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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 10, 2002, the Plaintiff, Deborah J. Clegg ("Plaintiff"), as the Personal Representative of the Estate of Allison T. Clegg ("Decedent"), filed both a wrongful death action and a survival action against Elliott M. Lambrecht ("Elliott") and Douglas A. Lambrecht ("Douglas"), Elliott's father, to recover damages for the death of the Decedent in a one car automobile accident occurring on January 9, 2002. (Complaint, 02-07-CP-1159 ("1159"), p 1- 9, R. p. 79; Complaint, 02-07-1160 ("1160"), p. 1-9, R. p. 89).

In the initial Complaints, the Plaintiff alleged that Douglas owned the automobile involved in the accident, knew that Elliott had a poor driving record and that his driver's license had been suspended, but negligently entrusted the automobile to him. The Complaints further alleged that Douglas was liable for Plaintiff's damages because Douglas had failed to prevent Elliott from driving and had failed to warn others of Elliott's alleged dangerous propensities. (Complaint, 1159, p. 2 - 8, R. p. 79; Complaint, 1160 p. 2 - 8, R. p. 89).

On May 11, 2004, Plaintiff served and filed an Amended Complaint in both actions, joining Jan Horan ("Jan"), Elliott's mother, Anna C. Lambrecht ("Anna"), Elliott's sister, and Rhett Barker ("Rhett") as additional defendants. (Amended Complaint, 1159, R. p.135; Amended Complaint, 1160, R. p.146).

In the Amended Complaints, Plaintiff alleged that Douglas was the *de facto* owner of the 1994 Mazda automobile ("Mazda") involved in the accident and that Douglas negligently entrusted the automobile to Elliott. In the Amended Complaints, the Plaintiff further alleged that Douglas was liable to the Plaintiff for

allowing or permitting Elliott to drive and for failing to prevent him from driving when he knew or should have known that Elliott's operation of the Mazda would pose an unreasonable risk of harm to others. Similar allegations were made against Jan, Anna, and Rhett. (Amended Complaint, 1159, R. p.135; Amended Complaint, 1160, R. p.146).

On May 26, 2004, Douglas served his Answer to both Amended Complaints, generally denying the allegations against him. (Answer to Amended Complaint, 1159, R. p.157; Answer to Amended Complaint, 1160, R. p. 164).

On June 16, 2004, Douglas filed his Motion for Summary Judgment with respect to both actions. (Motion for Summary Judgment, 1159, R. p.171; Motion for Summary Judgment, 1160, R. p.173).

On April 17, 2005, before Douglas' Motions for Summary Judgment were heard, the actions were dismissed pursuant to Rule 40(j) SCRCP. (Dismissal, 1159, R. p. 001; Dismissal, 1160, R. p. 001).

On April 19, 2006, pursuant to the Motion of the Plaintiff, both cases were restored to the trial docket. (Order, April 19, 2006, R. p. 008).

On August 10, 2006, a second Amended Complaint was served in both actions. (Amended Complaint,1159, R. p. 215; Amended Complaint, 1160, R. p. 227). The essence of the allegations of the second Amended Complaints against Douglas were essentially the same as the prior Complaints in that it was alleged that he negligently entrusted the Mazda to Elliott and failed to prevent him driving or to warn others of his dangerous propensities. (Amended Complaint, 1159, R. p. 215; Amended Complaint, 1160, R. p. 227).

On August 23, 2006, Douglas served his Answer to the second Amended Complaint in each action generally denying the allegations against him. (Answer to Second Amended Complaint, 1159, R. p. 239; Answer to Second Amended Complaint, 1160, R. p. 245).

On September 11, 2006, the trial court heard arguments on the summary judgment motions of all Defendants. .

On October 20, 2006, the trial court granted summary judgment to Douglas[1], although written notice of the Order was not received by Douglas until January 10, 2007.[2] (S.J. Order, R. p. 13; Motion for Sanctions, p. 3, R. p. 277).

On January 17, 2007, Douglas filed his Motion for Sanctions in each action pursuant to S.C. Code § 15-36-10 and pursuant to Rule 11, SCRCP. (Motion for Sanctions, R. p. 277).

The Plaintiff appealed the Order granting summary judgment, but after initial briefs were filed, the appeal was dismissed. (Order, R. p. 21).

By an Order, dated March 1, 2007, and filed March 5, 2007, and not received by Douglas until March 13, 2007, the trial court denied Douglas' Motion for Sanctions in each action. (Order, Sanctions, March 1, 2007, R. p. 17).

On March 19, 2007, Douglas timely filed his Motion to Alter or Amend Pursuant to Rule 59(e) SCRCP in each action. A hearing on the record was had on the Motions on May 1, 2007, and the Motions were denied from the bench by

[1] All claims against the other defendants were also dismissed, except one claim against Rhett Barker based upon the allegation that, at the time of the accident, he and Elliott were "racing".
[2] At this point in the proceedings, the cases bore new case numbers, 06-CP-07-1125 and 06-CP-07-1126, respectively, as the result of being reinstated to the trial docket after the Rule 40(j) dismissal, and all filings and order bore the case numbers of both the survival and the wrongful death actions.

the trial court and by formal order dated May 1, 2007. (Order, May 1, 2007, R. p. 18).

On May 23, 2007, Douglas served his Notice of Appeal in each case.

On May 13, 2009, this Court issued its Opinion with respect to Douglas' appeal, vacating the trial court's Order denying sanctions and remanding the matter to the trial court for further proceedings.[3] (Opinion, May 13, 2009, R. p. 23)

On January 8, 2010, the trial court entered its Order granting sanctions against the Plaintiff and her attorneys. (Order, January 8, 2010, R. p. 27)

Pursuant to the direction of the January 8, 2010, Order, the joint Affidavit of John E. North, Jr., and Pamela K. Black and the Affidavit of Douglas A. Lambrecht were filed in support of Douglas' request for reimbursement of attorney fees and other consequential damages. (North and Black Affidavit, R. p. 315; Lambrecht Affidavit, R. p. 479).

On January 19, 2010, the Plaintiff filed a Motion for Reconsideration. (Motion for Reconsideration, R. p. 299).

On July 9, 2010, a hearing was had with respect to the Plaintiff's Motion for Reconsideration. (Transcript, July 9, 2010 Hearing, R. p. 624).

By an Order, dated July 28, 2010, the trial court reversed its previous Order granting sanctions and denied sanctions. (Order, July 28, 2010 R. p. 47).

Douglas timely filed his Motion to Alter or Amend the July 28, 2010, Order. (Motion to Alter or Amend, R. p. 554).

[3] This Opinion was the third Opinion issued by the Court, the first two having been withdrawn and substituted.

By an Order, dated September 14, 2010, the trial court denied Douglas' Motion to Alter or Amend. (Order, September 14, 2010, R. p. 77).

This appeal followed.

SUMMARY OF THE ARGUMENT

This is the second appeal arising from Douglas' Motion for Sanctions. In 2007, the trial court denied sanctions based upon its finding that the claims were pursued by "competent counsel" who had a "good faith belief" in the merits of the claims. As pointed out by Douglas in his appeal of that Order, a "good faith belief" in the merits of a claim is not the standard by which the claim of frivolity was to be evaluated under either the FCPSA or Rule 11. Ultimately, this Court remanded the case to the trial court for further evaluation, directing the trial court to make an extensive factual consideration of the record to determine whether and at what point the Plaintiff's attorneys knew or should have known that the claims were frivolous.

After remand, the trial court entered a 19 page Order articulating the proper standard by which to evaluate frivolity under the FCPSA and Rule 11, describing in detail the basis in the record that showed that no reasonable attorney would have believed that there was a legal or factual basis for the Plaintiff's claims, and finding that Douglas was entitled to sanctions.

The Plaintiff filed a Rule 59(e) Motion asking the trial court to reconsider its grant of sanctions. At the hearing on that Motion, the trial court acknowledged that "after some time of reading, going back, looking at the transcripts, discussing

that with my law clerk, we had come to the conclusion that maybe I had needed to issue sanctions in the first place...". (Transcript, R. p. 625, lines 15-23.

However, after being confronted with both of Plaintiff's counsel at the hearing on Plaintiff's Rule 59(e) Motion, the trial court, on the same record, vacated its Order awarding sanctions, and entered an Order drafted by Plaintiff's counsel that denied sanctions based upon findings of fact and conclusions of law that were completely opposite of those upon which the trial court had previously awarded summary judgment and upon which the Order awarding sanctions was based. Further, in its Order denying sanctions, the trial court once again used the erroneous subjective "good faith belief" and "competent counsel" standard to evaluate frivolity and not the objective standard mandated by the FCPSA and Rule 11.

Not only is it completely inexplicable that the trial court could enter two Orders, on the same record, the findings and conclusions of which are in complete conflict, but that the trial court persists in excusing Plaintiff's counsel from sanctions for their conduct not under the "reasonable attorney" standard mandated by the FCPSA, but because of the subjective "good faith" and purported "competence" of Plaintiff's counsel and because of the "earnestness and sincerity" of Plaintiff and her counsel.

In this case, there is no need for this Court to analyze the facts or law with respect to whether or not Douglas was liable to the Plaintiff. In granting summary judgment, the trial court found that there was no legal or factual basis for imposing liability on Douglas for the consequences of his adult son's automobile

accident in which the son was driving a car which the son owned. That is the law of the case. The only issue to be resolved in this appeal is whether and at what point any reasonable attorney viewing the law and the facts objectively would have recognized that the claims were meritless.

The Plaintiff asserted two theories of recovery against Douglas, failure to warn and negligent entrustment. At the summary judgment stage, the trial court found that the failure to warn claim was, as a matter of law, meritless because, under South Carolina law, there is no legal duty to warn of or to control the conduct of another. Thus, the Plaintiff's claims that Douglas was liable for failing to warn the Decedent of his adult son's allegedly dangerous propensities and for failing to prevent his adult son from driving on the night of the accident were completely meritless, as a matter of law, from the outset.

As the trial court further recognized, the negligent entrustment claim[4] against Douglas required as an essential element that Douglas own or otherwise have the legal right to control the automobile involved in the accident. Because it was undisputed that Douglas' adult, emancipated son held title to the vehicle he was driving on the night of the accident, and all other incidents of ownership, in addition to title, were attributable to him and not to Douglas, the facts unequivocally demonstrated that Douglas could not be liable on a negligent entrustment theory.

[4] As set forth hereinafter, the Plaintiff contends, which Douglas disputes, that she raised additional claims such as agency and the Family Purpose Doctrine. However, each of these claims, even if they had been raised, would only have been viable if Douglas owned or controlled his son's vehicle, which he did not.

In related litigation, the Supreme Court examined the pleadings and found that the Plaintiff's claims against Douglas had no merit *from the outset,* and that Douglas could not even be "potentially liable" for the consequences of his son's accident. *USAA Property and Casualty Insurance Company v. Clegg, et. al.* 377 S. C. 643, 656, 659, 661 S. E. 2d 791, 797, 799 (2008).

Douglas respectfully suggests that, when this Court makes an independent review of the record, as it is required to do, it will conclude, as the Supreme Court has already concluded, that there was no legal or factual merit in the claims asserted against Douglas from the outset of the litigation. Based upon what the Plaintiff's counsel knew or should have known, no reasonable attorney would have filed the claims against Douglas, let alone pursued them for four years. Under the FCPSA and Rule 11, Douglas was entitled to mandatory sanctions and the subjective "good faith" of Plaintiff's counsel and their alleged competence does not and should not excuse their objectively unreasonable conduct.

STATEMENT OF FACTS

As set forth in the Statement of the Case, the Plaintiff's theory of liability against Douglas was that he negligently entrusted the vehicle involved in the accident to his son and that he failed to warn the Decedent of his son's dangerous propensities or prevent his son from driving. The following relevant and material facts were not in dispute:

1. The accident in which Decedent was killed occurred when Elliott was nineteen years of age. (Affidavit Douglas, ¶ 5, R. p. 205; Second

Amended Complaint, ¶ 23, R. p. 147; Deposition Elliott, R. p. 702, lines 5-14).

2. Elliott completed his formal education in May, 2001, eight months prior to the accident, and from and after May 2001, had lived at his own residence and did not reside at the home of either of his parents. (Affidavit Elliott, ¶ 6, R. p. 201; Deposition Elliott, R. p. 692, line 19 – R. p. 695, line 24).
3. From and after the time that he moved out of his father's house at the age of fifteen, Elliott did not receive any form of support from his father, Douglas, or his mother, Jan, other than occasional gifts. (Deposition Elliott, R. p. 696, line 24 – R. p. 697, line 18).
4. Douglas did not claim Elliott as a dependent on his federal and state income tax returns for tax years subsequent to 1999. (Affidavit Douglas, ¶ 9, R. p. 206).
5. The Mazda that involved in the accident was purchased by Elliott in 2000 and titled in Elliott's name, alone. (Affidavit Douglas, ¶10, Exhibit A, R. p. 206, R. p. 209; Deposition Elliott, R. p. 698, line 18 – R. p. 699, line 14).
6. Although Douglas co-signed the loan obtained by Elliott to purchase the Mazda, all payments were made by Elliott. (Affidavit Douglas ¶ 11, R. p. 206; Deposition Elliott, R. p. 698, line 20 – R. p. 699, line 14).
7. The Mazda was a replacement automobile for a Ford Taurus, also purchased by Elliott, and also titled in Elliott's name, alone. (Affidavit Douglas ¶ 12, R. p. 206; Deposition Elliott, R. p. 697, line 19 – R. p. 698, line 17).
8. In 2001, the Mazda could not be driven as the result of engine trouble. (Deposition Elliott, R. p. 699, line 15 - R. p. 700, line 2).
9. During the period that the Mazda was being repaired, Elliott's driver's license was suspended for a period of six months. (Affidavit Elliott, ¶ 14, R. p. 202; Deposition Elliott, R. p. 678, lines 13-24).
10. In November, 2001, after the Mazda was repaired, it was towed to Douglas' home at Elliott's request and parked there. (Deposition Douglas,

R. p. 714 line 9 – R. p. 715, line10; Deposition Elliott, R. p. 700, lines 9-15).

11. In mid-December, 2001, Anna, Elliott's sister, asked Elliott if she could drive the Mazda while her own automobile was being repaired. (Deposition Elliott, R. p. 705, line 25 – R. p. 706, line 23).
12. Elliott gave Anna permission to drive the Mazda and informed Douglas that the keys to the automobile could be given to Anna so that she could use it. (Affidavit Douglas, ¶ 15, R. p. 207; Deposition Elliott, R. p. 706, line 10 - 23).
13. While the Mazda was at Douglas' house, no one other than Anna was given permission by Elliott to drive it. (Deposition Elliott, R. p. 700, lines16-19).
14. In mid-December, 2001, several weeks before the accident, Anna picked up the Mazda from Douglas' home where it had been parked. (Affidavit Douglas, ¶ 15 – 17, R. p. 207).
15. After mid-December, 2001, the Mazda was never again at Douglas' residence nor did Douglas ever have the keys to or access to the Mazda after that date. (Affidavit Douglas, ¶ 17, R. p. 207).
16. On January 9, 2002, Elliott and his friend, Rhett, with whom he was living in Hilton Head, drove in Rhett's family car to Beaufort to the home of Anna, Elliott's sister, and Jan, his mother, to retrieve the Mazda. (Deposition Elliott, R. p. 673, line 25 – R. p. 674, line 17).
17. Elliott testified that the purpose of retrieving the Mazda was so that Rhett, whose car was being sold, could drive the Mazda for his own use and so that he could provide transportation for Elliott to and from Elliott's employment. (Deposition Elliott, R. p. 701, lines14 – 25).
18. Elliott was in Jan's home for a few minutes, got the keys to the Mazda from the kitchen, and left. (Deposition Elliott, R. p. 676, line 10 – R. p. 677, line 6).
19. When Elliott and Rhett left Jan and Anna's home, Elliott drove the Mazda. (Deposition Elliott, R. p. 675, lines 5 - 18).

