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PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2012-UP-293  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

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

v.

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

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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

v.

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

Of whom Douglas A. Lambrecht is the Appellant.

Appeal From Beaufort County  
Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2012-UP-293  
Heard April 9, 2012 – Filed May 16, 2012

**AFFIRMED**

John E. North, Jr., and Pamela K. Black, both of  
Beaufort, for Appellant.

H. Fred Kuhn, Jr., of Beaufort, and G. Richardson  
Wieters, of Charleston, for Respondent.

**FEW, C.J.:** Douglas Lambrecht appeals the circuit court's decision to deny his motion for sanctions under Rule 11, SCRCP, and sections 15-36-10(C)(1)(a) and -10(C)(1)(c) of the South Carolina Code (Supp. 2011).[1] Lambrecht alleged Deborah Clegg's pursuit of a negligent entrustment action against him was frivolous and unwarranted under South Carolina law. Pursuant to Rule 220(b)(1), SCACR, we affirm the circuit court's decision to deny the motions.

A motion for sanctions under Rule 11 or the amended Frivolous Proceedings Act is an equitable action and therefore, on appeal, this court finds facts in accordance with its own view of the preponderance of the evidence. Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). The circuit court made detailed findings of fact in its order denying Lambrecht's motions. After a complete review of the record and taking our own view of the preponderance of the evidence, we make the same findings of fact.[2]

A party seeking sanctions under the Frivolous Proceedings Act must prove "a reasonable attorney in the same circumstances would believe that": (1) "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"; or (2) "the case or defense was frivolous as not reasonably founded in fact." S.C. Code Ann. §§ 15-36-10(C)(1)(a), (c) (emphases added).

A party seeking sanctions under Rule 11 must prove an attorney signed a pleading or motion "to cause delay or when no good grounds exist to support the filing." Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011); Rule 11, SCRPC (stating an attorney's signature on a pleading or motion certifies "that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay").

Applying our findings of fact to these standards of proof, we hold Lambrecht is not entitled to sanctions.[3] Accordingly, the decision of the circuit court is

**AFFIRMED.**

**HUFF and SHORT, JJ., concur.**

[1] We apply the amended version of the Frivolous Proceedings Act rather than the 2002 version in effect at the time the cause of action arose because in a prior unpublished opinion remanding this case, this court found "neither party asserted the prior version applied; thus the trial court applied the 2005 version," and "it has become the law of the case." Clegg v. Lambrecht, Op. No. 4498 (S.C. Ct. App. filed Feb. 5, 2009) (Shearouse Adv. Sh. No. 8 at 68 n.1), withdrawn, substituted, and refiled Op. No. 2009-UP-376 (Ct. App. filed June 30, 2009); see also 2005 Act No. 27, §§ 5, 16 (stating the amended version of § 15-36-10 "take[s] effect July 1, 2005, and shall only apply to causes of action arising on or after that date").

[2] The only factual finding made by the circuit court which we do not make is that the record contains "evidence to support the reasonableness (and the good faith) of the allegation that at[] the time of [the] fatal wreck Elliott was acting pursuant to instructions from [Douglas] to retrieve the Mazda." However, our disagreement with the circuit court on this point does not change our overall conclusion that Clegg's claim for negligent entrustment does not violate the requirements of the Frivolous Proceedings Act and Rule 11.

[3] For one example that refutes Lambrecht's argument that a reasonable attorney in the same circumstances would believe that under the facts, his claim was clearly not warranted, see Nationwide Mutual Insurance Co. v. Smith, 376 S.C. 60, 67, 654 S.E.2d 837, 840 (Ct. App. 2007) ("An automobile insurance policy, like other forms of insurance, must be supported by an insurable interest in the named insured. The insurable interest required does not depend upon the named insured having either a legal or equitable interest in the property, but it is enough that the insured may be held liable for damages to its operation and use." (internal citations and quotation marks omitted) (emphasis added)).

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable Roger M. Young, Presiding Judge

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

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

v.

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

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

PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Rules 221 and 219(b) SCACR, Appellant hereby Petitions the  
South Carolina Court of Appeals for a rehearing of the matters decided in the  
Court's Opinion, filed on May 16, 2012.

The grounds for this Petition and the supporting points and authorities are  
set forth with particularity below.

*App. p. 3*

1. The Court of Appeals overlooked or misapprehended the requirements of Rule 220(b)(1) SCACR when it failed to distinctly state its findings of fact, failed to address the legal issues raised by the Appellant, and failed to provide the basis for its decision.

As this Court acknowledged in its Opinion, under the applicable standard of review, this Court was to make its own findings of fact in accordance with the evidence in the record and apply the relevant law to those facts.

Rule 220(b)(1) SCACR requires that the Court's findings of fact and the basis for the Court's decision be distinctly articulated.

Rule 220(b)(1) SCARC states that in every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. Accordingly, when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reasons for its decision.

