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

Appellate Case No. Case: 2025-001304

Case No. 2021-CP-10-03379

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

v.

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

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FINAL BRIEF OF APPELLANTS/RESPONDENT REGARDING CROSS APPEAL

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STATEMENT OF THE CASE

Appellant-Respondent Carolina Neurosurgery & Orthopedics, Inc. ("CNO")[1] incorporates by reference its statement of the case from its brief filed on February 17, 2026. Additionally, CNO adds that on May 12, 2025, the Law Firm filed a motion for sanctions. (ROA 1089-1233.) The circuit court did not hold a hearing on this motion. Rather, it denied the motion for sanctions, stating "[a]fter reviewing the motion and the record, the Court declines to hold a hearing. Defendants' Motion for Sanctions is denied." (ROA 75-77.) The Law Firm filed a motion for reconsideration. (ROA 1252-1258.) In response, CNO filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Reconsideration of the Order Denying Their Motion for Sanctions on June 30, 2025. (ROA 1259-1267.) On July 14, 2025, the circuit court issued an Initial Order Regarding Motion to Reconsider, informing the parties that pursuant to Rule 59(f), SCRCP, the circuit court would decide the motion on written submissions. (ROA 78-79.) On August 25, 2025, the circuit court denied the motion to reconsider. (ROA 80-81.) This cross-appeal followed, including the order denying the motions for sanctions and the order denying the motion to strike CNO's second amended complaint. (ROA 1268-1282.)

STATEMENT OF FACTS

CNO incorporates by reference its statement of the facts from its brief filed on February 17, 2026.

STANDARDS OF REVIEW

I. Frivolous Civil Proceedings Sanction Act

The decision to impose sanctions under the Frivolous Civil Proceedings Sanction Act ("the

[1] CNO uses the same acronyms and capitalized proper nouns in this brief as it does in its brief in chief, dated February 17, 2026, in its appeal

Act") sounds in equity because it is a decision for the judge, not the jury. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003). "Pursuant to the South Carolina Constitution, an appellate court reviews findings of fact in an equity matter taking its own view of the evidence." *Id.* (citing S.C. Const. art. V.)

II. Order Regarding Motion to Strike

The standard of review of an order regarding a motion to strike is abuse of discretion. *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979). "It is well settled that a motion to strike is addressed to the sound discretion of the trial court." *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Griffin v. Giovino*, 446 S.C. 533, 550, 920 S.E.2d 418, 427 (Ct. App. 2025).

ARGUMENT

I. The Circuit Court Did Not Err by Not Issuing Findings of Fact and Conclusions of Law Regarding the Order Denying the Motion for Sanctions When Neither the Act nor the South Carolina Rules of Civil Procedure Require Them.

The Law Firm takes issue with the fact that the circuit court did not issue findings of fact or conclusions of law in its order denying sanctions. First, the Law Firm states that the Act uses the mandatory "shall" when providing the circuit court "shall proceed to determine if the claim or defense frivolous" and "shall take into account" seven factors when determining whether sanctions are warranted. (Br. of Respt's/Appellants (hereinafter "Br.") at 8 (citing S.C. Code Ann. § 15-36-10(C)(1) & (E).) The Law Firm also argues that the Act "shall not alter the South Carolina Rules of Civil Procedure." (*Id.* (citing S.C. Code Ann. § 15-36-10(I)). The Law Firm juxtaposes these references of "shall" in the Act to Rule 52(a) of the South Carolina Rules of Civil Procedure, which provides "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under

Rules 12 or 56 or any other motion except as provided in Rule 41(b)."[2] By comparing the use of "shall" in the Act to Rule 52(a), SCRCP, the Law Firm argues that the two are in conflict and that findings of fact and conclusions of law would facilitate appellate review. These arguments are incorrect.

