Beacon for payment. **R. p. 1218**. That same month, One Beacon issued an Explanation of Benefits explicitly stating that the Client was covered under the policy, and issued a check to Carolina Neurosurgery paying a sum for each of the services Carolina Neurosurgery rendered Client, albeit far less than the total medical bills. **R. pp. 1218-26**. Carolina Neurosurgery continued to allege D&M falsely represented Client was covered under the One Beacon policy even after One Beacon sent its Explanation of Benefits and check.

Because Carolina Neurosurgery's allegations changed throughout litigation, D&M had to change their motion for summary judgment three times before the court ruled on the motion, the last of which was filed March 25, 2025. After a hearing, Judge Salvini granted D&M summary judgment and dismissed Carolina Neurosurgery's claims by formal order on May 2, 2025. **R. pp. 1139-58**.

Importantly, the court found that many of Carolina Neurosurgery's allegations were preempted by the court's prior order granting D&M's motion to dismiss, that there was no contract between Carolina Neurosurgery and D&M whereby D&M would be obligated to pay Client's medical bills, and that D&M were not engaged in trade or commerce with Carolina Neurosurgery to sustain a SCUTPA claim. **R. pp. 1148-53**.

Considering Carolina Neurosurgery's meritless and shifting allegations through litigation and the findings in the court's orders on the motion to dismiss and motion for summary judgment, D&M moved for sanctions under section 15-36-10 of the South Carolina Code and Rule 11, SCRCP, asking the court order Carolina Neurosurgery to pay D&M's $114,757.50 in attorney's

fees and cost. **R. p. 1089**. Carolina Neurosurgery did not respond to the motion and the court did not hold a hearing. Yet the court denied the motion. **R. p. 75**. D&M asked the court to reconsider, hold a hearing, and order sanctions. **R. p. 1252**. Carolina Neurosurgery replied to the motion for reconsideration and the court denied the motion. **R. p. 1259; R. p. 80**. D&M timely appealed the rulings. **R. p. 1268**.

## STANDARD OF REVIEW

The decision to impose sanctions under the Frivolous Civil Proceedings Sanctions Act (the Act) and under Rule 11, SCRCP, sounds in equity. *Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). "In an action in equity tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *Id.* If the appellate court agrees with the lower court's findings of fact, it reviews the decision for an abuse of discretion and the decision on sanctions will not be disturbed unless controlled by an error of law or unsupported factual findings. *Id.*, 713 S.E.2d at 654.

A court's decision on a motion to strike will not be reversed on appeal unless there was an abuse of discretion or an error of law. *See Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009). A failure to exercise discretion is an abuse of discretion. *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020); *see Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.").

## ARGUMENT

**I. This Court should find the circuit court erred in refusing to make findings of fact and conclusions of law when deciding the motion for sanctions because the Act's language is mandatory and findings and conclusions ensure the court of appeals can perform its review function.**

A statute using clear and unambiguous language need not be interpreted, but must be applied according to its literal meaning and the court shall not impose another meaning. *Collins v. Doe*, 352 S.C. 462, 465-66, 574 S.E.2d 739, 740-41 (2002). A statute using terms like "shall" and "must" imposes a mandatory requirement. *See id.* at 470, 574 S.E.2d at 743 (finding section 38-77-170's use of "must" in multiple sentences imposed a mandatory requirement the plaintiff file a sufficient witness affidavit); *see also Johnston v. S.C. Dep't of Lab., Licensing, & Regul.*, 365 S.C. 293, 296, 617 S.E.2d 363, 364 (2005) (finding the statute stating the board of real estate appraisers "shall render a decision and *shall serve* notice, in writing within thirty days, of the board's decision" required the board to serve notice of its decision within thirty days of its ruling).

Here, the Act uses mandatory language outlining that the court "shall proceed to determine if the claim or defense frivolous" and, when making that determination, "shall take into account" seven factors. S.C. Code Ann. § 15-36-10(C)(1) & (E). Considering the mandatory language outlining specific factors and requiring the court to "proceed to determine", it follows that the court should be required to outline its findings of facts and conclusions of law on motions under the Act. Without the hearing, it is difficult to discern if the court actually considered whether a claim or defense was frivolous, or the mandatory seven factors. The court's order does not describe the court's reasoning, stating "After reviewing the motion and the record, the Court declines to hold a hearing. Defendants' Motion for Sanctions is denied." **R. p. 68**.

Admittedly, the Act states that it "shall not alter the South Carolina Rules of Civil Procedure." S.C. Code Ann. § 15-36-10(I). And Rule 52(a) states that courts are not required to

issue findings of fact or conclusions of law on most motions. *See* Rule 52(a), SCRCP. However, the Act and Rule 52(a) should not be read to absolve the circuit court of failing to make findings of fact and conclusions of law because (1) the language of the Act conflicts with Rule 52(a), and (2) requiring findings of fact and conclusions of law facilitates appellate review.

First, the language of Rule 52(a) and the Act conflict on "findings." Rule 52(a) states findings are not required for decisions on motions, i.e., regardless of whether that decision grants or denies the motion. The Act does not explicitly state the court must make findings of fact or conclusions of law in making a decision. However, the Act does state that if the court imposes sanctions on an attorney, "the court shall report its findings to the South Carolina Commission on Lawyer Conduct." S.C. Code Ann. § 15-36-10(H). The Act, therefore, imposes a requirement of written findings if sanctions are awarded against an attorney. If Rule 52(a)'s plain language is applied, then it conflicts with the Act because Rule 52(a) does not require findings if a decision grants a motion, but the Act does require findings if the court grants a motion for sanctions against an attorney. This conflict must be resolved in favor of the more specific language of the Act.

But further, the court should be required to make findings when denying a motion under the Act. An unequal findings requirement dependent on the decision encourages courts to make the decision that is less burdensome on the court. If applied in this scenario, that encourages courts to deny motions for sanctions because they would be permitted to do so without a hearing and without preparing a detailed order, where to grant sanctions would require a detailed order.

