THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Case No. 2009-CP-10-3010

Ex Parte:
John Hughes Cooper, Appellant,

In Re:
Betty Fisher and Lisa Fisher Plaintiffs,

v.

Bessie Huckabee, Kay Passailaigue Slade, and Sandra Boyd, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 19, 2008, Plaintiff Lisa Fisher was appointed as sole guardian and conservator for her great-aunt, Alice Shaw-Baker. On February 25, 2009, Ms. Shaw-Baker died. On March 11, 2009, Defendant Bessie Huckabee was appointed as personal representative in accordance with Ms. Shaw-Baker's last will. Defendant Huckabee was a friend of Ms. Shaw-Baker who, along with Defendants Slade and Byrd, was a named beneficiary in the will. On April 27, 2009, Plaintiff Lisa Fisher and her mother, Plaintiff Betty Fisher, filed a civil action against Defendants Huckabee, Slade, and Byrd contesting the will and asserting multiple causes of action in equity (the Will Contest litigation). Appellant John Hughes Cooper represented the Plaintiffs in the Will Contest. Plaintiff Lisa Fisher is an attorney licensed in California. She was admitted *pro hac vice* and served as Appellant's co-counsel.

The parties were involved in several other legal proceedings that ran concurrently with the Will Contest litigation, including the probate of the estate; a survival action for damages filed by Betty Fisher against Bessie Huckabee and others; a magistrate's court ejectment action filed by Bessie Huckabee against the tenant living in Ms. Shaw-Baker's house; and, various appeals

filed in connection with those matters.

On May 13, 2009, the Will Contest litigation was removed from the Probate Court to the Circuit Court. On motion of the Defendants, the Will Contest case was bifurcated into the revocation claim (to be tried by a jury) and the equitable trust and related claims (to be tried by a judge). On August 2, 2017, the Defendants filed their first motion for summary judgment. On October 23, 2017, (the first day of the jury trial of the revocation claim) the trial judge denied that motion from the bench. During the jury trial, the trial judge denied the Defendants' motion for directed verdict. On October 26, 2017, at the end of a three-day trial, a jury found for the Defendants on the revocation claim. On November 6, 2017, the Defendants filed a motion for sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (the FCPSA).

On January 2, 2018, the Defendants filed a renewed motion for summary judgment on the remaining causes of action. On February 28, 2018, after a pre-trial hearing, the trial judge issued an order again declining to grant summary judgment. On March 7, 2018, the Defendants' counsel re-asserted the motion for summary judgment in an email to the trial judge. On March 12, 2018, prior to the start of the bench trial on the equitable claims, the Defendants' counsel again argued for summary judgment. The trial judge stated that he "preferred to proceed," effectively denying summary judgment on the equity claims for the fourth time.

On March 21, 2018, the trial judge issued an order finding in favor of the Defendants on the remaining equitable claims and imposing sanctions against the Plaintiffs and Appellant pursuant to both the FCPSA and Rule 11, SCRCP. The sanctions included a judgment of $253,969.31 against Appellant and the Plaintiffs jointly in favor of the Defendants. The sanctions also included a judgment of $65,151.34 against Appellant in favor of the Estate of

Alice Shaw-Baker. On April 3, 2018, the trial judge issued an order relieving Appellant as counsel for the Plaintiffs in the Will Contest litigation and, as an additional sanction, "enjoined and restrained" the Plaintiffs and their attorneys from filing "any motions in the Circuit Court." On April 13, 2018, Appellant filed and served his Notice of Appeal of the March 21 and April 3 orders.

On May 21, 2018, the trial judge held a hearing on the Plaintiffs' post-trial motions. On June 27, 2018, the Supreme Court certified Appellant's appeal for review. On June 29, 2018, the trial judge filed an order which included, among other things, judgments against Plaintiff Lisa Fisher and Appellant jointly of $35,315.00 in favor of Defendants' attorney Peter A. Kouten, $59,289.50 in favor of Defendants' attorney W. Westbrook Wills, III, and $25,512.50 in favor of Defendants' attorney Jessica L. Crowley. On July 2, 2018, Appellant filed and served his Notice of Appeal of the June 29 order.

On July 9, 2018, the trial judge issued an amended version of his June 29 order adding Plaintiff Betty Fisher to the sanctions awards in favor of Defendants' attorneys. On July 23, 2018, the trial judge issued an order increasing the sanctions awards against Appellant and the Plaintiffs in favor of Mr. Kouten to $78,872.43 and in favor of Ms. Crowley to $32,461.75. The trial judge also vacated his prior judgments against Appellant in favor of the Defendants and the Estate of Alice Shaw-Baker. On August 6, 2018, Appellant filed and served his Notice of Appeal of the July 23 order.