First, the Act and Rule 52(a), SCRCP, are not in conflict. The circuit court (1) can determine if the claim or defense is frivolous and (2) can take into account all seven factors without having to reduce those considerations to findings of fact and conclusions of law. This is what happened in the present case. The Law Firm seems to acknowledge this reasoning. It states "[t]he Act does not explicitly state the court must make findings of fact or conclusions of law in making a decision." (Br. at 9.) But then states that if an award of sanctions against an attorney is found, the circuit court "shall report its findings to the South Carolina Commission of 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." (*Id.*) True, but that is not the issue here. There was no sanctions award issued against the attorney, and therefore, there is no need to report "findings" to the South Carolina Commission of Lawyer Conduct.[3] The findings from the circuit court are there was no sanctionable conduct. Rule 52(a), SCRCP and the Act are not in conflict.

Next, the Law Firm argues that by ostensibly requiring findings of fact in finding that an attorney violated the Act and not requiring findings of fact when concluding there was no sanctionable conduct encourages a circuit court to take the path of least resistance and conclude

[2] Rule 41(b), SCRCP, is inapplicable here. It involves the involuntary dismissal of claims for failure of plaintiff to prosecute or comply with the rules or order of court.

[3] Moreover, "findings" are not necessarily findings of fact and conclusions of law. It could simply be that a circuit court found an attorney in violation of the Act and reported that finding of a violation to the Commission.

there was no sanctionable conduct. (Br. at 9.) More specifically, the Law Firm argues "[a]n 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." (Br. at 9.) To claim that circuit courts would take the easier route and not apply the law is misguided.

Second, the Law Firm argues that requiring factual findings and conclusions of law are suggested by this Court's standard of review. The Law Firm argues that because this Court is to review findings of fact and the law, it must have findings of fact and conclusions of law to conduct appellate review. The Law Firm argues that "it is better practice" for circuit courts to issue findings of fact and conclusions of law.

This argument ignores the fact that this Court commonly reviews orders without findings of fact and conclusions of law. The argument also ignores Rule 52(a), SCRCP, statement that even dispositive motions (like those under Rules 12 and 56) do not require findings of fact and conclusions of law. Finally, this argument ignores the tenets of separation of powers. The General Assembly passed both the Act and the South Carolina Rules of Civil Procedure. This Court cannot re-write either the Act or the rules. This Court could sit in review as to whether the Act and South Carolina Rules of Civil Procedure are constitutionally sound, but that is not what the Law Firm is asking of this Court. Rather, they ask this Court to find that the Act and Rule 52(a), SCRCP, are in conflict (which they are not) and that this Court should adopt a "better practice" policy for circuit courts to issue findings of fact and conclusions of law in matters involving the Act, even when the circuit courts find that no violation occurred. Respectfully, this Court cannot grant such relief.

II. The Circuit Court Correctly Denied Sanctions When (a) There Was No Evidence That No Reasonable Attorney Would Believe The Claims Were Warranted; (b) There Was No Evidence of Delay or Efforts to Avoid Evidence, and (c) The Claims Were Not Found Meritless.

A. CNO Can Challenge the Motion for Sanctions.

As a preliminary argument, the Law Firm argues that CNO waived its ability to contest the motion for sanctions because it did not file a return within thirty days after the Law Firm filed its motion for sanctions. (Br. at 11-12 (citing S.C Code Ann. § 15-36-10(D).) This argument is incorrect and is conflating notice and opportunity to be heard with a written return.

Undeniably, the Act provides the non-moving party notice and opportunity to be heard and gives him thirty days to respond. S.C. Code Ann. § 15-36-10(D). But, the Act does not state that a written return is the only method for the non-moving party to be heard. For example, the non-moving party could be heard at the hearing. Additionally, the Act does not state that the non-moving party only has thirty days to respond to the motion. The non-moving party could respond with a written return up until the circuit court will receive it, as is common practice in South Carolina state court. Here, the circuit court did not hold a hearing; therefore, there was no notice of hearing, prompting CNO to file a written return. Fortunately, it did not have to incur additional attorney's fees in drafting a written return when the circuit court believed, and thus ordered, that the motion for sanctions had no merit. The waiver argument is misguided.