Second, the standard of review for decisions on sanctions presupposes a circuit court making findings. *See Site Prep, L.L.C.*, 394 S.C. at 104, 713 S.E.2d at 654 (stating the court reviews a decision on sanctions for an abuse of discretion if it agrees with the circuit court's findings). In fact, because decisions on sanctions are equitable, the South Carolina Constitution

likewise presupposes findings of fact and law by the circuit court to facilitate review. *See* S.C. Const. art. V, § 5 ("The Court shall have appellate jurisdiction only in cases of equity, and in such appeals they shall review the findings of fact as well as the law. . . ."). On appeal of a decision denying sanctions without any findings, there is functionally no "review" for the appellate court to conduct without speculating on the circuit court's reasoning.

Moreover, our courts generally agree that it is better practice, and more common, for circuit courts to articulate findings and conclusions, which is better for the judicial process. *See Woodson v. DLI Properties, LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). This policy is reflected in Rule 52(a)'s requirement of findings and conclusions in "actions tried upon the facts without a jury", and courts holding under that requirement that findings must be must be sufficient "to ensure the law is faithfully executed below." *See Church v. McGee*, 391 S.C. 334, 346, 705 S.E.2d 481, 487 (Ct. App. 2011) (quoting *In re Treatment of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002)). Therefore, requiring findings of fact and conclusions of law for equitable decisions on motions for sanctions facilitates the appellate process, comports with the State's Constitution, and is the better practice for circuit courts.

In sum, this Court should determine that findings of fact and conclusions of law are required on decisions on motions for sanctions under the Act because the Act requires the court to consider specific factors, requires findings if sanctions are awarded against an attorney contrary to straightforward application of Rule 52(a), and findings of fact and conclusions of law align with the constitutionally-based review standard presupposing the circuit court making findings.

Ultimately, given the applicable standard of review and despite the circuit court erring on failing to make findings, this Court should rule on the issue for the benefit of the bench and bar without remanding, and proceed to find its own facts out of judicial efficiency.

## II. This Court should find its own facts and award as a sanction D&M's reasonable attorney's fees and costs because the preponderance of the evidence establishes that at multiple stages of this litigation Carolina Neurosurgery advanced frivolous claims, tried to change allegations to bypass relevant testimony and documents to prolong litigation, and its ultimate claims were found lacking on basic elements.

As a threshold matter, this Court should find that Carolina Neurosurgery waived contesting the motion for sanctions under the Act. "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Skipper v. Perrone*, 382 S.C. 53, 62, 674 S.E.2d 510, 514 (Ct. App. 2009). "It may be expressed or implied by a party's conduct." *Id.* Litigants are charged with knowledge of the law. *See Labruce v. City of N. Charleston*, 268 S.C. 465, 467, 234 S.E.2d 866, 867 (1977). Here, the Act is clear that after receiving notice of allegations the party's conduct that violates the Act, the person accused has 30 days within which to respond:

> (D) A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. **A** court or **party proposing a sanction** pursuant to this section **shall notify the court and all parties of the conduct constituting a violation** of the provisions of this section **and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant** who allegedly violated subsection (A)(4) **has thirty days to respond to the allegations** as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.

S.C. Code Ann. § 15-36-10(D) (emphases added). Carolina Neurosurgery was notified of the conduct constituting a violation and the basis for the sanction when D&M filed its motion for sanctions on May 12, 2025. **R. p. 1089**. Under the terms of the statute, Carolina Neurosurgery had until June 11, 2025, to respond. Carolina Neurosurgery did not respond to the motion within 30 days, and the Court denied the motion on June 18, 2025. **R. p. 68**. By not responding and presumably knowing of the right to respond within 30 days, Carolina Neurosurgery waived its right to respond to the Motion for Sanctions. Accordingly, even without a hearing, the circuit court

should have found that Carolina Neurosurgery's conduct as detailed in the motion for sanctions violated the Act, awarding D&M the relief requested in the motion.

Even if the failure to respond to the motion for sanctions is not a waiver, this Court should not consider the arguments Carolina Neurosurgery raised in response to D&M's motion for reconsideration of the June 18, 2025 Order. A party cannot use Rule 59(e) as vehicle to submit evidence/arguments to a court that the court did not consider when ruling on the motion that is being asked to be reconsidered. *See Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); *see also Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (finding a financial form attached to a Rule 59(e) motion and not previously submitted could not be considered on appeal). Carolina Neurosurgery did not offer any mitigating arguments or evidence in response to the motion for sanctions, but instead responded to the motion to reconsider the order denying the motion for sanctions. Under our preservation rules, it would be improper for this Court to consider that response when reviewing the circuit court's order denying sanctions. This is especially true because the Act requires when ruling on a motion for sanctions that the circuit court consider the response from the party against whom sanctions are requested. S.C. Code Ann. § 15-36-10(E)(6). Thus, at the very least, this Court should not consider whatever response Carolina Neurosurgery submitted in opposition to the request for sanctions when finding its own facts.

Turning to the merits, sanctions should be awarded because the preponderance of the evidence shows Carolina Neurosurgery advanced frivolous claims and arguments, attempted to change allegations to bypass relevant evidence and unnecessarily prolong litigation, and no reasonable attorney would believe there were grounds for such arguments.

After summary judgment, "upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous." S.C. Code Ann. § 15-36-10(C)(1). An attorney or party must be sanctioned for a frivolous claim if the court finds that attorney or party did not comply with any of the following conditions:

> (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;
>
> . . . .
>
> (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.

§ 15-36-10(C)(1)(a) & (c). Under Rule 11(a), SCRCP, when a party signs a pleading, motion or other paper, the signature is a certificate that he has read it and "to the best of his knowledge, information and belief, there is a good ground to support it." When something is signed in violation of the rule, the court "may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party" a reasonable attorney's fee. Rule 11(a), SCRCP. Also relevant, a verification is a sworn written statement that the party signing it swears "the facts stated to be true of his own knowledge, except to those matters stated on information or belief." Rule 11(c), SCRCP. Nevertheless, the "criteria for Rule 11 sanctions are essentially the same as those for sanctions under the" Act. *Father v. S.C. Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001).