20. When Elliott and Rhett returned to Hilton Head that evening, they stopped at the residence of the Decedent to pick her up and, because she was not allowed to smoke in the automobile being driven by Rhett, she elected to ride with Elliott. (Deposition Elliott, R. p. 682, line19 – R. p. 683, line 5).
21. Elliott testified that the accident occurred at approximately 9:00 p.m. when Elliott swerved to avoid a deer, lost control of the Mazda, and hit a tree, killing Plaintiff's Decedent and injuring Elliott. (Second Amended Complaint ¶ 23, R. p. 150; Deposition Elliott, R. p. 687, line 8 – R. p. 689, line13).
22. Elliott received citations arising from the accident for driving while under suspension and driving too fast for the conditions and pled no contest to those charges. (Deposition Elliott, R. p. 684, line 16 – R. p. 685, line 7).
23. At no time after mid-December did Douglas have information from any source that Elliott intended to drive the Mazda. (Affidavit Douglas ¶ 18, R. p. 207; Affidavit Elliott, ¶ 20, R. p. 202).
24. At no time between the date that Anna picked up the Mazda and the date of the accident did Douglas have any information that Elliott intended to or did obtain possession of the Mazda from his sister's residence. (Affidavit, Douglas ¶ 18, R. p. 207).
25. Elliott did not tell Douglas anything about his intention to go to Beaufort and retrieve the Mazda. (Deposition Elliott; R. p. 679, lines 17 -25; R. p. 700, lines 20-23; R. p. 703, line 23 – R. p. 704, line 2).

ARGUMENT

I. STANDARD OF REVIEW.

The determination of whether sanctions should be awarded under the FCPSA is treated as an equitable proceeding. Accordingly, the Court of Appeals makes an independent review of the record and makes its own determination of the preponderance of the evidence. Rutland v. Holler, Dennis, Corbett, Ormand & Garner, 371 S.C. 91, 637 S.E. 2d 316 (Ct. App. 2006); Father v. South

Carolina Department of Social Services, 345 S.C. 57, 545 S. E. 2d 523 (Ct. App. 2001).

II. THE TRIAL COURT ERRED WHEN IT DENIED SANCTIONS BASED UPON SUBJECTIVE "GOOD FAITH" AND UPON THE "EARNESTNESS, DEMEANOR, AND CONDUCT" OF PLAINTIFF AND HER ATTORNEYS.

Under the FCPSA, the trial court was to evaluate the Plaintiff's claims based upon a "reasonable attorney" standard. If a reasonable attorney would have believed them to be either: 1) legally unwarranted; or 2) not founded in fact, or both, they were, by definition, frivolous. The specific language of the relevant section of the FCPSA defining frivolity is:

> (C)(1)(a): a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (C)(1)(c): a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

Even the most sincere of beliefs[5] in a claim will not preclude the imposition of sanctions if a reasonable attorney, viewing it objectively, would find it without merit.

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

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

> excuse an appellate brief that "ignores significant issues and facts while deploying a smokescreen of irrelevant and tangential issues."

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

Once again, just as in the prior Order, which was vacated by this Court (Order, R. p. 47), and despite the fact that nowhere in the FCPSA is the competence and/or good faith belief of a particular attorney the standard by which to evaluate frivolity, that is clearly the basis upon which the trial court relied to avoid the imposition of sanctions.

On page 9 of the Order, 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). On page 20, the trial court finds "ample evidence **supporting a good faith and reasonable belief** that Elliott was a member of Defendant's household at the time of the wreck." (Order, R. p. 66). The same "good faith" standard is referenced at pages 15, 21, 22, and 23 of the Order. (R. p. 61; R. p. 67; R. p. 68; R. p. 69).

In its conclusion, on page 25 of the Order, the trial court reiterates and adopts its previous finding from 2007 that "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).

Finally, the trial court's failure to apply the proper standard is made perfectly clear in its Order denying Douglas' 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).

Most incredibly, the trial court relies upon the "conduct and demeanor" of the "parties and their counsel" and notes how "impressed' the court was "by the earnestness and good faith of Plaintiff and her attorneys" to find that sanctions were not warranted. (Order, R. p. 71).

The conduct, demeanor, and earnestness of the parties is completely irrelevant to whether or not the Plaintiff's claims were frivolous under Rule 11 and the FCPSA. Even it were, such an evaluation was factually impossible for the trial court to have made. The case was adjudicated on summary judgment. The record does not reflect one instance in which the Plaintiff Clegg or Douglas ever appeared before the trial court in any capacity or for any purpose. It was a factual impossibility for the trial court to have judged the demeanor or conduct of the parties, even if it had any relevance to the issue of sanctions, which it does not.

For the trial court to base any part of its frivolity analysis on the "conduct, demeanor or earnestness" of counsel is absolutely without any basis in law and is the antithesis of the legal analysis the trial court was directed to conduct and of the role of the judiciary in general. Without regard to whether the Plaintiff's counsel presented their specious arguments with gusto, whether they were earnest, and whether the trial court found their conduct appealing, the bottom line is that they sued Douglas without any factual or legal basis and pursued meritless claims against him for years, all the while requiring him to continue to spend time and money defending their groundless claims.

It was not the good faith and competency of Plaintiff and her counsel that the trial court was to evaluate. It was whether the claims asserted against Douglas, viewed objectively, had any merit at any point in time. When the trial court denied sanctions based upon the "good faith" and "competency" of Plaintiff's counsel, and the "conduct, earnestness and demeanor" of Plaintiff and her counsel, and not on the objective standard of a "reasonable attorney", the trial court clearly erred.

III. THE TRIAL COURT DID NOT BASE ITS ORDER DENYING SANCTIONS ON ITS OWN "INTENSIVE FACTUAL REVIEW OF THE RECORD.

The Opinion of this Court remanding Douglas' claim for sanctions, instructed the trial court, pursuant to the FCPSA, to make an "intensive factual review of the record" to determine whether and at what point a reasonable attorney would have know the claims against Douglas were frivolous.

In granting summary judgment on the same record as was before it for purposes of Douglas' motion for sanctions, the trial court found that the Plaintiff's

claims against Douglas had **no factual or legal merit** on any of the theories pursued by the Plaintiff. In its review of the record at that time, the trial court found that: 1) there was **no** evidence that Douglas owned the vehicle involved in the accident; 2) there was **no** evidence that Douglas had control over the vehicle; 3) Douglas had **no duty** to control the actions of his emancipated adult son; 4) there was **no** evidence that Douglas had dominion or control over his son; and 5) there was **no** evidence that Douglas' son was acting as Douglas' agent at the time.

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

(Order, R. p. 13).

The trial court had already found that there was no legal or factual basis for the claims against Douglas, and thus its analysis for purposes of sanctions was to determine at what point the lack of factual or legal merit should have been recognized by the Plaintiff and her counsel.

After remand of the case, the trial court entered a 19 page Order articulating the proper standard applicable under the FCPSA for determining frivolity and setting forth the facts in the record which established that, based upon the applicable law and the readily available facts, a reasonable attorney

would have recognized that the claims had no merit from the outset. Based upon those findings, the trial court awarded Douglas sanctions.

At the hearing on the Plaintiff's Motion to Alter or Amend with respect to that Order, the trial court explained the process of analysis by which sanctions were awarded after the case was remanded.

> I get the transcripts and start to work on an order, and after some time of reading, going back, looking at the transcripts, discussing that with my law clerk, we had come to the conclusion that maybe I had needed to issue sanctions in the first place, but I was up in the air about it, and so I had my law clerk at that time call and request proposed orders. . . .I thought my communications were to get them from both parties, at any rate. (Transcript, R. p. 625, line16 – R. p. 626, line11) [6]

In its January 8 Order granting sanctions, the trial court found that the relevant facts and the applicable law, which imposed no duty of Douglas to control his adult son, established that Douglas did not own or control his son's car, that these facts were known to or should have been known by the Plaintiff from the outset of the litigation, and that a reasonable attorney would not have pursued the claims. Accordingly, the trial court found that the claims were frivolous and sanctions were warranted. (Order, R. pp. 31 - 42).

However, after hearing the pleas of Plaintiff's counsel in connection with the Plaintiff's Motion to Alter or Amend, the trial court inexplicably entered its July Order[7] denying sanctions and completely repudiated the factual and legal findings underpinning both its Order granting summary judgment and its Order

[6] Douglas' counsel recalls that the trial court's clerk notified him that the court intended to grant sanctions, and to submit a proposed order. He did so and provided copies to the Plaintiff's counsel. (Transcript, R. p. 637, lines 11 – 23)

[7] The Order which the trial court ultimately signed denying sanctions was the Order prepared by the Plaintiff's counsel. (Affidavit, John E. North Jr., R. pp. 592-622).

granting sanctions. Despite the fact that the trial court had, on two previous occasions, found just the opposite, in its July Order it found, among other findings: (1) that Douglas "had physical control over the vehicle", (Order, p. 10, R. p. 56); (2) that Douglas was the *de facto* owner of his son's automobile, (Order, p. 12, R. p. 58), (3) that Douglas "was the one who either owned or controlled" the Mazda (Order, p. 11, R. p. 57); (4) that it was reasonable and in good faith to believe that Douglas "held the attributes of ownership and control of the Mazda" (Order, p. 13, R. p. 59); and (5) that Douglas "represented to USAA (his insurer) that he was the owner" of his son's automobile (Order, p. 13, R. p. 59).

Although the record did not change, the findings in the Order denying sanctions are the polar opposite of the findings upon which the trial court granted summary judgment and upon which it based its order granting sanctions. Further, the July Order denying sanctions incorporates, essentially *verbatim,* the alleged facts and arguments made by the Plaintiff throughout the litigation that had already been rejected at the summary judgment stage and demonstrated by Douglas to be *completely without support in the record.*

With all due respect to the trial court, whatever motivated the trial court to completely reverse its prior findings that there was no factual or legal basis for the Plaintiff's claims against Douglas, and to enter completely opposite findings, it was certainly not material gleaned from an "intensive review" of material found in the record.[8]

[8] As Douglas' counsel remarked at oral argument, " . . the court may not like to award sanctions. It may be something that you wish more than anything you could avoid, but if ever there was a case where the court has no choice, this is the case." (Transcript, R. p. 666, lines 2 – 6).

IV. ON THE RECORD BEFORE IT, THE TRIAL COURT ERRED WHEN IT REVERSED ITS PRIOR ORDER GRANTING MANDATORY SANCTIONS UNDER THE FCPSA AND RULE 11.

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.*

The trial court's finding on summary judgment that the claims pursued against Douglas had no legal or factual basis is the law of the case. This Court's task is not to reconsider those findings, but only to determine at what point a "reasonable attorney" viewing the facts and the law objectively would have concluded that the claims were factually and legally meritless. It is Douglas' position that, based on the record and the applicable law, a reasonable attorney would have recognized that the claims pursued against Douglas were doomed from the outset.

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 Plaintiff's claims against Douglas was that he owned the automobile involved in the accident and that he negligently entrusted it to his son, Elliott. Those initial Complaints further alleged that, because Douglas allegedly knew that operation of a vehicle by Elliott would pose an unreasonable risk of harm to others, Douglas had a duty warn third parties and to prevent Elliot from driving. (Complaints, 1159, 1160 ¶ 20 – 37, R. pp. 82 - 85; R. pp. 92 - 95).

Any attorney with knowledge of the basic concepts of legal duty and undertaking even minimal research would have concluded that Douglas had no duty under the law to control the conduct of another adult or to warn others about him.

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

Without regard to whether Plaintiff's attorneys actually did the required pre-filing investigation and research, within three months thereafter, Plaintiff and her attorneys 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, when these actions had been on file for seven months, Plaintiff's attorney took the sworn statements of Elliott's mother, Jan, and his minor sister, Anna, neither of whom had initially been joined as defendants in the action. (Deposition, Jan, Exhibit 1, R. pp 736 - 739; Deposition, Anna, Exhibit 1, R. pp.747 - 744). The statements of Jan and Anna 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 further 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)[9]

Despite knowledge of these facts, in May, 2004,[10] fifteen months after taking the sworn statements, the Plaintiff filed Amended Complaints asserting essentially the same causes of action against Douglas, but modifying her allegation of ownership, contending that Douglas was the *de facto* owner of the automobile involved in the accident. At that time, Jan, Anna, and a friend of Elliott's, Rhett Barker, were also joined as defendants.

In June, 2004, Douglas filed his Motion for Summary Judgment supported by his own Affidavit and that of Elliott, affirming Elliott's legal age and emancipation at the time of the accident, the ownership of the automobile, Douglas' lack of physical possession or control of the automobile, and Douglas'

[9] Douglas and Elliott's mother Jan were divorced and living in separate households.
[10] Until this time, Douglas had been appearing *pro se* in this action.

lack of any knowledge concerning Elliott's intention to drive on the night of accident. These affidavits were consistent with the testimony of Anna and Jan in their sworn statements. (Affidavit Douglas, R. pp. 205 - 209; Affidavit Elliott, R. pp. 200 - 204).

Douglas also at that time filed his Memorandum In Support of Motion for Summary Judgment, which set forth the uncontroverted facts and cited *American Mutual Fire Insurance Company v. Passmore*, 275 S.C. 618, 621, 274 S.E. 2d 416, 418 (1981) with respect to the elements of a negligent entrustment claim. *American Mutual* established that, under South Carolina law, an essential element of a negligent entrustment case is that the defendant "own or control" an automobile and be "responsible for its use". Douglas also cited *Doe v. Marion*, 361 S.C. 463, 605 S.E. 2d 560 (Ct. App. 2004), *reh denied, cert. granted* and *Gilmer v. Martin,* 323 S.C. 154, 473 S.E. 2d 812 (Ct. App. 1996), *rehearing den., cert. granted, cert. dismissed* for the proposition that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger. (Memorandum in Support of Motion for Summary Judgment, R. pp. 175 - 199).

Despite having the duty to know the applicable law prior to filing suit, and despite being aware from Douglas' submissions, if not before, of the relevant facts and law, Plaintiff and her attorneys insisted on deposing all witnesses before Douglas' summary judgment motion could be heard. Those depositions were completed in early 2005. In them, Jan and Anna affirmed the truth of their prior sworn statements. (Deposition Anna, R. p. 742, line 16 - R. p. 743, line 12;

Deposition Jan, R. p. 734, line 19 – R. p. 735, line 14). The deposition testimony of Douglas and Elliott with respect to the relevant and material facts was consistent with the Affidavits that had been submitted in support of Douglas' Motion for Summary Judgment.

