

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
Appellate Case No. 2018-000662

Ex Parte:
John Hughes Cooper, Appellant,

In Re:
Betty Fisher and Lisa Fisher Plaintiffs,

v.

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

FINAL REPLY BRIEF

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ARGUMENTS

I. THE SANCTIONS AGAINST APPELLANT SHOULD BE SET ASIDE BECAUSE THE REQUIREMENTS OF THE FCPSA AND RULE 11 HAVE NOT BEEN MET.

The standards set forth in the FCPSA and Rule 11 were incorrectly applied to the record in this case. In their brief, Respondents conclude that the absence of specifically identified criteria under the FCPSA in the sanctions orders means that the trial judge found that Appellant “violated all of them.” Even if, in fact, the sanctions against Appellant are based on the trial judge’s “implicit, if not specific” finding that Appellant violated all of the criteria set forth in the FCPSA, the order as to Appellant should be overturned for four reasons. First, Appellant has established a nonfrivolous basis to proceed; therefore, the statute does not apply pursuant to Subsection (J). Second, the trial judge did not set forth findings required by subsection (E) of the statute. Third, the trial judge lacks the authority to award attorney’s fees as a sanction against an attorney for a party under subsection (G). And fourth, the trial judge applied the wrong standard in evaluating the Appellant’s conduct under Rule 11.

A. THE PROVISIONS OF THE FCPSA DO NOT APPLY WHERE AN ATTORNEY ESTABLISHES A BASIS TO PROCEED WITH LITIGATION THAT IS NOT FRIVOLOUS.

Notwithstanding the “reasonable attorney” standard set forth throughout the rest of the statute, Subsection (J) of the FCPSA unambiguously states that the “provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law.” (*emphasis added*) Respondents argue in their brief that “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.” To the contrary, Appellant has “established a basis to proceed that is not frivolous” – which is all that is required of him.

In his initial brief, Appellant outlined in detail the evidence he had to support his clients’ claims in the Will Contest litigation. Further, his legal arguments are clearly articulated in the record, including in the Return by Plaintiffs to Defendants’ Renewed Motion for Summary Judgment (R. p. 433); in Plaintiffs’ Pre-Trial Brief (R. p. 451); in Plaintiffs’ Memorandum in Opposition to Defendants’ Post-Trial Motions (R. p. 407); and, in arguments made during the jury trial and bench trial. The statute could not be clearer: if an attorney has a nonfrivolous basis to proceed, the FCPSA does not apply.

B. THE STATUTE SETS FORTH THE FACTORS THAT A TRIAL JUDGE MUST TAKE INTO ACCOUNT IN MAKING A DETERMINATION UNDER THE FCPSA.

Absent from the trial judge’s sanctions orders is any mention of findings based on the factors set forth in subsection (E) of the statute, which states:

In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

Instead, the sanctions award against Appellant is based on sweeping conclusions and generalizations about the trial judge's view of the case. All of which were made in spite of (1) an affidavit from an expert in the field stating that "a reasonable attorney would believe that the claims were (a) warranted under existing law or a good faith or reasonable argument for an extension of existing law and (b) the allegations were supported by the facts"¹ (R. pp. 415-417); the trial judge's admitted lack of familiarity with will contest cases (R. p. 628, line 20-p. 629, line 1; p. 637, line 24 – p.638, line 1); and, Appellant's willingness to forego certain claims and arguments as the case progressed.

C. IF THE SANCTION IMPOSED ON APPELLANT WAS PURSUANT TO A FINDING UNDER THE FCPSA, THAT SANCTION WAS NOT AUTHORIZED BY THE STATUTE.

The FCPSA specifically identifies the type of sanctions a trial judge may impose based on who is being sanctioned. Subsection (G) distinguishes sanctions available to the judge against a party from sanctions available to the judge against attorneys representing a party, as follows:

Sanctions may include:

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;

(2) an order for the attorney to pay a reasonable fine to the court; or

¹Compare Mr. Freeman's opinion to the affidavit of Respondents' expert, Evan A. Smith, a lawyer with four years' experience who also happened to represent them in related litigation. (R. p. 354)

(3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

The trial judge in this case ultimately imposed two sanctions against Appellant: the attorneys' fees and costs and an injunction against future filings in the case. Appellant was not a party to the litigation, but rather an attorney for a party. Therefore, attorneys' fees and costs are not taxable to him under the statute. As a result, the findings pursuant to the FCPSA and sanctions attributable thereto must be set aside.

D. THE RECORD SHOWS THAT APPELLANT SUBJECTIVELY BELIEVED THAT HE HAD "GOOD GROUND TO SUPPORT" THE CLAIMS AND ARGUMENTS ASSERTED; THEREFORE, RULE 11 WAS NOT VIOLATED.