When determining whether a party or attorney violated the Act, the court must consider:

> (1) the number of parties;
> (2) the complexity of the claims and defenses;

(3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
(4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
(5) previous violations of the provisions of this section;
(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
(7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)-(7); *see Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 166, 758 S.E.2d 483, 498 (2014) (citing the Act and outlining the factors relevant to determining sanctions).

Pursuant to these above factors, sanctions are warranted against Carolina Neurosurgery. D&M addresses the general factors first, then specific instances of conduct that violated the Act and Rule 11.

For (1), this case had only three parties, and two of those were a law firm and attorney who are functional equivalents (D&M). It is not as though it involved a complex web of parties or unknown parties that made allegations or attribution difficult to ascertain prior to bringing the action. For (2), Carolina Neurosurgery's claims, although numerous and shifting, were not complex, and neither were the defenses. The claims were based on two short Letters of Protection and a few emails between the staff of the parties that clearly outlined D&M's involvement and statements about insurance. Considering the simplicity of the facts involved, the frivolity of the claims is more striking. For (3), Carolina Neurosurgery and the parties have had nearly 4 years of litigation to determine any violations of (A)(4), and D&M included as an affirmative defense the FCPSA in their answers. For (4), Carolina Neurosurgery had all the information on which it based its complaint from the very beginning—the letters and emails. Thus, no information was needed to be uncovered in discovery that changed the allegations. Yet Carolina Neurosurgery continued

to insist on litigation and change its verified allegations to maintain the claims. For (5), D&M is unaware of whether Carolina Neurosurgery previously violated the Act. For (6), Carolina Neurosurgery did not respond to the motion for sanctions. For (7), D&M otherwise outlines below the various other factors favoring a decision imposing sanctions.

### A. The majority of Carolina Neurosurgery's verified original complaint was frivolous because many of the claims were clearly not supported by the facts Dr. Highsmith swore were true.

Carolina Neurosurgery's original complaint, filed on July 22, 2021, asserted claims for (1) breach of contract; (2) breach of contract accompanied by a fraudulent act; (3) violation of the S.C. Unfair Trade Practice Act; (4) fraud; (5) constructive fraud; (6) unjust enrichment; and (7) negligence. Dr. Highsmith, after being duly sworn, attested that he read the original complaint and that the statements contained therein were true to the best of his knowledge. **R. p. 99**. The court dismissed the three different fraud claims, and the unjust enrichment and negligence claims. The court's order dismissing five of Carolina Neurosurgery's seven claims demonstrates that there was no reasonable basis to bring those claims in law or fact.

#### i. Carolina Neurosurgery's negligence claim was clearly not supported by the facts alleged.

The court dismissed Carolina Neurosurgery's negligence claim because, as a matter of law, there was no duty running from D&M to Carolina Neurosurgery. **R. p. 1129, ¶ 39**. The court recognized that attorneys are immune from liability to third parties arising from performing their professional activities on behalf of and with the knowledge of their client, citing *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). **R. p. 1127, ¶¶ 32-35**.

The court held that the allegations in the complaint established there was no attorney-client relationship between Carolina Neurosurgery and D&M, and the complaint made clear that the

circumstances alleged to give rise to the negligence claim all occurred in the context of D&M representing Client and with Client's knowledge and consent. **R. p. 1129, ¶ 39**. Sanctions have been awarded against a plaintiff for suing in violation of the doctrine that attorneys are immune from liability to third parties for actions taken in the course and scope of their representation. *See, e.g.*, *Harbin v. Blair*, 2019 WL 13129354 (S.C. Com. Pl. October 9, 2019) (finding the plaintiff's claim was in violation of the attorney immunity doctrine because he was trying to hold his opponent's attorneys liable for actions taken in representing the opponent, and awarding sanctions after the claim was dismissed for over $13,000 in attorney's fees and costs), *affirmed* 2022 WL 2826361 (S.C. Ct. App., filed July 20, 2022).

Therefore, Carolina Neurosurgery's facts Dr. Highsmith swore were true to support a negligence claim did not, as a matter of law, support a claim for negligence and that claim was dismissed with prejudice. Any reasonable attorney, especially one with expertise in legal malpractice, would know those facts did not support a negligence claim. Because there were no facts to support a claim for negligence under existing law, the claim was frivolous. § 15-36-10(C)(1)(a) (finding sanctionable conduct where a reasonable attorney would believe the facts clearly did not warrant a claim or defense); 15-36-10(C)(1)(c) (stating it is sanctionable conduct where a reasonable attorney would believe the case or defense was not reasonably founded in fact); Rule 11, SCRCP (permitting sanctions against a party who file documents, and verify the truth of statements, when there is no reasonable grounds to support them).

**ii. Carolina Neurosurgery's fraud claims were clearly not supported by the facts alleged.**

Pursuant to Rule 9(b), SCRCP, all fraud allegations must be stated with particularity. The failure to state with particularity any of the elements renders a claim fatally defective. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Carolina Neurosurgery accused

D&M of fraudulent representations on insurance coverage and intent to pay Carolina Neurosurgery from a recovery as referenced in the Letters of Protection. **R. p. 93-94, ¶¶ 47-53**. To support the constructive fraud claim, Carolina Neurosurgery alleged it relied on the special confidence imposed on lawyers to be truthful in statements to others. **R. p. 95, ¶ 63**.