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, line18 – 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 Douglas did not know that Elliott planned to pick up the automobile or drive it. (Deposition Elliott, R. p. 679, lines17 – 20; R. p. 700, lines 20 – 23).

In April, 2005, after Douglas' 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 SCRCP Rule 40(j).

In April, 2006, the Plaintiff moved to reinstate the cases to the active roster and they were reinstated.

In August, 2006, when discovery was complete, the Plaintiff filed second Amended Complaints in which essentially the same allegations were made as the previous versions, and, in addition, alleged that Douglas "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 Douglas arising out his son's automobile accident.

Since the outset, the Plaintiff and her attorneys should have known that the duty to warn claim against Douglas was without merit as a matter of law since such a duty does not exist under South Carolina law. However, they continued to allege such a duty even in the second Amended Complaints filed more than four years after the accident.

At least by February, 2003, the Plaintiff and her attorneys are charged with the knowledge that the negligent entrustment claim against Douglas was not viable factually because Elliott and not Douglas owned the automobile and because Elliott and not Douglas had the legal right to control its use.

"Control" of the use of a vehicle is a legal right or power, not the mere exertion of influence. *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].

Without regard to whether or not Douglas wished that his son would not drive, or whether he had an opinion that he should not drive, or if he actually attempted to persuade his son not to drive, he had no legal right to control his son, who was an adult, or to control the use of the vehicle owned by his adult son.

Not only should the Plaintiff's attorneys have known the law on that point, but all of the facts were consistent with the law. All of the witnesses testified that Elliott and not Douglas decided who could use the automobile and Elliott testified that while Douglas might suggest what should be done with it, it "wasn't his car". R. p. 746, lines 22 – 25 (Anna); R. p. 654: 10 – 15 (Douglas); R. p. 728, lines 10 – 16 ; R. p. 680, lines 2 – 22); R. p. 700, lines 16 - 19 (Elliott).

After all of the law was known or should have been known, and all of the relevant, material facts were discovered, not only did the Plaintiff and her attorneys continue to pursue the claims, they even reinstated them under Rule 40(j) immediately before the dismissal would have been final.

Most telling about the egregious nature of Plaintiff's conduct was the additional allegations contain in the second Amended Complaint filed in August, 2006. In those Complaints, for the first time the Plaintiff 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. (R. p. 218; R. p. 230). In making those allegations, "upon information and belief" the Plaintiff knew full well that there was **no** evidence to support them and that they were pure fiction.

Plaintiff 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 she filed her second Amended Complaint, the Plaintiff had known for eighteen months that the facts she alleged "on information and belief" were not true.

When Douglas' summary judgment motion was ultimately heard, four years after the cases were initiated, and after they had been dismissed and reinstated, the Plaintiff and her attorneys were unable to direct the trial court to any material fact which was inconsistent with what they knew or should have known since the outset of the litigation. They did not provide any authority setting forth a legal duty breached by Douglas nor did they argue that the relevant law should be modified. (Supplemental Memorandum in Opposition to Summary Judgment R. pp. 251 - 258).

In considering the "reasonable attorney" standard, this Court should note that the attorneys for each of the defendants, Douglas, Anna, Jan and Rhett, immediately, and 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 breached by the defendants. (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). All of those attorneys

had the same obligation under the FCPSA as the attorneys for the Plaintiff, and all of them concluded that the Plaintiff's claims were without legal merit. The trial court agreed, dismissing all claims except one against Rhett concerning the allegation that he was "racing" with Elliott at the time of the accident. (Order, R. pp. 13 -14; Order, R. p. 15; Order, R. p. 16) [11]

Presumably, the trial court would consider the Supreme Court's analysis to represent that of a "reasonable attorney". In what may be unique to this case, in companion litigation, that Court reviewed the pleadings filed against Douglas by the Plaintiff and found that the Plaintiff's claims against Douglas had no merit *from the outset,* and that Douglas could not even be "potentially liable" for the consequences of his son's accident. *USAA Property and Casualty Insurance Company v. Clegg, et. al.* 377 S. C. 643, 656, 659, 661 S. E. 2d 791, 797, 799 (2008).

Certainly, in South Carolina, sanctions have been imposed for far less culpable conduct than that demonstrated by the Plaintiff's attorneys in this case. In *Ex Parte Gregory*, 378 S. C. 430, 663 S. E. 2d 46 (2008), the Supreme Court upheld sanctions under the prior version of the FCPSA because the attorney had failed to conduct a proper investigation before filing a conversion action against another attorney. In *Rutland v. Holler, et al,* 371 S. C. 91, 637 S. E. 2d 316 (Ct. App. 2006), sanctions were upheld when the Court found, based upon the procedural history of serial dismissals, "it is inconceivable that Rutland

[11] In its Order granting summary judgment, the trial court found, without regard the "reasonable attorney" analysis, no "reasonable juror" could have found merit in the Plaintiff's claims. Presumably, an attorney would be more versed in the law and facts than a lay juror. If no layman could find merit in the Plaintiff's claims, certainly it was frivolous for an attorney to pursue them.

reasonably believed that his claims against Respondents were valid." *Id.* at 98, 320.

In *Russell v. Wachovia Bank*, 370 S. C. 5, 17, 633 S. E. 2d 722, 728 (2006), sanctions were upheld from the point after which the litigant had access to affidavits and other evidence which should have led her to realize that the facts did not support her claims and when she had facts which demonstrated her claims to be without merit, she could no longer assert that she acted in "good faith" in continuing to pursue them. *See, also:* In *In Re Young*, 366 S. C. 180, 621 S. E. 2d 359 (2007) [attorney disciplined for bringing action without research, with no factual basis, and for which he could not explain the legal basis].

As these cases demonstrate, a "reasonable belief" in the merits and continuing merits of a claim can be substantiated only on the basis of supporting law and the existence of favorable facts. In this case, the Plaintiff had no legal or factual basis, from the outset, to support her claims and the four years of litigation to which she subjected Douglas did not result in one fact or argument upon which she could base a "reasonable belief" in the merits of her position. The Plaintiff and her attorneys persisted in turning a blind eye to both the law and the facts while on their quest to impose liability on Douglas for an accident in which he played no part. That is the essence of frivolity for which the FCPSA and Rule 11 provide a remedy.

In addition to defining the nature of a frivolous claim, and establishing the "reasonable attorney" standard, the FCPSA mandates that certain factors are to be considered. Those factors are: (1) the number of parties; (2) the complexity of

the claims and defenses; (3) the length of time available to the attorney or party to investigate and conduct discovery; (4) information disclosed to the attorney or party through discovery and investigation; (5) previous violations of the act; (6) the response of the attorney or party to allegations that the act was violated; and (7) other facts which to the court are just, equitable, and appropriate. S.C. Code §15-36-10 (E).

Virtually all of these factors, when considered in connection with the evidence in the record, militate in favor of the imposition of sanctions.

The parties were not numerous and the Plaintiff was not precluded from pursuing all of the discovery she chose to do. The relevant and material facts were not complicated and were clear and undisputed from the outset.

Despite the trial court's conclusion otherwise, the claims were not complex. Negligent entrustment cases are commonplace. The material facts that Elliott was an adult and the owner of the vehicle with the correlative right to control its use could and should have easily been ascertained by the Plaintiff's attorneys prior to filing the Complaints. The law concerning the lack of a duty to control the conduct of an adult child or warn others of his allegedly dangerous propensities is clear.

The Plaintiff and her attorneys made absolutely no response to the allegations of frivolity in the manner prescribed by the FCPSA. Under the FCPSA section (D), the Plaintiff had thirty days from the filing in 2007 of Douglas' Motion for Sanctions to offer "an explanation of mitigation". If fact, they made no

response at all to the motion for sanctions until three years later when the trial court first entered its Order actually imposing sanctions against them.

The only factor that could be considered as a basis for denying sanctions was the absence of any previous violation of the act. However, in the face of the overwhelming evidence of frivolity and the presence of all other factors militating in favor of sanctions, the absence of one factor is not dispositive.

The applicable law and relevant facts that establish that the Plaintiff's claims against Douglas were meritless were readily available to the Plaintiff and her attorneys from the outset of this litigation. All of the attorneys in the litigation, whose clients had been sued on the same theories as Douglas, immediately and without discovery, filed motions for summary adjudication for lack of a factual or legal basis supporting the claims. The trial court granted summary judgment because there was **no** factual or legal basis supporting the claims. The Supreme Court held that Douglas did not even have "potential" liability pursuant to the allegations of the complaints filed against him. All of the factors to be considered under the FCPSA save one militated in favor of sanctions.

When the trial court recanted the findings of fact and law appearing in both its Order granting summary judgment and its Order granting sanctions and granted the Plaintiff's Motion for Reconsideration and denied sanctions, it clearly erred. This Court, based on the record, should find that the preponderance of the evidence establishes that mandatory sanctions under the FCPSA and Rule 11 are warranted.

V. THE TRIAL COURT'S ORDER DENYING SANCTIONS ERRONEOUSLY ADOPTS THE PLAINTIFF'S SMOKESCREEN OF IRRELEVANT AND TANGENTIAL ISSUES THAT WERE REJECTED AT THE SUMMARY JUDGMENT STAGE.

The trial court granted summary judgment on the basis that the Plaintiff's claims against Douglas had no factual or legal merit on any of the theories pursued by the Plaintiff. (Order, R. p. 13). In its Order denying sanctions, the trial court essentially "undoes" its summary judgment findings of fact and law and adopts, almost *verbatim,* the Plaintiff's recitation of the facts and the law upon which she relied to unsuccessfully fend off summary judgment.

This "smokescreen" appears in the Plaintiff's Supplemental Memorandum in opposition to summary judgment. (Supplemental Memorandum, R. pp. 251 – 258). In it, the Plaintiff set forth her view of the factual and legal basis for her contention that Douglas owned or controlled the Mazda or was otherwise liable for the consequences of his son's accident.[12] Although rejected at the summary judgment stage, on the basis of the same record, those previously rejected facts and arguments appear throughout the Order and are specifically referenced in the Order in summary fashion as the findings of fact providing Plaintiff a "good faith belief" in her claims and justifying the denial of sanctions.[13] (Order, p. 24, R. p. 70).

Not only has the "evidence" now cited by the trial court as justifying a "good faith belief" in the claims been previously rejected on the same record, but

[12] By comparing the Plaintiff's Supplemental Memorandum in opposition to summary judgment to the Order denying sanctions, this Court can ready see that the "facts" and legal analysis in the two are essentially identical.

[13] Douglas demonstrated at the summary judgment stage that none of the alleged "facts" appeared in the record. (Reply Memorandum, R. pp. 262 – 273).

as has been repeatedly shown by Douglas, this "evidence" is not actually reflected in the record or is completely immaterial to any issue in the case.

The Ownership Issue.

As previously set forth, ownership or control is a necessary element of a negligent entrustment claim. The Plaintiff first alleged that Douglas was the "owner" of his son's car and after being confronted with the fact that the Certificate of Title was in Elliott's name, subsequently alleged that Douglas was the "*de facto*" owner of his son's car.

Under South Carolina law, a certificate of title constitutes *prima facie* evidence of vehicle ownership which can be overcome only in ligation involving the availability of insurance coverage and then only in the limited circumstances.

> This Court has held that under certain circumstances, someone other than the actual titleholder should be deemed the owner *for insurance purposes*. (emphasis supplied) In those cases, however, the owners' failure to hold title (or its equivalent) resulted from mere technicalities.

Unisun Insurance Company v. First Southern Insurance Company, 319 S.C. 419, 424, 462 S. E. 2d 260, 262 (1995) *reh. denied.*

Not only does this case not involve insurance coverage issues, it was undisputed that in addition to title, Elliott paid all expenses associated with his automobile, including licensing and insuring it, paying the loan by which it was purchased, and paying to repair it. (Elliott, R. p. 672, lines 8 – 12; R. p. 697, line 14 – 699, line 22; Douglas, R. p. 710, lines 2 – 6)

He was the titleholder not, as a "mere technicality", but because he was the owner.

In its Order denying sanctions, the trial court cites S. C. Code § 56-1-10(3) for the proposition that Douglas is the "owner" of his son's vehicle because he was entitled to the "use and possession" of it. (Order, R. p. 55) First, there was not one shred of evidence or legal basis to conclude that Douglas "was entitled" to use or possess his son's automobile.[14]

Second, the trial court's paraphrase of the statute is incorrect. That statute, in fact, further establishes that as a matter of law Elliott, at the holder of the title, was the owner of the vehicle, and not Douglas.

> (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.

Under the statute, the owner of a vehicle is the one who has title to it, except in instances in which title is held by another merely as security for a loan. In such cases, even though the one entitled to the use and possession of the vehicle does not have "title", he is considered the "owner". In this case, it was undisputed that Elliott held title to the vehicle and thus the statute has no relevance to the issues presented.

The remainder of the "evidence", that was cited by the trial court as justifying the Plaintiff's assertion that Douglas "owned" his son's automobile,

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[14] The trial court's reliance on *Automobile Insurance Company of Hartford v. Curran*, 994 F. Supp. 324 (D.C.Pa.1998) to demonstrate that Douglas was the *de facto* owner of the Mazda is entirely misplaced, as is evident from the quoted passage. Even if South Carolina's law on *de facto* ownership is the same as that applied in *Curran*, which it is not, the alleged owner in that case had **all** of the incidents of ownership **except** title. In this case, Elliott had title **and** all other incidents of ownership discussed in *Curran* and Douglas had none of them. There is no basis under either South Carolina law or the *Curran* case to find that Douglas was a *de facto* owner of his son's automobile.

cannot, as a matter of law, overcome the *prima facie* evidence of title. While it is true, as the trial court finds, that Douglas co-signed his son's car loan, there is no authority for the proposition that merely by being liable on the loan, Douglas was an "owner" of the Mazda and no reasonable attorney could, without authority, conclude so.[15]

Commencing at page 9 of the Order (R. p. 55) the trial court engages in a tortuous discussion of an insurance policy providing coverage for the Mazda for a parking lot accident occurring nine months before the accident in which the Decedent was killed. Despite the undisputed fact that title to the Mazda always remained in Elliott, the trial court finds that through his interaction with the insurer, that Douglas represented he was the "true owner" of his son's automobile. [16]

First, the insurance policy which the trial court finds persuasive does not appear anywhere in the record. For the trial court to construe its provisions as Douglas' "representation" "that he (Douglas) was, in fact, the true owner of the Mazda" is complete speculation and conjecture. Further, what **is** in the record with respect to that insurance and Douglas' interaction with it is consistent with the otherwise undisputed fact that Elliot and not Douglas owned the automobile.

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[15] The alleged fact that Douglas paid the debt associated with the Mazda after the accident is not an accurate portrayal of the record. While Douglas did, in fact, pay the balance of the obligation which he had guaranteed, Elliott repaid Douglas.