Since the trial judge's findings cannot stand under the FCPSA, that leaves only Rule 11, SCRCP, as a basis for awarding attorneys' fees as a sanction against Appellant. Unlike the objective "reasonable attorney" standard set forth in the FCPSA, Rule 11 applies a subjective standard: "to the best of his knowledge, information, and belief there is good ground to support" the pleading, motion, or other paper. Evaluation of an attorney's conduct under the court rule requires an examination of the attorney's support for his claims and arguments "to the best of his knowledge, information and belief." Nowhere in any of the sanctions orders did the trial judge address the information available to Appellant at the time he signed the complaint, which included:

- Statements from Ms. Shaw-Baker's friend, Carol Linville, that she repeatedly stated that her assets would be left to the benefit of animal welfare work. (R. p. 723, lines 5-23; p. 724, lines 17-21).
- Statements from Ms. Shaw-Baker's neighbor, John Smoak, that she repeatedly stated that her house would be used for the benefit of animal welfare upon her death. (R. p. 1260, line 3-p. 1261, line 16; p. 1262, line 20-p. 1263, line 1; p. 1263, line 20-p. 1264, line 19)
- Statements from Ms. Shaw-Baker's caregiver, Candace Rickborn, that she was upset to learn that her assets would not be used for the benefit of animal welfare. (R. p. 728, line 4-p. 732, line 7)

- Notes in the retirement system and insurance company files showing Ms. Shaw-Baker's intent that her assets be used for the welfare of animals upon her death, particularly through the dog rescue that she believed Defendant Slade operated. (R. pp. 1233, 1236-1239; 1243; 1249-1252)
- Testimony and evidence documenting Ms. Shaw-Baker's lifelong dedication to the care of animals.
- Report of Dr. Waid that Ms. Shaw-Baker understood the purpose of a will. (R. p. 1258)
- Affidavit of Shanon Honney, MD, filed in the conservatorship case indicating that Ms. Shaw-Baker was not incapacitated at the time. (R. pp. 1209-1210)

Further, at least with regard to certain claims based on the fiduciary relationship between Respondents and Ms. Shaw-Baker, Appellant expected the burden of proof to be shifted to Respondents in accordance with the law. (R. p.890, line 19-p.892, line 2;. p. 459-p.460, para. 3(f)) He had no way to anticipate that the trial judge would simply decide he was "not going to proceed that way." (R. p.892, lines 3-4)

To the extent the trial judge's finding that Appellant violated Rule 11 was based on his application of a "reasonable attorney" standard, such finding should be set aside because that is not the appropriate standard.

II. APPELLANT DID NOT APPEAL AN ORDER THAT GRANTED RELIEF PLAINTIFFS REQUESTED.

In their brief, Respondents continue to perpetuate the mischaracterization that Appellant filed an appeal of the judge's decision to grant a temporary restraining order that his own clients had requested. Respondents began this theme in their post-trial motion for sanctions. It was picked up by the trial judge in his series of sanctions orders. Now, it is asserted again in Respondents' brief. It is demonstrably false.

Appellant filed a motion to prevent Ms. Huckabee from taking action as personal

representative of the estate while the Plaintiffs' claims against her were pending. The relief requested was granted. (R. p. 16) It was Ms. Huckabee who was not satisfied with the TRO. She filed a motion to modify the TRO to include restraints and burdens on the Plaintiffs. Respondents correctly recount in their brief that counsel for the Plaintiffs was present for a hearing on the motion to modify the TRO. However, Appellant was not included on the defendants' attorney's email to the trial judge which included a proposed order granting modification of the TRO, contrary to Court rules of procedure.² Appellant did file an appeal of the order modifying the TRO, but he certainly was not challenging the restraint of Ms. Huckabee, which was the relief he had in fact requested. His appeal challenged the addition of his client as a restrained party and the modification of the restraint on Ms. Huckabee, which was relief granted by the judge for the defendants through a procedure Appellant reasonably believed was improper.

Respondents stretch their false narrative even further to create a picture of misconduct by Appellant that includes a meritless claim to recuse the trial judge. Both Respondents in their post-trial motion and the judge in his sanctions orders dismiss Appellant's concerns about the trial judge's disqualification, suggesting that it was based on the fact that he "granted some order nine years earlier." This is an oversimplification of the circumstances.

Peter Kouten represented the estate and the beneficiaries of the estate in defense of the Will Contest litigation and in connection with the administration of the estate and other related litigation. In 2009, Mr. Kouten apparently engaged in ex parte communication with the trial judge by sending him a proposed order without notice to Appellant, his opposing counsel. The trial judge signed that order. The order was upheld on appeal two years later.

² It is also a mischaracterization to state that Appellant was "accidentally not immediately" copied on the proposed order. In fact, Appellant never received a copy of the proposed order, only to be served after it was signed and entered by the judge.