As it stands at the time of the filing of this brief, the only remaining sanctions against Appellant are $59,289.50 in favor of Mr. Wills, $78,872.43 in favor of Mr. Kouten, and $32,461.75 in favor of Ms. Crowley. However, the trial judge expressly incorporated the findings set our in the previous orders into his final order issued on July 23, 2018.

STANDARD OF REVIEW

The standard of appellate review of a lower court's imposition of sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act S.C. Code Ann. § §15-36-10 (Supp. 2012) (the FCPSA) is *de novo*. "[A]n appellate court reviews the findings of fact with respect to the decision to grant sanctions under the FCPSA by 'taking its own view of the evidence.'" Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 641, 760 S.E.2d 399, 410 (2014) (Holmes II) (*citing* Father v. S.C. Dep't of Social Services, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003)). The same standard of review applies to a trial judge's findings under Rule 11, SCRPC. Se. Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C., 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011) ("The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity.")). However, the abuse of discretion standard "play[s] a role in the appellate review of a sanctions award." *See,* Father, 353 S.C. at 261, 578 S.E.2d at 14. If, upon its review of the evidence, an appellate court agrees with the trial judge's factual findings, it will then determine whether the trial judge abused his discretion in granting sanctions under the Act. Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). ("[W]here the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard.")

ARGUMENTS

I. SANCTIONS AGAINST APPELLANT ARE NOT WARRANTED BECAUSE HE HAD A BASIS TO PROCEED WITH THE WILL CONTEST LITIGATION AND GOOD GROUND TO SUPPORT IT.

An objective view of the evidence reveals that sanctions against Appellant were not warranted under either the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA) or Rule 11 of the South Carolina Rules of Civil Procedure (SCRPC) because his belief that the Plaintiffs' claims and arguments had merit was reasonable. To the best of Appellant's knowledge, information, and belief, there was evidence to support the assertions he made and actions he took on behalf of the Plaintiffs. The purpose of Appellant's pursuit of those claims and his assertion of legal arguments on behalf of his clients was to seek a just determination of the dispute, not to cause delay or impose a burden on the Defendants or the courts.

A trial judge has the authority to impose sanctions for improper filings under both Rule 11 and the FCPSA. With regard to Rule 11, SCRCP, the trial judge must find that the pleading or motion lacked "good ground to support it" or that it was "interposed for delay" in order to impose a sanction on an attorney. The standard applicable to the requirements set forth in Rule 11 is "to the best of [the attorney's] knowledge, information and belief."

With regard to the FCPSA, the trial judge must find one or more of the following in order to impose sanctions on an attorney:

> SC Code §15-36-10(A)(4)(a)(ii): The attorney filed a frivolous pleading, motion, or document when "a reasonable attorney in the same circumstances would believe that under the facts, his claim ... was clearly not warranted under existing law[.]"
>
> SC Code §15-36-10(A)(4)(a)(iii): The attorney filed a frivolous pleading, motion, or document when "a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation ... of a civil cause was intended merely to harass or injure another party[.]"

> SC Code §15-36-10(A)(4)(a)(iv): The attorney filed a frivolous pleading, motion, or document when "a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for delay, or merely brought for any purpose other than securing proper ... adjudication of the claim[.]"
>
> SC Code §15-36-10(A)(4)(b): The attorney made frivolous arguments that "a reasonable attorney would believe were not reasonably supported by the facts."
>
> SC Code §15-36-10(A)(4)(c): The attorney made frivolous arguments "that a reasonable attorney would believe were not warranted under the existing law[.]"

(*emphasis added*)

The trial judge in this case did not state with any specificity which subsection(s) he found violated by Appellant, but rather inserted the entire code section into his order. (March 21 Order, p.3-6.) Notably, subsection (J) of the FCPSA says that the provisions of SC Code §15-36-10 "shall not apply where an attorney ... establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous[.]"

Both the FCPSA and Rule 11 require the trial judge to evaluate an attorney's decision to proceed based on the circumstances known to the attorney at the time he signed and filed the pleading or at the time he propounded the argument. Therefore, an appropriate evaluation of Appellant's conduct must be made, not in hindsight, but with a view to his knowledge and understanding of the evidence and law available to him at the time. The record shows that Appellant had "a basis to proceed" with the Will Contest litigation and had "good ground to support it."

In his sanctions orders, the trial judge wrote generally about the frivolous nature of the proceedings as a whole. For example, in the March 21 Order, the trial judge declared that the "commencement and continuation of this action is sanctionable" and that the Plaintiffs' "claims were entirely frivolous." (March 21 Order, p. 6.) However, he criticized just two filings with any

specificity: the merits of the revocation claim (March 21 Order, p.7) and the appeal related to the modification of a temporary restraining order (TRO) (June 29 Order, p.5). Appellant had a reasonable factual basis and reasonable arguments under existing law to support both the revocation claim and the appeal of the modified TRO.[1] Because he established a nonfrivolous "basis to proceed with litigation, or to assert or controvert an issue therein," the provisions of the FCPSA do not apply. SC Code §15-36-10(J).