[16] In evaluating this "evidence", this Court should be reminded that not only did title to the Mazda always remain with Elliott, but at the time of the accident which killed the Decedent, neither the Mazda nor Elliott were insured under the policy owned by Douglas. (R. p. 720, line 21 – R. p. 721, line 4)

If this Court examines the Affidavit of Salvage (R. p. 707) relied upon by the trial court to establish this "representation", that document identifies **Elliott Lambrecht** – not Douglas – as the **owner of the vehicle**. The Affidavit was signed by Douglas, under oath, as the owner of the USAA policy and not the owner of the vehicle. Rather than a representation that Douglas owned the vehicle, as found by the trial court, in the Affidavit, Douglas affirmed, under oath, that Elliott was the owner of the vehicle. The proceeds of the insurance were used to repair Elliott's vehicle, at his direction.

As Douglas testified:

> Q: . . . as I understand it, you received a check from USAA for a total loss of that vehicle?
> A. We received a check in conjunction with . . .I say "we" because I was the owner of the policy and the policy dictated that the check be made out to the policyholder not the named insured.
>
> * * * *
>
> Q. When the check was received from USAA for the crumpled fender and for the stolen items, who. . what happed to the money?
> A. I asked Elliott what he wanted to do with the money. He wanted to repair his car, so we put those funds towards the replacement of the engine for the car.

R. p. 712, line 13 - R. p. 713, line 16

There was no "sale" of the Mazda to Douglas as found by the trial court. As a matter of law, the insurer could not "sell" a car that it did not own and it was undisputed that, from the day the Mazda was purchased until the day of the accident in which the Decedent was killed, title was always in Elliott's name.[17]

[17] The Total Loss Cover Sheet and the Wilson Appraisal Service estimate referred to by the trial court at page 10 of its Order are nowhere in the record and thus must be disregarded as "evidence" of Douglas' alleged "representation" or on any other issue..

Finally, even if Douglas had "represented" to an insurer or to the world at large that he was the owner of Elliott's vehicle, such a representation does not change the fact that he was not. Any reasonable attorney would not continue to attempt to pursue a negligent entrustment case on the basis of some purported "representation" that Douglas was the owner of his adult son's automobile when the Certificate of Title and all other incidents of ownership established otherwise and there was no evidence to establish any legal right to control the use of the vehicle.

In its Order, the trial court found that *Gadson v. Echo Services of South Carolina, Inc.*, 374 S. C. 171, 648 S. E. 2d 558 (2007), changed the law in South Carolina and, but for that change, the Plaintiff had a viable negligent entrustment claim. However, with or without *Gadson*, the Plaintiff could not establish the basic element of a negligent entrustment, and that is that Douglas owned or otherwise had the legal right to control the use of his son's car. In *Gadson,* the Supreme Court did not modify the law of negligent entrustment but merely rejected any attempt to expand the scope of negligent entrustment liability beyond the rule of *Jackson v. Price*, 288 S. C. 377, 342 S. E. 2d 628 (Ct. App. 1986), which required the involvement of alcohol in the accident.

The only effect of *Gadson* was to reaffirm that intoxicants were a necessary element of a negligent entrustment claim, in addition to ownership or control. *Id.* at 176, 177 and that decision is, in reality, merely icing on the cake with respect to the lack of viability of any negligent entrustment claim in this case.

Because the facts clearly established that Douglas had neither owned or controlled his son's automobile, *Gadson* and its purported impact on the Plaintiff's claim is irrelevant.[18]

The Control Issue

Not only did Douglas not own his son's car, he had no right to control its use. 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. "Control" of the use of a vehicle is a legal right or power, not the mere exertion of influence. *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].

As noted previously, without regard to whether or not Douglas wished that his son would not drive, or whether he had an opinion that he should not drive, or even if he had actually attempted to persuade his son not to drive, he had no legal right to control either his son or the use of his son's vehicle. Even Elliott recognized as much. He testified that even though Douglas suggested that he not drive after his license was suspended, Douglas couldn't "give me a direct order. It wasn't his car." (R. p. 680, lines 2 – 22).

At page 11-12 of its Order, (R. p. 57 – 58) the trial court found that Douglas had "physical control over the vehicle itself, as it was normally kept at his house", a finding that is not only irrelevant to the right of control but completely unsupported by the record. After the Mazda's engine was repaired

[18] At no point did the Plaintiff rely upon *Gadson* for any purpose.

and during the period Elliott's driver's license was suspended, the automobile was towed to Douglas' home at Elliott's request where it remained for only two to three weeks.

> Q. When it was ready to drive again, did Elliott drive it or what happened to it?
> A. No, he did not drive it. It was delivered by tow truck to our driveway at Spartina Point.
> Q. Okay. And was that at your request?
> A. That was at Elliott's request. It was his car.
> Q. So Elliott requested that the car be, I guess for lack of a better term, stored at Spartina?
> A. Parked, yes.
> Q. Parked. Okay. How long was it parked there?
> A. Maybe two weeks. I don't recall the exact date in November when the car was repaired, but it a fairly short period of time. Two or three weeks.

R. p. 714, line 16 – R. p. 715, line 10.

After two to three weeks of being parked at Douglas' residence the automobile was picked up by Elliott's sister, Anna, who drove it for a week and then parked it in the driveway of her home until Elliott picked it up on January 9 of the following year. R. p. 207; R. p. 19; R. p. 673, line 21 – R. p. 674, line 25. Not only was the Mazda not "normally" kept at Douglas' home, it was there for, at most, three weeks. That evidence would not suggest to any reasonable attorney that Douglas controlled the use of his son's automobile.

Directly contrary to the trial court's finding that "Elliott needed the Defendant's permission for the use of the Mazda" and that Douglas controlled who used the vehicle, each witness who testified on this point stated that it was Elliott and not Douglas who decided who could use the vehicle and it was Elliott's permission and not Douglas' 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 is not one shred of evidence in the record that supports the trial court's finding that Douglas, as a matter of fact, controlled the use of his son's vehicle or as a matter of law had the right to control it. No reasonable attorney would pursue a negligent entrustment claim on the basis of non-existent facts and law that precludes liability.

Simply put, it appears that the trial court merely adopted the findings and analysis put before it by the Plaintiff as a basis to deny sanctions without any independent review of the "facts" or legal analysis and wholly repudiated its own prior findings of fact and conclusions of law in the process. Not only had the identical findings and analysis been previously rejected by the trial court on the same record when advanced by the Plaintiff to avoid summary judgment, the record simply does not substantiate any of them and they should not be given any credence by this Court in its independent review of the record.

VI. THE TRIAL COURT FAILED TO ADDRESS THE FRIVOLITYOF THE PLAINTIFF'S FAILURE TO WARN CLAIM.

Even though all versions of the Complaints filed against Douglas contained a claim that Douglas was liable for failing to warn the Decedent about Elliott's purportedly dangerous driving and to prevent Elliott from driving, neither the trial court in its Order denying sanctions nor the Plaintiff make any attempt to justify the pursuit of that claim. There is absolutely no basis in the law that would impose such a duty on Douglas and the trial court's failure to address it is a tacit admission of the frivolity of such a claim. In failing to find that no reasonable

attorney would have filed such a claim against Douglas and pursued it for four years, the trial court erred.

VII. THE TRIAL COURT DENIED SANCTIONS ON THE BASIS OF CLAIMS NOT ACTUALLY PURSUED AGAINST DOUGLAS AND WHICH WERE FACTUALLY AND LEGALLY WITHOUT MERIT IN ANY CASE.

At page 2 of its Order, the trial court finds that, in addition to negligent entrustment, the Plaintiff pursued Douglas on the basis of the Family Purpose Doctrine and agency. (Order, R. p. 48). A fair reading of the various versions of the Complaints filed against Douglas demonstrates that the Plaintiff's only theories of recovery were negligent entrustment and breaches of a duty to warn the Decedent and to control Elliott or prevent him from driving. Claims or defenses not asserted in the pleadings will not be considered on appeal. *Fraternal Order of Police v. South Carolina Dept. of Revenue*, 352 S. C. 420, 574 S.E. 2d 717 (2002).

In none of the versions of the Complaints filed by the Plaintiff was liability under the Family Purpose Doctrine alleged either by reference, by name, or by allegations of the essential elements of the claim. However, even if the Plaintiff had actually pursued such a theory, like her other claims, there was no factual basis to support it.

Liability pursuant to the Family Purpose Doctrine requires evidence that Douglas owned the automobile involved in the accident and that he furnished and maintained it for the general use and convenience of members of his household. *Thompson v. Michael*, 315 S.C. 268, 433 S. E. 2d 853 (1993); *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E. 2d 632, 635 (Ct. App. 2006).

There is no factual dispute that the Mazda was not owned by Douglas and the record unequivocally establishes from all of the witnesses that Elliott was not a member of Douglas' household, but an emancipated adult who had been living independently for some time before the accident. (R. p. 692, line 19 – R. p. 696, line 18; R. p. 738, line 5 – R. p. 739, line 8)

In the Order denying sanctions, the trial court places evidentiary value on an unsworn, incomplete, and disavowed statement, taken from Douglas by an insurance investigator after his son's accident, that he considered Elliott a member of his household. First, Douglas' testified that he "used the word household interchangeably with the term family in my conversation with USAA." (R. p. 729, lines16 – 25). Second, as a matter of law, unsworn statements are not competent evidence of any fact. *Morris v. Jensen*, 309 S. C. 153, 420 S. E. 2d 710, (Ct. App. 1992), *reh denied* [collecting numerous cases in which such statements were deemed incompetent]. *See, also: South Carolina National Bank v. S & L Investment Partnership*, 308 S.C. 511, 419 S.E. 2d 243 (1992), *reh denied; cert. denied* [appraiser's unsworn statement insufficient][19]

No reasonable attorney would rely upon a statement that could not be admitted into evidence as the basis to pursue a claim, particularly when all other, undisputed evidence established contrary facts.

The trial court's abject failure to actually review the record and to simply sign an order placed before it by Plaintiff's counsel is illustrated by its erroneous finding, without any reference to the record, that Elliott "told" the investigating

[19] Douglas objected to the consideration of this unsworn statement at the summary judgment stage. (Reply Memorandum, R. pp. 261, 262). The document has never been admitted into evidence.

officer that his address was Douglas' home. In fact, Elliott was unconscious after the accident and gave no statement to anyone at any time. (R. p. 686, lines11 – 23).

The trial court also erroneously states, without any reference to the record, that "Douglas and Elliott Lambrecht's 'story' was that at the time of the wreck, Elliott was living with the Barkers" and that "Rhett Barker testified that at the time of the wreck he was mainly a resident of Defendant's home". (Order, R. p. 68). Barker's actual testimony was that Elliott had his own apartment for six months to a year, vacated the apartment between Christmas and New Years of 2001, and that, during the period between moving out of the old apartment and moving into his new apartment, Elliott stayed multiple places, including one night with his father and multiple nights with Barker. (Barker, R. p. 750, line 12 – R. p. 755, line 9).

Even if it had been pled, which it was not, because Douglas did not own the Mazda or provide it for "general family purposes", as a matter of law there was no basis for such a claim against him.

The first mention of an agency theory of liability was in Plaintiff's Supplemental Memorandum filed three days after Douglas' Motion for Summary Judgment was argued. (Supplemental Memorandum, R. p. 257).[20] The trial court refers to one paragraph of the second Amended Complaint (Order, R. p. 67; Amended Complaint, R. p. 218, R. p. 230), which was filed in August, 2006, shortly before dismissal on summary judgment, as a basis for its finding that an

[20] Douglas noted in his Reply Memorandum that this issue had never been previously raised. (Reply Memorandum, R. p. 272).

agency theory was pled. This sole paragraph fails to even allege the basic elements of such a relationship.

Further, as previously discussed, the facts that were pled "on information and belief" were known to the Plaintiff at that time not to be true. From his testimony taken eighteen months before, the Plaintiff knew that Elliott retrieved the vehicle only so that his friend Rhett could use it and that he was unaware of any alleged request by his mother about getting the vehicle moved from his mother's home. (R. p. 673, line 25 – R. p. 17; R. p. 681 line 19 – R. p. 682, line 18). There was no other evidence on the issue. No reasonable attorney would have pursued an agency theory against Douglas on the basis of facts he knew not to be true.

The trial court erred when it found that the Plaintiff actually did pursue Douglas on an agency theory or under the Family Purpose Doctrine and further erred when it found that those claims had some basis in fact or law.

VIII. THE TRIAL COURT ERRED WHEN IT APPLIED THE LAW OF COMBINING AND CONCURRING NEGLIGENCE.

Although the trial court's discussion on page 16 of its Order of the concept of "combining and concurring negligence" is in the abstract, the Order must be read to suggest that, in some manner, this concept justified the Plaintiff's pursuit of Douglas for the consequences of his son's automobile accident.

In its discussion, 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. Not only does this statute, for

its application, require a finding that the violator had some power of ownership or control over the particular vehicle, which Douglas did not, the trial court does not even articulate what violation of the motor vehicle act it finds occurred.

Assuming that the Court intended to relate this statute to Elliott's operation of the vehicle without a license, registration, or insurance, those acts are not negligence *per se*, **even as to Elliott,** and are not actionable 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. Even if Douglas owned the vehicle, which he did not, he is not liable for the acts of his adult son in operating the vehicle.

Second, 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 Douglas which combined with Elliott's acts, or the acts of any other person, that "combined or concurred" to result in the death of the Decedent.

Douglas had no power to control the use of his son's vehicle and knew nothing about his adult son's intentions when he picked it up from his sister's home.

> Q: Now, on January 9, 2002, did your father have any knowledge that you were going to Beaufort to pick up your car from Anna?
> A. No.

R. p. 700, lines 20 – 23.*See, also:* R. p. 679, lines 17 – 25; R. p. 703, line 23 – R. p. 704, line 2.

Thus, there is not one shred of evidence in this record to establish any finding that Douglas "authorized" or "permitted" a vehicle "owned" or "controlled" by him to be driven. The trial court's Order, instead of supporting the Plaintiff's position that the claims were not frivolous, in fact demonstrates precisely how frivolous they were.

IX. DISCRETIONARY SANCTIONS WERE PROPER WHEN THE PLAINTIFF FILED A COMPLAINT AND TWO AMENDED COMPLAINTS WITH FACTUALLY AND LEGALLY UNSUPPORTED CLAIMS.

In addition to the mandatory sanctions, FCPSA provides for discretionary sanctions against an attorney who *files* a frivolous pleading, motion or document or makes an argument that a reasonable attorney would recognize as not warranted under the facts or law. § 15-36-10(A)(4)(a), (b), and (c).

The same facts and argument set forth above apply to all of the filings and arguments asserted in this case. A reasonable attorney would not have filed the Complaint and the, two amended Complaints, which asserted facts for which Plaintiff had no evidence and asserted legal claims which they should have known to be untrue and without merit at that time. Frankly, a reasonable attorney would not present to the court, as fact, material which is not in the record.

X. THE AWARD OF ATTORNEY FEES AND OTHER COSTS INCURRED IN THE DEFENSE OF THE ACTIONS IS AN APPROPRIATE SANCTION TO IMPOSE UPON PLAINTIFF AND HER ATTORNEYS.

