THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Circuit Court Case No. 2009-CP-10-3010
Appellate Case No. 2018-000566

Ex parte:
John Hughes Cooper..... Appellant,

Betty Fisher and Lisa Fisher.. ..... Plaintiffs,

v.

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

In the Matter of the Estate of
Alice Shaw-Baker.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Alice Shaw-Baker ("Alice" or "Mrs. Shaw-Baker") left her home in California in the 1960s to join the Navy. After discharge from the Navy, Alice worked as an accountant at Charleston Memorial Hospital. Over the course of the following 40 years, Alice developed close, enduring friendships with Respondents Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd (deceased), with whom she worked in different departments at the hospital. In that time, Alice and Respondents spent holidays and vacations together, shared common interests, and frequently attended various social events together. After moving to Charleston, Alice maintained very little contact with any family remaining in California.

In August 2008, Charleston County Elder Services initiated Guardianship and Conservatorship proceedings for Alice Shaw-Baker due to her incapacity. Plaintiffs Lisa Fisher and her mother, Betty Fisher, distant relatives of Alice, were notified of the probate proceedings. Lisa Fisher, a probate attorney in California, came to Charleston and sought appointment as permanent Guardian and Conservator. Fisher employed the services of Appellant, John Hughes

Cooper, to assist in the proceedings. Appellant represented both Lisa Fisher and Alice Shaw-Baker at various stages of the Guardianship and Conservatorship proceedings.

On November 19, 2008, the Charleston County Probate Court entered an Order appointing Plaintiff Lisa Fisher as Alice's permanent Guardian and Conservator, and further ordering that "[n]either Alice Shaw-Baker, nor anyone on her behalf may revise or revoke her will or execute a new will, unless specifically ordered by [the] Court." It further ordered that Mrs. Shaw-Baker consult with forensic psychologist Randolph Waid in order to determine whether 24-hour in-home care was required for Mrs. Shaw-Baker. Said consultation was effectuated on November 20, 2008. Prior to coming to Charleston in October of 2008 and being appointed as her conservator, Lisa Fisher had never met Alice in person. Betty Fisher, currently in her 80s, had not seen Alice since Betty was a child.

Alice Shaw-Baker died testate on February 25, 2008. Prior to her death, Mrs. Shaw-Baker executed a Last Will and Testament in January of 1993, which she formally revised on 3 separate occasions by subsequent wills on April 5, 1996, February 13, 2001, and May 21, 2001. Respondents are named beneficiaries in each of Ms. Shaw-Baker's wills, and Bessie Huckabee is designated as Personal Representative in all of them.

Appellant and Lisa Fisher provided Alice's original Last Will & Testament to the Charleston County Probate Court, and on March 11, 2009, Bessie Huckabee was appointed Personal Representative according to the will.

On April 27, 2009, Lisa Fisher and her mother, would-be intestate heir Betty Fisher, filed the present action alleging causes of action for 1) constructive trust, 2) declaratory judgment regarding revocation of will, 3) undue influence, 4) fraud, 5) declaratory judgment regarding improper execution of will, 6) declaratory judgment regarding subsequent will, 7) unjust

enrichment, 8) promissory estoppel, 9) petition for removal of Bessie Huckabee as personal representative, 10) petition for appointment of Betty Fisher as personal representative, and 11) attorney's fees and costs.

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 and malpractice action for damages filed by Betty Fisher against Bessie Huckabee and her attorney, Peter Kouten; and various appeals filed in connection with those matters. [March 12, 2018 Bench Trial Trans., p. 107].

In May 2009, Attorney Cooper and the Plaintiffs filed a motion for a restraining order to be issued against the Personal Representative. On May 22, 2009, the court granted Plaintiffs' motion restraining the personal representative "from doing anything." On May 28, 2009, counsel for the Personal Representative filed a motion to reconsider, to enable the Personal Representative to perform administrative duties, and to conform with the requirements of Rule 65(b), SCRCP. Following hearing with counsel for all parties present, Judge Hughston issued Order Granting Modification of Temporary Restraining Order on June 10, 2009. Appellant and Plaintiffs then appealed the Order restraining the Personal Representative on June 18, 2009, and proceeded to argue that the trial could not proceed until resolution of their appeals.

On August 1, 2012, Plaintiffs filed Motion by Plaintiffs Betty Fisher and Lisa Fisher to Disqualify and Remove Opposing Counsel Peter Kouten due to Non-Waivable Conflict of Interest. Attorney W. Westbrook Wills, III took over representation of the Defendants and Plaintiffs appealed due to what they alleged was faulty Certificate of Service.

