

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834
Appellate Case No. 2018-001443

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes..... Respondent,

v.

Bank of America National Association.....Appellant.

FINAL BRIEF OF APPELLANT

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INTRODUCTION

In 2015, Plaintiff Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, through his counsel of record (“Plaintiff’s Counsel” or “Counsel”), sued defendant Bank of America, N.A. (“BANA”) in federal court relating to charges associated with an insurance product. Plaintiff’s Counsel brought several claims and eventually voluntarily dismissed his fraud-based causes of action, recognizing that binding precedent barred his claims since they did not survive his mother’s death. The federal court dismissed the remainder of the claims, finding that they were barred by the applicable statute of limitations. Plaintiff’s Counsel appealed the dismissal to the Fourth Circuit, which affirmed the lower court decision, and then to the Supreme Court of the United States, which denied his petition for *writ of certiorari*.

Undeterred, Plaintiff’s Counsel sued BANA again on nearly identical allegations in the Court of Common Pleas of South Carolina. During proceedings on BANA’s Motion to Dismiss, Plaintiff’s Counsel *conceded* that his claims were destined to fail; he testified that he knew his non-fraud based claims were barred by *res judicata* on the issue of statute of limitations, and that he had not read the text of the South Carolina Unfair Trade Practices Act (“SCUTPA”) to determine whether Plaintiff could bring claims in a representative capacity.

Not surprisingly, Plaintiff’s Counsel lost again in the Court of Common Pleas, which also found that all of Plaintiff’s claims were barred by the same statute of limitations previously applied by the federal court in the prior lawsuit; that all of his claims were also barred by *res judicata*; that the fraud-based claims were barred by South Carolina’s survival statute; and that Plaintiff’s unfair trade practices claim was also barred because the plain language of the statute did not allow such claims to be brought in a representative capacity. Plaintiff’s Counsel despite conceding his claims were untenable, appealed the dismissal to this Court.

Plaintiff's Counsel's decision to proceed with claims that he conceded were barred on the basis of statute of limitations, *res judicata*, and the plain language of the germane statute violated Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the Frivolous Civil Proceedings Sanctions Act § 15-36-10 ("FCPSA"). Based on Counsel's egregious behavior, BANA filed a Motion for Sanctions on March 29, 2018, within ten days of the dismissal of Plaintiff's complaint. BANA sought to recover the mounting costs of defending against Plaintiff's frivolous claims.

The Court of Common Pleas denied the Motion for Sanctions on a procedural basis. It held that because the matter was currently pending before the South Carolina Court of Appeals, it had not yet been fully adjudicated and thus the Motion for Sanctions was both untimely and premature. The Supreme Court of South Carolina, however, has held that a motion for sanctions under Rule 11 must be filed in a timely fashion, *before* final resolution in the appellate court. Likewise, the FCPSA does not require that parties wait for a final resolution in the appellate court before filing a motion for sanctions and requires only that parties file the motion within ten days of the entry of judgment. Because BANA's Motion for Sanctions was filed within ten days after the dismissal of the Plaintiff's Complaint (and before an entry of judgment was entered), the Motion for Sanctions was timely.

In addition to being timely filed, BANA's Motion for Sanctions under Rule 11 and the FCPSA was meritorious and should have been granted. Plaintiff's Counsel actively pursued claims barred by the statute of limitations, the doctrine of *res judicata*, and the plain language of South Carolina's statutes. For these reasons, the Court of Common Pleas' denial of the Motion for Sanction based on timeliness should be reversed and remanded to the Court of Common Pleas for appropriate further proceedings.

STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Court of Common Pleas err as a matter of law in concluding that BANA's Motion for Sanctions under Rule 11 was premature and untimely? (Yes.)
- II. Did the Court of Common Pleas err as a matter of law in concluding that BANA's Motion for Sanctions under the FCPSA was premature and untimely? (Yes.)
- III. Should the Court of Common Pleas Grant BANA's Motion for Sanctions? (Yes.)

STATEMENT OF THE CASE

A. 2015: Plaintiff First Pursues Frivolous Claims Against BANA, Which Are Dismissed With Prejudice.

In 2015, Plaintiff sued BANA on behalf of his mother's estate (the "2015 Lawsuit"). Plaintiff alleged that for nine years, from 2006 into 2015, BANA charged Plaintiff's parents \$28.40 per month for an optional insurance product. (R. p. 84, ¶ 25)¹ Plaintiff alleged that each charge appeared on the Hughes' monthly bank statements, listed as "Ad Insurance" and under the name of Plaintiff's father. (*Id.*) Plaintiff's father died in 2008, and his mother passed away in 2015. (R. pp. 83, ¶14, 86, ¶32.) After learning of their passing, BANA refunded all of the charges made after Plaintiff's father's death. (R. p.85, ¶30).

