

Hopkins, Debbie

From: Jessica Crowley <jcrowleylawfirm@gmail.com>
Sent: Thursday, December 27, 2018 4:57 PM
To: Hopkins, Debbie
Cc: Barbara Seymour; W. Westbrook Wills III
Subject: Ex Parte John Hughes Cooper
Attachments: JHC Pet.pdf; ATT00001.htm

Dear Ms. Hopkins,

Please find attached Respondents' Petition for Rehearing in the matter of Fisher v. Huckabee, 2018-000662, which is being hand delivered today.

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DEC 27 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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DEC 27 2018

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.: 2018-000662

Ex Parte:
John Hughes Cooper, Appellant,

In Re:
Betty Fisher and Lisa Fisher,
Plaintiffs,

v.

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

PETITION FOR REHEARING

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-and-

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ATTORNEYS FOR RESPONDENTS

Pursuant to Rule 221, SCACR, Respondents respectfully petition the Court for a rehearing in the above-captioned appeal stating particularly the following points Respondents believe the Court overlooked or misapprehended:

I. In reversing the trial court's imposition of sanctions on John Hughes Cooper under the FCPSA and Rule 11, this Court has either misapprehended Appellant's role as counsel for Lisa and Betty Fisher or has overlooked critical facts in the Record establishing the basis for the trial court's decision to impose those sanctions.

The Frivolous Civil Proceedings Sanctions Act ("FCPSA") provides that an attorney or party *shall* be sanctioned for a frivolous claim if the court finds by a preponderance of the evidence that he *took part* in the procurement, initiation or continuation of any claim that a reasonable attorney in the same circumstances would believe that under the facts: (a) was clearly not warranted under existing law; (b) was intended merely to harass or injures the other party, or (c) would believe is frivolous, interposed merely for delay, or for purposes other than adjudication of the claim upon which the claim is based; or (d) by making frivolous arguments that a reasonable attorney would believe were not warranted under existing law. S.C. Code Ann. § 15-36-10. For a court to issue sanctions under the FCPSA, it must find that the attorney or party engaged in advancing a frivolous claim by a preponderance of the evidence. Similarly, under Rule 11, an attorney may be sanctioned for "filing a pleading, motion, or other paper in bad faith where there is not good ground to support it." Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996). Both the FCPSA and Rule 11 place the burden of reasonableness and good faith on the attorney who signs the document. Rule 11(a), SCRCF; S.C. Code Ann. § 15-36-10(A)(3).

The decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law. Holmes v. E. Cooper Cmty. Hosp., Inc., 408

S.C. 138, 167, 758 S.E.2d 483, 499 (2014). Therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the FCPSA by “taking its own view of the evidence.” *Id.* If the reviewing court agrees with the judge’s findings of fact, then the decision to award sanctions, as well as the terms of those sanctions, is viewed under an abuse of discretion standard. *Holmes*, 408 S.C. at 167, 758 S.E.2d at 499. “An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.” *Id.*

John Hughes Cooper, both as attorney for the Plaintiffs and as *pro hac vice* sponsor for Lisa Fisher, signed every pleading filed in the case, certifying that he has “read the pleading, motion or other paper; that to the best of his knowledge, information and belief there [was] good ground to support it; and that it [was] not interposed for delay.” Rule 11, SCRCP; S.C. Code Ann. § 15-36-10(A)(3). As attorney for the Plaintiffs, he advanced and continued a frivolous suit, with, as the record reflects, no good ground to support his claims. As *pro hac vice* sponsor, Appellant acted as accomplice and gateway for Lisa Fisher, who this Court found engaged in abusive litigation tactics. Judge Hughston found by a standard of “overwhelmingly clear and convincing evidence” that the actions of John Hughes Cooper violated the FCPSA and Rule 11, and the record affirms this finding. Judge Hughston’s findings that Appellant’s conduct was frivolous, and thus sanctionable, were correct and are supported by the record.

A. The record reflects that no reasonable attorney in the same circumstances would believe that the procurement, initiation or continuation of this case was warranted under existing law.