*Dearybury v. Dearybury*, 351 SC 278, 283, 569 S.E. 2d 367, 369 (2002).

In his briefing in this Court, Appellant set out the numerous findings of fact relied upon by the trial court to reach its conclusion that were not substantiated by the record as well as the incorrect application of the law upon which it relied. The Appellant discussed at length the erroneous reliance by the trial court upon the "competence" and "good faith" of Respondent's counsel as a basis for denying sanctions under Rule 11 and the FCPSA. Finally, the Appellant demonstrated that the record was unequivocal that Appellant neither owned or controlled the automobile involved in the accident, which was, in fact, owned and driven by his adult son, that there had never been viable negligent entrustment or

negligence claims against him, and that, under the standard mandated by the FCPSA, sanctions were mandatory.

In its May 16<sup>th</sup> Opinion, the entirety of the discussion of its findings of fact is one sentence that states "we make the same findings of fact" as the trial court. There is no discussion, whatsoever, of the points raised by the Appellant and no rationale other than a one sentence affirmance of the trial court.

Merely adopting wholesale the findings of fact of the trial court without any discussion of what those facts were or how they related to the legal issues raised and without any articulated basis for the Court's decision is clearly inadequate under Rule 220(b)(1). Rehearing should be granted so that this Court can reconsider its decision and issue an opinion that complies with Rule 220(b)(1) and the precedent established by *Dearbury*.

2. The Court of Appeals overlooked or misapprehended the Appellant's argument that the trial court analyzed the frivolity of the Respondent's claims on the basis of the subjective good faith belief and competence of her counsel and not on the standards applicable under Rule 11 and the FCPSA .

The trial court's finding at the summary judgment stage of this proceeding that the Respondent's claims against Appellant were without legal and factual merit were not appealed and became the law of the case. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997).

The only task of the trial court in the context of the request for sanctions was to evaluate whether, under the standards of the FCPSA and Rule 11, a reasonable lawyer, who knew the facts and the law that the Respondent knew or

should have known, would have concluded that the claims were clearly without merit and at what point that conclusion would have been reached.

That is precisely the direction given by this Court on the first appeal of this matter when the case was remanded to the trial court.

Under the peculiar facts of this case, more specific findings and conclusions by the trial court are necessary because a duty to dismiss or withdraw frivolous litigation may arise at a subsequent point in the litigation based on whether an attorney knew or should have known a claim is frivolous. This type of review requires an intensive factual consideration of the record, including discovery.

*Clegg v. Lambrecht*, Op. No. 2009-UP-376 (Ct. App. filed May 13, 2009)

However, rather than evaluate the record with respect to what the Respondent knew or should have known about the factual and legal viability of her claim under the FCPSA and Rule 11 standard, the trial court denied sanctions on the basis that there was some evidence upon which Respondent's attorneys could have held a "good faith" belief in the validity of the claims. (R. p. 47) In that Order at page 9, the trial court held that even though the claims were not legally viable "there is evidence supporting *the good faith belief* that Defendant exercised ownership or control over the Mazda vehicle".

Even if "good faith" were the standard by which frivolity was evaluated, which it is not, it is impossible to reconcile the trial court's holding on summary judgment with its denial of sanctions on the basis of good faith. In its order on summary judgment, the trial court held that there was no evidence that could be "reasonably" construed by a jury that Appellant owned or controlled his son's vehicle and that as a matter of law, Appellant had no legal duty to control his son's actions.

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

R. p. 13

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

If a juror could not reasonably conclude from the evidence that Appellant owned or controlled his son's vehicle, Respondent's attorneys cannot have, on the same evidence, formed a reasonable and good faith belief that it did.

In its May 16<sup>th</sup> Opinion, this Court recited the correct standard for evaluating frivolity under the FCPSA - "whether a reasonable lawyer in the same circumstances" would believe that under the facts the claim was "clearly not warranted". There is no question that the trial court did not employ that standard.

On page 9 of the Order affirmed by this Court, the trial court states "there is evidence supporting the **good faith belief** that Defendant exercised ownership or control over the Mazda vehicle." (Order, R. p. 55). On page 13 of the Order, the trial court states "in the instant case there is evidence to support the **reasonable and good faith belief** that it was the Defendant who held the attributes of ownership and control". (Order, R. p. 59). On page 13, the trial court finds "that the claim of negligent entrustment was **brought both in good faith and was reasonable**". (Order, R. p. 59). On page 19, the trial court finds that "**it is both reasonable and in good faith to assert that .....**" (Order, R. p. 65). (Order, R. p. 66). The same "good faith" standard is referenced at pages 15, 20, 21, 22, and 23 of the Order. (R. p. 61; R. p. 67; R. p. 68; R. p. 69).