A. APPELLANT'S PURSUIT OF THE WILL CONTEST LITIGATION WAS REASONABLY SUPPORTED BY THE FACTS AND WAS WARRANTED UNDER EXISTING LAW.

At the trial of the revocation claim in the first portion of the bifurcated Will Contest case, the trial judge instructed the jury that "the law does provide that if a person can prove by the greater weight or preponderance of the evidence ... that after [the decedent] regained her sound mind, she got better, she knew what she was doing, she knew what her estate was, she knew how she wanted it to be distributed, that she tore up the other will because of that; the burden of proof on that is on the party making that claim." (Jury Trial Transcript p. 481, lines 17–25.) The trial judge went on to say that "if the scale tips even slightly in favor of the Plaintiff's claim that [the decedent] revoked [her will] legally on that day by tearing up a copy of it, then the Plaintiff would have met the burden of proof of proving (*sic*) that claim by the greater weight or preponderance of the evidence." (Jury Trial Transcript p. 484, line 24–p. 485, line 5.) The trial judge correctly instructed the members of the jury that it was "up to you to decide ... whether or

[1] Appellant has elected not to include arguments in support of the merits of each cause of action asserted, document filed, or argument propounded on behalf of the Plaintiffs in this brief but instead only address the two specifics identified by the trial judge. However, given that the trial judge found fault with "this case as a whole," Appellant stands ready to provide the Supreme Court with a supplemental brief in support of any position taken in the litigation on behalf of the Plaintiffs.

not there was any tearing up of a copy of the will, and whether if it was torn up did [the decedent] have the mental capacity she needed to have in order to revoke the will on that occasion. You have to decide all that. That is why you are here today." (Jury Trial Transcript p. 489, line 25–p. 490, line 6.)

In his reasonable estimation, prior to the trial judge's exclusion of a significant portion of the Plaintiffs' evidence at the jury trial, Appellant and his clients had a nonfrivolous basis to proceed with the revocation claim. As the trial judge instructed the jury, the Plaintiffs needed to prove (1) that Alice Shaw-Baker tore up a copy of her will; and, (2) that she had the mental capacity necessary to revoke her will on that occasion. Both of those issues were submitted to the jury with instructions that they had "to decide all that."

In pursuing the revocation claim, Appellant had evidence to show both of those elements. With regard to defacing and tearing up of the will, Appellant had the testimony of Plaintiff Lisa Fisher. (Jury Trial Transcript p. 145, line 22–p. 146, line 22.) The trial judge incorrectly stated in the March 21 Order that "nothing corroborates" that testimony.[2] To the contrary, in addition to Plaintiff Lisa Fisher's eyewitness testimony, Appellant had multiple documents showing Ms. Shaw-Baker's understanding and intent with regard to the distribution of her assets upon her death including devises under her will (Plaintiffs' Bench Trial Exhibits 17, 18, 19); evaluations of Ms. Shaw-Baker's mental capacity from Dr. Waid and Dr. Honney (Plaintiffs' Jury Trial Exhibits 1 and 31 (for identification only)); and, testimony from Candace Rickborn that Ms. Shaw-Baker was upset to learn that her assets would not be used as she intended (Jury Trial

[2] Even if the trial judge was correct that the only evidence of revocation was Plaintiff Lisa Fisher's testimony, that would not support a finding that Appellant's pursuit of the Will Contest litigation was frivolous. An attorney can obtain a reasonable belief in the merits of a case based solely on information related to him by a client. See, Gregory, 378 S.C. at 439, 663 S.E.2d at 14.

Transcript p. 202, line 4–p. 203, line 23; p. 205, line 17 – p. 207, line 7).[3]

In support of his finding that the Plaintiffs' revocation claim had no merit, the trial judge pointed to the order issued by the probate judge appointing Lisa Fisher as conservator and guardian for Ms. Shaw-Baker prior to her death. In each of his sanctions orders, the trial judge referred back to the provision in that probate court order that Ms. Shaw-Baker was prohibited from revising or revoking her will, stating that a reasonable attorney would have recognized this as a "huge legal stop sign." (March 21 Order, p.7.) This fact fails as a basis for finding that the Will Contest was a frivolous proceeding for two reasons. First, the probate order did not specifically find that Ms. Shaw-Baker lacked the mental capacity to revoke her will. (Order Appointing Conservator and Guardian.) Second, although the probate court order did include a prohibition on the revocation of the will, it does not follow that revocation did not in fact happen.