On April 27, 2009, John Hughes Cooper, acting as attorney for Betty and Lisa Fisher, filed a Verified Complaint alleging eleven causes of action contesting the May 21, 2001 Last Will and Testament of Alice Shaw-Baker (“Alice”) in which she left her entire estate to her three

best friends of over forty years. (R. p. 99). Prior to filing, Appellant was the attorney for Lisa Fisher and Alice Shaw-Baker in the related Guardianship and Conservatorship action. (R. p. 6). At the October 2017 trial, Lisa Fisher admitted she had never met Alice prior to October 2008, and 84-year-old Betty admitted she had not seen Alice since Betty was a child. Alice died on February 25, 2009, less than four months after Lisa Fisher was appointed as her Guardian and Conservator. (R. p. 251). At the time he filed the will contest Appellant had the following information:

(1) the **November 19, 2008** Order finding that Alice Shaw-Baker was incapacitated which specifically ordered that “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.” (R. p. 6-15, p. 12);

(2) the **November 20, 2008** report of L. Randolph Waid, Ph.D. finding that Alice Shaw-Baker was “experiencing dementia with comorbid psychological/ emotional difficulties” and that, among other cognitive impairments, she was not “oriented to the year, season of the year, date, day of the week, or month.” (R. p. 1253-58, p. 1255, p. 1257);

(3) each of Alice’s previous three wills, drafted by attorneys, dating back to 1993, naming the same Respondents as beneficiaries of a substantial portion of her estate. (R. p. 1212, 1220, 1224);

(4) the *original* unrevoked May 21, 2001 Last Will and Testament that was the subject of the litigation and which Appellant delivered to the probate court following Alice’s death (R. p. 1206);

(5) clear evidence of Alice Shaw-Baker’s incapacity and Appellant’s knowledge of said incapacity. (See, e.g., testimony of caregiver Denise Ferguson, R. pp. 1116-81, p. 1122, 1119-25)

("[Alice] had a white ashtray. And a lot of times she would think that was food and you would walk in the room and she would be eating cigarette butts . . . she came in the den with coffee cups on her feet and wanted to know why her shoes didn't fit.")

(6) NO evidence that Alice ever intended her entire estate to go to animal charities, or to her intestate heirs (to include Betty Fisher). A finding of intestacy was the primary prayer for relief in the Complaint.¹

This is by no means an exhaustive list, but it is sufficient to support Judge Hughston's findings that no reasonable attorney would have brought this action, under either the subjective standard required for Rule 11 violations or the objective standard required under the FCPSA.² (See, R. pp. 79-80).

B. The record reflects that Appellant made frivolous arguments that a reasonable attorney would believe were not reasonably supported by the facts or by existing law.

Appellant, acting as sole attorney for the Plaintiffs, filed the Verified Complaint contesting the Last Will and Testament of Alice Shaw-Baker and alleging eleven causes of action. (R. p. 99). After nine years of delay, several related lawsuits initiated by Appellant, and nine unsuccessful appeals, Appellant presented no evidence at trial to support any of the original causes of action save Lisa Fisher's testimony that on **January 1, 2009**, Alice Shaw-Baker revoked her will (an act prohibited by court order) by tearing up a copy, which had *never* been alleged prior to the jury trial. (R. p. 676, ll 3-22). A summary of Appellant's causes of action are as follows:

¹ At trial, it was revealed that there were additional intestate heirs who Appellant did not name as parties in this action. See, R. p. 1061, ll 3-24.

² While Appellant submitted an affidavit from an attorney attesting to the reasonableness of the lawsuit, it does not appear that that attorney was informed that there was an order prohibiting Mrs. Shaw-Baker from revoking her will as that is not addressed in the filing. (R. p. 415-17). It also appears that he was not informed or was confused as to other facts of the case.