Using similar logic, the Law Firm argues that CNO cannot respond in its brief to the motion for sanctions because it "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." (Br. at 12.) The short answer to this argument is that the circuit court ruled before CNO had an opportunity to respond to the motion for sanctions. However, it did have time to respond to the motion for reconsideration because the circuit court gave notice to the parties that

it was not going to hold a hearing and was going to rule on the briefing. (ROA 71-72.) CNO responded to the motion for reconsideration. Its response was before the circuit court in its consideration of the motion for reconsideration. Its response is properly before this Court. Similarly, the Law Firm argues that "[a] party cannot use Rule 59(e) as [a] 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." (Br. at 12.) But, the Law Firm was the one who filed the Rule 59(e) motion, not CNO. CNO had every right to contest the motion for reconsideration.

B. The Act and The Law Firm's Reliance on It

The Act is codified at section 15-36-10 of the South Carolina Code. As its name suggests, it serves to deter frivolous litigation and imposes a "reasonable attorney" standard. S.C. Code Ann. § 15-36-10. For a court to find a violation of the Act, the court must find frivolous conduct by a preponderance of the evidence. *Id.* But the frivolous conduct has a heightened threshold and must go beyond a simple lack of merit. "A party who makes a 'frivolous' claim or raises a 'frivolous' defense has committed a more egregious act that one who merely acts 'without substantial justification.'" *Father v. S.C. Dept of Social Services*, 353 S.C. 254, 259, 578 S.E.2d 11, 13 (2003) (quoting *Heath v. Aiken County*, 302 S.C. 178, 394 S.E.2d 709 (1990)).

1. The Act

The Law Firm looks to two subsections of the Act to argue that CNO should be sanctioned. First, the Law Firm states that CNO should be sanctioned under section 15-36-10(C)(1)(a), which provides as follows:

> 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.

Additionally, the Law Firm argues that CNO should be sanctioned under section 15-36-

10(C)(1)(c), which provides as follows:

> 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.

In addition to these two subsections of the Act, the Law Firm argues that Rule 11, SCRCP, should serve as another mechanism to sanction CNO. The Law Firm contends when something is signed in violation of Rule 11 "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." (Br. at 13 (citing Rule 11, SCRCP).) As acknowledged by the Law Firm, the "criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Act." (Br. at 13, citing *Father*, 345 S.C. at 72, 545 S.E.2d at 531.)

In determining whether to impose sanctions, the court "shall take into account" seven factors, which are as follows:

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.

Applying these seven factors to the present case, the Law Firm argues as follows:

1. There are only three parties so the case is not complex.
2. CNO's claims were not complex and were based on two letters of protection

and a few emails.[4]

3. The case was nearly four years long, and the Law Firm listed the Act as an affirmative defense.
4. CNO had all the information it needed when it filed its complaint; thus, no discovery was needed.[5]
5. The Law Firm is unaware of whether CNO previously violated the Act.[6]
6. CNO did not respond to the motion for sanctions.[7]
7. The Law Firm provides other reasons in its brief for sanctions.[8]

None of evidence or argument submitted in support these seven factors rise to the level of the sanctionable conduct. Additionally, the information submitted in support of the seven factors is incorrect as discussed below. Moreover, returning to the threshold question of whether "a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law," there is no argument or evidence supporting a finding of sanctions. *See* S.C. Code Ann. § 15-36-10(C)(1)(a). Similarly, there is no argument or evidence supporting a finding of sanctions under section 15-36-10(C)(1)(c) that "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[.]"

[4] This statement is incorrect. A substantial part of the lawsuit centered around the "email" purportedly sent to CNO. (ROA 572.) Additionally, the case relied (and the appeal relies) heavily on deposition transcript. It is too simplistic to state the claims merely relied on two letters of protection and a few emails.

[5] This statement is incorrect. CNO needed depositions and written discovery and relied on the same defending against the motion for summary judgment and pursuing its appeal of the same.

[6] As admitted by the Law Firm, it affirmatively pled the Act violations as a defense. It could have asked in discovery if CNO had violated previously the Act.