It is significant that the probate court order appointing Lisa Fisher as conservator and guardian was temporary. The probate judge included instructions in that order that a "full neuropsychological evaluation" be conducted to determine the extent of Ms. Shaw-Baker's mental impairment to determine, in part, "whether or not less care/supervision may be sufficient." (November 19, 2008 Order Appointing Conservator and Guardian, page 8.) As it happened, Ms. Shaw-Baker died before the probate judge had the opportunity to review the report and make that determination. However, Appellant had that report and other significant evidence to support the Plaintiffs' assertion that Ms. Shaw-Baker did in fact have the mental

[3] Similarly, Appellant proceeded with the bench trial of the equity claims based on a reasonable belief that the facts and law supported his clients' claims. In addition to admissions by Defendants Huckabee and Slade in their answer regarding their fiduciary relationships with Ms. Shaw-Baker, Appellant had the testimony of multiple witnesses (including Defendant Slade) and writings of the decedent that demonstrated her capacity and intent regarding her nonprobate assets. Further, as outlined in detail in his pre-trial brief, other filings, and arguments at trial, Appellant reasonably believed that his clients' claims were well-founded on the principles of law and equity.

capacity and intent to revoke her will. The trial judge's reliance on the probate court's temporary and interrupted order as evidence that the Will Contest was a frivolous claim is wholly unsupported by the actual timeline of events and the probate court order itself.

Appellant did not approach these trials unprepared. He had significant personal contact with Ms. Shaw-Baker during the pendency of the conservatorship prior to her death; he conducted extensive discovery on behalf of his clients (Transcript of Pre-Trial Hearing, p.20, line 8 – p.25, line 7); he fully researched the issues as reflected in his pre-trial brief; and, he took reasonable and appropriate steps to ensure that his clients got a fair hearing. To the best of Appellant's knowledge, information and belief, the evidence he had was good ground to support the Will Contest litigation. As Appellant attempted to offer this evidence, the trial judge "called balls and strikes" allowing some evidence and excluding some evidence. Appellant cannot be held accountable for failing to accurately predict a judge's discretionary evidentiary rulings, particularly with regard to objections as to relevance. As the trials unfolded and rulings were made on the admissibility of his evidence, Appellant elected not to pursue certain arguments and claims that he reasonably determined would not succeed. At each stage in the litigation, Appellant had a nonfrivolous basis to proceed.

B. DENIAL OF MOTIONS FOR SUMMARY JUDGMENT AND DIRECTED VERDICT IS EVIDENCE THAT APPELLANT'S CONDUCT WAS REASONABLE UNDER THE CIRCUMSTANCES.

While not determinative, it is significant that the trial judge allowed Plaintiffs' revocation claim to proceed with the jury trial in the bifurcated Will Contest litigation, denying the Defendants' motions for both summary judgment and directed verdict. The trial judge also

denied the Defendants' motions for summary judgment and directed verdict[4] on the equitable claims, even after the jury found in their favor on the revocation claim. (Pre-Trial Hearing Order dated February 28, 2018; Transcript of Pre-Trial Hearing, p.20, lines 2-6; Transcript of Bench Trial p.10, line 2 – p.12, line 5.)

In Hanahan v. Simpson, sanctions awarded against the plaintiff under the FCPSA were overturned on appeal because the defendant's motion for summary judgment had been denied. 326 S.C. 140, 485 S.E.2d 903, (1997). At that time, there had been a split of authority as to whether sanctions may be awarded under the FCPSA notwithstanding the denial of a summary judgment. Id. at 157, 485 S.E.2d at 912. The Supreme Court determined that if a litigant's case survived a motion for summary judgment but was then lost on its merits in a jury trial, it could not later be deemed frivolous. Id. That holding in the Hanahan case was revisited by the Court after the FCPSA was amended in 2005. See, Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 758 S.E.2d 483 (2014) ("Holmes I"). In Holmes I, the Court determined that surviving a summary judgment motion was no longer preclusive of a sanctions award. Id. at 153, 758 S.E.2d at 491 ("[S]anctions may be awarded under section 15-36-10 regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the FCPSA.") However, the Holmes I decision does not say that a trial judge's repeated denials of motions for summary judgment and directed verdict cannot be considered as evidence that the claims asserted were not frivolous

[4] There is some confusion in the record regarding the judge's ruling on the Defendants' motion for directed verdict on the undue influence claim. The trial judge seemed to have granted the motion at the jury trial. (Jury Trial Transcript p.410, line 20 –p.417, line 7.) However, at the bench trial, when Appellant made arguments related to the undue influence claim and the Defendants' attorney responded that the claim had been "abandoned" and directed verdict granted, the trial judge "reserved" the ruling on that, and determined that the jury trial and the bench trial were "still one case." (Bench Trial Transcript p.6, line 19 – p.8, line 19; p.11, line 19 – p.13, line 20.)

under the standard set forth in the FCPSA.