In the 2015 Lawsuit, Plaintiff's Counsel brought claims for violation of the Truth in Lending Act ("TILA") and for breach of contract, fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and breach of duty of good faith and fair dealing. (*See* R. 79-108, generally.) Plaintiff's Counsel thereafter voluntarily dismissed the fraud-based claims,

¹ The 2015 Lawsuit was captioned, *Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, and all others similarly situated; JoAnne Hafter, and all others similarly situated v. Bank of America, National Association*, Civil Action No. 7:15-cv-05083-MGL in the U.S. District Court for the State of South Carolina, Spartanburg Division.

acknowledging that such claims were barred in South Carolina because they did not survive the death of his parents.² (See R. pp. 109-111.)

The United States District Court for the District of South Carolina dismissed the remaining case in 2017 and ruled that all of Plaintiff's claims were barred by the applicable one-year and three-year statutes of limitations for TILA and breach of contract, respectively. Noting that the insurance charges appeared on Ms. Hughes' monthly statements from 2006 to 2015, the court held that equitable tolling did not apply because "any argument they failed to discover the purported wrongdoing by Defendant...is bereft of any merit." (See R. p. 116.) The Fourth Circuit Court affirmed after a *de novo* review, and the Supreme Court of the United States denied Plaintiff's petition for writ of certiorari. See *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017).

B. 2017: Shortly After The 2015 Lawsuit Was Dismissed, Plaintiff Files The Nearly Identical 2017 Lawsuit In The Court Of Common Pleas Of South Carolina, Which Is Also Dismissed With Prejudice.

Not happy with the first result, Plaintiff's Counsel *again* sued BANA in 2017 in South Carolina Court of Common Pleas on behalf of his client (the "2017 Lawsuit"). (See R. pp. 16-29.) The factual allegations were nearly identical to the federal lawsuit that had been previously adjudicated to the Supreme Court level. The 2017 lawsuit included the fraud-based claims that Plaintiff's Counsel had previously voluntarily dismissed (fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts), but also included *new* claims, all of which could have been brought in the original action, all of which are based on the same allegations that had already

² BANA served Plaintiff and Counsel with a Rule 11 motion because his fraud-based claims did not survive the deaths of Plaintiff's mother. (See R. p. 296, ¶ 3.) It was only then that Plaintiff and Counsel agreed to "voluntarily" dismiss Plaintiff's clearly untenable fraud claims. Plaintiff also admitted in his opposition to BANA's motion to dismiss that breach of duty of good faith and fair dealing was not a separate cause of action. (See R. p. 153.)

been adjudicated, and all of which are admittedly barred by the statute of limitations and *res judicata*. (*Id.*) In particular, Plaintiff's Counsel asserted causes of action for violation of the South Carolina Unfair Trade Practices Act, §39-5-10 ("SCUTPA"), breach of fiduciary duty, and conversion. (*Id.*)

BANA moved to dismiss his claims on the basis that all of his claims were barred by *res judicata* and the three-year statute of limitations; the fraud-based claims were barred by binding South Carolina precedent holding that fraud claims do not survive death; and the SCUTPA claim was barred by the clear statutory language stating that such claims could not be brought in a representative capacity. (*See R. pp. 44-62.*)

At the hearing on BANA's motion to dismiss, Plaintiff's Counsel **conceded** that numerous of his claims should be dismissed on the basis of collateral estoppel and *res judicata*:

I'm inclined to concede the point [that the claims of] conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and *res judicata* analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(*R. p. 530, lines 1-16, R. p. 535, lines 12-15.*)

Plaintiff's Counsel also admitted that he failed to read the SCUTPA statute before asserting a cause of action under the act. (*R. p. 535, lines 12-21 ("As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent. And this is being brought in a represented capacity obviously.")*)

Predictably, Judge R. Keith Kelly of the Court of Common Pleas confirmed what Plaintiff's Counsel conceded and the federal court had already decided in the 2015 Lawsuit—that Plaintiff's

claims were without merit. On March 20, 2018, the court dismissed Plaintiff's action on multiple grounds, holding that: (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's SCUTPA claim was not allowed in a representative capacity; (3) all of Plaintiff's claims were barred by the doctrine of *res judicata*; and (4) all of Plaintiff's claims were also barred by the applicable statute of limitations and were not subject to equitable tolling. (See R. pp. 5-15.)

Judge Kelly stated:

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

(R. p. 8.) Likewise, Judge Kelly held that Plaintiff's claims were barred by the statute of limitations, reasoning:

In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit.