[7] As discussed above, the circuit court denied the motion before CNO had an opportunity to respond; thus, no notice of hearing was issued to prompt a return.

[8] CNO will dispute these points throughout this brief.

2. Caselaw Regarding the Act

The Law Firm relies on three cases regarding the Act: (1) *Holmes v. East Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014), (2) *Father v. S.C. Department of Social Services*, 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001), and (3) *Harbin v. Blair*, No. 2017-CP-04-02099, 2019 WL 13129354 (S.C. Com. Pl. Oct. 9, 2019) and its unpublished appellate opinion, No. 2020-000421, 2022 WL 2826361 (S.C. Ct. App. July 20, 2022). All of these cases are distinguishable or have no application.

First, in *Holmes*, the plaintiff was a serial litigator who argued her credentialing decisions over four different lawsuits. *Holmes*, 408 S.C. at 143-47, 758 S.E.2d at 486-88. The plaintiff, an ophthalmologist, was also a licensed member of the South Carolina Bar, and the Supreme Court "ordered all clerks of court to refuse filings from [plaintiff], unless she was represented by a licensed attorney (other than herself), due to her vexatious and meritless filings." *Id*. at 165 n.18, 758 S.E.2d at 498 n.18. In each of her four lawsuits against the hospital, the plaintiff "alleged breach of contract and breach of the covenant of good faith and fair dealing arising out of [the hospital's] alleged mishandling of [plaintiff's] medical staff privileging applications." *Id.* at 143, 758 S.E.2d at 486. The plaintiff lost each lawsuit. *Id*. at 143-47, 758 S.E.2d at 486-88. Moreover, in her third lawsuit, the plaintiff was sanctioned under the Act. *Id.* at 146, 758 S.E.2d at 487. Next, in the fourth litigation, at a hearing on motion for judgment on the pleadings, the circuit court warned the plaintiff's counsel "against engaging in frivolous proceedings[.]" *Id.* at 147, 758 S.E.2d at 487. Plaintiff, however, continued with the frivolous arguments. Summary judgment was granted with respect to her claims, and the circuit court found she violated the Act by "initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against [plaintiff] that this Court lacks subject matter jurisdiction, and despite

being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations." *Id.* at 149, 758 S.E.2d at 489.

Second, in *Father*, the family court awarded Father $22,000 in attorney's fees pursuant to the Act. *Father*, 353 S.C. at 257, 578 S.E.2d at 13. This Court found that the Act could have some application, but it did not warrant an award of $22,000. *Id.* The Supreme Court affirmed. *Id.* The Supreme Court found that DSS's conduct was flawed, but Father did not prove that that "DSS acted without a proper purpose in this case." *Id.* at 261, 545 S.E.2d at 15.

Finally, in *Blair*, the circuit court issued sanctions under the Act because the lawsuit was an attempt to relitigate a prior lawsuit and "any reasonable attorney would believe that the filing of the Current Lawsuit was frivolous." *Blair*, 2019 WL 13129354 at *1. Additionally, the circuit court found that the law firm was named as a defendant "solely by virtue of their representation of Blair in the underlying lawsuit" and the plaintiff's lawyer "failed to assess whether case law supported his theories of liability against [the law firm]." *Id.* at *2. Finally, the circuit court was "particularly concerned" that the plaintiff's lawyer had been sanctioned previously under the Act. *Id.* "In light of the fact that [plaintiff's lawyer] was previously sanctioned for this same conduct, and the clear rulings from our state's appellate courts, a reasonable attorney would not have filed and pursued this action against [law firm] because it was clearly not warranted under existing law. Thus, [plaintiff's lawyer] violated the limitations established by the [Act] . . . ." *Id.* This Court affirmed the circuit court, holding that the "filing of this action was an improper attempt to relitigate the personal injury action as the trial court in the personal injury action considered and rejected the same factual allegations of wrongdoing . . . ." *Blair*, 2022 WL 2826361, at *1.