In this case, the trial judge had multiple opportunities to end the Will Contest litigation if it was clear that it had no merit. In its *de novo* review in this matter, Appellant urges the Supreme Court to consider not only the trial judge's repeated decisions to allow the case to be tried to verdict, but also the impact that those decisions had on Appellant's view of the merits of his clients' claims and legal arguments. What is telling is the trial judge's own characterization of the case as a "big, complicated case[] with many disputed facts and opinions as to how those facts fit into the law." (Pre-Trial Hearing Order dated February 28, 2018.) While not dispositive, the fact that the judge determined that at least some of the claims should proceed to trial suggests that Appellant's pursuit of the case was not unreasonable. In addition, as the trials progressed, Appellant re-evaluated his clients' claims based on the evidentiary rulings of the judge and only proceeded with those he continued to believe were supported by facts he could prove. As it turned out, the jury and the judge ruled against the Plaintiffs. Such is the nature of the American judicial process, but losing at trial is not grounds for sanctions under the FCPSA or Rule 11.

The *de novo* standard of appellate review permits the Supreme Court to take its own view of the evidence. When the evidence available to Appellant at the time he filed his pleadings and appeals is viewed objectively pursuant to the law outlined in the Plaintiffs' pre-trial brief and charged by the trial judge to the jury – and in light of the judge's denials of multiple motions that would have ended the case without trial – it cannot be said that a reasonable attorney under the same circumstances would believe that the claims were meritless or frivolous or that they were propounded for no purpose other than delay and, therefore, elect not to proceed.

C. THE APPEAL OF THE ORDER MODIFYING TEMPORARY RESTRAINING ORDER WAS NOT INTERPOSED FOR DELAY.

Other than the will revocation claim, the trial judge specified only one argument, pleading, motion, or document as frivolous: the Plaintiffs' appeal of the June 10, 2009, order granting modification of a prior temporary order restraining Defendant Huckabee, in her capacity as personal representative form taking any action regarding the Shaw-Baker Estate. (June 29 Order, p. 5.) The trial judge identifies the filing of that appeal as the point at which the "[e]ffective disposition of the case was severely hindered." (See, March 21 Order, Appendix 1, page 5.) The appeal of the order modifying the TRO was not frivolous, nor was it interposed for delay.

At the time of the informal appointment of Ms. Huckabee as the personal representative of the estate, the Plaintiffs believed that the estate had valid civil claims against her. The Plaintiffs sought a TRO to prevent Ms. Huckabee from taking action detrimental to the estate while those claims were pending. The initial TRO simply restrained Ms. Huckabee "from doing anything regarding the estate." (TRO, May 22, 2009.) The Plaintiffs were satisfied with that order. Ms. Huckabee filed a subsequent motion to modify the TRO. After a hearing on that motion, Appellant was served with a signed order granting that motion. (Order Granting Modification of Temporary Restraining Order, June 10, 2009.) He believed that it was prepared by Ms. Huckabee's counsel, but he had not been provided a copy. He also identified what he reasonably concluded were other errors in the issuance of the order. Further, because the order added restraints and burdens on his clients that were not contained in the original TRO, Appellant concluded that an immediate appeal was necessary and appropriate. The appeal of the order modifying the TRO was not dismissed as interlocutory, but rather on other grounds. See,

Fisher v. Huckabee, 2011-UP-173 (Ct.App. 2011). Significantly, the Court of Appeals made no finding that the appeal of the modification of the TRO was frivolous or otherwise improper. The record does not support the trial judge's conclusion that the appeal "severely hindered" the progress of the civil litigation, but to the extent that any delay resulted from that appeal, such delay was not the intent, desire, or fault of Appellant or his clients.

D. THE TRIAL JUDGE ABUSED HIS DISCRETION BY BASING THE SANCTIONS AGAINST APPELLANT ON UNSUPPORTED FACTUAL CONCLUSIONS REGARDING THE PLAINTIFFS' MOTIVES.

"An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." Father v. S.C. Dep't of Social Services, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003). In this case, the trial judge abused his discretion in granting sanctions because the award was based on unsupported factual conclusions. In the sanctions order, the trial judge based the findings of statutory and rule violations, in part, on his own evaluation of "the credibility of the witnesses" including that of Plaintiff Lisa Fisher. The trial judge characterized Ms. Fisher's testimony as "not believable," stating that he "count[s] it as nothing." Respectfully, the standard for sanctions against an attorney is the reasonableness of proceeding in the matter based on the information that the attorney had at the time. The trial judge's evaluation of the quality of the evidence is a subjective standard that cannot fairly bind the attorney in hindsight.