1. Constructive Trust (R. p. 112): Plaintiffs sought a constructive trust over Alice Shaw-Baker's probate and non-probate assets "pending a determination of the validity of her various wills . . ." Appellant persisted in going to trial on this issue *after* the jury verdict determining the validity of Alice Shaw-Baker's May 21, 2001 will. (R. p. 457).
2. Declaratory Judgment Regarding Revocation (R. p. 113): Plaintiffs sought a finding of *intestacy* (which would have directed her assets to Betty Fisher and other unnamed heirs) on the basis that Alice Shaw-Baker "instructed her Conservator and Guardian, Lisa Fisher, to revoke Ms. Shaw Baker's May 21, 2001 Will." (*Id.*). The purported revocation by tearing up a copy of her will was never alleged prior to the jury trial and was the only evidence produced in support of the Complaint which began this suit.
3. Undue Influence (R. p. 113-14): The Complaint alleges that Respondents unduly influenced Alice Shaw-Baker at some point prior to the execution of the May 21, 2001 Will. At trial, the Plaintiffs testified that they had NO knowledge of Alice Shaw-Baker or her relationship with Respondents prior to her incapacity in 2008. (*see, e.g.*, R. p. 697, ll 12-25 – p. 698, ll 1-6; p. 982, ll 19-25). There was NO evidence, admitted or excluded, to support this claim. (*See, Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329 (2003) (Standard of proof in an undue influence case is "unmistakable and convincing evidence").
4. Fraud (R. p. 114-16): The Complaint alleges two inconsistent positions, used interchangeably throughout the pendency of this litigation: that Slade and Huckabee promised Alice Shaw-Baker that if she included them in her May 21, 2001 Will, they would care for her if she became unable to care for herself *and* if Alice Shaw-Baker included them in her May 21, 2001 Will, they would ensure that all of her estate went to animal charities. (R. p. 114-16). The Complaint additionally alleges that Slade and Huckabee acted neglectfully by "intentionally

conceal[ing] Ms. Shaw-Baker's condition to avoid exposure..." (R. p. 117, ¶ 111). At trial, the Plaintiffs' testimony, elicited by Appellant, was that Huckabee and Slade betrayed Alice by *reporting* her to Elder Services. (R. p. 753, p. 22-15, p. 754, ll. 1-24, p. 778, ll 9-17). Furthermore, the law is clear that a claim for fraud does not survive to the estate of a deceased individual.

5. Declaratory Judgment Regarding Improper Execution (R. p. 117): Although the May 21, 2001 Will included a self-proving affidavit, was drafted by an attorney, and all parties had an opportunity to interview the witnesses to the will prior to the trial, Appellant continued to argue Improper Execution at the jury trial, without any legal or factual basis. (R. p. 636, ll 13-25, p. 637, ll 1-5).

6. Declaratory Judgment Regarding Subsequent Will (R. p. 117): Appellant offered no evidence to support this claim. (See, e.g., Jury Trial transcript, R. pp. 594-881).

7. Unjust enrichment (R. p. 118-19) and Promissory Estoppel (R. 119-20): The Complaint alleged that Slade and Huckabee made false representations to Alice that they would care for her and give all of her estate to animal charities. Each of these claims required evidence of a promise made to Alice prior to execution of the May 21, 2001 Will. As discussed above in subsection (b)3), the Plaintiffs testified at the trial that they had no knowledge of Alice Shaw-Baker or her relationship with the Respondents prior to her incapacity in 2008. Again, there was NO evidence, admitted or excluded, to support this claim.

Of the multiple causes of action, Appellant had knowledge, through discovery and through basic review of the law and facts, that there was no evidence to support any of the claims brought at trial, save the entirely new claim that Alice Shaw-Baker had torn up a copy of her will

despite a court order expressly prohibiting revocation. The trial court found, correctly, that no reasonable attorney would have brought this action.

C. The record reflects that a reasonable attorney presented with the same circumstances would believe that the initiation and continuation of this action was frivolous, interposed merely for delay, intended to harass or injure the other party or brought for purposes other than securing adjudication of the claims.