On August 2, 2017, Respondents filed a Motion for Summary Judgment. The Motion was heard on October 23, 2017, as a pretrial matter, Attorney for Respondents verbally withdrew the motion at that time.

On January 17, 2017, Plaintiffs filed Consent Motion for Date Certain for a five-day trial to begin May 15, 2017, with sixteen expected live witnesses. However, trial was ultimately scheduled for October 23, 2017. On October 2, 2017, Plaintiffs filed a Motion to Transfer Venue, and to Disqualify Attorneys Crowley and Wills. During the hearing, Appellant acknowledged that the law he relied on as the basis for his motion did not support his position and withdrew his Motion. The following day, Appellant filed a Motion for Reconsideration of the Court's Order denying Motion to Transfer Venue, which the Court denied. On the day the case was set to go to trial, Plaintiffs, by and through Appellant, filed a Notice of Appeal of the denial of Motion to Transfer Venue, and claimed the trial could not go forward pending resolution of the appeal. The Court of Appeals dismissed the appeal as not immediately appealable.

On the day of trial, in addition to Notice of Appeal, Appellant and Plaintiffs filed a Motion to Disqualify Judge Hughston based on allegations that former counsel for Respondents had sent a proposed order to Judge Hughston nine years prior and had not immediately copied Appellant. Judge Hughston denied their motion.

Plaintiff, Betty Fisher, did not appear for the jury trial. During the jury trial, Plaintiffs abandoned all of their legal causes of action except for the revocation claim. The Court directed verdict in favor of Respondents on all of Plaintiffs' legal causes of action except the revocation claim because no evidence was presented to support the claims. [Jury Trial Trans. 410-19]. On

October 26, 2017, at the end of a three-day trial, the jury found for the Defendants on the revocation claim. [Jury Trial Trans. 497, ll18-20].

On November 6, 2017, Defendants filed Post-Trial Motion requesting attorney's fees pursuant to South Carolina Code § 62-1-111 and attorneys' fees and sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA"). Plaintiffs filed their reply on December 6, 2017. Defendants submitted their affidavits of fees at that time, based on the work that had been done through that date. The trial judge subsequently ordered the parties to provide information on all of the accountings that had been done in the related conservatorship case and the estate case.

On January 2, 2018, Respondents filed renewed Motion for Summary Judgment on the remaining equitable causes of action due to Plaintiffs' lack of standing. Judge Hughston issued Order on February 28, 2018 deferring ruling on the motion, indicating that it was his preference to proceed to trial and for the parties to be prepared to move forward on the merits. [Order of Judge Hughston, May 29, 2018, p. 2]. On March 7, 2018, Defendants reasserted their Motion for Summary Judgment following Supreme Court decision in associated case as to Plaintiffs' standing. Again, the judge held the issue in abeyance but dismissed the Plaintiffs' action following the two-day bench trial in Order dated July 19, 2018. [Order of Judge Hughston dated July 19, 2018].

On March 22, 2018, the trial judge filed an order finding in favor of the Respondents and imposing sanctions against the Plaintiffs and their attorney pursuant to both the FCPSA and Rule 11, SCRCP. The sanctions included a judgment of $253,969.31 against Plaintiffs and their attorney jointly in favor of Defendants. The sanctions also included a judgment of $65,151.34 against attorney for Plaintiffs in favor of the Estate of Alice Shaw-Baker. On April 3, 2018, the

trial judge issued an order granting Appellant's request to be relieved as counsel for the Plaintiffs in the Will Contest litigation and, as an additional sanction, enjoined the Plaintiffs and their attorneys from filing "any motions in the Circuit Court." [Order of Judge Hughston dated April 3, 2018]. Plaintiffs subsequently requested relief in the Supreme Court, claiming that they had not received Judge Hughston's March 21, 2018 Order until March 26, 2018. The Supreme Court issued Order on April 16, 2018 allowing Plaintiffs an additional 15 days to file their post-trial motions. On April 23, 2018, Plaintiffs filed their Rule 59 Motions for new trial, to alter or amend the judgment, and for recusal of Judge Hughston.

On May 21, 2018, the trial judge held a hearing on the Plaintiffs' post-trial motions, at which he took substantial additional testimony including from Plaintiffs and Respondents. On May 29, 2018, Judge Hughston executed Order amending the judgment against plaintiffs to include reduced attorney's fees awarded to Respondents, based on Plaintiffs' assertions in their post-trial motions (this order was subsequently vacated). Defendants filed Motion to Reconsider on May 31, 2018. Thereafter, on July 23, 2018, the judge issued Order restoring the award of attorney's fees to the original amount awarded, finding that he had incorrectly evaluated Attorneys Kouten's and Crowley's affidavits and mistakenly reduced their award of fees.