Finally, in its conclusion, on page 25 of the Order, the trial court holds: "I find that the case was brought by experienced, competent lawyers who in good faith believed the facts of the case warranted bringing the lawsuit under the theory it was pursued". (Order, R. p. 71).<sup>1</sup>

The trial court's failure to apply the proper standard is made perfectly clear in its Order denying Appellant's Motion to Alter or Amend. The only basis articulated for failing to award sanctions was: "Upon consideration, I find that the case was brought in good faith by experienced, competent lawyers who in good faith believed the facts of the case warranted bringing the lawsuit under the theory it was pursued." (Order, R. p. 77).

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<sup>1</sup> This was exactly the language employed by the trial court in its first order denying sanctions and which was remanded by this Court on appeal for purposes of evaluating frivolity based on the correct standard articulated under the FCPSA.

Even the Respondent acknowledged at page 11 of her Brief that the trial court, in fact, applied a "subjective good faith" standard to evaluate the frivolity of the claims pursued against Appellant. At no point in the trial court's Order denying sanctions did the trial court evaluate the record to ascertain when the Respondent's attorneys knew or should have know the critical facts and applicable law which was ultimately lethal to the viability of her claims.

As set forth in a following argument, not only did the trial court apply the wrong standard to evaluate frivolity, the evidence upon which the trial court concluded that the Respondent's counsel could have held a good faith belief in the merits of the claim is either nowhere in the record, or is irrelevant to the critical issues of ownership or control of the vehicle allegedly negligently entrusted.

In addition to the erroneous standard employed by the trial court for evaluating frivolity, this Court has affirmed an Order in which the "conduct and demeanor" of the "parties and their counsel" and "the earnestness and good faith of Plaintiff and her attorneys" was deemed relevant in determining whether the negligent entrustment claim was frivolous. (Order, R. p. 71). Those considerations are absolutely without any basis under Rule 11 and the FCPSA and is the antithesis of the objective legal analysis that this Court and the trial court are required to conduct.

Rehearing should be granted so that this Court can apply the correct legal standard to the facts that are actually supported by the record, not find facts that

are irrelevant or not supported by the record, and articulate the distinct basis for its conclusions with regard to the frivolity of the Respondent's claim.

3. The Court of Appeals misapprehended or overlooked the Appellant's argument that, based upon the facts and the law which were known or should have been know by Respondent's counsel, a reasonable attorney would not have believed them to be meritorious.

If a claim is pursued that a "reasonable attorney" would find not factually or legally meritorious, the claim is frivolous under the standard established by the FCPSA. If it is frivolous, the trial court "shall" impose sanctions. (S.C. Code § 15-36-10(C)(1).

The standard for determining frivolity is essentially the same under Rule 11 as it is under the FCPSA. Under Rule 11, an attorney must conduct a pre-filing investigation and his signature is a certification that there are good grounds to support the claim. It is not necessary to demonstrate bad faith in order to establish a violation of Rule 11, but only to demonstrate that the claim had "no chance of success under existing precedent". *Gibbes v. Rose Hill Plantation Development Company*, 794 F. Supp. 1327, 1340 (D. S.C. 1992) See, also: *In Re Beard*, 359 S.C 351, 597 S.E. 2d 835 (Ct. App. 2004) cert. denied.

During oral argument and in the May 16<sup>th</sup> Opinion, this Court stressed the phrase "clearly not warranted" as significant in excusing Respondent's responsibility for filing and pursuing a frivolous claim. "Clearly" means patently, obviously, and unambiguously. There is nothing ambiguous or unclear about the requirements of a negligent entrustment claim under South Carolina law and there was nothing ambiguous or unclear about the material facts relevant to that claim.

Liability for negligent entrustment can be imposed only upon a person who owns or controls the use of a vehicle. The unambiguous facts known to the Respondent almost from the outset of this four year litigation were that Appellant did not own his son's vehicle and his son, as an emancipated adult, was not subject to Appellant's control over his person or his vehicle.

Any reasonable lawyer considering those facts and the law objectively would conclude that, clearly, there could be no viable claim for negligent entrustment. Neither this Court nor the trial court articulated any basis why the frivolous nature of such a claim would be "unclear" to a reasonable lawyer, unless that lawyer is excused from sanctions when simply chooses to ignore both the facts and the law.

The record in this case is neither unclear nor ambiguous about what the Respondent knew of the material facts and when they were known.

The accident in which the Decedent was killed occurred in January, 2002. The initial Complaints were filed six months later in July, 2002. In those Complaints, the gist of the Respondent's claims against Appellant was that he owned the automobile involved in the accident and that he negligently entrusted it to his son, Elliott. (Complaints, 1159, 1160 ¶¶ 20 – 37, R. pp. 82 - 85; R. pp. 92 - 95).

Had Respondent investigated the facts in the six months between the accident and filing the Complaints, she could have easily determined that Elliott, and not Appellant, owned the automobile involved in the accident and that Elliott

was of legal age, thus rendering her negligent entrustment claim without a factual basis.