The Supreme Court has held that a "court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." Ex Parte Gregory, 378 S.C. 430, 438, 663 S.E.2d 46 (2008). In spite of its several successive iterations, the decision of the trial judge to award sanctions appears to be

founded on his general disapproval of the Plaintiffs' theories and his outright speculation as to their motives. In his order, the trial judge characterized the Plaintiffs' lawsuit as "deviously concocted" calling it a "half-baked scheme" – an unsupported factual conclusion. (March 21 Order, p.2.) Although the judge did not state what he thought the "oppressive and improper purposes" were, it is apparent he concluded the Plaintiffs were abusing the civil process for their own monetary gain or other ulterior motives. (March 21 Order, p.6.) This conclusion is completely unsupported in the record. In fact, the only evidence in the record regarding the Plaintiffs' motives is their repeated testimony and statements to the judge that they wanted to ensure that the decedent's wish to benefit animal charities upon her death was carried out. (Jury Trial Transcript p. 163, line 14 – p.164, line 22; Bench Trial Transcript p. 98, line 4 – p. 99, line 25; p. 138, line 7-22.)

Further evidence that rebuts the trial judge's conclusions about the motive of the Plaintiff is the inclusion of the Attorney General as a defendant in the Will Contest complaint. The trial judge repeatedly stated that a favorable outcome of the Will Contest litigation would not benefit animal charities, but rather the Plaintiffs themselves. To the contrary, the Plaintiffs elected to name the Attorney General as a defendant in order to protect the interests of unidentified animal charities and to ensure that Ms. Shaw-Baker's intent was carried out. This belies the trial judge's conclusion that they filed this lawsuit for "oppressive and improper purposes."

Even if there were evidence to support the trial judge's conclusion that the Plaintiffs brought their case for no purpose other than to get Ms. Shaw-Baker's money for themselves, such evidence would not be attributable to Appellant. He used his professional judgement to evaluate the case and make decisions that he reasonably believed were both appropriate under the law and in his clients' best interests. Ultimately, the Plaintiffs did not prevail. Ultimately,

the facts weighed against them. Ultimately, law and equity delivered a different result. However, none of that forms a proper basis for imposition of sanctions.

II. THE TRIAL JUDGE ABUSED HIS DISCRETION BY BASING THE DECISION TO IMPOSE SANCTIONS ON MATTERS OUTSIDE THE WILL CONTEST LITIGATION.

Appellant does not dispute that a trial judge has broad discretion to determine whether sanctions should be imposed under the FCPSA and Rule 11. However, such discretion should extend only to the proceedings before that court and only to the consequences directly attributable to wrongful conduct. Here, the trial judge determined that sanctions were appropriate based on his misapprehensions of the cause of delays in the matter and on his own assessment of Appellant's actions in connection with proceedings in other courts.

A. THE RECORD DOES NOT SUPPORT THE CONCLUSION THAT APPELLANT IS RESPONSIBLE FOR THE DURATION OF THE LITIGATION.

In this case, the trial judge created a "Procedural Timeline" (Appendix 1 to March 21 Order)[5] incorporating several related legal proceedings that were presided over by other judges in other courts, none of whom made any findings that the Plaintiffs' claims, filings, or arguments were frivolous, unreasonable, or otherwise improper. The Procedural Timeline prepared by the trial judge included not only proceedings in the "Circuit Court Case," but also the "Underlying

[5] The Procedural Timeline annexed to the original sanctions order and incorporated into the subsequent orders was created by the trial judge. It was not part of the Defendants' motion for sanctions. It was not provided to Appellant for review prior to the trial judge's decision to impose sanctions. Appellant was prepared to raise the argument that he was denied an opportunity to be heard with regard to the Procedural Timeline when the trial judge issued his order of April 3, 2018, in which he took the extraordinary step of enjoining and restraining Appellant from filing any motion in his court related to the case. Although that order did not legally prevent Appellant from challenging it under the Rules of Civil Procedure, on advice of counsel he elected to forgo filing a Rule 59(e) motion and risking the further ire of the trial judge as well as additional attorneys' fees for all involved, choosing instead to file this appeal.

Probate Case" and the "Guardian and Conservator action." In fact, more than half of the entries on the Procedural Timeline are designated by the judge's Legend as the "underlying Probate Case" and the "separate but related Guardian and Conservator action."

In taking its own view of the evidence in this case, the Supreme Court should consider that the Procedural Timeline that forms the basis of the trial judge's sanctions includes not only motions and appeals filed by Appellant on behalf of the Plaintiffs in the Will Contest case, but also routine proceedings in the Probate Court; a number of motions filed by the Defendants in the various cases; and, normal court system time lags that were completely outside Appellant's control. This is not to suggest that any of those filings or procedures were improper, but rather to demonstrate that the "nine year legal nightmare" cited by the trial judge was not a result of frivolous pleadings, motions, appeals, or arguments presented by Appellant, but rather the unfortunate fact that civil litigation and appeals – particularly in a complex matter such as this – take time.[6] To the extent the trial judge's sanctions award was based on the duration of the litigation or Appellant's actions in connection with legal proceedings other than the Will Contest, those findings should be rejected.