STANDARD OF REVIEW

The decision whether to impose sanctions the South Carolina Frivolous Civil Proceedings Sanctions Act sounds in equity, rather than law. See Father v. S.C. Department of Soc. Servs., 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003)(refusing to adopt the more deferential "abuse of discretion federal standard of review in assessing decisions to impose sanctions under the FCSA).

Therefore, this Court may find facts according to its own view of the preponderance of the evidence. S.C. Dept. of Transp, v. Horry Cnty., 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings. Ballard v. Roberson, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012); Pinckney v. Warren, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). Furthermore, the reviewing Court is not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses. Id. at 387, 544 S.E.2d at 622. The Court may reverse the factual findings of the lower court in such cases when the appellant satisfies the Court that the findings are against the preponderance of the evidence. See Lewis v. Lewis, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011); See Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

ARGUMENTS

I. THE TRIAL COURT CORRECTLY ISSUED SANCTIONS AGAINST APPELLANT BASED ON OVERWHELMING EVIDENCE DEMONSTRATING HE HAD NO GOOD FAITH BASIS TO INITIATE OR PROCEED WITH THE WILL CONTEST LITIGATION AND NO GOOD GROUND TO SUPPORT IT.

As Appellants correctly set out in their brief, under the FCPSA, an attorney or party shall be sanctioned for a frivolous claim or defense if the court finds the attorney or party failed to comply with **any one** of the following conditions:

> a. a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> b. a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party;
>
> 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 the proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

See S.C. Code Ann. §15-6-10(C)(1)(a),(b), and (c). "Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in a frivolous claim or defense, the attorney or party, or pro se litigant shall not be sanctioned." See S.C. Code Ann. §15-6-10(D).

Thereafter, despite the ample and unequivocal findings contained in Judge Hughston's multiple orders following the jury trial and trial of the equitable claims related to the will contest litigation to the contrary, Appellant argues that the record, in fact, shows he had "a basis to proceed . . . and had good grounds to support it," and therefore the FCPSA does not apply to him. [See Appellants' Int. Brief, p. 6, 7]. However, other than simply stating it, Appellant points

to no law or evidence whatsoever, in the Record or otherwise, to demonstrate that his initiation of the will contest, and any of the interrelated actions, was reasonable under the circumstances, and that grounds existed for it under the law.

Importantly, Appellant, in no substantial way, addresses Judge Hughston's specific findings of frivolousness nor does he explain how those findings were not accurate and appropriate. Instead, Appellant merely states, inaccurately, that "the trial judge did not state with any specificity which subsections he found violated by Appellant, but rather inserted the entire code section into his order (March 21, Order, p. 3-6)". [See Appellant's Int. Brief, p. 6].

Under the FCPSA a lawyer's conduct is sanctionable if he fails to comply with any of the criteria set out for frivolousness. In setting out the entire FCPSA code section in his March 21, 2018 Order, Judge Hughston implicitly, if not specifically, found Appellant violated all of them. Of course, Judge Hughston's language in setting out his findings regarding the frivolousness of Appellant's conduct leaves nothing to speculation.

Immediately after setting forth the entire FCPSA in order, Judge Hughston indicates, "it is clear to me that Plaintiffs' claims were entirely frivolous, and for that reason I find Plaintiffs and their attorney are subject to sanctions . . ." [See Order of Judge Hughston, March, 21, 2018, p. 6]. "Plaintiffs' claims were completely baseless . . . " [Id.], "Plaintiffs have done nothing but delay and harass Defendants." [Id.] "Plaintiffs . . . were subject to sanctions based on the inherent authority of courts to sanction litigants who act in bad faith, vexatiously, that is without proper grounds, or for oppressive and improper purposes." [Id.]. "This is the worst case of frivolous acts that I have experienced." [Id., p. 9].

Judge Hughston continues in his Order of May 29, 2018, following a hearing on Plaintiffs' SCRCP, Rule 59 motion for a new trial, at which he took substantial additional

testimony, including from Plaintiffs, Respondents, and one of Alice Shaw-Baker's caregivers during her life:

> One cannot fully comprehend the total waste of time and expense in this case without reading everything including all of the discovery of each side. It takes me two days to read these voluminous files, and I have read them two times to fully understand this case, and particularly, the claims of the Plaintiffs. **The bottom line of it all is that there are no facts supporting these claims made up by essentially strangers to Alice Shaw-Baker and her friends.**

[Order of Judge Hughston, June 29, 2018, p. 1]. "This should have been a simple guardian/conservator/personal representative case. Instead it has by Plaintiffs' frivolous acts gone on for nine years and counting. This is unconscionable and an abuse of the court system. Every avenue to delay has been used and abused by Plaintiffs for no good reason." [Id., p. 4].