(R. p. 9.)

Plaintiff's Counsel appealed the dismissal to this Court. (See R. pp. 273-274.) However, he did not appeal the dismissal of the conversion, breach of fiduciary duty, or SCUTPA claims—

apparently conceding the lack of merit in those claims. (*See generally*, Initial Brief of Appellant, Appellate Case No. 2018-000568).

C. 2018: BANA Filed Its Motion For Sanctions To Recover Its Costs Associated With Defending Plaintiff's Frivolous Claims in the 2017 Lawsuit.

On March 29, 2018, nine days after the Court of Common Pleas' dismissal order, BANA filed a Motion for Sanctions under the FCPSA and Rule 11 to recover costs and fees incurred defending against Plaintiff's numerous frivolous claims. (R. pp. 286-294.)

At the hearing on the Motion for Sanctions, Plaintiff's Counsel did not dispute that he knowingly brought claims barred by *res judicata* and the statute of limitations. Nor did he argue that there should be a change in relevant law as to the statute of limitations and *res judicata*. Instead, he only argued that the "time is right" to "overturn previous precedent" as to the survivability exception for fraud claims and that sanctions would hurt his firm's reputation. (*See* R. p. 514, lines 3-17; R. p. 511, lines 15-17.) Plaintiff's Counsel made no substantive arguments as to why sanctions were not appropriate for the admittedly frivolous claims of conversion, breach of fiduciary duty, or violation of SCUTPA. (*See generally*, R. pp. 494-518.)

After hearing oral argument, the Court denied the Motion for Sanctions on procedural grounds as both "untimely and premature" because the case was currently pending before the South Carolina Court of Appeals and thus had "not yet been fully adjudicated."³ (R. p. 3.) BANA timely filed its Notice of Appeal with this Court on August 1, 2018. (R. pp. 490-493.)

³ The Court noted in its Order that Judge Kelly, at the hearing on BANA's motion to dismiss, had considered the "same conduct for which Defendant presently seeks sanctions" yet not granted sanctions. (R. p. 3.) This aside was not entirely correct: in fact, BANA's counsel did not *ask* for sanctions at the merits hearing. (*See* R. p. 525, line 7-12.) Equally important, the Court's denial of sanctions was on timeliness grounds, nothing else. The fact that the merits court below, in granting BANA's motion to dismiss, was not asked to grant sanctions and did not do so is irrelevant here.

STANDARD OF REVIEW

In this matter, the timing of the filing of the Motion for Sanctions is not in dispute. The Order on the Motion for Sanctions findings show that “[o]n March 29, 2018 [BANA] filed this Motion for Sanctions pursuant to SCRCF Rule 11 and S.C. Code Section 15-36-10 of the FCPSA, seeking sanctions against Plaintiff and his counsel for filing the August 15, 2017, survival action.” (R. p. 2, at ¶5). The trial court ruled on the Motion for Sanctions based on procedural grounds, deciding that the motion was “untimely and premature.” (R. p. 3, at ¶8). Accordingly, where, as here, the court made a determination of law based on an undisputed fact, the proper standard of appellate review is *de novo*. “When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.” *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (S. C. 2000); *see also Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (S.C. Ct.App. 2004)(accord). In such cases, the appellate court is “not required to defer to the circuit court’s legal conclusions.” *Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (S.C. 2006); *Goldston*, 358 S.C. at 167 (“[w]hen an appeal involves stipulated or undisputed facts ... the appellate court does not have to defer to the trial court’s findings.”); *see also In re Estate of Boynton*, 355 S.C. 299, 301–302, 584 S.E.2d 154, 155 (S.C. Ct.App.2003)(“In such cases, the appellate court owes no particular deference to the trial court’s legal conclusions.”)

Further, the court seemingly interpreted the FCPSA statute and the South Carolina Rules of Civil Procedure in finding the motion to be untimely. That “[s]tatutory interpretation is a question of law [that is also] subject to *de novo* review.” *Smith v. State*, 412 S.C. 472, 476, 772 S.E.2d 286, 289 (S.C. Ct. App. 2015), citing *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (S.C. 2010). Because the Court of Common Pleas made a determination of law (the timeliness of the Motion for Sanctions under Rule 11 and the FCPSA)

to undisputed facts, the Court is “free to review whether the trial court properly applied the law to those facts” with a *de novo* review. *WDW Props.*, 342 S.C. at 10, 535 S.E.2d at 632.