When granting D&M' motion to dismiss, the court made multiple findings establishing that Carolina Neurosurgery failed to allege the elements of fraud with particularity and, therefore, the claims as pled had no support in law. With respect to representations about insurance coverage in the January 21 email (Exhibit D), the court found that there were no facts supporting Carolina Neurosurgery's right to rely on those statements. **R. p. 1130, ¶ 45**. The court noted there is no right to rely where there is no confidential or fiduciary relationship, and Carolina Neurosurgery did not bother to allege that there was a confidential or special relationship between Carolina Neurosurgery and D&M. **R. p. 1130, ¶ 46-47**. By the facts Dr. Highsmith verified were true, the court found that two months before Client's first surgery, Carolina Neurosurgery was on notice that treatment under the first Letter of Protection had been withdrawn and that Carolina Neurosurgery should file claims with the Client's private health insurance. **R. p. 1131, ¶ 52**. Further, Carolina Neurosurgery was under a duty to exercise reasonable diligence to protect its own interests and investigate coverage for itself. However, there were no facts alleged that Carolina Neurosurgery exercised reasonable diligence. Carolina Neurosurgery's fraud claims based on the Letters of Protection were similarly inadequately pled because Carolina Neurosurgery did not allege with particularity indicating D&M had no intention of paying Carolina Neurosurgery when they sent the second Letter of Protection, or that the statements were false when made. **R. p. 1133, ¶ 62**. In addition, critical to why the fraud claims failed was that Carolina Neurosurgery

was on notice to submit claims to private health insurance but did not do so or inform D&M it would not do so. **R. p. 1131, ¶ 51; 1133, ¶ 61**.

Additionally, with respect to Carolina Neurosurgery's breach of contract accompanied by a fraudulent act claim, Carolina Neurosurgery failed to allege facts sufficient to establish that there was a fraudulent act accompanying the alleged breach. **R. p. 1136, ¶¶ 77-78**.

Because of these basic pleading failures, all of the fraud claims failed and were dismissed at the initial pleading stage. Any reasonable attorney would have known the verified *facts* were insufficient to support various elements of the fraud claims under the heightened pleading standard of Rule 9(b) and, as a result, the initiation of those failed claims is sanctionable conduct. § 15-36-10(C)(1)(a) (finding sanctionable conduct where a reasonable attorney would believe the facts clearly did not warrant a claim or defense); 15-36-10(C)(1)(c) (stating it is sanctionable conduct where a reasonable attorney would believe the case or defense was not reasonably founded in fact); Rule 11, SCRCP (permitting sanctions against a party who file documents, and verify the truth of statements, when there is no reasonable grounds to support them).

**iii. Carolina Neurosurgery's unjust enrichment claim was clearly not supported by the facts alleged.**

An unjust enrichment claim requires there to be a benefit given to the defendant, the defendant must realize that benefit, and retaining that benefit would be inequitable without paying its value. *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). Speculative claims for future increased value are insufficient to support the claim. **R. p. 1134, ¶ 66**.

Carolina Neurosurgery alleged it provided services to Client and that it enhanced the settlement value of the Client's claim. The court found that these allegations did not support a claim because the complaint effectively admitted it conferred a benefit to Client, not D&M, by

providing services to Client. Further, the assertion that providing services to Client would increase settlement value was speculative and was not sufficiently pled. **R. p. 1135, ¶ 71**. A reasonable attorney in similar circumstances would know that the facts Dr. Highsmith verified were true clearly did not support an unjust enrichment claim. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP. Thus, Carolina Neurosurgery should be sanctioned for filing a pleading in violation of the Act and Rule 11.

### B. Carolina Neurosurgery engaged in litigation tactics not to obtain a determination on the merits, but solely to survive dispositive motions, unnecessarily prolong the case, and its remaining claims were without merit.

After the majority of Carolina Neurosurgery's claims were dismissed at the pleading stage, Carolina Neurosurgery continued to litigate a breach of contract claim and claim for violation of SCUTPA. After substantial discovery and on the cusp of a summary judgment motion, Carolina Neurosurgery changed its allegations contrary to prior testimony and sworn statements to the court to prolong the case, and filed pleadings in violation of the Rules of Civil Procedure.

#### i. Carolina Neurosurgery's changed allegations contrary to prior sworn representations and testimony warrant imposing sanctions because they indicate the purpose was other than obtaining a determination on the merits of the claims.

Carolina Neurosurgery's breach of contract claim was initially based on the Letters of Protection being a contract between Carolina Neurosurgery and D&M. **R. p. 91, ¶ 41**. Carolina Neurosurgery was using the Letters of Protection to try and force D&M to pay for Client's medical bills after Client's recovery in the personal injury claim was not sufficient to pay the bills. Carolina Neurosurgery's SCUTPA claim was vague, but in discovery it was based on the email on insurance. **R. p. 1165-66**. In his individual deposition in May 2023, Dr. Highsmith testified that the only way he has to try and hold D&M responsible for Client's medical bills are the Letters of Protection. **R. p. 1181-82 (Dr. Highsmith Depo. Tr. 33:22 – 34:7)**.

D&M moved for summary judgment on August 22, 2023, because the Letters of Protection specifically contemplated an insufficient recovery and who would be responsible for the costs—Client.[2] The March LOP prior to any surgeries stated:

> Please accept this correspondence as our Law Firm's agreement to protect any portion of your bill not paid by private health insurance out of any settlement proceeds we may receive arising out of the incident referred to above. The above-named individual has been informed that, in the event of insufficient recovery, he remains personally responsible for your outstanding balance.

**R. p. 1118**. Clearly, the language in the letters explains that D&M would "protect" claims to "settlement proceeds we may receive" and the Client was personally responsible if there was an insufficient recovery—establishing no basis in fact to hold D&M responsible for Client's medical bills after an insufficient recovery. D&M also moved for summary judgment on the SCUTPA claim as pled, which was based on the January 2019 emails on insurance coverage according to Carolina Neurosurgery's discovery responses. **R. p. 1165-66**.

Two weeks after the motion for summary judgment was filed, however, Carolina Neurosurgery moved to amend the complaint in a clear attempt to avoid the unambiguous language in the Letters of Protection, instead describing the "contract" that was breached as "a contract wherein [Carolina Neurosurgery] would provide medical services to [D&M's] client based on [D&M's] representations about insurance coverage." **R. p. 185, ¶ 27**. The court allowed that amendment over D&M's protest because the standard for amendment does not consider the merits. The allegation changed contrary to the verified complaint and Dr. Highsmith's testimony, which were based solely on the Letters of Protection. In short, on the cusp of a summary judgment motion

[2] In the interest of brevity, D&M does not outline each and every argument made in summary judgment because D&M was required to file three different memoranda. Nevertheless, D&M incorporated into the motion for sanctions the reasoning in its memoranda and exhibits in support of summary judgment, filed August 14, 2024, October 28, 2024, and March 25, 2025.

that was going to succeed, Carolina Neurosurgery changed its theory on breach of contract to change the basis of the contract and try to avoid summary judgment.