Judge Hughston's findings are even more specific with regard to the reasonableness of Plaintiffs' claims in the will contest and related actions:

> It is important to read the Order of Judge Curry of November 19, 2008, for it is dispositive of Plaintiffs' contention that Alice Shaw-Baker revoked her Will. She was an 'Incapacitated Person'. Section 62-5-101(1) S.C. Code of Laws. Among other things, Judge Curry Ordered, 'neither Alice Shaw-Baker nor anyone on her behalf may revise or revoke her Will or execute a new Will, unless specifically ordered by this Court. No one sought to change this Order. **This alone should have told Plaintiffs not to claim the Will was revoked under extremely suspicious and questionable circumstances shown in the record and recited in my prior Order.** This Order is in addition to the settled law that mentally incompetent person lacks capacity to revoke a Will. **Without question, Alice Shaw-Baker lacked capacity to revoke her Will.**

[Order of Judge Hughston, May, 29, 2018, p. 2-3]. "Plaintiffs' conduct through the case appears to have been nothing but vexatious, that is, brought without sufficient grounds, and the maintenance of this completely frivolous claim can only be characterized as unreasonable." [Order of Judge Hughston, March 21, 2018, p.6].

Appellant defends that his purpose in instigating and continuing the action, and in asserting the legal arguments was "to seek a just determination of the dispute, not to cause delay

or impose burden on the Defendants." [See Appellants' Int. Brief, p. 5]. Judge Hughston disagrees, stating "[p]laintiffs may subjectively say, 'We are just doing what Alice Shaw-Baker wanted us to do.' Intent and result are shown by their acts, not their words.'" [Order of Judge Hughston, June 29, 2018, p. 4]. "It is not their actual intent to harm, but harm is the reasonable foreseeable outcome." [Order of Judge Hughston, March 21, 2018, p. 6].

Appellant also argues that while Judge Hughston indicates in his orders that he found Appellant's actions over the entire course of the litigation of the will contest and related actions sanctionable, he, in fact, "criticized just two filings with any specificity: the merits of the revocation claim (Order of Judge Hughston, March 21, 2018, p. 7) and the appeal related to the modification of a temporary restraining order (TRO)(Order of Judge Hughston, June 29, 2018, p. 5)." [Appellant's Int. Brief, p. 6-7]. As discussed above, Judge Hughston's orders reveal his criticism of Appellant's conduct in far more instances than specifically with regard to just two filings. In fact, Judge Hughston indicates that he has made his findings based on the case as a whole [Order of Judge Hughston, March 21, 2018, p. 1]. To that end, he specifically set forth in an appendix to his order a procedural timeline to illustrate Appellant's and Plaintiffs' vexatious course over a 9-year period, particularly in light of the case they ultimately brought to trial, which ended up being a challenge to Alice Shaw-Baker's will on a single claim of revocation, which Judge Hughston found should never have been brought in the first place. [See Order of Judge Hughston, March 21, 2018, Appendix A].

Nevertheless, the determination for the imposition of sanctions under the FCPSA is not to be made based on the number of filings the court finds frivolous, but whether the court finds by a preponderance of the evidence that a lawyer's conduct in instigating and continuing a legal action was violative of the Act and reasonable under the circumstances. Here Judge Hughston

has specifically found Appellant's actions unreasonable and sanctionable according to the criteria set out in the FCPSA. This could not be more clearly stated than in his Order of June 29, 2018 at page 4:

> Frivolous determinations are governed by a reasonable attorney standard. Here, two questions arise. One, would a reasonable attorney bring and maintain a suit now in its ninth year claiming that an undoubtedly incompetent person had revoked her otherwise valid will by tearing it on January 1, 2009, following Judge Curry's Order of November 19, 2008, when only that attorney supposedly witnessed the tearing and no proof of such an act existed other than that attorney's say so, and that attorney's mother is an heir if the Will was revoked along with some other heirs who are not parties, or notified of this suit, and whose existence was just revealed? **The answer is an unqualified "No".** Two, would a reasonable attorney bring and maintain a suit now in its ninth year claiming an equitable constructive trust over the entire Estate given all the clear facts and circumstances in the record contrary to such a claim? **Again, the answer is an unqualified "No".**

[Order of Judge Hughston, June 29, 2018, p. 5] (emphasis added).