The Supreme Court has sent a very clear message that a litigant who pursues frivolous litigation will be subjected to sanctions and that those sanctions include attorney fees. In *Russell v. Wachovia Bank,* 370 S.C. 5, 633 S.E. 2d 722, 729 (2006), the Supreme Court affirmed an award of more than $525,000 in

attorney fees and costs awarded as sanctions when the plaintiff in a will contest persisted in asserting claims of undue influence after being provided with numerous affidavits affirming the testator's clear state of mind.[21] The FCPSA specifically contemplates reimbursement of attorney fees and other costs incurred by a litigant as the result of a frivolous claim being pursued. S.C. Code §15-36-10(G)(1).

In this case, Douglas has had to defend, not only the tort claims asserted against him by the Plaintiff through summary judgment and a subsequent appeal, but has had to defend the declaratory judgment action filed against him by his insurer, and has now appeared in this Court for the second time to pursue his remedy. As reflected in the Affidavits filed herein, his legal fees and expenses alone exceed $138,000 exclusive of all time and expense incurred after the filing of the Affidavits. This is obviously an extreme burden for an ordinary citizen, who was merely unfortunate enough to have an adult son that was involved in an automobile accident and to be sued in a completely meritless lawsuit.

Because Douglas' allegations of frivolity were unrebutted by the Plaintiff and because all factors to be considered under the FCPSA preponderate in favor of frivolity, the only reasonable result is to require Plaintiff and her attorneys to compensate Douglas for the financial burden to which he was subjected by the initiation and four year pursuit of claims which had no factual or legal basis.

[21] The *Russell* case was decided under the predecessor to the prior statute pursuant to which the standard by which to evaluate frivolity was whether there was a "reasonable belief" in the facts upon which the claim is based. The standard under the current version of the FCPSA is much more stringent.

CONCLUSION

The current version of the FCPSA, unlike its predecessors, mandates sanctions when the trial court determines, based on objective standards, that a claim was frivolous. Although the accident in which the Decedent was killed was tragic, there never was a factual or legal basis for Plaintiff's claim that Douglas should bear legal responsibility for the consequences of an automobile accident involving his adult, emancipated son who was driving his own automobile at the time. Any reasonable attorney who had performed the most basic of investigation and legal research would have concluded that, under the facts and the law, no legally cognizable duty was breached. To subject Douglas to years of litigation, with the attendant attorney fees and legal expenses, and to the personal distress and costs incurred in defending these meritless claims, mandates that, under the FCPSA, the Plaintiff and her attorneys should be sanctioned.

In this case, after remand, the trial court concluded that after "looking at the transcripts, discussing that with my law clerk, we had come to the conclusion that maybe I had needed to issue sanctions in the first place..." and then properly awarded sanctions. There was no factual or legal basis for the trial court's subsequent complete reversal of that conclusion and this Court should not affirm it.

With all due respect to the trial court, it is inconceivable that there is some basis, other than deference to members of the bar, for it to have completely recanted the findings of fact and conclusions of law set forth in both its Order

granting summary judgment and its initial Order awarding sanctions, to have ignored the holding of the Supreme Court which found that the claims against Douglas were without merit from the outset, and to set forth totally contradictory findings justifying the denial of sanctions. The trial court's refusal to grant sanctions, in a case as clear as this one, does an injustice to both Douglas and to the legal system as a whole.

Douglas respectfully requests that this Court evaluate the evidence, as it is required to do, in light of the objective standards and factors to be considered under the FCPSA, and to find that the evidence establishes that Plaintiff and her attorneys initiated and pursued frivolous litigation against Douglas. Douglas further respectfully requests that the Court find that he is entitled to reimbursement of his costs, including reasonable attorney fees and expenses, as appropriate sanctions, and that the cases should be remanded to the trial court for determination of the amount of the sanctions to be awarded.

DOUGLAS A. LAMBRECHT, Appellant

By _____

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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 No.: 2006-CP-07-1126

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

vs

Elliott M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, of whom Douglas A. Lambrecht is, Appellant

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RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

A. Procedural History

These are companion cases for wrongful death and conscious pain and suffering. They were commenced by the filing of Summonses and Complaints in the Beaufort County Court of Common Pleas on July 10, 2002. [ROA, pp. 79-87; and ROA, pp. 88-97]. In her Complaints, the Respondent alleges that she is the Personal Representative of the Estate of her daughter, Allison T. Clegg ("Allison"), and that Allison was killed when she was riding as a passenger in an automobile being operated by Elliott M. Lambrecht ("Elliott") when Elliott drove the vehicle off the road at a high rate of speed and into a tree. The Complaints further allege that the Appellant Douglas A. Lambrecht, the father of Elliott, is liable for Allison's death and injuries on the theory that he negligently entrusted the vehicle to his son, Elliott. *Id.*

On August 26, 2002, the Appellant Douglas Lambrecht answered the Complaints. In his Answer, the Appellant Douglas Lambrecht raises the affirmative defense of assumption of the risk, alleging that Allison assumed the risk of being killed by riding in a vehicle being operated by Elliott. Specifically, in his Answer the Appellant Douglas Lambrecht alleges that the decedent, Allison Clegg:

> knew or should have known of the . . . disposition of . . . Elliott M. Lambrecht to operate a vehicle improperly and . . . that the Defendant Elliott M. Lambrecht posed an unreasonable risk of harm to the public at large and specifically, to . . . those who might be passengers in his automobile.

The Respondent amended her Complaint on May 4, 2004. [ROA, pp. 135-145 and pp. 146 - 156]. In her Amended Complaints, the Respondent added additional Defendants. *Id.* In her

Amended Complaints, the Respondent also refined her allegations against the Appellant Douglas Lambrecht, alleging that Douglas Lambrecht was the *de facto* owner of the 1994 Mazda automobile the Elliott was driving at the time of the fatal wreck. *Id.*, pg. 136, ¶8 and pg. 147, ¶8.

The Appellant Douglas Lambrecht answered the Amended Complaints on May 26, 2004, generally denying the allegations against him. [ROA, pp. 157-163, and pp. 164-170]. In these Answers the Appellant Douglas Lambrecht omits the specific affirmative allegation contained in his original Answers, quoted above, that Allison should have known that Elliott had a disposition to operate vehicles improperly and that Elliott posed an unreasonable risk of harm to both the public and to his passengers. *Id.* Although the specific allegation is admitted, however, in his Answers to the Amended Complaints, the Appellant Douglas Lambrecht alleges the affirmative defense of assumption of the risk, i.e., presumably, that Allison assumed the risk of dying by riding with Elliott. *Id.*, pg. 162, ¶50 and pg. 169, ¶50.

On June 15, 2004, the Appellant Douglas Lambrecht filed a motion seeking the entry of summary judgment on his behalf. [ROA, pp. 171-174]. The motion itself is general and does not specify a ground for relief, but it references a contemporaneously filed Memorandum in Support of Motion for Summary Judgment [ROA, pg. 175]. In this memorandum, the Appellant argues that he is entitled to the entry of summary judgment because there was no duty of care owed by him to the Respondent's decedent. [ROA, pg. 179].

While the summary judgment motion was pending, these cases were removed from the active roster pursuant to Rule 40(j), SCRCP. [ROA, pg. 1]. These cases were subsequently restored to the active roster and assigned their current civil action numbers of 2006-CP-07-1125 and 1126. [ROA, pg. 8].

The Respondent filed her second, and final, Amended Complaints on August 10, 2006. [ROA, pp. 215-2388]. Significantly, in his Answers to these final Amended Complaints, the Appellant Douglas Lambrecht again omits his prior specific allegations that it was known that his son Elliott had a disposition to operate a vehicle improperly, and that his son Elliott posed an unreasonable risk of harm to both the public at large and to his passengers, but continues to assert the affirmative defense that Allison assumed the risk of being killed when she chose to be a passenger in Elliott's vehicle. [ROA, pg. 234, ¶54 and pg. 249, ¶54].

On September 11, 2006, the Appellant Douglas Lambrecht's pending motion for summary judgment was heard by the Honorable Roger M. Young, presiding Circuit Court Judge for the Beaufort County Court of Common Pleas. In opposing the request for summary judgment, the Respondent argued that the evidence in the case supported three (3) theories of liability on behalf of the Appellant Douglas Lambrecht: (1) Negligent Entrustment, (2) Family Purpose Doctrine, and (3) Agency. The Respondent argued that there are genuine issues of material fact as to the Appellant Douglas Lambrecht's ownership or control of the subject 1994 Mazda automobile (Negligent Entrustment), as to whether or not Elliott was a member of the Appellant Douglas Lambrecht's household (Family Purpose Doctrine); and as to whether Elliott was performing an errand on behalf of the Appellant Douglas Lambrecht at the time of the wreck (Agency).

On October 20, 2006, Judge Young granted the Appellant's Motion for Summary Judgment. [ROA, pg. 13[1]]. The Respondent's motion pursuant to Rule 59, SCRCP, to reconsider the granting of summary judgment to the Appellant Douglas Lambrecht was denied by Order filed on March 5,

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[1]This Order is erroneously entitled "Order Granting in Part Defendant Rhett Barker's Motion to Reconsider Denial of Motion for Summary Judgment."

2007. [ROA, pg. 17].

The Respondent initially appealed the granting of summary judgment in favor of the Appellant Douglas Lambrecht, but subsequently did not pursue that appeal.

On January 17, 2007, the Appellant Douglas Lambrecht filed his Motion for Sanctions, requesting sanctions pursuant to Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10, et al. (2007) and Rule 11, SCRCP. [ROA, pg. 277].

On March 1, 2007, Judge Young, the same Judge who had previously heard and granted the Appellant's Motion for Summary Judgment, denied the Appellant's Motion for Sanctions. [ROA, pg. 17].

On March 19, 2007, the Appellant filed a motion asking Judge Young to alter or amend his Order denying sanctions. A hearing on the record was held on this motion on May 1, 2007 and the motions were denied from the bench by Judge Young, which was followed by a written Order dated May 1, 2007. [ROA, pg. 18].

On May 23, 2007, the Appellant Douglas Lambrecht initiated his first appeal in this case, appealing the denial of his request for sanctions to the South Carolina Court of Appeals. The Court of Appeals initially issued an opinion affirming the denial of sanctions. See Opinion No. 4498, filed February 5, 2009. Upon reconsideration, however, the Court of Appeals vacated that Opinion and remanded the case back to Judge Young, stating:

> 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. We are unable to determine which facts the trial court relied upon in its decision. We therefore vacate the denial of sanctions and remand the matter to the trial judge for an order "identifying the facts and accompanying legal analysis on which (he) relied" to enable meaningful appellate review of this issue. . . . Upon remand, the trial court shall conduct a separate evaluation under Rule 11, SCRCP, and under FCPSA, and make findings and conclusions as to each sanction mechanism asserted.

Opinion No.: 2009-UP-376, filed June 30, 2009.

On January 8, 2010, Judge Young initially entered an Order granting sanctions [ROA, pg. 27] but following a Motion for Reconsideration [ROA, pg. 299] and a hearing [ROA, pg. 624]), Judge Young entered his Order denying sanctions, with specific findings of fact and accompanying legal analysis as requested by the Court of Appeals. [ROA, pp. 47-76].

On September 14, 2010, Judge Young denied the Appellant Douglas Lambrecht's Motion to Alter or Amend his Order denying sanctions, [ROA, pg. 77] and this appeal follows.

B. Factual Background

These survival and wrongful death actions were commenced in August 2002 by the Respondent Deborah J. Clegg, as Personal Representative of the Estate of her daughter, Allison, to recover damages for the death of Allison in a one-car automobile wreck occurring on January 9, 2002. [ROA, pp. 79-94].

At the time of her death, Allison was a passenger in a the front right seat of a 1994 Mazda automobile which was being driven by Elliott. Elliott is the son of the Appellant Douglas Lambrecht, and at the time of the fatal wreck he was nineteen (19) years of age. [ROA, pg. 206, ¶5;

ROA, pg. 702, lines 5-14].

The 1994 Mazda which was involved in the wreck had been purchased in 2000. Title to the Mazda was placed in Elliott's name. The Appellant Douglas Lambrecht co-signed the loan obtained to purchase the Mazda. [ROA, pg. 206, ¶¶10 and 11; ROA, pg. 209; ROA, pg. 698, line 16 to pg. 699, line 14]. About six (6) months prior to the fatal wreck which is the subject of these lawsuits, the Mazda was involved in a wreck in a parking lot. As a result of that wreck, the car was totaled by its insurance carrier, USAA. On August 21, 2001, USAA paid $2,273.67, representing full and final payment for the total loss of the Mazda. These funds were paid to the Appellant Douglas Lambrecht. At that same time, the Appellant Douglas Lambrecht purchased the car for the agreed upon salvage value of $500.00. The Appellant Douglas Lambrecht signed the settlement documents with USAA as the owner of the Mazda. USAA, in negotiating the settlement of this claim, corresponded with the Appellant Douglas Lambrecht. In corresponding with the Appellant Douglas Lambrecht, USAA references settling "**your** total loss." Most importantly, in settling this claim with USAA, the Appellant Douglas Lambrecht executed a document entitled "Affidavit of Salvage Retention," in which he stated the following:

> On June 14, 2001 **my** 1994 Mazda . . . was involved in an accident. As a result of this accident **my** car was deemed a total loss . . . . **I** have elected to keep the salvage
>
> . . . .

The Appellant Douglas Lambrecht executed this document immediately above the line which states, "SIGNATURE OF OWNER". Immediately above the signature of the Appellant Douglas Lambrecht this document warns that any false representations in this affidavit is potentially a criminal offense.

The Mazda was subsequently repaired and from that point forward it, and its keys, were kept by the Appellant Douglas Lambrecht at his residence. [ROA, pg. 721, line 17 - pg. 723, line 20]. A week or so prior to the fatal wreck, Anna Lambrecht (the daughter of the Appellant Douglas Lambrecht), who resided with her mother Jan Horan in Beaufort, wanted to borrow the Mazda automobile because her own car broke down. [ROA, pg. 705, line 25 to pg. 706, line 23]. She picked the car up from the Appellant's house on Hilton Head Island. On January 9, 2002, Elliott and his friend, Rhett Barker, went to the residence of his sister Anna and his mother Jan in Beaufort and picked up the Mazda. Elliott drove the Mazda back to Hilton Head Island, with Rhett following in his own vehicle. Upon returning to Hilton Head Island that evening, they stopped at the residence of Plaintiff's decedent, Allison, who was Rhett's girlfriend, to pick her up. At approximately 9:00 p.m., they left Allison's house. Elliott drove the Mazda, with Allison riding in the front passenger seat. Rhett initially followed in his own vehicle, but at some point in time passed Elliott's vehicle. Shortly thereafter, Elliott lost control of the Mazda, running off the road, becoming airborne, and hitting a tree, killing Allison.

In his Brief, the Appellant Douglas Lambrecht enumerates several facts which he represents "were not in dispute." Appellant's Brief, pp. 10-12. This representation is not accurate. The Respondent disputes a large number of these so-called "undisputed" facts, and the evidence rebutting these facts is set forth more fully in Respondent's argument as well as in Judge Young's Order. [ROA, pp. 52-62, 65-69, 70-71]. See Respondent's Brief, *infra,*, pp. 9-10. Since Rule 208, SCACR, prohibits contested factual matters from being set forth as part of the Statement of the Case, the Respondent will not address these disputes in detail in this section of the Respondent's Brief, but in summary, there is ample, if not compelling, evidence that the Appellant Douglas Lambrecht

owned or controlled the Mazda automobile at the time of the fatal wreck (which relates to the Negligent Entrustment allegation), [ROA, pp. 52-62]; that Elliott was a member of the Appellant Douglas Lambrecht's household at the time of the fatal wreck (which relates to the Family Purpose Doctrine theory of liability), [ROA, pp. 65-66];and that Elliott was running an errand on behalf of the Appellant Douglas Lambrecht at the time of the fatal wreck (which relates to the Agency theory of liability). [ROA, pp. 66-69].