ARGUMENT

The South Carolina Supreme Court has held that motions for sanctions brought pursuant to Rule 11 must be filed in a timely fashion, before the final resolution of the appellate court. The FCPSA similarly does not require that parties delay in bringing a Motion for Sanctions until final resolution of the appellate court and provides only that a party must file its Motion for Sanctions within ten days of the entry of judgment. Thus, under South Carolina law, BANA’s Motion for Sanctions, filed within ten days of the dismissal order, was timely and ripe for consideration.

BANA’s Motion for Sanctions was further supported by the evidence and applicable law—Plaintiff’s Counsel conceded that he brought claims he knew were barred by the statute of limitations and *res judicata* (and made no argument that the law should be changed on these grounds).

For these reasons, the Court of Common Pleas’ decision to deny BANA’s Motion for Sanctions should be reversed and remanded for appropriate further proceedings.

I. BANA’S MOTION FOR SANCTIONS WAS FILED IN A TIMELY FASHION AND IS RIPE FOR CONSIDERATION.

A. The Motion For Sanctions Was Timely Pursuant To Rule 11.

The South Carolina Court of Appeals has held that motions for sanctions brought pursuant to SCRCF Rule 11 must be filed in a timely fashion and that waiting until the appeal is complete is not timely. *See* S. C. App. Ct. R. 205 (“Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.”); *see also Pee Dee Health Care, P.A. v. Estate of Thompson*, 418 S.C. 557, 571, 795 S.E.2d 40, 48 (S.C. Ct. App. 2016), *reh’g denied* (Feb. 21, 2017) (finding that Rule 11 sanctions motion was untimely when it

was filed after conclusion of the appeal).

In *Pee Dee Health Care*, the South Carolina Court of Appeals provided a thorough analysis of the appropriate timing of a Rule 11 motion for sanctions. In this case, the defendant waited until after the appellate court issued a remitter of the action before filing its Rule 11 Motion for Sanctions. 418 S.C. at 571, 795 S.E.2d at 48. The court determined that the “delay in filing the motion for sanctions until final resolution of the merits appeal” was untimely and “failed to come in line with the underlying purposes of Rule 11.” *Id.* at 570–71, 795 S.E.2d at 48. The court noted that although “[s]ome courts recognize the ability of a party to file a [Rule 11] motion for sanctions at the end of litigation or after a judgment,” it was “unable to find any authority to support the proposition that a party can wait until the entire case has finished.” *Id.* The court further explained that while it would not read any specific time limits into the rule, “a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule.” *Id.* With this reasoning, it determined that the defendant’s “delay in filing the motion for sanctions until final resolution of the merits appeal” rendered the motion untimely. *Id.*

In making its decision, the South Carolina Supreme Court relied on the Third Circuit’s discussion of the negative consequences of allowing such a delay in filing a Rule 11 motion. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988). In *Lingle*, the Third Circuit discussed the timing and purpose of Rule 11 motions, noting that “timely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter.” *Id.* at 99. The Third Circuit also stated that “concurrent resolution of the challenges to the merits and the imposition of sanctions avoids the invariable demand on two

separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions." *Id.*

Similarly here, BANA complied with the South Carolina Supreme Court's mandate by filing its motion for sanctions within "a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule." *Pee Dee Health Care*, 418 S.C. at 571, 795 S.E.2d at 46. Waiting until Plaintiff's appeal was resolved would be contrary to the court's direction and be deemed untimely under *Pee Dee Health Care*. Consequently, BANA's Motion for Sanctions was neither untimely nor premature, and thus should be heard on the merits by the Court of Common Pleas.

B. The Motion For Sanctions Was Timely Under The FCPSA.

The FCPSA, Section (A) provides that an attorney may be sanctioned for "filing a frivolous pleading, motion or document" (§15-36-10(A)(4)(a)), "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts" (§15-36-10(A)(4)(b)), or "making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law." (§15-36-10(A)(4)(c)).

The statute does not require that the parties delay in bringing the motion until final resolution of the appellate court. Instead, the South Carolina Supreme Court requires that the FCPSA motion be filed within ten days of the entry of judgement. *See Russell v. Wachovia Bank*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (S.C. 2006) (providing that "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (S.C. Ct. App. 2004) (noting that "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment").

Here, BANA filed its Motion for Sanctions on March 29, 2018, nine days after the Court

of Common Pleas entered its Order of Dismissal with prejudice of all of Plaintiff's claims on March 20, 2018, and before the Clerk entered a notice of entry of judgment.⁴ Accordingly, BANA's Motion for Sanctions was timely filed under the FCPSA. *See In re Beard*, 359 S.C. at 357.