But Carolina Neurosurgery continued to change allegations to make the case survive. Dr. Highsmith swore Carolina Neurosurgery received the April 29, 2019 email from Ms. Bennett notifying that they had recovered only $30,000. **R. p. 88, ¶ 29**. That fact was also a finding in the court's order on the motion to dismiss. **R. p. 1125, ¶ 20**. This fact was also in the amended complaint. **R. p. 587, ¶ 17.** Carolina Neurosurgery then changed that allegation in its Second Amended Complaint to make the "false email" the focus of its SCUTPA claim, asserting it received the "false email" after incurring the medical costs. **R. p. 615-16, ¶¶ 20-29.** Dr. Highsmith, who has a background in IT, apparently knew that the email was fake and had no evidence it was sent. **R. p. 1211 (Dr. Highsmith Depo. Tr. 86:16 – 86:25)**. As an aside, it is absolutely frivolous to argue that the email caused any damages under SCUTPA or otherwise even under Carolina Neurosurgery's changed allegations because Carolina Neurosurgery changed to alleging it did not receive the email until after it incurred costs, and immediately suspected its authenticity. In short, Carolina Neurosurgery could not have incurred damages (medical costs) based on an event (email they did not receive) that occurred after the damages were incurred.

Carolina Neurosurgery modified its sworn allegations in order to prolong the case and determination on the SCUTPA claim. In addition, Carolina Neurosurgery initially filed an amended complaint that did not comply with the court order granting leave to amend, withdrew and filed the proper amended complaint, and then without consent or leave from court again amended the complaint in violation of Rule 15(a), SCRCP.

Our courts have awarded sanctions when sworn statements in an affidavit are contradicted by later testimony, establishing there was not a reasonable ground to support the affidavit. *See*

*Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006). For example, in *Russell*, the court upheld sanctions under Rule 11 against a party for filing an affidavit when later deposition testimony contradicted the statements in the affidavit. *Id.* The court found that the contradicted statements demonstrated the affidavit was not based on knowledge that there were good grounds to support it. Therefore, the court upheld the lower court's order requiring the plaintiff to pay attorney's fees and costs incurred up until summary judgment. *Id.*

Despite Carolina Neurosurgery's verified complaint attesting that the contract was based on the Letters of Protection and that it received the April 29, 2019 email about the insufficient recovery of $30,000 and Dr. Highsmith's testimony the case was based on the letters, Carolina Neurosurgery changed its allegations to the contrary to avoid the clear language of the Letters of Protection and state, after many years of knowing the circumstances of the April 29 email, that it did not receive it and the case was now about the email. Further, filing a Second Amended Complaint without consent or court order was a clear violation of Rule 15(a), SCRCP. This conduct is sanctionable because the shifting allegations, some initially in contravention of the rules and contrary to prior pleadings, were not initiated to obtain a determination on the merits, but to prolong the inevitable grant of summary judgment. *See* 15-36-10(C)(1)(c).

**ii. Carolina Neurosurgery continued to assert that representations about insurance coverage were false despite the insurer, One Beacon, finding that Client was covered and paying it an amount for each of the services charged to Client**.

Throughout litigation Carolina Neurosurgery maintained that Ms. Bennett's representations about there being over $1,000,000 in Occupational Accident Coverage under the One Beacon Policy were completely false. **R. p. 89, ¶37 (filed 7.22.21), R. p. 598, ¶ 20 (filed 9.10.24), R. p. 612, ¶ 1 & R. p. 616, ¶ 32 (filed 9.24.24)**. In discovery, Carolina Neurosurgery as

late as September 5, 2024, based the SCUTPA claim, in part, on the representations about the coverage. **R. p. 1165-66**.

While the litigation was pending, however, Carolina Neurosurgery submitted its bills to One Beacon under Client's $1,000,000 Occupational Accident Policy. In July 2023, Carolina Neurosurgery submitted its bills that it had demanded D&M pay in full. **R. p. 1218-25**. Also in July 2023, One Beacon issued an Explanation of Benefits to Dr. Highsmith, explaining on every page that Client "is covered under an Occupational Accident Policy." **R. p. 1218-25**. At the same time, One Beacon sent a check to Dr. Highsmith paying a sum for each one of the services Carolina Neurosurgery rendered to Client that is the subject of this action. **R. p. 1218-25; 1226**. Comparing the Explanation of Benefits to the full list of charges for services to Client, it is clear that One Beacon paid an amount for each one of the charges. ***Compare*** **R. p. 1218-25** ***to*** **R. p. 1113**.

Despite knowing that the $1,000,000 policy provided coverage, Carolina Neurosurgery continued to allege that Ms. Bennett's statement about coverage was false, maintaining that allegation in amended pleadings and discovery filed a year after it received the Explanation of Benefits. No reasonable attorney under similar circumstances would believe that claim had any basis in fact after receiving that information, yet Carolina Neurosurgery continued to assert it. The conduct violates the Act and Rule 11. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP.

### iii. Carolina Neurosurgery asserted a frivolous claim for attorney's fees for litigating against another person contrary to their representation to the court and a straightforward interpretation of SCUTPA.

Carolina Neurosurgery hired Attorney Biff Sowell and the firm Sowell & Durant to represent it in a debt collection action against Client. Carolina Neurosurgery litigated that case until the eve of trial, and paid Sowell & Durant $93,716. **R. p. 1160 (ATI 5)**. Carolina Neurosurgery entered into a settlement agreement with the Client and filed a stipulation of dismissal with prejudice on February 24, 2024, representing that "Each party shall bear its own attorney's fees and court costs." **R. p. 1227**. Carolina Neurosurgery then amended its discovery responses to claim as damages against D&M those attorney's fees, mischaracterizing them as "Legal fees paid to Sowell & Durant to pursue recovery under One Beacon policy" for $93,716. The fees were incurred primarily for litigating against Client in the debt collection action. **R. p. 1231 (Carolina Neurosurgery 30(b)(6) at 40:10-14)** (Carolina Neurosurgery confirming they are asserting as damages Sowell's attorney's fees were for suing the client).