Without regard to whether Respondent's attorneys actually did the required pre-filing investigation and research that they had a duty to do, within three months thereafter, they were served with discovery responses which provided them with a copy of the Certificate of Title for the automobile, which showed Elliott as the owner. (Responses to Plaintiff's Request for Production, R. p. 104).

In February, 2003, sworn statements of Elliott's mother, Jan, and his minor sister, Anna, were taken by Respondent's attorneys. (Deposition, Jan, Exhibit 1, R. pp 736 - 739; Deposition, Anna, Exhibit 1, R. pp.747 - 744). The statements established that Elliott had been living on his own since the summer of 2001 and that, on the date of the accident, he was nineteen years old. (Deposition Jan, Exhibit 1, p. 5, R. p. 738, lines 4 - 23, p. 6, R. p. 739, lines 4-10). The statements additionally established that, prior to the accident, Elliott's vehicle had been in Anna's possession for some time, and that it was from his mother's and Anna's home that Elliott took the automobile on the evening of the accident. (Deposition Anna, Exhibit 1, p. 7, R. p. 746, lines 11 - 14; p. 13, R. p. 747, lines 3- 15)<sup>2</sup>

Fifteen months after taking the sworn statements, the Respondent filed Amended Complaints alleging that Appellant was the *de facto* owner of the automobile involved in the accident.

In June, 2004, Appellant filed his Motion for Summary Judgment supported by his own Affidavit and that of Elliott, affirming Elliott's legal age and

<sup>2</sup> Douglas and Elliott's mother Jan were divorced and living in separate households.

emancipation at the time of the accident, the ownership of the automobile, Appellant's lack of physical possession or control of the automobile, and his lack of any knowledge concerning Elliott's intention to drive on the night of accident. (Affidavit Douglas, R. pp. 205 - 209; Affidavit Elliott, R. pp. 200 - 204). Appellant also filed and served his supporting brief setting forth the legal elements of negligent entrustment and negligence claims and the relevant facts which showed that no such claims could be pursued against Appellant.

Despite knowledge of these facts, Respondent continued to pursue the litigation, deposing all parties. Elliott testified that the automobile had been purchased by and titled to him, that he made all the payments and paid for repairs. (Deposition Elliott, R. p. 698, line 18 – R. p. 699, line 22). He further testified that only he controlled the use of the automobile, that he had allowed his sister Anna to use it, and that, when he picked up the automobile, it was at Anna's and his mother's home where it had been for some time. Elliott further testified that Appellant did not know that Elliott planned to pick up the automobile or drive it. (Deposition Elliott, R. p. 679, lines 17 – 20; R. p. 700, lines 20 – 23).

In April, 2005, after Appellant's Motion for Summary Judgment was on file, and after all of the sworn statements and depositions of the witnesses had been taken, the cases were dismissed pursuant to SCRPC Rule 40(j).

One year later, in April, 2006, Respondent moved to reinstate the cases to the active roster and they were reinstated.

In August, 2006, when discovery was complete, the Respondent filed second Amended Complaints in which essentially the same allegations were

made as the previous versions, and, in addition, alleged that Appellant "controlled" the use of Elliott's vehicle. (Second Amended Complaints, R. pp. 215 – 238).

Two months later, the trial court granted summary judgment, finding that there was no factual or legal basis for any claim against Appellant arising out his son's automobile accident.

At no point during the litigation were the essential and material facts relevant to the ownership and control of the automobile involved in the accident ever in dispute. At the latest, by February, 2003, the Respondent and her attorneys should have known that the negligent entrustment claim against Appellant was not viable because Elliott, an adult, and not Respondent, owned the automobile and that ownership gave him and not Appellant the legal right to control its use. In addition, there was never any evidence that alcohol was involved the accident, which alone negates the viability of a negligent entrustment claim.

Most telling about the egregious nature of Respondent's conduct were the additional allegations contained in the second Amended Complaint filed in August, 2006. In those Complaints, for the first time, Respondent alleged "upon information and belief" that Elliott took his car on the night of the accident "in compliance with instructions" from Douglas and/or Jan (his mother). (R. p. 218; R. p. 230). In making those allegations, "upon information and belief", the Respondent knew full well that there was not one shred of evidence to support them and that they were pure fiction.

Respondent had taken Elliott's deposition eighteen months prior to filing this version of her Complaints and in that deposition Elliot testified as follows:

Q. Had your mother complained about there were too many cars in her driveway and it needed to be moved?

A. No.

Q. You don't recall that?

A. No. There's plenty of room there.

Q. So you don't recall your mother saying to your sister or to you or to your father, that the car needed to be moved.

A. No, never.

Q. Or were you not aware of that?

A. It wouldn't have been told to anybody but me, because it was my car and would have been my responsibility to get it moved. So if it wasn't said to me, then chances are it was never said.

Q. Okay. So the only reason that you went to get the car, then, was because Rhett needed to use it.

A. Yes, I was gonna let Rhett use it.

R. p. 681, line19 – R. p. 882, line18.

At the time that she filed her second Amended Complaints, the Respondent had known for eighteen months that the facts she alleged "on information and belief" had absolutely no basis in the record.