Judge Hughston is an experienced trial judge with 33 years on the bench. [See Order of Judge Hughston, June 29, 2018, p. 7]. He had the benefit of experiencing the entirety of the proceedings and of intently studying the entire file multiple times. It was from his informed and experienced perspective that he made all of his findings, including his findings related to Plaintiffs' and Appellant's frivolousness, "by a standard of overwhelmingly clear and convincing evidence considering the case as a whole, and that is the only way one can ever begin to understand this case – as a whole." [See Order of Judge Hughston, March 21, 2018, p. 1].

A. APPELLANT'S PURSUIT OF THE WILL CONTEST LITIGATION WAS NOT RESONABLY SUPPORTED BY THE FACTS AND WAS NOT WARRANTED UNDER THE LAW

In Section A of his Argument, Appellant claims his pursuit of the will contest litigation was reasonably supported by the facts, and was warranted under existing law. In support of that proposition, Appellant advances the argument that because the judge instructed the jury that if a

person can prove by a preponderance of the evidence that an incapacitated person regains sound mind, that person may then revoke his or her will, and that it would be up to the jury to decide whether Alice Shaw-Baker 1) had regained the capacity needed to revoke her will, and 2) whether they believed she tore up a copy.[1] [See Appellant's Int. Brief, p. 8]. Further, Appellant argues that his good faith, non-frivolous basis for bringing the claim was obfuscated by Judge Hughston's exclusion of portions of Plaintiff's evidence at trial, the admission of which would have revealed the viability of his claims as to the revocation of the will and other aspects. He contends that he had researched the issues, had significant personal contact with Alice Shaw-Baker during the pendency of the conservatorship prior to her death, conducted extensive discovery, and, to the best of his knowledge, information and belief, at the time of bringing the will contest litigation, that the evidence showed there was a good ground to support it. [See Appellants' Int. Brief, p. 10].

First, and as the Record reflects, the vast majority of what Judge Hughston excluded from evidence at the jury trial as irrelevant to the issues were materials Appellant and Plaintiffs' presented to prove their bad faith, if not fraudulent, position that it was Alice Shaw-Baker's intention to give the totality of her estate and non-probate assets to unspecified animal charities, despite the intentions expressed in all of her wills, and was a primary reason she sought to revoke it. This position was in particular bad faith considering that revocation would result in intestacy and, rather than the estate going to animal charities, it would go to Plaintiffs.

Second, Appellant was present at the October 29, 2008 Probate Court hearing appointing his client as Alice Shaw-Baker's Conservator and Guardian, and had first-hand knowledge of the

[1] Importantly, Judge Hughston also instructed the jury that they would have Probate Judge Tamara Curry's Order Appointing Lisa Fisher as Conservator and Guardian of Alice Shaw-Baker, and that they "can see what she said in that order, and you can presume that she had good reason to say that. She had good reason to do what she did when she put it in writing and filed in the Probate Court. You can presume that, that she was not able to make a will at that time." [See Jury Trial Transcript, p. 481: 11-16].

basis of Judge Curry's order, and the order itself, which specifically prohibited Alice, or anyone on her behalf, from revising, revoking, or making a new will "unless specifically ordered by this Court." [See Order of Judge Tamara Curry, November 19, 2008, p. 7]. Also present at the hearing was Dr. Leonard W. Mulbry Jr., MD, and Rebecca S. McCrudden, M.A., L.P.C. who had been appointed by the Court to examine Alice to make a determination with regard to her capacity. Dr. Mulbry and Ms MuCrudden both presented their reports and findings at the hearing concluding that Alice was an incapacitated person. [See id., p. 5]. Those findings, of course, were consistent with Judge Curry's conclusion of law that "Alice Shaw-Baker is an incapacitated person as defined by S.C. Code Ann. § 62-5-101(1)."

Thereafter, for the sole purpose of determining the appropriate level of in-home and follow-up care for Alice, the Probate Court ordered that she be examined by Dr. Randolph Waid, Ph.D., who would report to the Court on his findings. [Id., p. 8]. Appellant and Plaintiffs were instrumental in arranging Alice's examination with Dr. Waid, and obtaining his report with regard to her mental condition to submit to the Probate Court pursuant to Judge Curry's November 19, 2008 Order. Dr. Waid reported that Alice "demonstrated considerable impairment on learning/memory tests," was not oriented as to "the year, season of the year, date, day of the week, or month." [See Report of Dr. Randolph Waid, Ph.D., made November 20, 2008].[2] Waid diagnosed her with dementia with comorbid psychological/ emotional difficulties.