Carolina Neurosurgery's conduct in asserting as damages the attorney's fees in this case is sanctionable because (1) it is contrary to its representations to the court and Client/his attorney; (2) the reason for the fees is misrepresented; (3) there was no basis in law to recover those fees.

First, Carolina Neurosurgery represented in Client's case when it filed its stipulation of dismissal with prejudice that it would bear its own attorney's fees and costs. That dismissal was signed by Attorney Sowell and, clearly, included the fees incurred litigating that case. Notably, Client was represented by an attorney from D&M—Jay Masty, who also signed the dismissal. ***See* R. p. 1227**. Months later, despite that representation to D&M and the court, Carolina Neurosurgery amended its discovery responses to directly assert as damages against D&M those attorney's fees and costs. **R. p. 1160**.

Second, Carolina Neurosurgery characterized the attorney's fees and costs as "Legal Fees paid to Sowell & Durant to pursue recovery under One Beacon Policy." **R. p. 1160.** Carolina Neurosurgery confirmed in its deposition that the fees were incurred suing Client. **R. p. 1231 (Carolina Neurosurgery 30(b)(6) at 40:10-14)**. The invoices Sowell & DuRant provided bear out that conclusion.[3] It would be abundantly clear to a reasonable attorney under similar circumstances that the fees were not incurred to pursue recovery under the One Beacon Policy.

Last, there is no basis in law to assert the attorney's fees as damages against D&M. It is well known that attorney's fees are not recoverable absent a contract or statute. Carolina Neurosurgery did not allege and there was a contract allowing for recovery of attorney's fees. Carolina Neurosurgery asserted them as damages, not under a right to recover pursuant to a statute.

Nevertheless, even if Carolina Neurosurgery intended to assert the right under statute, the fees were not recoverable under SCUTPA. Strictly construing SCUTPA as is required leads to the conclusion attorney's fees incurred in a separate lawsuit not involving a SCUTPA claim are not recoverable in this lawsuit. The statute states: "Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." S.C. Code Ann. § 39-5-140. The statute allowing fees contains limitations on recovering fees. The statute requires (1) a finding by the court of a violation of the article, and (2) indicates the fees should be awarded "to the person bringing the action" i.e., that the fees awardable under statute are limited to those reasonable fees incurred in "bringing the action" for violation of SCUTPA. Under a strict interpretation of the statute, Carolina Neurosurgery's fees paid to a *different* attorney (Biff Sowell) for a different lawsuit (collection

[3] D&M intended to offer the invoices as evidence at the hearing, and noted same in the motion for sanctions, but were denied the opportunity because the court did not hold a hearing.

action against the Client) cannot be awarded because they are not related to "bringing the action" for violation of SCUTPA against D&M. As such, there was no basis in law to assert the claim for Sowell's attorney's fees.

This Court should find it was a violation of the Act and Rule 11 to assert the claim to attorney's fees when Carolina Neurosurgery indicated it would not in court filings and representations to D&M, mischaracterized the claims in discovery, and there was no basis in law to recover those fees. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP.

**iv. Carolina Neurosurgery's last, altered claims were manifestly without merit, as determined by the court on summary judgment.**

The circuit court's order granting summary judgment establishes that no reasonable attorney under similar circumstances would believe the claims were warranted under existing law or reasonably founded in fact. Carolina Neurosurgery had claims for breach of contract, violation of SCUTPA, negligent misrepresentation, and promissory estoppel. The Court granted summary judgment on two overarching grounds (1) that a prior order of the court preempted the claims, and (2) that the claims failed on the most basic grounds.

First, the Court found that the claims were preempted by the Court's prior order dismissing five of Carolina Neurosurgery's seven claims. **R. p. 1143**. Carolina Neurosurgery was made aware of this outcome when D&M contested Carolina Neurosurgery's motion to amend in its memorandum in opposition filed August 14, 2024. **R. p. 322.** Carolina Neurosurgery nevertheless continued to maintain the claims in the face of the prior order that was the law of the case. Carolina Neurosurgery could have appealed the prior order to change that outcome, but chose not to. Indeed, Carolina Neurosurgery made sure to let the Court know in its pleadings that it reserved the right to appeal that prior order. ***See*** **R. p. 595, n.1** ("Plaintiff respectfully reserves its objections and potential appeal of the trial court's ruling granting Defendants' motion to dismiss . . . ."); **R. p.**

**612, n.1** (same). Further, although D&M asserted in opposition to the amendment and at summary judgment that the claims were preempted by the previous order, Carolina Neurosurgery did not bother to respond to that argument in its memorandum in opposition to summary judgment or at the hearing on the motion, seemingly conceding the issue. Despite clearly intending to appeal that order, Carolina Neurosurgery forced D&M to litigate for years and incur significant legal fees and costs in doing so, and then did not respond to that argument at summary judgment. No reasonable attorney under the same circumstances would believe there were grounds to support that position. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP.

Second, the circuit court's summary judgment order found Carolina Neurosurgery's claims lacking on the most basic grounds. The court granted summary judgment on the breach of contract claim because there was no legally enforceable contract. **R. p. 1148-52**. Although there were the Letters of Protection and an email about insurance, Carolina Neurosurgery's claim was essentially that there was a contract whereby D&M would be responsible for Client's medical bills. No matter how the facts were twisted, there was no evidence that D&M offered to pay for Client's medical costs if Carolina Neurosurgery treated Client, or that Carolina Neurosurgery accepted by providing medical services conditioned on the promise to pay the bills. The Court found no offer because the Letters of Protection explained Client was responsible for his bills in the event of an insufficient recovery, Carolina Neurosurgery had a Financial Policy with Client containing similar language, Carolina Neurosurgery was already providing services to Client, and Ms. Bennett retracted the first Letter of Protection and asked Carolina Neurosurgery to bill private health insurance mere hours after the email referencing insurance. **R. p. 1151**. All of this information was available to Carolina Neurosurgery and was clear prior to it initiating suit against D&M that there was no basis

in fact or law that there was a legally enforceable contract obligating D&M to pay for Client's medical bills.