As the trial court noted, Appellant and his clients were unsuccessful on almost every single motion and other cause of action they brought during the pendency of this nine-year litigation. (R. p. 82). At every turn, they appealed – for a total of nine unsuccessful appeals prior to the jury trial. However, the appeals process delayed final adjudication of the will contest, the very adjudication which Appellant and his clients sought. When the time finally came for trial, Appellant filed a Motion to Transfer Venue and to disqualify opposing counsel. (R. p. 286). At the hearing on the Motion to Transfer Venue, for which Appellant, not Lisa Fisher, was present, he acknowledged that he had misinterpreted the law and withdrew his motion. (R. p. 29) (“At the inception of argument, Attorney for Plaintiffs, Mr. Cooper, conceded that his original argument was without support and withdrew Plaintiffs’ motion to transfer venue...”). Then, after the court issued an order denying the motion to transfer venue, Appellant filed a motion for reconsideration. (R. p. 322) (signature by John Hughes Cooper at R. p. 328). When that was denied, the Appellant appealed, in an attempt to further delay the trial, but the appeal was dismissed as not immediately appealable. (R. p. 343).

Of particular note is the fact that John Hughes Cooper was the attorney of record in a related action alleging professional malpractice against attorney Kouten and alleging elder abuse against the Respondents, both brought as third-party actions on behalf of Alice Shaw-Baker following her death. (R. p. 143, p. 189, p. 983, ll 8-17). While the *sole* argument presented at trial in the present matter was that Alice Shaw-Baker had the requisite capacity to revoke her

will, despite a court order to the contrary, Appellant argued the complete opposite position in the related malpractice and abuse case, which is reflected in his Motion for Temporary Injunction: “[b]y late 2007, Shaw-Baker was suffering from dementia [and] her home was cluttered and not livable, and she likely lacked adequate food and proper hygiene.” (R. p. 143). As with several filings throughout the case, Appellant and NOT Lisa Fisher signed, filed and argued this particular pleading. (R. p. 17, p. 154). As Judge Hughston noted in his March 21, 2017 order, Appellant appealed the grant of the restraining order based on the unsubstantiated allegation that opposing counsel had not copied him when he sent the proposed order to the judge. (R. p. 82) (law about not copying opposing counsel).

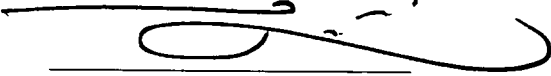
An example of his contradictory and frivolous behavior, during the bench trial, Appellant went so far as to suggest to the court that the 2008 probate court order finding Alice Shaw-Baker to be incapacitated and appointing his client, Lisa Fisher, as Guardian and Conservator should be vacated by Judge Hughston. (R. p. 961, ll 20-25, p. 962, ll 1-13). Particularly troubling is the fact that Appellant used this entirely false and unsupported information to procure an expert opinion as to attorney Kouten’s alleged malpractice based entirely on the unsupported allegation that the will was orally revoked, and that Respondents unduly influenced Alice Shaw-Baker. (R. p. 187-98, see, e.g., p. 193(12)(b), (c) and (o)). The fact that there was no evidence presented to support the claims of oral revocation or undue influence, Appellant’s allegations against Attorney Kouten and responsible are particularly vexatious.

The trial judge correctly found that Appellant’s actions were frivolous and were interposed for purposes other than securing adjudication of the claims he brought.

For the reasons above, Respondents respectfully request this Court grant a rehearing of Appellant's appeal on the points indicated herein, and reconsider its Reversal of the trial court's order of sanctions against Appellant, John Hughes Cooper.

Respectfully submitted,

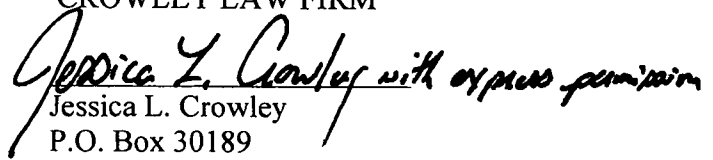
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Ex Parte:
John Hughes Cooper, Appellant,

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

v.

Bessie Huckabee, Kay Passailaigue Slade, and Sandra Byrd Respondents

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

PROOF OF SERVICE

I certify that I have served the enclosed Respondents' Petition for Rehearing by depositing a copy in the United States Mail, postage prepaid, on December 19, 2018, addressed to counsel for Appellant at her address of 1612 Marion Street, Suite 200, Columbia, SC 29201.

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