None of these three cases has factual situations like the present matter, with the exception of *Father* where the Law Firm cannot prove that CNO "acted without a proper purpose in this

case." *Father*, 353 S.C. at 261, 545 S.E.2d at 15. There are no serial litigators, arguing the same thing over and over. There are no parties or lawyers who have violated previously the Act. The Law Firm cannot establish by a preponderance of the evidence that the claims were frivolous.

C. The Negligence Claim Was Proper and Not Frivolous.

The Law Firm contends that no duty of care exists to support a negligence claim because attorneys are immune from liability to third parties in connection with providing professional services. (Br. at 15-16 (citing *Argoe v. Three Rivers Behavioral Center & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).)[9] But this dispute is between the Law Firm and CNO, where the Law Firm was indemnifying CNO. It had nothing to do with providing legal services of behalf of its client.

In *Argoe*, a husband and son entered into an attorney-client relationship with a law firm ostensibly to protect the wife/mother from irresponsible and erratic behavior. *Argoe*, 388 S.C. 394, 398, 697 S.E.2d 551, 553 (2010). The son was the wife/mother's durable power of attorney. *Id.* After learning that wife/mother took out a loan against a Beaufort County condominium that she owned and allowed the condominium to go into foreclosure, the law firm helped the son to transfer the title of the condominium into a trust for the wife/mother with the son being the beneficiary of the trust upon wife/mother's death. *Id.* According to the wife/mother's estate plan, son would receive the property upon her death regardless so "the creation of the trust at issue was consistent with the status quo." *Id.* at 399, 697 S.E.2d at 553. Wife/mother alleged that the transfer of the condominium and her involuntary commitment was a scheme of husband because she was

[9] The Law Firm also argues that *Harbin v. Blair*, No. 2017-CP-04-02099, 2019 WL 13129354 (S.C. Com. Pl. Oct. 9, 2019) and its unpublished appellate opinion, No. 2020-000421, 2022 WL 2826361 (S.C. Ct. App. July 20, 2022) provide that the negligence claim was not clearly supported by the facts as alleged. The distinction of *Argoe* as discussed below provides the same reasoning why *Blair* is inapplicable to the matter.

going to divorce him. *Id.* The wife/mother filed a lawsuit against the law firm in Beaufort County for various causes of action, including "setting aside influenced transactions, professional negligence, breach of fiduciary duty," among other causes of action. *Id.* at 399, 697 S.E.2d at 554. She filed another lawsuit in Lexington County arising out of the same facts and circumstances and naming two other parties. *Id.*

The wife/mother's theory of liability regarding the law firm was that "she had an attorney-client relationship with [law firm] arising out of his representation of Son. Therefore, [wife/mother] asserts that the transfer of title to the Beaufort County Property without her knowledge breached a duty of care [law firm] owed to her." *Id.* at 400, 697 S.E.2d at 554. The *Argoe* court found there was no attorney-client relationship between the law firm and the wife/mother. *Id*. Thus, there was no duty of care arising out of an attorney-client relationship. *Id.* at 400-01, 697 S.E.2d at 554-55.

The Court explained that "[g]enerally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney of behalf of and with the knowledge of his client." *Id* at 400, 697 S.E.2d at 554 (internal quotation marks and citation omitted). "Further, an attorney owes no duty to a non-client ***unless he 'breaches some independent duty to a third person*** or acts in his own personal interest, outside the scope of his representation of his client.'" *Id*. (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (emphasis added)).

This is exactly what happened in the present case. The Law Firm sent two letters of protection to CNO stating that it would protect claims CNO would have out of any settlement proceeds. (ROA 100 & 107.) These letters of protection provide the backdrop for the Law Firm's false representations that there was $1.1 million in coverage and "we are not concerned that there

will be enough over all coverage to pay the claim." (ROA 104.)