I. STANDARD OF REVIEW

In *The Father v. South Carolina Department of Social Services*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct.App. 2001) the South Carolina Court of Appeals held that the criteria for Rule 11 sanctions are essentially the same as those for sanctions under the Frivolous Civil Proceedings Sanctions Act (FCPSA).

The determination of whether attorney's fees should be awarded under FCPSA is treated as one in equity. On appeal, accordingly, the Appellate Court may take its own view of the preponderance of the evidence. "However, following the determination of facts, an Appellate Court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded." *Rutland v. Holler, Dennis, Corbett, Ormond and Garner*, 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006), citing *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997) and *In Re Beard,* 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). Generally, under the abuse of discretion standard of review, an abuse of discretion arises where the judge issuing the Order was controlled by an error of law or where the Order is based on factual conclusions that are without evidentiary support. *Tri County Ice and Fuel Company v. Palmetto Ice Company*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). Additionally, under the abuse of discretion standard the reviewing Court is "obligated to give great deference to the trial court's judgment." *Jamison v. Ford Motor Company,* 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007), citing *State v. Adams,* 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

In the case *sub judice*, it is respectfully submitted that it is particularly appropriate for the reviewing court to give deference to the trial court's judgment, since it is the same judge (the Honorable Roger M. Young) who heard the case on its merits and granted the Appellant's Motion

for Summary Judgment and who has heard and denied the Appellant's Motion for Sanctions, following multiple hearings. As the Court of Appeals previously noted in this case:

> Moreover, the trial judge who denied the Motion for Sanctions was also the trial judge who granted summary judgment in Lambrecht's favor, therefore, he was particularly familiar with the substance of the underlying case.

Clegg v. Lambrecht, et al., Opinion No. 4498, pp. 9-10 (South Carolina Court of Appeals filed February 5, 2009); vacated and remanded by Unpublished Opinion No. 2009-UP-376 (South Carolina Court of Appeals filed June 30, 2009).

Finally, the burden of proof is on the party requesting the imposition of sanctions. *Rutland v. Hollar, Dennis, Corbett, Ormand and Garner, supra*, 371 S.C. at 97, 637 S.E.2d at 319.

II. THE TRIAL COURT, IN DENYING SANCTIONS, DID NOT RELY SOLELY UPON A FINDING OF SUBJECTIVE GOOD FAITH, BUT PROPERLY APPLIED THE OBJECTIVE STANDARD OF A REASONABLE ATTORNEY.

The Appellant argues that the trial court erred when it denied sanctions because it relied solely upon a subjective "good faith" standard, and upon the "earnestness, demeanor, and conduct" of the Respondent and her attorneys. Appellant's Brief, pp. 13-16.

While the trial court certainly made express findings that the Respondent and her counsel acted in good faith [ROA, pp. 55, 59, 61, 67-69] the trial court also went to great lengths to examine the evidence in this case and applied an objective standard of what was "reasonable." *Id.*

In his Order, the trial court examined the standard for determining frivolity under both the FCPSA [ROA, pp. 52-52] and under Rule 11 [ROA, pp. 74]. The trial court then noted:

> The next step in the analysis is to apply the foregoing standards to the case before me, examining the facts of this case and then applying those facts to the applicable law. The foundation of (Appellant's) request for sanctions is the fact that his summary judgment motion was granted. In opposition to (Appellant's) motion for summary judgment, the (Respondent) argued three theories of liability, i.e., Negligent Entrustment, Family Purpose Doctrine, and Agency.

ROA, pg. 54.

The trial judge then conducted an exhaustive examination of the record, applying the facts to the applicable law, and concluded that the evidence satisfied **both** a subjective standard of good faith and an objective standard of reasonableness.

For example, Judge Young concluded that "**there is evidence supporting** the good faith

belief that Defendant exercised ownership or control over the Mazda vehicle." [ROA, pg. 59](emphasis added). The trial Judge then went on to summarize the evidence which supported this belief. *Id.*

The trial judge further concluded that "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, pg. 13 (emphasis added).

Likewise, the trial court found "that the claim of negligent entrustment was brought both in good faith and was reasonable". *Id. (emphasis added).*

With respect to the Family Purpose Doctrine, the trial judge concluded that "the record in this case . . . contains evidence supporting my finding that it was both reasonable and in good faith to assert that at the time of the fatal wreck giving rise to this lawsuit Elliott was living with the Defendant and was a member of the Defendant's household." [ROA, pp. 65-66]. The trial judge then went on to specify the evidence that supported this finding. *Id.*, pg. 66.

Finally, with respect to the Agency theory of liability, the Court concluded that "there is 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 the Defendant to retrieve the Mazda . . . ." [ROA, pg. 67]. Again, the trial judge went on to specify this evidence. *Id.*

In short, the trial court went to great lengths to specify the evidence that supported his finding that the objective standard of "reasonableness" was satisfied.

In fact, the trial court emphasized that he was not relying solely upon a subjective finding of good faith, stating as follows:

"[T]he common thread is that there must be evidence in the record which would

> demonstrate that the litigant and/or her attorney had sufficient facts and had conducted sufficient research and investigation to support a "reasonable" belief in the existence and continuing existence of a meritorious claim. Subjective 'good faith' belief in the merits of the claims is not the equivalent of the required 'reasonable' belief reached after investigation and research."

ROA, pp. 72-73. The trial court, in his Order, explicitly made it perfectly clear that he was applying the objective standard of reasonableness, expressly finding that in the case before him "there exists in the record, from the time litigation was commenced until the motion for summary judgment was granted, evidence supporting my finding of the objective, reasonable belief in the existence and continuing existence of a meritorious claim." *Id.,* pg. 73.

There is simply no merit to the argument that the trial judge relied solely upon a subjective finding of good faith.

III. THE TRIAL COURT PROPERLY CONDUCTED A FACTUAL REVIEW OF THE RECORD IN THIS CASE.

The Appellant argues that the trial judge failed to conduct a factual review of the record in this case. Appellant's Brief, pp. 16-19. This is incorrect. The trial judge conducted an exhaustive review of the evidence in this matter.

The South Carolina Court of Appeals, in its Order vacating its prior decision affirming the denial of sanctions, remanded this case to the trial judge for an Order "identifying the facts and accompanying legal analysis on which he relied" to enable meaningful appellate review of this issue. *Clegg v. Lambrecht, et al., Unpublished Opinion No. 2009-UP-376, pg. 2 (South Carolina Court of Appeals, June 30, 2009).*

Upon remand, Judge Young, in compliance with the aforesaid direction, conducted an extensive and intensive review of the evidence in this case, making specific findings and conclusions, dealing first with the FCPSA, and secondly with Rule 11. [ROA, pg. 52]. With respect to the FCPSA, Judge Young identified the standard for determining frivolity, and then examined the facts of this case and applied those facts to the applicable law. *Id.*, pp. 53-54.

With respect to each theory of liability, i.e., Negligent Entrustment, Family Purpose Doctrine, and Agency, Judge Young made specific factual findings regarding the evidence in support of each of these legal doctrines.

Rather than repeat Judge Young's analysis, the specific factual findings supporting his conclusion that there was evidence to support the reasonableness of the claim for Negligent Entrustment is set forth in his Order [ROA, pp. 8-16], while his specific factual findings and legal conclusions supporting his finding that it was reasonable to assert that Elliott was living with the

Defendant and was a member of the Defendant's household (i.e., the Family Purpose Doctrine) is set forth in his Order [ROA, pp. 65-66]. Finally, the specific factual findings and conclusions of law regarding the Agency theory of liability are set forth in his Order [ROA, pg. 67-69].

Additionally, the FCPSA enumerates seven (7) factors which the Court should consider or take into account in determining whether to impose sanctions, and Judge Young made specific factual findings regarding each of these factors in his Order [ROA, pp. 70-72].

A review of Judge Young's Order clearly shows that he complied with this Court's directive to identify the facts and accompanying legal analysis upon which he relied in denying the request for sanctions.

IV. ON THE RECORD BEFORE IT, THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO GRANT MANDATORY SANCTIONS UNDER THE FCPSA AND RULE 11.

The Appellant Douglas Lambrecht argues that, on the record before it, the trial court erred in refusing to impose mandatory sanctions under the FCPSA and Rule 11. The Appellant notes that 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, and that the standard for determining frivolity under Rule 11 is essentially the same as it is under the FCPSA. Appellant's Brief, pg. 20. The Appellant then gives a very one-sided recitation of "facts," which ignores a great deal of the evidence in this case. Appellant's Brief, pp. 20-30.

The essence of Appellant's argument, however, is that since Judge Young granted summary judgment in favor of Appellant, Judge Young erred in failing to impose sanctions. Appellant's Brief, pg. 20. This argument - that the granting of summary judgment automatically requires the imposition of sanctions - ignores the fact that the standard for granting summary judgment is distinctly different from the standard for imposing sanctions under the FCPSA or Rule 11. Compare Rule 56, SCRCP with S.C. Code Ann. §15-36-10 (2007) and Rule 11, SCRCP. If this were not so, then sanctions would be imposed in every case that is resolved by summary judgment.

In his Order, Judge Young exhaustively sets forth his factual findings and the accompanying legal analysis upon which he relied in determining that the Appellant's request for sanctions should be denied. The undersigned attorney cannot explain Judge Young's reasoning any better than Judge Young himself, and accordingly rather than repeat or rephrase Judge Young's analysis, this Court's attention is directed to Judge Young's Order [ROA, pp. 52-76].

Two (2) issues raised by Appellant in his brief, however, warrant additional comment.

First, the Appellant puts great weight upon the fact that when the Mazda was initially purchased it was titled in Elliott's name. Appellant's Brief, pp. 21-25. Appellant argues that only the titled owner of a vehicle can possess the necessary "ownership or control" over a vehicle required to support a claim for negligent entrustment. *Id.* This argument overlooks the fact that it was alleged that the Appellant Douglas Lambrecht was the "*de facto*" owner of the 1994 Mazda automobile at the time of the fatal wreck. See, e.g., ROA, pg. 136, ¶8. Asking the Court to, in effect, ignore legal, titled ownership of a car held by a child, and instead conclude that a parent was the *de facto* owner of the car, is a recognized legal concept. In a case nearly factually identical to the instant case, the Court in *Automobile Insurance Company of Hartford v. Curran, 994 F.Supp. 324 (DC PA 1998)* held that the father was the *de facto* owner of a car titled in the name of his child. Is so holding, the Court noted that the father "had easy access to and could freely use the vehicle whenever he so chose and it is clear that he, more than anyone else, had responsibility for the car's maintenance, repairs and insurance and had control over who used the car and when." *Id., 994 F.Supp. at 330.* While this is a Federal Court decision from another State, South Carolina has recognized that the issue of *de facto* ownership or control over the use of an automobile is not answered simply by looking at how the vehicle was last titled. See, *Campbell v. Paschal, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986).* Although there is no South Carolina Appellate Court decision precisely on point, there is clearly legal authority to support an assertion of *de facto* ownership. Under the FCPSA, frivolity does not exist if "a good faith or reasonable argument" can be made for "the extension, modification, or reversal of existing law." S.C. Code Ann. §15-36-10(C)(1)(c) (2007).

Additionally, the Appellate argues that there is "no evidence" to support the allegation that

the car was being brought back to Hilton Head Island at the time of the fatal wreck in compliance with a request from the Appellant Douglas Lambrecht to return it to his house for safe keeping. Appellant's Brief, pg. 26. In support of this assertion, the Appellant recites deposition testimony from Elliott that his mother had not asked him to remove the car from her driveway. Appellant's Brief, pg. 26. Ignoring for the moment the fact that Elliott's testimony that his mother did not ask him to remove the car from her house in Beaufort does not necessarily equate to the conclusion that his father did not ask him to return the car to Hilton Head Island, there is testimony in the record from the Appellant Douglas Lambrecht's own mouth that the car was being brought back to Hilton Head Island at his request. In a statement the Appellant Douglas Lambrecht gave to his insurance company, USAA, shortly following the fatal wreck, the Appellant told the USAA claims agent that Elliott was bringing the car back from Beaufort because he, the Appellant, wanted the Mazda brought back to his Hilton Head residence, stating "it was not a specific agreement but there was a general understanding that I wanted the car back, uh, at our Hilton Head home and to be parked . . . ." The Appellant Douglas Lambrecht also stated that the day before the fatal wreck he had a discussion about "bringing the car back to my home because I wanted the car in safekeeping." Although the Appellant later attempted to distance himself from these statements, it is respectfully submitted that his inconsistent statements go to the weight of the evidence, rather than simply erase it. As noted by the trial judge, the credibility of the Appellant Douglas Lambrecht was "suspect." [ROA, pg. 68] The Appellant Douglas Lambrecht admitted in his deposition tha the had no qualms about "spinning" the facts if it suited his purposes, and when he was finally forced to admit to some previous false statements in his deposition, he testified that he preferred not to "characterize them (his false statements) as lies," but preferred to state that he had "conveniently blurred" the truth to

serve his purposes.

V. THE TRIAL COURT, IN DENYING THE APPELLANT'S REQUEST FOR SANCTIONS, DID NOT ERRONEOUSLY ADOPT A "SMOKE SCREEN OF IRRELEVANT AND TANGENTIAL ISSUES WHICH WERE REJECTED AT THE SUMMARY JUDGMENT STAGE."

The Appellant Douglas Lambrecht argues that the trial court erred in refusing to impose sanctions by relying upon a "smoke screen of irrelevant and tangential issues which were rejected at the summary judgment stage." Appellant's Brief, pp. 31-40. This argument is similar to the Appellant's prior argument, in which the Appellant argues that the trial court, in denying sanctions, essentially "undoes" its summary judgment. Appellant's Brief, pg. 32. As previously noted, this argument is flawed, since the standards for summary judgment and sanctions are distinctly different, and the law does not require that sanctions be automatically awarded to every party who prevails on a summary judgment motion.

Again, the Appellant gives a very one-sided and selected recitation of the "evidence", Appellant's Brief, pp. 32-40, and again, this Court's attention is directed to Judge Young's Order, which sets forth exhaustive and detailed factual findings and legal analysis. [ROA, pp. 52-76].

Once again, however, there are a couple of points raised by the Appellant which need to be specifically addressed herein.

The Appellant argues that Judge Young erred in relying upon the Affidavit of Salvage as some evidence that it could be reasonably argued from which it Appellant was the owner of the Mazda automobile. Appellant cleverly argues that when he executed the Affidavit of Salvage as the "owner" he signed it as the owner of the USAA policy, not as the owner of the vehicle. Appellant's Brief, pg. 35. The response to this argument is two-fold.