The circuit court also granted judgment to Defendants on the SCUTPA claim because SCUTPA requires that a plaintiff and defendant be engaged in trade or commerce with each other. Carolina Neurosurgery alleged that D&M were engaged in commerce representing Client. However, D&M were not engaged in trade or commerce with Carolina Neurosurgery because the communications about insurance were not in the context of Defendants providing services to Carolina Neurosurgery and were not related to advertising, sale or distribution of services or property to Carolina Neurosurgery. **R. p. 1152**. Because this claim failed on the most basic element and it was clear from the beginning that D&M was not engaged in trade or commerce with Carolina Neurosurgery, no reasonable attorney in those circumstances would believe it proper to continue that position or that there was reasonable factual support for that claim.

Likewise, Carolina Neurosurgery's claims for negligence, misrepresentation and promissory estoppel failed on the most basic elements. For negligent misrepresentation, the Court found there was no false statement of fact about the insurance coverage representations. **R. p. 1154**. The Occupational Accident Coverage from One Beacon did apply and it eventually paid, which Carolina Neurosurgery knew in July 2023 but still maintained the statement was false. After One Beacon paid Carolina Neurosurgery under its policy, there was no support to continue to maintain that Ms. Bennett's statement was a false statement of fact. Certainly, there were no grounds to ask the Court for permission to amend the complaint and assert a negligent misrepresentation claim on the basis of the insurance email after Carolina Neurosurgery knew One Beacon found coverage. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP.

For promissory estoppel, the claim requires an unambiguous promise, and none of the relevant emails or Letters of Protection contained an unambiguous promise that D&M would pay for Client's medical bills out of specific coverages. **R. p. 1156**. Thus, the claim failed on the first element based on information Carolina Neurosurgery knew for years prior to asking the court permission to assert the claim.

Considering the reasons the court granted summary judgment, a reasonable attorney in the same circumstances would know under the facts that existed when Carolina Neurosurgery filed the claim and as the allegations changed that the claims were clearly not warranted under existing law, the case was not reasonably founded in fact, or that there were good grounds to support the claims. Accordingly, this Court should impose sanctions for violating the FCPSA and Rule 11. *See* § 15-36-10(C)(1)(a); 15-36-10(C)(1)(c); Rule 11, SCRCP.

**C. This Court should award D&M its reasonable attorneys' fees and costs incurred in litigating the case.**

The Act and Rule 11 each allow for the recovery of reasonable attorney's fees and costs. S.C. Code Ann. § 15-36-10(G)(1) (stating the sanctions may include "reasonable costs and attorney's fees of the prevailing party"); Rule 11(a), SCRCP (stating that the court may order as a sanction against the offending party "a reasonable attorney's fee").

When determining whether a fee is reasonable, the court should consider the following factors:

> (1) the nature, extent, and difficulty of the case;
> (2) the time necessarily devoted to the case;
> (3) professional standing of counsel;
> (4) contingency of compensation;
> (5) beneficial results obtained;
> (6) customary legal fees for similar services.

*Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). The court must make a finding on each of the above factors.

Here, the parties litigated this case from August 17, 2021, until summary judgment was entered on May 2, 2025. The case took nearly four years to litigate, and it involved substantial written discovery, deposition practice, and motions practice. The parties took six depositions: Dr. Highsmith, two separate 30(b)(6) depositions of DeLuca Maucher, Tina Bennett, Eric Weinberger, and a 30(b)(6) of Carolina Neurosurgery. Although the case did not involve particularly complex legal issues, the factual issues shifted and the case took a long time to litigate to a successful conclusion. There was robust dispositive motions practice that was necessary because of the claims and was successful. During the litigation, attorneys for D&M spent 498.50 hours on work related to the defense and incurred $114,757.50 in attorney's fees, making the average rate approximately $230/hour. ***See*** **R. p. 1232-33 (Affidavit)**. The average hourly amount charged is similar to the customary legal fees for similar services counsel for D&M provide in similar cases. D&M's attorneys obtained beneficial results by having the court dismiss all of Carolina Neurosurgery claims by motion to dismiss or by summary judgment.

According to the factors above, D&M' attorneys' fees of $114,757.50 are reasonable and this Court should award that amount as the sanction against Carolina Neurosurgery under the Act and Rule 11, SCRCP.

## III. Only if this Court reverses either the Dismissal Order or Summary Judgment Order, this Court should reverse the lower court's order refusing to strike Carolina Neurosurgery's Second Amended Complaint because the pleading was filed without leave or consent.

As a threshold matter, this Court need not address this issue unless it decides to reverse either the lower court's June 28, 2022 order dismissing some of Carolina Neurosurgery's claims or the May 2, 2025 order granting Defendants' motion for summary judgment. If this Court affirms

the lower court on both decisions, then the lower court's error refusing to strike the amended complaint would become moot or merely academic because Carolina Neurosurgery's claims as amended were dismissed. In other words, it would not matter if the lower court erred because summary judgment was proper. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 476 (2006) (noting the court will not decide moot or academic questions, which exist when judgment by the court would have no practical legal effect). Otherwise, D&M outlines its arguments below.

"A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." Rule 15(a), SCRCP. The "complaint" is considered a pleading, not an "amended complaint." *See* Rule 7(a), SCRCP (defining pleadings and including the "complaint," not listing "amended complaints," and stating "no other pleadings shall be allowed").