These letters of protection and representations about coverage constitute an independent duty to CNO. To insulate lawyers from liability based on their representations that may tangentially touch on their representation would give lawyers carte blanche to renege on promises or representations. It could absolve lawyers from paying their experts because the experts were hired in connection with the performance of the lawyer's professional services. Similarly, it could provide blanket protection to lawyers not to pay their other bills because the bills were accrued in connection with providing legal services. This is not what the principle behind the *Argoe* or *Blair* cases serves to protect. The Law Firm is not cloaked in immunity, and thus able to avoid its promises and misrepresentations, with respect to CNO. It like all other entities are responsible for its liabilities.

D. The Fraud Claim Was Proper and Not Frivolous.

The Law Firm states that the fraud claim was dismissed on failure to allege with particularity and that CNO had no right to rely on the Law Firm's statements. (Br. at 16-17.) Additionally, the Law Firm continues to rely on law of the case doctrine to argue that CNO was on notice of certain issues, specifically that the first Letter of Protection had been withdrawn and that CNO should file claims with the Client's private health insurance. (*Id.* at 17.) Next, the Law Firm alleges that CNO was under a duty to investigate the coverage. (*Id.* at 17-18). The Law Firm continues to argue that no allegations were made with particularity indicating that the Law Firm was not going to honor its second Letter of Protection and that statements were false when they were made. (*Id.* at 17.)

CNO is not appealing the fraud claim, but it is appealing all of these issues raised in the preceding paragraph. The law of the case doctrine has no application in this case for all the reasons

discussed in CNO's brief in chief in its appeal. Further, CNO challenges the merits of all of these issues as they go to CNO's negligent misrepresentation claim. In sum, the fraud claim is not frivolous and does not support a violation of the Act or Rule 11, SCRCP.

E. The Unjust Enrichment Claim Was Proper and Not Frivolous.

The Law Firm argues that the potential enhancement that CNO's services could provide to the Law Firm's settlement figure was too speculative to substantiate a benefit to support an unjust enrichment claim. (Br. at 18.) While CNO may disagree with the circuit court's conclusion, the fact that the claim was dismissed is not evidence in and of itself that the claim was frivolous. It stretches credulity to argue that a reasonable attorney would believe this claim was frivolous. *See* S.C. Code Ann. § 15-36-10(C)(1)(c). Moreover, it is an equitable claim. A reasonable attorney could see that the claim was warranted under existing law, and even if existing law did not explicitly address this issue, there is a good faith and reasonable argument for the extension of the existing law to capture that the medical services provided by CNO could increase the settlement value of the Law Firm's case. *See* S.C. Code Ann. § 15-36-10(C)(1)(a).

F. The Breach of Contract Claim Was a Proper Claim and Not Frivolous.

The Law Firm paints CNO's breach of contract claim as one that shifted unnecessarily throughout litigation to serve as some litigation tactic. This is not correct. The Law Firm states that the breach of contract claim was initially based on the two letters of protection. (Br. at 19.) Then, the Law Firm argues that the contract claim shifted to "a contract wherein [Carolina Neurosurgery] would provide medical services to [D&M's] client based on [D&M's] representations about insurance coverage." (*Id.* at 20.) However, the circuit court allowed for this amendment. (ROA 35-36.) It matters not that it was on the cusp of summary judgment. The Law Firm inappropriately complains that the theory of the breach of contract changed from the Letters

of Protection to the promise to provide medical services based on representations about coverage.[10]

The Law Firm emphasizes the testimony of Dr. Highsmith to state that he only thought the Letters of Protection were the only way to hold the Law Firm responsible. (Br. at 19-20.) But a closer review of the transcript does not show that Dr. Highsmith testified as the Law Firm says he did. Over an objection to the form of the question, Dr. Highsmith testified "[a]gain, I trust the agreement and the paperwork we had from them. Beyond that, I don't have any other way to hold them accountable." (ROA 473-474, pp 33:22 – 34:7.) Dr. Highsmith is not limiting himself to Letters of Protection. Rather, he is also referring to the emails, including the one stating the coverages and the lack of concern from the Law Firm about paying out the claim. Additionally, this is a legal question for his lawyers, not Dr. Highsmith, to argue.