First, there is absolutely nothing in the Affidavit of Salvage indicating that the "owner"

referenced in the line "signature of owner" is the owner of the insurance policy, not the owner of the vehicle. It is certainly reasonable to interpret the "owner" referenced in an Affidavit of Salvage which negotiates the sales price of a vehicle and the ultimate ownership of that vehicle and its salvage, would be the owner of the vehicle. Construing it to be the owner of the insurance policy simply makes no sense.

Secondly, this interpretation ignores the plain english of the affidavit, in which the Appellant refers to "my 1994 Mazda" and "my car". Likewise, such an interpretation belies the cover letter sent by USAA to the Appellant Douglas Lambrecht, in which the USAA agent references "your vehicle."

VI. THE TRIAL COURT DID NOT ERR IN FAILING TO ADDRESS THE FRIVOLITY OF THE PLAINTIFF'S FAILURE TO WARN CLAIM.

The Appellant Douglas Lambrecht argues that even though all versions of the Complaints filed against him contained a claim that he was liable for failing to warn Allison about Elliott's purportedly dangerous driving, the trial court erred in failing to address the frivolity of this purported "failure to warn" claim. Appellant's Brief contains no citations supporting this argument.

Contrary to what Appellant asserts, none of the Complaints filed in this case contain a "failure to warn" claim. [ROA, pp. 79-97, pp. 135-156, and pp. 215-238]. The trial court did not err in failing to address a nonexistent claim.

VII. THE TRIAL COURT DID NOT DENY SANCTIONS ON THE BASIS OF CLAIMS NOT ACTUALLY PURSUED, NOR FACTUALLY AND LEGALLY WITHOUT MERIT.

The Appellant Douglas Lambrecht argues that in her Complaints the Respondent did not assert causes of action based upon the Family Purpose Doctrine or Agency, and therefore, the trial court erred in denying sanctions on these claims which were not actually pursued. Appellant's Brief, pg. 41. The Appellant's argument on this point is difficult to comprehend. Since sanctions can be awarded only for pursuing a frivolous claim, it is difficult to understand how the trial court could have erred in refusing to award sanctions on the basis of claims that were not pursued.

In any event, while the Family Purpose Doctrine and Agency were not separately pled causes of action, these were theories of liability that were argued in opposition to the Appellant's Motion for Summary Judgment. Since, to that extent, these were claims that were "pursued," it is clear that Judge Young, perhaps out of an abundance of caution, felt the need to address these claims in his Order, thereby ensuring compliance with this Court's directive to set forth all of his factual findings and legal analysis.

In any event, as set forth in Judge Young's Order, there is ample evidence to support his finding that arguing these theories in opposition to the motion for summary judgment was both reasonable and in good faith. [ROA, pp. 11 and 65-68].

VIII. THE TRIAL COURT DID NOT ERR IN CONSIDERING THE LAW OF COMBINING AND CONCURRING NEGLIGENCE.

The Appellant's argument on this issue is somewhat difficult to follow. The Appellant summarizes his argument as follows:

> Although the trial court's discussion on page 16 of its Order of the concept of "combining and concurring negligence" is in the abstract, the Order must be read to suggest that, in some manner, this concept justified the Plaintiff's pursuant of Douglas for the consequences of his son's automobile accident.

Appellant's Brief, pg. 44. The foregoing conclusion is simply not supported by the content of Judge Young's Order.

In his Order, Judge Young discusses the law of combining and concurring negligence as a subsection within that part of his Order dealing with negligence and negligent entrustment. [ROA, pp. 62-64]. Judge Young probably felt compelled to address the concept of combining and concurring negligence, since it is a concept expressly alleged in the Complaints. See, e.g., ROA, pg. 221, ¶28 and pg. 233, ¶28. As Judge Young correctly notes in his Order, under the concept of combining and concurring negligence, it is not necessary that the Appellant's negligence be the sole cause of the injury in order to impose liability, but need only be a proximate concurring cause, and that when someone is injured by the concurrent negligence of two or more, all or any of the tortfeasors can be liable. [ROA, pg. 63]. Judge Young is simply countering the Appellant's argument that simply because Allison was killed as a result of the negligence of Elliott, that does not necessarily absolve other potential tortfeasors, including the Appellant, of liability. This is well established law, as Judge Young accurately states. See, e.g., *Skipper v. Hartley, 242 S.C. 221, 224,*

130 S.E.2d 486, 488 (1963); Culbertson v. Johnson Motor Lines, 226 S.C. 13, 23-24, 83 S.E.2d 338, 343 (1954); and *Shearer v. DeShon, 240 S.C. 472, 483, 126 S.E.2d 514, 519 (1962).*

IX. THE TRIAL COURT DID NOT ERR IN REFUSING TO AWARD DISCRETIONARY SANCTIONS.

The Appellant Douglas Lambrecht argues that even if the trial judge properly refused to award mandatory sanctions, the Judge erred in refusing to award discretionary sanctions, relying upon the same arguments as early set forth in his brief. Appellant's Brief, pp. 45-46.

After concluding that mandatory sanctions were not appropriate, Judge Young expressly considered, and refused to award, discretionary sanctions under the FCPSA, stating:

> I decline to impose discretionary sanctions under the FCPSA, relying upon the same factual findings and legal analysis as set forth above in declining to impose mandatory sanctions.

ROA, pg. 73.

Since the evidence in this case supports Judge Young's conclusion that "there exists in the record from the time litigation was commenced until the Motion for Summary Judgment was granted, evidence supporting my finding that the objective, reasonable belief in the existence and continued existence of a meritorious claim," then Judge Young's decision not to impose discretionary sanctions did not constitute an abuse of his discretion.

X. THE AWARD OF ATTORNEY'S FEES AND OTHER COSTS INCURRED IN THE DEFENSE OF THE ACTIONS IS AN APPROPRIATE SANCTION TO IMPOSE UPON PLAINTIFF AND HER ATTORNEYS.

The Appellant Douglas Lambrecht argues that an award of attorney's fees and other costs incurred in defending frivolous litigation is an appropriate sanction to impose under the FCPSA. Appellant's Brief, pp. 46-47.

Under the FCPSA, a wide range of sanctions is authorized. One of the authorized sanctions, in an appropriate case, is a reasonable attorney's fee. S.C. Code Ann. §15-36-10(G) (2007). Although the Act certainly authorizes an award of attorney's fees, it does not require it, and other sanctions, including directives of a non-monetary nature, are also expressly authorized. *Id.* In determining the severity of a sanction, the Act mandates that the Court shall consider previous violations of the Act, which in this case are none. *Id.*, §15-36-10(F).

At any rate, since the Court determined that an award of sanctions was not appropriate, this issue was never reached or ruled upon.

CONCLUSION

As requested by the South Carolina Court of Appeals, Judge Young has set forth in his Order "the facts and accompanying legal analysis on which (he) relied" in his issuing his original Order denying sanctions, with separate evaluations under the South Carolina Frivolous Civil Proceedings Sanctions Act and Rule 11, SCRCP. As the trial judge who heard and disposed of this case on its merits, and who also conducted multiple hearings on the sanctions issue, Judge Young is intimately familiar with the facts of this case. Judge Young has concluded "that there exists in the record, from the time litigation was commenced until the motion for summary judgment was granted, evidence supporting my finding of the objective, reasonable belief and the existence and continuing existence of a meritorious claim." [ROA, pg. 73]. It is respectfully submitted that this conclusion by Judge Young does not constitute an abuse of his discretion and that the Appellant has failed to satisfy his burden of proof.

It is accordingly respectfully requested that the Order of the Honorable Roger M. Young denying sanctions be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE
WITH ORDER DATED AUGUST 13, 2008

Counsel for Appellant hereby certify that the Appellant's Final Brief filed with this Court is in compliance with the Order of the South Carolina Supreme Court dated August 13, 2008.

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CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Appellant's Final Brief and Appellant's Final Reply Brief in this comply with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned certifies that the **Respondent's Final Brief**, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

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in a post office or official depository under the exclusive care and custody of the United States Postal Service, on May 12, 2011.

By: Sue Radford
Sue Radford
Secretary for H. Fred Kuhn, Jr.

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,

vs.

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

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

REPLY BRIEF OF APPELLANT

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ARGUMENT AND AUTHORITIES

I. THE PLAINTIFF MISSTATES THE STANDARD OF REVIEW.

In her Brief, the Plaintiff suggests that the decision of the trial court to deny sanctions is reviewed by this Court only for an abuse of discretion. That is an incorrect statement of the standard. The issue of *whether* to award sanctions is considered a proceeding in equity and is reviewed by this Court on the record. This Court is entitled to take its own view of the evidence. *Rutland v. Holler, Dennis, Corbett, Ormand & Garner*, 371 S.C. 91, 637 S.E. 2d 316 (Ct. App. 2006); *Father v. South Carolina Department of Social Services,* 345 S.C. 57, 545 S. E. 2d 523 (Ct. App. 2001).

If the trial court had awarded sanctions, the amount and nature of those sanctions would be reviewed on appeal based on the abuse of discretion standard. *Ex Parte Gregory*, 378 S.C. 430, 663 S.E.2d 46 (S.C. 2008).

Even under the abuse of discretion standard, if the decision is controlled by unsupported findings of fact, as the trial court's Order denying sanctions was, this Court is entitled to make independent findings. *Rutland, op. cit.*

II. THE TRIAL COURT ERRED WHEN IT USED THE STANDARD OF THE SUBJECTIVE GOOD FAITH, EARNESTNESS, DEMEANOR, AND CONDUCT OF THE PLAINTIFF AND HER COUNSEL AS A BASIS TO DENY SANCTIONS PURSUANT TO THE FCPSA AND RULE 11.

Under the FCPSA, Rule 11, and the case authorities cited by Douglas in his Brief, the *only* standard for evaluating frivolity is whether, when viewed objectively, a reasonable attorney would believe that the facts and the law

supported the claim pursued. At page 11 of her Brief, the Plaintiff acknowledges that the trial court, in fact, applied a "subjective good faith" standard to evaluate Douglas' claim of frivolity. However, the Plaintiff attempts to support the trial court's Order by suggesting that the trial court applied *both* the "subjective good faith standard" *and* the objective reasonableness standard mandated by the FCPSA.

A comparison of the absolutely contradictory factual and legal findings in the trial court's Order granting Summary Judgment, the trial court's Order denying Douglas' Rule 59(e) Motion, and the trial court's Order denying sanctions establishes how unsupportable that argument is.

As pointed out in Douglas' Brief, at every point in its analysis of frivolity, the trial court couples its finding of "reasonableness" with its finding that the Plaintiff and her attorneys acted with a good faith belief in the merits of the claim. The trial court's references to the "earnestness, demeanor and conduct" of the Plaintiff and her counsel as a basis for denying sanctions makes it perfectly clear that the focus of the trial court was not on whether a reasonable lawyer would have concluded that the claims pursued against Douglas were factually and legally meritorious, but whether the "hearts and minds" of these particular attorneys and the Plaintiff were in the right place. The subjective "good faith" of Plaintiff and her counsel is absolutely irrelevant to the objective analysis of the legal and factual merits of the claims that the trial court was required to conduct. Whether the Plaintiff and her attorneys were or were not earnest, well mannered, and competent and whether or not they wholeheartedly believed that Douglas

should be liable for his adult son's automobile was wholly irrelevant to the legal standard mandated by the FCPSA.

The fact that the trial court evaluated frivolity based only upon a subjective, and thus erroneous standard, is demonstrated in its Order denying Douglas' Rule 59(e) Motion (Order, R. p. 77). In that Order the trial court found as the *sole* basis for denying Douglas' motion that the case was brought in "good faith", by "experienced, competent counsel" who in "good faith" "believed that the facts of the case warranted bringing the lawsuit". In that Order, the trial court did not even pay lip service to the proper standard by which frivolity is to be evaluated under the FCPSA and Rule 11.

Finally, the findings of fact and conclusions of law in the trial court's Order granting summary judgment (Order, R. p.) and the factual and legal findings in its Order denying sanctions cannot possibly be reconciled.

In granting summary judgment, the trial court found that, based upon the undisputed facts, as a matter of law, there was *no* basis for concluding that Douglas either owned or controlled his son's automobile, or that Douglas had any legal duty to control the conduct of his adult, emancipated son, or that at the time of the accident, Elliott was acting as Douglas' agent. Those findings became the law of the case after the Plaintiff abandoned her appeal.

Despite those prior findings, the trial court subsequently signed a lengthy Order articulating numerous purported facts that it concluded gave the Plaintiff and her attorneys a basis for pursuing the claims. With all due respect to the trial court, it cannot be both ways.

This case presents the unique situation in which the trial court stated on the record that its review of the evidence led the trial court to conclude that "I had needed to issue sanctions in the first place." (Transcript, R. p. 625, lines 20 - 21). In accordance with that conclusion, the trial court on remand had entered its nineteen page Order articulating why the Plaintiff's claims were frivolous under the statute. (Order, R. pp. 27 - 45). Only when confronted with the Plaintiffs' counsel in a Rule 59(e) hearing did the trial court reverse itself and enter an Order drafted by the very counsel sought to be sanctioned[1] that recanting all of its previous factual and legal findings and made new findings that were wholly inconsistent with the factual basis for granting summary judgment. If the alleged facts set forth in the Order denying sanctions were relevant and material to the claims asserted against Douglas, summary judgment would have been improper.

It is apparent that the trial court did not evaluate the record with respect to what a reasonable attorney would do when viewing the facts and the law objectively. Its focus remained on what these particularly lawyers viewed as justification for their "good faith" belief in the claims they pursued against Douglas. The trial court evaluated the frivolity of the claims not on the basis of at what point, either at the outset of the litigation or at some point thereafter, a reasonable attorney would have reached the same conclusion as the trial court – that the claims had no factual or legal merit[2], but on its subjective conclusions about the motives and competence of the Plaintiff and her counsel.

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[1] As noted by Douglas in his Brief, the Order signed by the trial court was, *verbatim,* the one

[2] Indeed, this is precisely the analysis the trial court was instructed to do by the Court of Appeals on Remand. " . . .a duty to dismiss or withdraw frivolous litigation may arise at a subsequent point

Despite the clear, statutorily mandated definition of frivolity and the analysis that is to be employed, the trial court was wedded to the idea that so long as an attorney can be found to have a subjective "good faith belief" in a claim, he can avoid the imposition of sanctions no matter how meritless the claim. That was the basis for the trial court's initial denial of sanctions prior to Douglas' first appeal, and once again, on remand, despite the direction of this Court, it is the basis for the current denial of sanctions.

In failing to apply the standard mandated by the FCPSA, not only did the trial court err for the second time on the same issue, it has subjected Douglas to yet more litigation and more legal expense arising from a case which had no legal or factual or legal merit from the outset. At some point, the judicial system must provide him a remedy.

III. THE PLAINTIFF FAILED TO ADDRESS DOUGLAS' CONTENTION THAT HER COUNSEL KNEW OR SHOULD HAVE KNOWN FROM THE OUTSET OF THE LITIGATION THAT THE CRITICAL FACTS AND APPLICABLE LAW DID NOT SUPPORT THE CLAIMS ASSERTED AGAINST DOUGLAS.