South Carolina's Rule 15 is similar to Federal Rule 15, and our courts rely frequently on federal law and cases interpreting Federal Rule 15 to interpret South Carolina's Rule 15. *See* Rule 15(a), SCRCP, note ("This Rule 15(a) is substantially the same as the Federal Rule . . . ."); *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (relying on SCOTUS case to interpret South Carolina's Rule 15(a)); *Skydive Myrtle Beach, Inc., v. Horry County*, 426 S.C. 175, 183, 826 S.E.2d 585, 589 (2019) (relying on and quoting Wright & Miller's Federal Practice and Procedure section 1487 (3d ed. 2010) to interpret futility under Rule 15, SCRCP)

Federal Rule 15, which gives 21 days instead of 30 in which to amend a pleading, makes clear that there is only one "as a matter of course" amendment period: "The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a

designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period." Rule 15, FRCP (Comm. Notes – 2009 Amd.). In other words, the period to amend as a matter of course expires 21 days after the date of the earliest defensive action. *O'Reilly Plumbing & Constr., Inc. v. Lionsgate Disaster Relief, LLC*, No. 1:19-CV-00024, 2020 WL 6393902, at *3 (D.V.I. Nov. 2, 2020); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc. Civ.* § 1483 (3d ed. 2010) ("These periods are not cumulative; only one amendment as a matter of course is permitted.").

If the time within which to amend a complaint has expired, a party can amend the complaint with consent or leave of court, and if filed without consent and without the court's leave, the amended complaint is a legal nullity without effect. *Koulpasis v. State Farm Fire & Cas. Co.*, No. 0:19-CV-02674-JMC, 2020 WL 3548809, at *2 (D.S.C. June 30, 2020); *see also United States ex rel. Mathews v. Healthsouth Corp.*, 332 F.3d 293, 296 (5th Cir. 2003) (finding an amended complaint is without legal effect if leave or consent was required but not obtained). In *Koulpasis*, Judge Childs dismissed an amended complaint that was filed outside of the 21-day period without leave of court or consent. 2020 WL 3548809, at *2. Judge Childs noted that filing the amended complaint outside of the time period without leave or consent "render[ed] the pleading to be more than technically deficient." *Id.*

Similar to Federal Rule 15(a), South Carolina's Rule 15(a) limits amendment as of right to one amendment. The time within which to amend as of course is limited to 30 days after a responsive pleading is served. Once the thirty days passes, a pleading can be amended only with the adverse party's consent or leave of court. Similar to the federal rule, the time to amend "as a matter of course" is not revived by subsequent amended pleadings. Otherwise, a plaintiff could request leave to amend for some innocuous reason and, if leave to amend is granted, could amend

the complaint within 30 days to include anything the plaintiff wanted. This result promotes gamesmanship, contrary to the requirement to interpret the Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP.

Pursuant to the above, D&M moved to strike the Second Amended Complaint as a legal nullity. Carolina Neurosurgery did not file a response to the motion to strike, and made one argument to the court at the hearing that it had a right to amend under Rule 15(a) because it did so within 30 days of the date D&M answered the Amended Complaint. **R. p. 1348-50 (Mtn. to Strike Hearing Tr. 11:19-13:11)**. The lower court denied the motion to strike without explanation. **R. p. 37**. By denying the motion to strike without explanation, the lower court must have adopted Carolina Neurosurgery's sole argument. D&M moved to reconsider the 11.6.24 Order, to which Carolina Neurosurgery responded with new arguments. **R. p. 834**. The lower court refused to reconsider its erroneous order. **R. p. 39**. The lower court "explained" it considered "the various interests balanced by the [c]ourt at the time of ruling," yet did not identify those interests or what it relied on to deny the motion to strike. **R. p. 39**.

The lower court absolutely abused its discretion in ruling on the motion to strike because (1) its ruling suggests it did not exercise any discretion and (2) its decision is infected by an error of law. First, the court denied the motion to strike in an unexplained ruling in the face of weak opposition. Further, in ruling on the related motion to reconsider, the court indicated it balanced interests at the time it made the original ruling. It appears, therefore, that the lower court did not actually exercise any discretion in making its ruling. Thus, its ruling was an abuse of discretion.

Second, assuming the interests it balanced were D&M's well-supported arguments against the lone erroneous argument from Carolina Neurosurgery, the lower court's decision was based on an error of law. No South Carolina court of which D&M is aware has ruled on whether there

is a renewed or cumulative right to amend under Rule 15(a). But persuasive federal law holds expressly there is not, and our courts frequently rely on federal court interpretations of Federal Rule 15 to interpret South Carolina's Rule 15. Carolina Neurosurgery's argument is contrary to that persuasive law, and if adopted would promote gamesmanship in pleadings. Because the only argument Carolina Neurosurgery advanced against the motion to strike was wrong as a matter of law, and the lower court impliedly agreed, this Court should reverse the lower court's ruling and strike the improperly filed Second Amended Complaint.

## CONCLUSION

This Court should, for the benefit of the bench and bar, find that the circuit court should have made findings of fact and conclusions of law in ruling on the motion for sanctions because the language in the Act requires considering specific factors, reporting findings of sanctions, and it would facilitate appellate review. However, and in the absence of the circuit court's findings, this Court should find its own facts and impose on Carolina Neurosurgery sanctions of D&M's reasonable attorney's fees and costs, because the preponderance of the evidence establishes that no reasonable attorney would believe any of Carolina Neurosurgery's claims were legitimately based on facts, and Carolina Neurosurgery's litigation tactics unnecessarily delayed the inevitable dismissal of its claims and forced D&M to incur more fees. Finally, only if this Court reverses the lower court on the motion to dismiss order or summary judgment order, this Court should find the lower court abused its discretion in refusing to strike Carolina Neurosurgery's second amended complaint filed without consent or leave of court, and should strike that pleading.

*[SIGNATURE ON FOLLOWING PAGE]*

This 12th day of May, 2026.

Respectfully submitted,

_________*s/ Skyler C. Wilson*
Douglas W. MacKelcan, Esq.
Skyler C. Wilson, Esq.
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
dmackelcan@csvl.law
swilson@csvl.law
Ph: (843) 727-0307
*Attorneys for Respondents/Appellants*