Ultimately, four years after the cases were initiated, and after they had been dismissed and reinstated, the Respondent was unable to direct the trial court to any material fact that was inconsistent with what Respondent knew or should have known since the outset of the litigation and no law which would give her a viable claim against Appellant. There was no additional discovery done between the time that the cases were reinstated and the trial court's grant of summary judgment wherein the court determined that there was no evidence to support the Respondent's claims.

All of the attorneys for Appellant's co-defendants immediately, upon being sued on the same theory of liability as asserted against Appellant, without any discovery, filed motions for summary dismissal on the basis that the allegations of the Amended Complaints did not give rise to any legal duty that was breached. (Motion to Dismiss, Anna, July 9, 2004, R. p 210; Motion to Dismiss, Jan, July 26, 2004, R. p. 211; Motion for Summary Judgment, Rhett, November 22, 2004, R. pp. 213 -214).<sup>3</sup>

In essence, four different attorneys, all of whom were obligated under the FCPSA and Rule 11 not to make frivolous claims or filings, concluded that the Respondent's claims were meritless, as a matter of law, and sought dismissal on that basis, which was granted.

When the trial court granted Respondent's Rule 59(e) Motion and denied sanctions, it not only found that there was evidence from which the Respondent's attorneys could have formed a good faith belief in the claim, but effectively disavowed its prior summary judgment findings. In the Order denying sanctions, which this Court adopted and affirmed, the trial court found that (1) that Appellant "had physical control over the vehicle", (Order, p. 10, R. p. 56); (2) that Appellant was the *de facto* owner of his son's automobile, (Order, p. 12, R. p. 58), (3) that Appellant "was the one who either owned or controlled" the Mazda (Order, p. 11, R. p. 57); and (4) that Appellant "represented to USAA (his insurer) that he was the owner" of his son's automobile (Order, p. 13, R. p. 59).

The applicable law and the material facts do not change depending upon the purpose for which they are being considered. When summary judgment was

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<sup>3</sup> All the claims were dismissed by the Court save an unrelated one against Elliott's friend.

granted, the findings in that Order became the law of the case. Despite the Order denying sanctions, Appellant did not have control of his son's vehicle, was not the *de facto* owner of the vehicle, did not own or control the vehicle, and did not represent to his insurer that he owned his son's car.

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

Neither this Court nor the trial court made any attempt to distinguish this case, in which sanctions were denied, from *Ex Parte Gregory*, *Russell*, and *In Re Young* in which sanctions were granted or discipline imposed for, like this case, pursuing claims without a factual or legal basis or for which no adequate investigation and research was undertaken.

This Court should grant a rehearing to evaluate, based on the actual record in this case, what the Respondent's attorneys knew about the relevant and material facts and applicable law, and when they knew it, and whether, and at what point in time, a reasonable attorney with the same information would have recognized that there was no factual or legal basis for the claim.

4. The Court of Appeals overlooked or misapprehended that the trial court's Order finding an evidentiary basis for a "good faith belief" in the claims pursued

against Appellant was based on factual findings that were not substantiated in the record, were irrelevant to the issues, or both.

In its May 16<sup>th</sup> Order, this Court stated: "we make the same findings of fact" as the trial court.

Consistent with its summary judgment findings, the trial court initially entered an Order (R. p. 27) granting sanctions on the basis that no reasonable lawyer would have pursued the claims pursued against Appellant. However, in response to the Respondent's rule 59(e) Motion, the trial court completely reversed its factual and legal findings and issued an Order finding that the evidence in the record provided a basis for the "good faith" belief of Respondent's counsel in the merits of the claim. (R. p. 47)

The trial court made no explanation of how it came to make completely inconsistent factual findings. Likewise, the trial court did not even discuss how, on the one hand, it could find that no reasonable juror could conclude that Appellant either owned or controlled his son's vehicle and that sanctions were appropriate because the claims had no factual and legal merit and then, a few months later, find that sanctions were not appropriate because counsel had a good faith belief in them.

This Court should not be provoked when the Appellant contends that there is error in this outcome. It is inexplicable. Neither the trial court nor this Court in its May 16<sup>th</sup> Opinion makes any effort to explain its analysis and conclusion or the clear inconsistency between the summary judgment findings and those made with regard to the request for sanctions.

In addition to being in total conflict with the law of the case and its previous findings, as pointed out in pages 32 through 40 of Respondent's Brief and incorporated herein by reference, the "evidence" upon which the trial court relied to deny sanctions was either an incorrect statement of the law or were factual findings completely unsupported by the record. Some of those unsubstantiated contentions are additionally addressed below.