Commencing at page 20 of his Brief, Douglas sets forth from the record the facts known to or readily available to the Plaintiff, the legal elements of the claims asserted against Douglas, and demonstrates that from the outset, there was no basis for the pursuit of any of the claims actually asserted or purportedly asserted against him.

The crux of the Plaintiff's claim against Douglas is negligent entrustment. The necessary factual basis for a negligent entrustment claim is that the

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in the litigation based on whether an attorney knew or should have known a claim is frivolous." (Opinion, R. p. 24)

defendant owned or controlled the use of the automobile involved in the accident. The Plaintiff and her counsel either knew or could have known that at the time of the accident and at all times since it was purchased, Douglas' adult son and not Douglas held the Certificate of Title to that vehicle.

As pointed out in Douglas' Brief, in South Carolina, title is *prima facie* evidence of ownership of an automobile, except in cases involving the availability of insurance coverage and then, only if the litigant possesses all incidents of ownership other than title. *Unisun Insurance Company v. First Southern Insurance Company*, 319 S. C. 419, 424, 462 S. E. 2d 260, 262 (1995), *reh. denied*. Further, by South Carolina statute, the "owner" of a vehicle is one who holds title, except when title is held by another merely as security. S.C. Code § 56-1-10(3).

In her Brief, the Plaintiff focuses solely on her theory that, despite failing to have title, Douglas was the *de facto* owner of his son's vehicle. (Plaintiff's Brief p. 17). As the legal basis for this proposition, the Plaintiff relies upon a Pennsylvania case, *Automobile Insurance Company of Hartford v. Curran,* 994 F. Supp 324 (D.C. Pa., 1998) and *Campbell v. Paschal*, 290 S.C. 1, 347 S.E. 2d 892 (Ct. App. 1986). Neither case, when read by an objectively reasonable attorney, would suggest that under the undisputed facts of this case, the Plaintiff had any chance of proving *de facto* ownership.

The *Curran* case did not even deal with *de facto* ownership, but rather liability under the Family Purpose Doctrine.

The rule of the *Campbell* decision is the same as the applicable law in South Carolina as set forth in *Unisun*. Both cases hold that in insurance coverage cases, if a non-title holder possesses *all* incidents of ownership *other* than title, he can be considered the *de facto* owner of a vehicle involved in an accident in order to avail himself of insurance coverage. In her Brief, the Plaintiff does not even address Douglas' recitation, beginning on page 20 of her Brief, of the undisputed facts relevant to whether or not there was any factual basis for pursuing Douglas as the *de facto* owner of his son's vehicle. Those facts, which were known to or available to the Plaintiff, demonstrated that not only was Elliott an emancipated adult, but at all times he held the Certificate of Title to the vehicle involved in the accident and that he possessed all the other incidents of ownership. Elliott, and not Douglas, paid for the vehicle, paid to license it, paid taxes on it, paid for the insurance on the vehicle, and had the exclusive right to control who used it.

Because this case did not involve insurance coverage and because there was no evidence that Douglas had any of the incidents of ownership, neither *Curran* nor applicable South Carolina law provided any basis for the Plaintiff's pursuit of Douglas on the basis that he was the *de facto* owner of his son's vehicle. Just because a legal theory for recovery may exist, a litigant may not pursue it when there is no factual underpinning to support that legal theory.

As the only evidence cited in support of her *de facto* ownership theory, the Plaintiff clings to the thin reed of the Affidavit of Salvage (R. p. 707). (Plaintiff's Brief, page 20). First, despite how the Plaintiff would like to characterize that

document, or speculate about how it should be construed, the bottom line is that at the very top of that one-page document, Elliott Lambrecht is clearly identified as the owner of the vehicle that was damaged. (R. p. 707). Douglas testified that he signed that Affidavit not as the owner of the vehicle, but as the owner of the USAA policy. (R. p. 26, lines 11 - 21)[3]. As the trial court found at the summary judgment stage, based on the same record, there was NO evidence that Douglas was the *de facto* owner of the vehicle to which his son Elliott held title. At the time of the hearing on Douglas' Motion for Sanctions, that finding was the law of the case.

In his Brief, Douglas discusses at length that neither the Family Purpose Doctrine nor liability under an agency theory were ever pled and, even if they had been, there was absolutely no factual basis for the Plaintiff's pursuit of Douglas on either of those theories of liability.

At page 23 of her Brief, the Plaintiff concedes that these theories were not pled, but suggests that the trial court needed to discuss them because they were "argued" at the summary judgment stage. As set forth in Douglas' Brief, there is no basis for excusing a claim on frivolity on the basis of some theory of liability that might have existed but that was not even pled by the Plaintiff.

However, even if those theories of liability had been pled, unless Douglas owned or controlled the use of his son's vehicle, which he did not, neither theory of liability has any merit.

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[3] There was no evidence in the record other than the testimony of Douglas with respect to the circumstances surrounding the Affidavit of Salvage or its meaning. Even if Douglas had misrepresented the state of ownership to the insurer or the world at large, that misrepresentation would not transform the status of the title and did not change the undisputed fact that Elliott and not Douglas owned the vehicle.

The only attempt by Plaintiff in her Brief to support a reasonable basis for liability under these theories is her argument that, while Elliott testified that he drove his car on the night of the accident for his own purposes, Douglas, in an unsworn statement that was never admitted into evidence and disavowed by him, stated that there was a "general understanding" that Douglas wanted Elliott, whose driver's license was suspended at the time, to park the vehicle and not drive it. That "evidence", even if admissible, is simply wholly insufficient to establish an agency relationship, or liability under the Family Purpose Doctrine. [4]

In *Jamison v. Morris,* 385 S.C. 215; 674 S.E. 2d 168 (2009), the Supreme Court made it clear that the basis for an agency relationship is the right or power of the master to control or direct the servant. *Id.* at 221, 171. There is absolutely no factual or legal basis upon which to conclude that Douglas had the right or power to control the conduct of his adult emancipated son, or the right or power to control the use of his son's automobile. While Douglas may have wished that his adult son would not drive, or encouraged him not to, he had no legal power to direct or control either Elliott or Elliott's automobile.

At no point in the litigation did the Plaintiff have any evidence to support the basic underpinning of the claims she actually pursued against Douglas or those that she merely "argued". The trial court so found in granting summary judgment and in entering its initial Order granting sanctions. There is nothing in the Plaintiff's Brief which supports the trial court's complete reversal of its

[4] As set forth in Douglas' Brief, liability under the Family Purpose Doctrine requires that the defendant own or otherwise furnish an automobile for the general use of members of his household.

findings of fact and conclusions of law or which would justify denying sanctions under the FCPSA and Rule 11.

IV. SANCTIONS UNDER THE FCPSA AND RULE 11 ARE WARRANTED IN A CASE THAT WAS SO LACKING IN FACTUAL OR LEGAL MERIT THAT IT WAS DOOMED FROM THE OUTSET.

At page 20 of her Brief, the Plaintiff argues that sanctions are not warranted just because summary judgment is granted, and that the standard for granting summary judgment and imposing sanctions are "different". Douglas could not agree more.

The issue on summary judgment is whether, under the facts and the applicable law, a litigant is entitled to judgment as a matter of law. Under the FCPSA and Rule 11, the issue is whether a "reasonable" attorney, when taking an objective view of the law and the facts, would believe that the potential claim had merit. [5]

In her Brief, the Plaintiff does not even address the holding of the Supreme Court in litigation involving Douglas and his insurer [6] that the claims filed by the Plaintiff against Douglas had no merit *from the outset*, and that Douglas could not even be "potentially liable" for the consequences of his son's accident. *USAA Property and Casualty Insurance Company v. Clegg, et. al.*, 377 S.C. 643, 656, 659; 661 S.E. 2d 791, 797, 799 (2008). That finding is the epitome of the difference between a case in which there were debatable issues

[5] As noted by this Court in its Opinion issued in the first appeal of this issue, even if a claim appears meritorious at the outset, if it later becomes clear that there are no supporting facts or law, sanctions are appropriate for continuing to pursue it.

[6] The Plaintiff was also a named party in that litigation but made no appearance.

of fact or law upon which reasonable attorneys could differ and one that a reasonable attorney would conclude was not meritorious.

In a case decided under Rule 38, FRAP, which permits the imposition of sanctions for frivolous appeals, the Court described the nature of frivolity:

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

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

In an Oklahoma case, the difference between evaluating frivolity on an objective rather than subjective basis was addressed:

> When faced with deciding if sanctions should be imposed under §2011 a court must view the matter through the eyes of a competent attorney who is advocating the claim of his/her client(s). An objective test is used to decide if a competent lawyer could make a reasonable argument supporting the legal theory advanced (citation omitted) but the test is not whether the argument, claim or defense being presented is ultimately successful. (citations omitted) To constitute a frivolous legal position it must be clear under existing precedents that there is no chance for success and no reasonable argument to extend, modify or reverse the law as it stands. (citation omitted).

State ex rel Tal v. City of Oklahoma City, 61 P. 3d 234, 244, 245 (Ok., 2002).

At the time the litigation was filed, the Plaintiff knew or could have known that Douglas did not own his son's automobile, that the theory of *de facto* ownership was not applicable when the case did not involve insurance coverage, and that there was no evidence that Douglas had any of the incidents of ownership of the vehicle involved in the accident.

Instead of an objective evaluation of the law and the facts, the Plaintiff chose to file these meritless claims based upon her purportedly "good faith belief" in the merits of the claim. That conduct violates both an attorney's ethical obligation to fully research and investigate the merits of a claim before filing it and the specific provisions of the FCPSA and Rule 11.

V. THE PLAINTIFF MAKES NO ATTEMPT TO DEMONSTRATE THAT PURPORTED FACTS RELIED UPON BY THE TRIAL COURT TO AVOID THE IMPOSITION OF SANCTIONS WERE ACTUALLY IN THE RECORD OR RELEVANT TO THE ISSUES.

In his Brief, commencing at page 33, Douglas points out in detail that the "facts" which appear in the trial court's Order denying sanctions either are not an accurate reflection of the record or are irrelevant to the issues presented. In her presentation, the Plaintiff makes no attempt to dispute Douglas' position in that regard. That failure must give credence to Douglas' position that the Order, prepared by Plaintiff's counsel, merely reiterates the "smokescreen" of irrelevant and tangential purported facts that were presented by the Plaintiff throughout this litigation and which were rejected by the trial court both at the summary judgment stage and in its initial Order imposing sanctions.

VI. THE PLAINTIFF DID, INDEED, PLEAD A FAILURE TO WARN CLAIM AGAINST DOUGLAS THAT NEVER HAD ANY LEGAL MERIT AND WHICH CONSTITUTES A SEPARATE BASIS FOR THE IMPOSITION OF SANCTIONS AGAINST THE PLAINTIFF.

At page 22 of her Brief, the Plaintiff asserts that she did not pursue a failure to warn claim against Douglas. Contrary to that position, all versions of the Complaint included such a claim. Specifically, the initial Complaints alleged

that Douglas was negligent by failing to "impart to those that might be in temporary possession of the automobile to act so as to prevent Defendant Elliott M. Lambrecht from the using the automobile." (Complaint, 1159, R. p. 86; Complaint, 1160, R. p. 96). The next two versions of the Complaints, including the Complaints upon which the cases were decided, also included that verbiage. (R. p. 143; R. p. 154; R. p. 225; R. p. 237).

As Douglas pointed out in his brief in support of summary judgment, there is no legal duty to control the conduct of another or to warn the third parties of his purportedly dangerous propensities. (Memorandum, R. pp. 181 – 183). By making such legally insupportable claims in her Complaints, the Plaintiff's counsel violated their ethical duties and the FCPSA and Rule 11.

VI. THE PLAINTIFF MISCONSTRUES DOUGLAS' POINT ON THE ISSUE OF COMBINING AND CONCURRING NEGLIGENCE.

In its Order denying sanctions, the trial court relies on the concept of combining and concurring negligence to find a basis for the imposition of liability on Douglas for the consequences of his adult son's automobile accident. While Douglas readily acknowledges that under certain factual circumstances, the negligence of one of more defendants can combine to cause the injury and that each bears liability therefore, that is not the case here.

What is completely absent from the trial court's "combining and concurrent negligence" analysis is the identification of one negligent act on the part of Douglas which "combined or concurred" with that of Elliott or the other

defendants to result in the death of the Plaintiff's decedent. In her Brief, the Plaintiff also fails to articulate the nature any negligent act committed by Douglas.

As discussed at length, there was no factual basis for a viable negligent entrustment claim against Douglas or any claim under an agency theory or the Family Purpose Doctrine. There was no legal duty of Douglas to control the conduct of his adult son.

Without finding some negligent act or breach of a legal duty on the part of Douglas, any discussion of "combining or concurrent" negligence is irrelevant and cannot excuse the Plaintiff's conduct in filing and pursuing claims against Douglas with no factual or legal basis.

CONCLUSION

By entering an Order prepared by the attorneys to be sanctioned, the trial court made findings of fact and conclusions of law that were completely opposite of those underlying its grant of summary judgment to Douglas and its initial award of sanctions. By doing so, the trial court adopted the same smoke screen of irrelevant purported facts and unsupportable legal positions that it had rejected, on the same record, on two prior occasions and when it had previously found that it had "needed to issue sanctions in the first place."

The trial court further erred when it persisted in evaluating the frivolity of the claims brought against Douglas, not on the basis of the clear language of the FCPSA and interpretive case law, but on the basis that the claims were brought "in good faith" and by "competent counsel" who in "good faith" "believed" in the merits of those claims.

In her Brief, the Plaintiff did not in any way explain or even address how it was reasonable to file and continue to pursue a claim against Douglas for the consequences of his adult son's automobile accident when Douglas neither owned nor controlled the use of the vehicle which was involved. Without being able to establish this basic fact, none of the claims actually pursued against Douglas, including those that the Plaintiff admits were not actually pled, had any legal viability.

Most telling, the Plaintiff failed to even address or reconcile how the Supreme Court could conclude that her claims against Douglas had no legal merit "from the outset" with her claim that she should not be sanctioned for filing and continuing to pursue them.

Clearly, not every case in which summary judgment or other summary disposition is granted is one for which sanctions are proper and the FCPSA does not require that result. What the statute does do is mandate an objective analysis of the record by the trial court to determine whether a reasonable attorney would have found arguable merit in the claims. The specific factors identified by the FCPSA to be considered in this evaluation include considerations of the nature and complexity of the issues, whether the parties were numerous, and whether the facts were clear, or whether there was sufficient opportunity to discover them. If these reasons offer some reasonable explanation for the pursuit of unsuccessful claims, the FCPSA implicitly suggests sanctions can be avoided. The issue is not whether the claims are ultimately dismissed, but whether a reasonable attorney would have found them to have

any factual or legal merit.

When Douglas initially moved for sanctions, the Plaintiff's attorneys had thirty days in which to offer some explanation or mitigation. They did nothing. Under the specific standards established by the FCPSA and Rule 11, and on the basis of the Supreme Court's finding in the related litigation, *USAA v. Lambrecht, et al,* Douglas is entitled to sanctions for the multi-year pursuit of patently frivolous claims against him. Douglas respectfully requests that this Court find that sanctions are appropriate and remand the cases with directions as to the award of such sanctions, including the reimbursement to Douglas of the costs and expenses incurred in connection with this groundless litigation.

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