During that time, the survival action alleging tort claims against the beneficiaries and Mr. Kouten personally was also pending. On top of that, it was evident that Mr. Kouten was likely to be called as a fact witness by the defendants in the Will Contest litigation because he had also served as the court-appointed visitor in the conservatorship proceedings prior to Ms. Shaw-Baker's death. There was no doubt that her capacity prior to her death would be an issue in the case.³ Plaintiffs sought Mr. Kouten's removal due to a clear conflict of interest.⁴ (R. 189-198) More than a year later, Kouten voluntarily withdrew from representing the individual beneficiaries but remained in the case as attorney for the estate.⁵ He was no less conflicted representing just one defendant than he was when he was representing all the defendants.

The case moved forward. Date certain was set for a trial in which the defendants intended to call Mr. Kouten as a fact witness. (R. p.610, line 23-p.611, line 14) In May 2017, just prior to the scheduled trial, Mr. Kouten was appointed to the Probate Court and his fellow probate judges in Charleston County were disqualified by Chief Justice Beatty from all matters related to the Shaw-Baker estate. (R. p. 303) The matter was set to proceed in October 2017.

Appellant was then faced with trying his clients' case in a county where a witness for the opposing side had been elevated to a judicial position. Further, the trial judge was set to be the same judge that had previously signed an ex parte order for that same witness in his capacity as an attorney for the defense. Filing a motion to change venue and disqualify the judge under these circumstances was not only not frivolous, it was required by Appellant's ethical duties to

³ Ironically, the defendants and Mr. Kouten went to great lengths in their attempt to thwart Plaintiff Lisa Fisher's *pro hac vice* admission in the case on the grounds that she would be a fact witness in the case. (R. pp. 167-175)

⁴ Respondents claim that Appellant's motions and appeals related to the appearance of Mr. Wills were based on some technical defect in his notice of appearance. This is also not correct.

⁵ In their post-trial motion for sanctions and their brief, Respondents characterize Mr. Kouten's ultimate withdrawal from the case as an "abundance of caution." In fact, it was the defendants who later identified Mr. Kouten as a fact witness in the Will Contest litigation, rendering him unable to proceed as an advocate at trial.

his clients. The legitimacy of Appellant's concern was starkly illustrated at the trial, where the judge advised the jury that Mr. Kouten, a likely witness in the case, was a judge. (R. p. 610, lines 23-25; p. 611, lines 15-19; p. 612, line 22-p. 613, line 15) Of course, it became unnecessary for the defendants to call Mr. Kouten to testify once the trial judge allowed the introduction of the conservatorship order into evidence, blatantly instructing the jurors on how they should decide the only factual issue left for the jury to decide. (R. p. 1200, lines 11-16) But, Appellant had no way of anticipating that at the time he moved for the recusal of the trial judge.

III. THE TRIAL JUDGE DID NOT FIND THAT APPELLANT ACTED IN BAD FAITH OR WITH FRAUDULENT INTENT AND THERE IS NO EVIDENCE OF SUCH IN THE RECORD.

In their brief, Respondents state that Appellant asserted a "bad faith, if not fraudulent" position in the Will Contest litigation. Their support for this conclusion is that "revocation would result in intestacy and, rather than the estate going to animal charities, it would go to Plaintiffs." This notion that Plaintiffs were using the court to grab Ms. Shaw-Baker's assets for themselves was repeated in the trial judge's sanctions orders. Notably, Plaintiff Lisa Fisher is not an intestate heir to the Shaw-Baker estate and would not have inherited even if the Will Contest litigation had been successful. Both Plaintiffs testified that their intent was to see that the assets were used to the benefit of charity. Furthermore, Appellant and Plaintiffs named the South Carolina Attorney General as a party to the litigation for the purpose of ensuring that the assets would be distributed to charity as they believed Ms. Shaw-Baker intended. (R. p. 101, para. 7) In fact, Plaintiffs specifically sought an order directing that assets be used for the benefit of charity when they filed their Will Contest lawsuit. (R. p.123, para. 7) If one examines the actual evidence, rather than drawing conclusions based on pure speculation, the record reveals that the sole motive of the Plaintiffs was to see that Ms. Shaw-Baker's desire for her estate to benefit charity be realized.

Appellant had a job to do: competently and zealously represent his clients within the limitations of court rules of ethics and procedure. Was it a difficult case? Yes. Were there evidentiary and procedural challenges? Yes. Did the case take a very long time? Yes. Did the jury and judge ultimately find against his clients? Yes. Are the FCPSA and Rule 11 designed to punish lawyers for pursuing cases under such circumstances? No.

CONCLUSION

The Frivolous Civil Proceedings Sanctions Act does not apply because Appellant has established a nonfrivolous basis to proceed; the criteria for violation of the Act has not been met; and, attorneys' fees and costs are not taxable to an attorney even if he was in violation of the Act. Furthermore, the conduct of Appellant was appropriate pursuant to Rule 11 under the required subjective standard, rather than an objective standard, as erroneously applied in this case. Therefore, the sanctions imposed upon Appellant should be set aside as an abuse of the discretion of the trial judge.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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