As set out in Appellant's Brief, in South Carolina the titleholder of a vehicle is *prima facie* its owner. *Unisun Insurance Company v. First Southern Insurance Company*, 319 S.C. 419, 424, 462 S. E. 2d 260, 262 (1995) *reh. denied*.<sup>4</sup> In its Order denying sanctions, the trial court cites S. C. Code § 56-1-10(3) for the proposition that, despite his failure to have title, Appellant was, in fact, the "owner" of his son's vehicle because he was entitled to the "use and possession" of it. (Order, R. p. 55)

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

The statute actually provides that:

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

Accordingly, the statute relied upon by the trial court provides just the opposite of its finding. Under the statute, the owner of a vehicle is the one who

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<sup>4</sup> As *Unisun* discusses, in cases involving insurance coverage, there may be limited circumstances in which a non-title holder can be considered the owner. Those are not present here.

has title to it – in this case Elliott and not Appellant - except in instances in which title is held by another as security for a loan – which is irrelevant in this case.

The remainder of the "evidence" cited by the trial court, which purportedly would give the Respondent a good faith belief in her claim of negligent entrustment, is simply irrelevant to the question of ownership.

There is no legal authority for considering the co-signer of a car loan as an "owner" of that vehicle. The insurance policy upon which the trial court relied on as evidence that Appellant was the owner of his son's car is not in the record of the case and never was. For the trial court to construe its provisions as some sort of "representation" "that he (Douglas) was, in fact, the true owner of the Mazda" is complete speculation and conjecture without any legal authority.

What is in the record with respect to that insurance and Appellant's interaction with the insurer is consistent with the otherwise undisputed fact that Appellant's son and not Appellant owned the automobile involved in the accident.

The Affidavit of Salvage (R. p. 707) relied upon by the trial court as Appellant's "representation" that he owned his son's vehicle, identifies **Elliott Lambrecht** – not Appellant – as the owner of the vehicle. The Affidavit was signed by Appellant, under oath, as the owner of the particular insurance policy, and correctly identified only his son as the owner of the vehicle. The vehicle involved in the accident may have been insured on the Appellant's auto policy when its owner, his son, was a member of Appellant's household, but that vehicle had not been insured on that policy after the summer preceding the accident. At the time of the accident, the son was no longer a member of that household, the

vehicle was not insured on Appellant's policy of insurance, and Appellant had no legal right to control the use of the vehicle.

It was undisputed that, from the day the vehicle was purchased until the day of the accident in which the Respondent's Decedent was killed, title was always in Elliott's name and, as described in Appellant's Brief, he had every other indicia of ownership.

A negligent entrustment claim may be viable against a non-owner if the defendant had the legal right to control the use of the vehicle. The trial court in granting summary judgment correctly found that there was no evidence from which a jury could reasonably conclude that Appellant controlled the use of his son's vehicle and the record reflects that that finding was correct, factually and legally.

The right to control the use of a vehicle is a legal right or power incident to the ownership of the vehicle, or arising otherwise under the law. *Broadwater v. Dorsey*, 344 MD 548, 688 A. 2d 436 (MD, 1997) [right of control of a vehicle belongs to title holder]; *DeBlanc v. Jensen*, 59 S.W. 3d 373 (Tex. App. Div. 1, 2001) [parents had no legal right to prevent adult son from operating vehicle he owned and no liability for negligent entrustment].

At page 11-12 of its Order denying sanctions, (R. p. 57 – 58), completely contrary to its finding on summary judgment, the trial court held that Appellant had "physical control over the vehicle itself, as it was normally kept at his house". This finding is not only irrelevant to a right of control, but is completely unsupported by the record.

In fact, the vehicle involved in the accident was parked at Appellant's home for only two to three weeks when Elliott was not driving it due to a suspended license. R. p. 714, line 16 – R. p. 715, line 10. After that period, the vehicle was picked up by Elliott's sister, and then parked in the driveway of her home until Elliott picked it up on the day of the accident. R. p. 207; R. p. 19; R. p. 673, line 21 – R. p. 674, line 25. Not only was the vehicle not "normally" kept at Appellant's home, it was parked there for, at most, three weeks. There is no legal basis for concluding that the owner of property upon which a vehicle owned by another is parked has the right to control its use.

Directly contrary to the trial court's summary judgment finding that Appellant had no control over his son's vehicle, in denying sanctions, the trial court found that "Elliott needed the Defendant's permission for the use of the Mazda" and that the only reasonable conclusion from that fact was that "the Defendant was the one who either owned or controlled the use of he Mazda". (R. p. 56 – 57) This finding is absolutely without support in the record.

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

As set forth at length in Appellant's Brief, essentially each of the findings made by the trial court in its Order denying sanctions are without support in the record. The trial court did not cite any support in the record and this Court, by

merely adopting the findings of the trial court, again perpetuates findings without any support in the record. "Evidence" which does not appear of record or is irrelevant to the issues, and inapplicable law cannot form the basis for the conclusion that the Respondent's attorneys acted reasonably and in good faith, even if that were the applicable standard for measuring frivolity.