Subsequently, Appellant and Plaintiff filed their will contest action alleging 11 causes of action for 1) constructive trust, 2) declaratory judgment regarding revocation of will, 3) undue influence, 4) fraud, 5) declaratory judgment regarding improper execution of will, 6) declaratory judgment regarding subsequent will, 7) unjust enrichment, 8) promissory estoppel, 9) petition for

[2] Appellant and Plaintiffs put Dr. Waid up as their witness during the bench trial on Plaintiffs' bifurcated equitable claims. Dr. Waid testified that according to his November 20, 2008 examination, Alice Shaw-Baker was "incapacitated and needed protection." [See Bench Trial Transcript, 190:10-19].

removal of Bessie Huckabee as personal representative, 10) petition for appointment of Betty Fisher as personal representative, and 11) attorney's fees and costs.

Appellant claims that despite having full knowledge of the doctors' reports discussed above, of the Probate Court's Order prohibiting Alice from revoking her will until further order of the Court, he had good grounds to file the will contest action based on his knowledge of the facts and law at the time. However, reference to page 8 of Judge Hughston's March 21, 2018 Order clearly shows, Appellant misses the point:

> The jury trial and the non-jury trials are perhaps the best evidence of [Plaintiffs'] frivolous actions. The claim that the Will was revoked should never have been filed. The only testimony on this came from Lisa Fisher. She and only she claims to have seen Ms. Shaw-Baker destroy a copy of her Will. Nothing corroborates this. . . Even if it did happen as described, this was an act of an incompetent person with no legal effect. Also, Judge Curry's Order says she could not revoke her Will due to her incapacity. **These two facts alone should have been enough to tell any reasonably competent lawyer not to file this suit. These were two huge legal stop signs with bright flashing red danger lights and said to any reasonably competent attorney, 'Go no further and if you do, you travel at your own peril'**

[Order of Judge Hughston, March 21, 2018, p.7]. This is the heart of the matter.

B. DENIAL OF MOTIONS FOR SUMMARY JUDGMENT IS NOT EVIDENCE THAT APPELLANT'S CONDUCT WAS REASONABLE UNDER THE CIRCUMSTANCES.

In Section B, Appellant argues that the denial of Respondents' motions for summary judgment and directed verdict motions is evidence Appellant's conduct was reasonable. He bases this contention on the reasoning set out in Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903(1997) which case found that an award of sanctions was precluded where a litigant survived pre-trial dispositive motions. However, as Appellants acknowledge in their brief, the holding in Hanahan was revisited by the Court after the 2005 revision to the FCPSA. This Court decided in Holmes v. East Cooper Community Hosp., Inc., 408 S.C. 138, 756 S.E.2d 483 (2014), that under

the plain terms of the FCPSA as revised in 2005, Hanahan's reasoning as to the disposition of pre-trial motions no longer applies. Moreover, just as in Holmes, the trial judge here also deferred ruling on Respondents' summary judgment motions, preferring instead to have the benefit of a fully developed record. His declining to rule on Respondents' summary judgment motions, as opposed to Appellant's claim he denied them, had nothing to do with the merits of the motion. In fact, Judge Hughston ultimately dismissed Plaintiffs' equitable claims for lack of standing, after hearing all of the evidence. [See Order of Judge Hughston, June 29, 2018, p. 2].

Appellant suggests that he may have somehow been encouraged by Judge Hughston's deferred rulings on Respondents' motions for summary judgment, to imply that perhaps it was Judge Hughston's fault that he and Plaintiffs' continued their frivolously brought claims [see Appellant's Int. Brief. P.12]. This claim is farfetched and not supported by the record. At trial, Plaintiffs presented no evidence whatsoever and abandoned every cause of action except one, their claim regarding revocation (discussed above), and their equitable claims were dismissed outright for lack of standing, after they spent two days essentially attempting to relitigate the will contest. Appellant went so far as to suggest that Judge Hughston should void Judge Curry's November 19, 2008 Order prohibiting revocation of Alice's will. [Bench Trial, trans. Pp 81-83, ll 1-16].