The Law Firm argues that because claims changed from the original complaint that was verified, then CNO is subject to sanctions. (Br. at 22.) The Law Firm relies on *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006) for the proposition that sanctions can be awarded when testimony contradicts statements in an affidavit. In *Russell*, a daughter tried to set aside her father's estate plan based on allegations of undue influence. *Russell*, 370 S.C. at 10, 633 S.E.2d at 724-25. In response to the allegations of undue influence, the defendants submitted "(1) an affidavit from Testator's attorney, who drafted the will and trust documents; (2) affidavits from

[10] The Law Firm also complains that allegations about the false email have changed. (Br. at 21.) It notes that the false email was referenced in the original and amended complaint, but then in the second amended complaint, CNO alleges that the email was false. Paragraph 29 of the Complaint references an email (Ex. 9 to the Complaint) from Tina Bennett of the Law Firm to Melinda Roten at Center for Advanced Surgery. (ROA 112.) This is not the fake email. The fake email is "Email" purportedly from Tina Bennett of Law Firm. (ROA 572.) The two emails contain similar verbiage, but it was a scrivener's error in paragraph 29 of the Complaint to state the Law Firm sent the email to Carolina Neurosurgery. Instead, it was sent to Center for Advanced Surgery. To be clear, CNO did not receive the false email the Law Firm claimed to have sent on April 29, 2019. (ROA 615, ¶ 22.)

Testator's colleagues on the Fourth Circuit; (3) an affidavit from one of the Testator's personal friends, a former Chief Justice of the South Carolina Supreme Court; (4) an affidavit from Testator's personal physician; and (5) copies of all of Testator's estate documents, dating back until the late 1950s." *Id.* at 18, 633 S.E.2d at 729. The Supreme Court held that the daughter should not have continued litigation after receiving all of these affidavits. *Id.* Additionally, the Supreme Court found that the daughter was properly sanctioned under Rule 11, SCRCP, for submitting a false affidavit. *Id.* at 19, 633 S.E.2d at 729. The Supreme Court found her deposition testimony contradicted her own affidavit, and therefore, the sanction of paying attorney's fees and costs from the arguing of defendant's motion for summary judgment until the granting of summary judgment was warranted. *Id.* at 19-20, 633 S.E.2d at 729-30.

Here, there is no contradiction in the statements sworn by Dr. Highsmith in the verified complaint and anywhere else in the record. Again, claims are changing, not facts. The claims are still grounded in the Letters of Protection and the representations regarding lack of concern about coverage from the Law Firm. There is no inconsistent factual testimony from Dr. Highsmith.

G. The UTPA Claim Was a Proper Claim and Not Frivolous.

The Law Firm looks to the amendments of the UTPA claim to argue that it was meritless from the beginning. It states at the beginning the UTPA claim was "vague, but in discovery it was based on the email for insurance." (Br. at 19.) To be more clear about the email, it was based on the false "email" that was never sent to CNO that purportedly stated only $30,000 worth of coverage is available.[11] (ROA 572) The Law Firm takes issue that CNO "modified its sworn allegations in order to prolong the case and determination on the SCUTPA claim." (Br. at 21.) It

[11] As an aside, it makes no financial sense for CNO to perform elective surgery on Law Firm's client if there was only $30,000 of coverage available. Each surgery was well over $30,000. (ROA 102.)

then goes on to say as follows:

> 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.

(*Id.* at 22.) This is false logic. A statement can be true and still remain true if the claims around the statement are amended. Facts are facts; claims can change. This is not evidence of a frivolous claim.

Additionally, the Law Firm tries to attack the UTPA claim by saying that One Beacon provided coverage, and therefore, representations about coverage were true. (Br. at 23.) This argument is misguided. One Beacon paid $6,323.50; the claim totaled $125,409.28. (ROA 1057 & 102.) To suggest that One Beacon's payment of $6,323.50 vitiates the negligent misrepresentation of "we are not concerned that there will be enough over all coverage to pay the claim" is specious. (ROA 104.)