The Court should grant a rehearing to reevaluate the factual and legal findings of the trial court that this Court has adopted. They are without factual or legal support and provide no basis upon which to conclude that the Respondent's attorneys had a reasonable basis to pursue a negligent entrustment claim against Appellant.

5. The Court of Appeals overlooked or misapprehended the significance of the holding in *USAA Property and Cas. Ins. Co. v. Clegg*, 377 SC 643; 661 SE2d 791 (2008).

In adopting the trial court's Order denying sanctions, this Court finds that a reasonable attorney could have concluded that there was a factual basis for pursuing negligent entrustment and negligence claims against Appellant even though he did not own and had no legal right to control the use of his emancipated son's automobile. That conclusion is directly contrary to the holding of the Supreme Court in the *USAA* case.

In that case, to which Appellant was a party, the issue was whether Appellant's own insurance company owed him a duty of defense to the Clegg claims. In finding that it did not, the Supreme Court reviewed the Clegg allegations in the Complaint and in the Amended Complaints of ownership, *de facto* ownership, and control of the vehicle. The Supreme Court held that "we do

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not believe that Lambrecht could be held "legally liable," . . . for Elliott's negligence" and that, therefore, there had been no duty of Appellant's liability insurer to defend the claim "from the onset of the litigation". *Id.* at 655. In discussing the USAA policy requirement that Appellant have legal liability for the Clegg claim, the Court stated: ". . .the undisputed facts established that Elliott, not Lambrecht, owned the vehicle involved in the accident. Thus, we do not believe that Lambrecht could be held "legally liable", as required by the terms of the policy, for Elliott's negligence . . ." *Id.* at 659, 799.

The only facts relied upon by the Supreme Court in *USAA* to reach its conclusion that Appellant had no legal liability for the Respondent's claims were those alleged in the Complaints and those which were known to be undisputed from the outset of this litigation. The law of negligent entrustment noted by the *USAA* Court was similarly clear and not a matter of dispute. In footnote 7 of its Opinion, the *USAA* Court quoted *Am. Mut. Fire Ins. Co. v. Passmore*, with respect to the elements of negligent entrustment. "The theory of negligent entrustment provides: the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment."

This Court in its Opinion failed to consider the significance of the precedent of the *USAA* decision when it affirmed the trial court's conclusion that a reasonable lawyer would pursue such claim given the undisputed facts. The Supreme Court has already found that the Respondent's claims, taken as true, are on their face without merit. This Court cannot reconcile its finding that the

Respondent had a reasonable basis for pursuing those claims with the ruling in the *USAA* case.

As noted above, it is not necessary to demonstrate bad faith in order to establish a violation of Rule 11, but only to demonstrate that the claim had "no chance of success under existing precedent". *Gibbes, supra*. The *USAA* ruling established just that. Any attorney, who has complied with the duty to know the law and to investigate the facts prior to filing the claims, would clearly know that the claims were without merit. The Respondent, having completed her discovery and having been served with the evidence and the Appellant's memorandum on summary judgment a year prior to reinstating the actions, certainly has no excuse for pursuing these groundless claims.

The Court's reference to *Nationwide Mutual Insurance Co. v. Smith*, 376 S.C. 60, 654 S.E. 2d 837 (Ct. App. 2007) is completely without relevance to the issues presented here. The issue in *Nationwide* was whether an automobile insurance policy provided coverage when the named insured did not have an insurable interest in the vehicle if the named insured could in some manner be held liable for its operation and use.

In this case, however, the theory of liability pursued against Appellant was negligent entrustment. Under South Carolina law, to establish that claim, it must be proved that Appellant owned or controlled the use of the vehicle involved in the accident. The issue is whether a reasonable attorney, knowing that Appellant did not own or have any legal right to control the use of his adult son's vehicle, and knowing that alcohol was not involved in the accident, would have pursued

the claim on that theory anyway. Whether or not Appellant could have been held responsible under some basis other than the one upon which he was sued is completely irrelevant to this case.

Rehearing should be granted so that this Court can consider how the holding of *USAA* can be reconciled with this Court's conclusion that a negligent entrustment claim was not frivolous under FCPSA when the undisputed facts, known from the outset, were that Appellant neither owned nor controlled the use of his adult son's automobile and where the Supreme Court does not believe that "Lambrecht could be held 'legally liable'" even based on the allegations of Respondent when taken as true.

6. The Court of Appeals misapprehended or overlooked Appellant's argument with respect to the irrelevance of the law of "combining and concurring" negligence.

In the trial court's Order that this Court affirms, there is a discussion of "combining and concurring negligence" which suggests that, in some manner, this concept justified the Respondent's pursuit of Appellant for the consequences of his son's automobile accident.

The trial court refers to S.C. Code § 56-1-480, which makes it unlawful for a person to "authorize" or "knowingly permit" a vehicle "owned" by him or "under his control" to be driven by a person not authorized to do so or in "violation" of the motor vehicle statute.