C. THE APPEAL OF THE ORDER MODIFYING TEMPORARY RESTRAINING ORDER WAS NOT REASONABLE UNDER THE CIRCUMSTANCES

In Section C, Appellant claims the order modifying the temporary restraining order was not interposed for delay. In fact, in the totality of their actions, this stands out as one of the most frivolous. In that instance, on May 14, 2009, Plaintiffs filed a motion for temporary restraining order in the circuit court to restrain Respondent Bessie Huckabee as personal representative for Alice's estate from performing her duties in that capacity. Judge Hughston, at that time, issued

an order restraining Ms. Huckabee "from doing anything regarding the estate." [See form 4 Order granting TRO, May 22, 2009] On May 28, 2009, Peter Kouten, former counsel for the personal representative of the Alice's estate, filed a motion to reconsider the grant of TRO asking the court to modify the it to allow the personal representative to at least have the power to do the bare minimum required for administering the estate. [See Defendant's Motion for Modification and Reconsideration, May 28, 2009] On June 8, 2009, the Court held a hearing on the personal representative's motion to reconsider at which counsel for Plaintiffs was present. [See Order Granting Modification of TRO, June 10, 2009]. Thereafter, despite having been granted the relief they requested in the TRO, on June 18, 2009, Appellant filed a notice of appeal from the order granting modification of the TRO based on his suspicion that counsel for the personal representative had sent Judge Hughston a proposed order without copying him contemporaneously. [See Notice of Appeal, June 18, 2009]. Prior to filing the notice of appeal Appellant did not file a motion for reconsideration. On June 2, 2011, the Court of Appeals affirmed the order modifying the TRO finding Appellant had not first filed a motion for reconsideration. [See Fisher v. Huckabee, Op. No. 2011-UP-173 (S.C. Ct. App. filed June 2, 2011)]. Thereafter, Plaintiffs filed a petition for certiorari of the Court of Appeals' order, which this Court denied on July 27, 2012. [Order denying Certiorari, July 27, 2012]. While this issue of the modification of TRO (essentially granting Plaintiffs the relief the requested) was on appeal, Appellant and Plaintiff argued at every juncture that the entire case was stayed pending the outcome of the appeal, and that the will contest could not go forward. Judge Hughston found in his order that Appellant and Plaintiffs have "appealed and asked for reconsideration of almost every decision of every Court." [Order of Judge Hughston, June 29, 2018, p. 5). Appellant then

used the pendency of the appeals to delay trial on the merits, which determination would have resolved many, if not all, of the issues on appeal.

In January of 2017, when the trial of the matter was finally placed on the jury roster, Appellant and counsel for Respondents entered into a consent scheduling order, wherein Appellant indicated he had approximately 16 expected live witnesses and 27 potential witnesses, and setting the trial date for May, 15-19 2017. [See Consent Motion for Date Certain Trial, January 17, 2017]. At the approach of May 15, 2017 trial date, Judge Jefferson, Chief Judge for Administrative Purposes, held a scheduling conference with the parties to determine the length of trial and number of witnesses. Appellant and Plaintiffs announced not ready for trial in May and that, because of the number of witnesses and the fact that Plaintiffs were from California, requested a 9-day date certain trial, which the court indicated it could not accommodate until October of that year.

Contrary to Appellant's assertion, he and Plaintiffs used every tactic imaginable, to forestall the adjudication on the merits of the will contest, the very adjudication which they sought in the first place. Such tactics included, without limitation, a) complaining that former counsel Peter Kouten had a conflict of interest in representing Defendants and then moving to disqualify new counsel when Mr. Kouten, out of an abundance of caution, sought separate representation for them (arguing the certificate of service on new counsel's notice of appearance was defective)[see Objection to Appearance of Wills, October 13, 2013], c) insisting on a five-day date certain trial, and then announcing not ready to proceed at two separate call of the cases on the fallacious argument that issues on appeal prevented the trial from going forward, d) filing a motion to transfer venue and stay all proceedings on the eve of the third specially set date certain for trial and then withdrawing the motion at the hearing of it (admitting their position was

incorrect) [see Motion to Transfer Venue, October 2, 2017], and then moving for reconsideration when the Court denied the motion [see Order denying Change of Venue and for Stay, October 19, 2017; see also Motion to Reconsider Denial to Change Venue and Stay, October 23, 2017], and then filing a notice of appeal of the denial of reconsideration [see Plaintiffs Notice of Appeal, October32, 2017], e) filing a motion to disqualify Peter Kouten's replacement counsel essentially on the basis that they knew each other [see Motion to Transfer Venue, October, 2 2017, and f) filing a last minute motion to disqualify Judge Hughston as trial judge on the argument that some 9 years earlier, Judge Hughston had received an email from counsel for Respondents on which Appellant was accidentally not immediately copied [see Motion to Disqualify Judge Hughston, October 23, 2017].

Ample evidence in the Record exists to support a finding by the trial court, and by this Court that Appellant and Plaintiffs used process frivolously with the express purpose of delaying the adjudication on the merits of the will contest, and to harass Respondents.

D. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN AWARDING SANCTIONS AGAINST APPELLANT.

In Section D Appellant argues the trial judge abused his discretion by basing his award of sanctions on unsupported factual conclusions. As discussed above, Judge Hughston's orders set forth ample factual support for his conclusions, and Appellant's argument is without merit.

II. THE TRIAL JUDGE DID NOT ABSUE HIS DISCRESION IN BASING HIS DECISION TO IMPOSE SANCTIONS ON MATTERS OUTSIDE THE WILL CONTEST LITIGATION

Appellant argues the trial judge abused his discretion by basing his award of sanctions on unsupported factual conclusions, and that the trial judge abused his discretion in considering other litigation in sanctioning. Appellant cites to no legal authority in this regard to support his argument that Judge Hughston abused his discretion in awarding sanctions against him by

looking at his involvement in matters directly related to the will contest litigation. Nevertheless, the FCPSA specifically provides that in determining if an attorney has violated the provisions of the Act, the court shall take into account, "information disclosed or undisclosed to the attorney . . . through discovery and adequate investigation" S.C. Code § 15-36-10(E)(4); and "**other factors the court considers just, equitable, or appropriate under the circumstance.**" S.C. Code § 15-36-10(E)(7). As Judge Hughston repeats in his order, one cannot fully understand this case without looking at the whole of it. Under the FCPSA, Judge Hughston had authority to do that.

III. SANCTIONS AWARD RELATED TO IMPROPER CONDUCT BY APPELLANT

Appellant's argument relates to whether the trial court abused his discretion because the trial judge allegedly included attorney's fees and costs that did not result from any improper conduct by Appellant. Appellant calls into question whether any of the fees forming the basis of the sanction against him were incurred in other actions unrelated to actions he took or didn't take. He also claims duplicate entries between former counsel Mr. Kouten and new counsel for the beneficiaries, Mr. Wills, and his replacement counsel Ms. Crowley, who substituted as counsel after Mr. Kouten was appointed to the bench as Associate Probate Judge. Plaintiffs made a motion to Judge Hughston making the same claim, and Judge Hughston consequently reduced the sanctions award based on a misunderstanding regarding Peter Kouten's former representation of the Personal Representative in conjunction with Mr. Wills's representation of the beneficiaries under Alice's will. [See Order of Judge Hughston, July 23, 2018, p. 2]. Respondents replied with a motion to alter or amend, which included an Affidavit of Peter Kouten Seeking Reconsideration of Fees and an Amended Affidavit of Jessica Crowley explaining the misunderstanding and asking Judge Hughston to reapply the fees. [See Defendants' Joint Motion to Alter Or Amend Modified Order of Judgment, July 19, 2018].

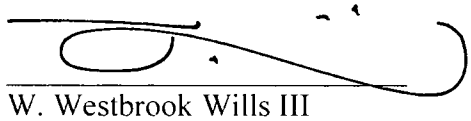
Based on the explanation and affidavits on Respondents' Motion to Alter or Amend, Judge Hughston corrected his award of fees. [See Order of Judge Hughston, July 23, 2018, p. 2]. Judge Hughston found the final award appropriate based on the facts and affidavits and the circumstances on the whole.

CONCLUSION

Fore the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

LAW OFFICE OF
W. WESTBROOK WILLS III



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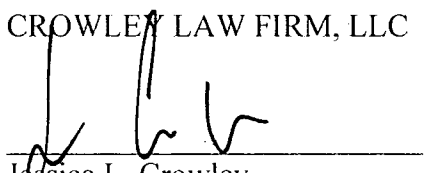

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Circuit Court Case No. 2009-CP-10-3010
Appellate Case No. 2018-000566

Ex parte:
John Hughes Cooper..... Appellant,

Betty Fisher and Lisa Fisher.. ..... Plaintiffs,

v.

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

In the Matter of the Estate of
Alice Shaw-Baker.

PROOF OF SERVICE

I certify that I have served the enclosed Respondents' Initial Brief and Designation of Matter to be Included in the Record by depositing a copy in the United States Mail, postage prepaid, on September 11, 2018, addressed to Barbara Seymour, Esq., 1612 Marion Street, Suite 200, Columbia, SC 29201-2939, and by e-mailing a copy to her.

LAW OFFICE OF
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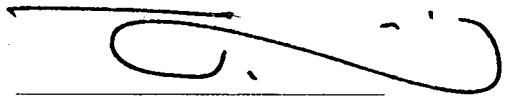

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