B. THE TRIAL JUDGE'S CONSIDERATION OF OTHER LITIGATION IN DETERMINING SANCTIONS AGAINST APPELLANT WAS AN ABUSE OF DISCRETION.

By incorporating the Procedural Timeline, the sanctions orders appear to be based in part on Appellant's actions in representing his clients in related civil cases heard by other judges (the

[6] One example is the appeal of the trial judge's order modifying the TRO, discussed in Part I(C), above. That appeal was filed on June 18, 2009. The Court of Appeals dismissed that appeal (with no finding that it was frivolous or otherwise improper) on June 2, 2011, almost two years later. See, Fisher v. Huckabee, 2011-UP-173 (Ct.App. 2011). Again, Appellant is not suggesting that the Court of Appeals – or any court involved in this matter – is somehow at fault for the time it took to resolve the case. It is simply a fact that lawsuits and appeals sometimes take years to resolve. To blame and punish the attorneys on the losing side of the case for that delay – without pointing to any specific improper conduct – cannot be the intent of the statute or the Rule.

survival action and the ejectment action). The trial judge also seems to have considered appeals from rulings in the probate case and the three civil cases in concluding that sanctions were warranted. Although the other civil cases and appeals were not successful, there has been no finding by the courts presiding over those matters that they were frivolous, vexatious, or otherwise in violation of the laws or rules that govern the conduct of attorneys or litigants in civil proceedings.

One example is the survival action filed by Appellant on behalf of the Plaintiffs in 2012. That matter is not part of the record of this case, yet related proceedings are included in the trial judge's "condensed history of the case." (June 29 Order, p. 5.) That matter was presided over by another circuit court judge and the appellate courts. No finding has been made by any judge that the Plaintiffs' survival action or Appellant's pleadings or arguments on behalf of the Plaintiffs were frivolous, vexatious, or otherwise in violation of the FCPSA or Rule 11. In fact, it was a divided Supreme Court that ruled against the Plaintiffs in their appeal in that case.[7]

In its review of the evidence in this case, Appellant urges the Supreme Court to examine his actions in connection with the Will Contest litigation only and reject the trial judge's conflation of all proceedings related to Ms. Shaw-Baker and her estate. The trial judge's intrusion into the purview of other judges constitutes an abuse of discretion warranting vacation of the sanctions judgments against Appellant.

III. THE TRIAL JUDGE ABUSED HIS DISCRETION BECAUSE HIS SANCTIONS AWARD INCLUDED ATTORNEYS' FEES AND COSTS THAT DID NOT RESULT FROM ANY IMPROPER CONDUCT BY APPELLANT.

The appellate review of a sanctions order should include the Court's own view of the basis for the award amount. In spite of multiple iterations of the sanctions order adjusting the

[7] See, Fisher v. Huckabee, et al., 422 S.C. 234, _____ S.E.2d _____ (2018).

attorneys' fee award down then up again, the trial judge's calculation of the amount of the award was based on time entries by the Defendants' attorneys for work outside the Will Contest litigation. The trial judge used various affidavits and time records submitted by Defendants' three attorneys to calculate the sanctions awards. The Defendants submitted several affidavits, invoices, and time records from Peter A. Kouten, W. Westbrook Wills, and Jessica L. Crowley. (See Defendants' Post-Trial Motions and Incorporated Memorandum of Law, Exhibits B, C, and D; Defendants' Joint Motion to Reconsider, Alter or Amend Judgment, Exhibits B and C; and, Defendants' Joint Motion to Reconsider, Alter or Amend Modified Order of Judgment, Exhibits B and C.) Those time records contain duplicate time entries and billing items for routine probate administration, the survival action and ejectment action, and appeals of probate court orders unrelated to the this case. Even in his final, revised sanctions order issued on July 23, 2018, the trial judge continued to include Defendants' attorneys' fees for work done in connection with proceedings in other courts.

There is significant confusion in the record regarding exactly how the awards of attorneys' fees were calculated by the trial judge.[8] Some of the claimed fees and expenses were included in affidavits and itemized statements that were actually filed in the record as exhibits attached to Defendants' post-trial motions. Other amounts were apparently exchanged by emails that are not contained in the record. Further complicating matters, the total amount awarded and the individual amounts awarded changed from one order to the next. Ultimately, the sanctions

[8] In Defendants' Post-Trial Motions and Incorporated Memorandum of Law filed after the jury trial, Mr. Kouten claimed $78,872.43, Mr. Wills claimed $22,697.50, and Ms. Crowley claimed $10,272.50. The trial judge initially awarded $157,539.93 for attorneys' fees ($45,697.50 more than what was initially claimed) without a breakdown of that calculation. Presumably, part of the difference was based on fees that were subsequently incurred by the Defendants in connection with the bench trial. The amount of attorneys' fees and costs awarded was adjusted down and then back up through successive orders, now totaling $170,623.68. There is insufficient information in the record to discern exactly how much of the award is attributable to the work of these attorneys on matters other than the Will Contest litigation.

imposed upon Appellant included three judgments in favor of the Defendants' counsel: Mr. Kouten ($78,872.43), Mr. Wills ($59,289.50), and Ms. Crowley ($32,461.75). (See July 23, 2018 Order) The amounts awarded by the trial judge to these attorneys improperly include fees and expenses incurred by the Defendants in connection with litigation and appeals in civil actions other than the Will Contest trials. In addition, those amounts include duplicative time entries and fees and expenses for the probate and administration of the estate.