Finally, the Law Firm attacks the UTPA claim by arguing that certain damages, including attorney's fees for litigation costs incurred in suing the Law Firm's client, are frivolous. (Br. at 24-26.) First, they argue that because a stipulation of dismissal was filed in the lawsuit against the Law Firm's client stated each party is responsible for its own fees, then those fees should be included in the UTPA claim. The Law Firm misconstrues the import of the stipulation of dismissal. The representation that each party is responsible for its own fees is with respect to the two parties in the litigation. That representation does not bar one party from going after another entity who is legally responsible for that element of damages—the Law Firm. The Law Firm caused those damages. The stipulation of dismissal does not bar CNO from going after the party who caused

them. Second, the Law Firm states that the fees were characterized as "Legal Fees paid to Sowell & DuRant to pursue recover under One Beacon Policy," but they were incurred suing the Law Firm's client. Again, the fees are damages under the UTPA claim. If the Law Firm had not engaged in an unfair and deceptive act, CNO would not have incurred these fees. If the Law Firm had adequately investigated the coverages, CNO would not have incurred these fees. These damages are proper. Finally, the Law Firm simply states that "attorney's fees are not recoverable absent a contract or statute." (Br. at 25.) UTPA is the statute. If CNO is successful against the Law Firm in its UTPA claim, it will also look for its attorney's fees under section 39-5-140.

H. CNO's Claims Dismissed at Summary Judgment Are on Appeal and Are Proper.

The Law Firm's argument in section II(B)(iv) of its brief appears to be a hodgepodge of argument regarding CNO's claims of breach of contract, violation of UTPA, negligent misrepresentation, and promissory estoppel. (Br. at 26-29.) First, the Law Firm argues that the law of the case doctrine preempts these claims. Second, the Law Firm argues that the claims failed on their own. These issues are on appeal, and for judicial economy's sake, CNO refers this Court to its brief in chief in its appeal and its reply brief to show that the law of the case doctrine was applied in error and that summary judgment for the violation of UTPA and negligent misrepresentation was improperly granted.

I. Attorney's Fees and Costs Should Not Be Awarded to the Law Firm.

Because there is no violation of the Act or Rule 11, SCRCP, the Law Firm is not entitled to any attorney's fees. Moreover, the circuit court denied the motion for sanctions, and therefore, did not consider any request for attorney's fees. Attorney's fees and costs are not properly before this Court.

I. The Circuit Court Correctly Refused to Grant the Motion to Strike.

The trial court did not abuse its discretion in denying the Law Firm's motion to strike. The well-known Rule 15, SCRCP, standard is "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. The Law Firm's argument regarding the motion to strike promotes form over substance, which is the antithesis of Rule 15's standard. The denial of the motion to strike is, in turn, the granting of a motion to amend, which should be "freely given[.]" As argued to the circuit court by CNO, the "[s]econd amended complaint and the first amended complaint contains the same, identical causes of action. So we're not going in front of a jury on anything in new terms of claim" and "[i]t's a notice pleading[,] there's no harm. It's – it's the same issues that people have testified about in the documents that were exchanged in discovery. So this is more of a notice issue, and there are no new claims . . . ." (ROA 1349:10-14 & ROA 1350:12-17.)

Moreover, the plain language of Rule 15, SCRCP, provides that 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." Here, the Amended Complaint was filed and served on September 10, 2024. (ROA 594-601.) The Law Firm filed it Answer to the Amended Complaint on September 20, 2024. (ROA 602-610.) Then, CNO filed its Second Amended Complaint on September 24, 2024—within 30 days after the responsive pleading was served. (ROA 611-619.) The Law Firm takes issue with the application of the plain reading of Rule 15, SCRCP, and encourages this Court to review federal cases suggesting that Rule 15 does not allow for two amendments as a matter of course. However, the practical response is that the circuit court gave CNO leave to amend its amended complaint when it denied the Law Firm's motion to strike. The

"freely given" standard regarding leave to amend complaints cannot be ignored.

CONCLUSION

For the above-reasons, this Court should affirm the circuit court with respect to its decision on the Law Firm's motion for sanctions and motion to strike CNO's second amended complaint.

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