As set out before herein, there is no factual or legal basis for the conclusion that Appellant owned or controlled his son's vehicle. Accordingly, on its face, the statute provides no basis for liability.

Further, although the trial court does not even articulate what violation of the motor vehicle act it finds occurred, assuming it intended to relate Elliott's operation of the vehicle without a license, registration, or insurance, those acts are not negligence *per se*, **even as to Elliott**, because there is no causal link between those statutory violations and the accident. *Unisun Insurance v. Hawkins*, 342 S. C. 537, 537 S. E. 2d 559 (Ct. App. 2000) *rehearing denied, cert. granted, cert dismissed*; 8 Am Jr. 2d *Automobiles and Highway Traffic*, § 812.

Finally, while Elliott may have operated his vehicle in violation of §56-1-480, the trial court does not articulate in its finding one legally cognizable negligent act committed by Appellant which combined with Elliott's acts, or the acts of any other person, which resulted in the death of the Decedent.

Appellant had no power to control the use of his son's vehicle and knew nothing about his adult son's intentions when he picked his own vehicle up from his sister's home. R. p. 700, lines 20 – 23. *See, also:* R. p. 679, lines 17 – 25; R. p. 703, line 23 – R. p. 704, line 2.

This Court should grant a rehearing to reevaluate whether the law of combining and concurring negligence can in any regard be relevant to whether or not the Respondent's claims against Appellant were frivolous.

7. The Court of Appeals misapprehended or overlooked the argument that *Gadson v. Echo Services of South Carolina, Inc.*, 374 S. C. 171, 648 S. E. 2d 558 (2007) made the Respondent's negligent entrustment claim legally viable and thus non-frivolous.

In its Order, which this Court adopted, the trial court found that *Gadson v. Echo Services of South Carolina, Inc.*, 374 S. C. 171, 648 S. E. 2d 558 (2007), changed the law in South Carolina and suggested that, but for that change, the

Respondent had a viable negligent entrustment claim. *Gadson* is simply irrelevant.

Any negligent entrustment case must be based upon the defendant's ownership or right to control the vehicle involved in the accident. *Gadson* only dealt with whether negligent entrustment liability could be based on entrusting to a person who, for any reason, posed a danger to others, or whether it was limited to entrusting to one under the influence of alcohol. Since Appellant neither owned nor controlled the use of his son's vehicle, *Gadson* was irrelevant. No matter which way the *Gadson* issue was resolved, Appellant had no liability under a negligent entrustment claim.

It should be noted that at no point in these proceedings did the Respondent make any argument one way or another about *Gadson*. A Rehearing should be granted to reconsider the relevance of the *Gadson* decision to the issue of whether sanctions under the FCPSA should be imposed.

#### CONCLUSION

The Appellant was forced for more than four years to incur the time and expense of defending claims which were found by the trial court to have no legal or factual basis and for which summary judgment was granted. The factual and legal findings supporting the grant of summary judgment became the law of the case.

In considering sanctions under the FCPSA and Rule 11, the trial court and this Court were to evaluate the record to determine if and when a reasonable lawyer would have clearly known or clearly should have known that the claims

lacked merit and, accordingly, whether sanctions were warranted. Instead of performing that analysis, the trial court erroneously adopted the findings of the trial court that relied on the standard of subjective good faith to evaluate the Respondent's conduct, revisited the merits of the Respondent's claims based on irrelevant facts or those not found in the record, and, relying on inapplicable law, simply reversed its prior findings and conclusions. That result cannot be reconciled with the trial court's conclusion on summary judgment that "[t]here is no evidence which could reasonably being (sic) construed by a jury that [Douglas] either owned the vehicle in question at the time of the accident or had control over it which would support a negligent entrustment cause of action."

By simply adopting that Order and its findings without further analysis, this Court has perpetuated that error.

The Court should rehear this matter so that it can evaluate the record, not to revisit whether the negligent entrustment claim had merit, which it clearly did not, but whether, based on what the Respondent and her attorneys knew or should have known prior to filing their claims, the claims were frivolous and subject to sanctions under Rule 11 and the FCPSA.

For all of the foregoing reasons, Appellant respectfully requests that the Court grant a rehearing of this matter.

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The South Carolina Court of Appeals  
**RECEIVED**

Deborah J. Clegg, as Personal Representative of the Estate of Allison T. Clegg, Respondent,  
S.C. Supreme Court

v.

Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, Defendants,  
Of whom Douglas A. Lambrecht is the Appellant.

Appellate Case No. 2010-175326

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ORDER DENYING PETITION FOR REHEARING

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the Appellant's petition for rehearing is denied.

*John Cannon* C.J.  
*Thomas R. Phillips* J.  
*Paul E. Shortz, Jr.* J.

Columbia, South Carolina

cc:  
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H. Fred Kuhn, Jr.  
G. Richardson Wieters  
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**FILED**

*12 June 2012*

*App. p. 31*