Notwithstanding the confusion and lack of specificity regarding the attorneys' fee award, it is clear that Appellant has been improperly ordered to pay for attorneys' fees and costs that are not attributable to the Will Contest litigation. Mr. Kouten claimed numerous time entries for legal work in other matters as well as duplicate time entries. Ms. Crowley claimed numerous time entries for work done in other matters as well as work done in this case after Appellant was relieved as counsel. As for Mr. Wills, the affidavit in the record reflects only work done in this case; however, the award to him significantly exceeds the amount shown in his affidavit, so Appellant is unable to determine to what extent his attorney's fees were incurred in this case and to what extent he claimed work in other matters, as his co-counsel did in subsequent submissions.

In the affidavit Mr. Kouten submitted with Defendants' Post-Trial Motions and Incorporated Memorandum of Law, he stated that the fees he claimed were incurred "in connection with this action" and "the time and labor devoted to this case were necessary to properly prepare for this case." (*emphasis added*) (See paragraphs 3 and 4(a).) In his affidavit submitted with Defendants' Joint Motion to Reconsider, Alter or Amend Modified Order of Judgment, Mr. Kouten stated, "All work devoted to this file by me was in direct response to the continued legal actions of the Plaintiffs in their pursuit to discredit the Last Will and Testament

of Alice Shaw-Baker[.]" (*emphasis added*) (See paragraph 11(b).) However, according to Mr. Kouten's own time records, the amount claimed included a significant number of entries for work done for matters other than this case.[9] For example, Mr. Kouten listed approximately 19.8 hours for work that was clearly part of his responsibilities in connection with routine administration of the estate, including tasks such as "3/2/2009 Visit to SC Vital Records for 5 copies of death certificate 0.60 [hours]"; "3/9/2009 Phone call to BH, regarding funeral service 0.20 [hours]"; and, "8/18/2009 Meeting w/ Bessie to open estate account 1.20 [hours]". Further, significant portions of Mr. Kouten's bills reflect time and expenses related to the survival and ejectment actions, neither of which were presided over by the trial judge and neither of which resulted in a finding of violations of the FCPSA or Rule 11.

Another example of an improper calculation of the sanctions assessed by the trial judge against Appellant is his inclusion of attorneys' fees and costs after Appellant was relieved as counsel in the case. Upon receipt of the March 21 sanctions order, Appellant took steps to withdraw as counsel for the Plaintiffs in all pending matters, including this case. In his supplemental sanctions order issued on April 3, 2018, the trial judge relieved Appellant from the case. In spite of the fact that he was no longer involved in the case, the final judgments against Appellant set forth in the July 23, 2018, order include fees and costs in connection with the Plaintiffs' post-trial motions, petitions, and appeals and the ejectment action incurred by the Defendants after April 3, 2018.[10]

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[9] In addition, Mr. Kouten's invoices and time records contained approximately 6.3 hours in February and March 2009 that were billed twice and approximately 1.6 hours in September 2016 that were billed three times.

[10] Again, it is difficult to determine exactly how much of the sanctions is related to proceedings after Appellant withdrew from the case because of gaps in the record. However, by way of example, the final judgment against Appellant in favor of Ms. Crowley includes 45.9 hours ($8,032.50) and $25.00 in expenses billed after April 3, 2018 (the date Appellant was relieved).

Appellant raised concerns about the reliability of the attorney's fee claims in the Memorandum in Opposition to Defendants' Post-Trial Motions. There was no hearing and no other opportunity to be heard. Appellant was then expressly precluded from seeking the trial judge's reconsideration of his findings by the "additional sanctions" set out in paragraph 5 of the April 3 Order.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court and vacate the award of sanctions against Appellant.

Respectfully submitted,

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August 22, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

RECEIVED
AUG 22 2018
S.C. SUPREME COURT

Case No. 2009-CP-10-3010

Ex Parte:
John Hughes Cooper, Appellant,

In Re:
Betty Fisher and Lisa Fisher, Plaintiffs,

v.

Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd, Respondents.

PROOF OF SERVICE

I certify that I have served Initial Brief of Appellant and Appellant's Designation of Matter on all parties by depositing copies of it in the United States Mail, postage prepaid, on August 22, 2018, addressed as follows:

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