The fact that Plaintiff's appeal was pending at the time BANA filed its Motion for Sanctions does not change this outcome. In *Holmes v. East Cooper Comty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (S.C. 2014), the court held that the trial court properly decided the defendant's motion for sanctions under the FCPSA, notwithstanding that the plaintiff's appeal was pending at the time. In *Holmes*, the plaintiff appealed the court's order dismissing her case, and a few days later, the defendant moved the trial court for sanctions pursuant to the FCPSA. *Holmes*, 408 S.C. at 148–49, 758 S.E.2d at 489. The trial court awarded sanctions under the Act, and the plaintiff appealed. *Id.* at 160, 758 S.E.2d at 489. On appeal, the plaintiff argued that the trial judge should have delayed ruling on sanctions until after her appeal of the dismissal was decided. *Id.* at 160, 758 S.E.2d at 495. The Supreme Court of South Carolina disagreed, holding that the trial court retained jurisdiction to consider the motion for sanctions despite the pending appeal of the dismissal order. *Id.* at 161, 758 S.E.2d at 496. The court reasoned that “the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion,” and thus, it was appropriate for the court to rule on the motion for sanctions.” *Id.*

Because the trial court retained jurisdiction after the filing of the Order of Dismissal, BANA properly filed its Motion with the Court of Common Pleas. Accordingly, the Court of Common Pleas' denial of BANA's Motion for Sanctions should be reversed. *See Rutland v.*

⁴ As of the date of this filing, the Clerk has not entered a notice of entry of judgment on the dismissal order.

Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (S.C. Ct. App. 2006) (“[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCF, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment.” (alteration in original)).

II. THE COURT OF COMMON PLEAS SHOULD HAVE GRANTED SANCTIONS

In addition to being timely filed, BANA’s Motion for Sanctions under Rule 11 and the FCPSA was meritorious and should have been granted.

Under Rule 11, the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, for making frivolous arguments without proper investigation, or for filing a pleading in bad faith. *See, e.g., Ex parte Gregory*, 378 S.C. 430, 437–39, 663 S.E.2d 46, 50–51 (S.C. 2008) (“Under Rule 11(a), SCRCF, a party and/or the party’s attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments . . . [or] for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it.”).

Similarly, the FCPSA states that “[a]n attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document if . . . (ii) 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. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

Here, Plaintiff’s Counsel is subject to sanctions under Rule 11 and the FCPSA because he actively pursued claims barred by the statute of limitations, the doctrine of *res judicata*, and the plain language of South Carolina’s statute.

In particular, Plaintiff's Counsel knew that all of Plaintiff's claims in this case were barred by the three-year statute of limitations, which the District Court of South Carolina and the Fourth Circuit had already applied to dismiss the 2015 Lawsuit. Unhappy with the outcome in federal court, Plaintiff simply re-filed his dismissed allegations with the Court of Common Pleas in the 2017 Lawsuit and added new claims that could have been brought in the previous action.

Indeed, Plaintiff's Counsel admitted that he "previously filed an action in...2015 based upon the same facts that establish his claim for relief" in the current action. (R. p. 255.) Thus, Counsel already knew that Plaintiff's claims were barred not only by the three-year statute of limitations, but also by *res judicata*. Counsel even admitted at the motion to dismiss hearing in the Court of Common Pleas that the claims were barred by *res judicata* and volunteered to forego the newly added claims:

I'm inclined to concede the point [that the claims of] conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and res judicata analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court – and I don't mean to try to make the Court's job easier, as I understand a dismissal is likely forthcoming. . . . So I think I would tend to agree that the conversion claim, breach of fiduciary claims are probably foreclosed and that we would forego those claims.

(R. p. 530, lines 1-16, R. p. 535, lines 12-15 (emphasis added)). At no point did Counsel raise an argument for a change in the relevant law with regard to the statute of limitations or *res judicata*.

Judge R. Keith Kelly of the Court of Common Pleas dismissed Plaintiff's action on multiple bases, including because the action was barred by the statute of limitations and *res judicata*. The court reasoned that "Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the

District Court” and thus was barred by *res judicata*. (R. p. 8.) Likewise, Judge Kelly held that all of Plaintiff’s claims were barred by the statute of limitations, explaining that in the 2015 Lawsuit, the “District Court held that Plaintiff’s claims were time-barred under a three year statute of limitations. Here, all of Plaintiff’s claims have a statute of limitations period of three years. Thus, if Plaintiff’s claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.” (R. p. 5.)

In addition to being frivolous based on *res judicata* and the statute of limitations, Plaintiff’s SCUTPA claim is also frivolous for a third reason: the plain text of the statute bars claims brought in a representative capacity. As the Court of Common Pleas noted in its Order on Motion to Dismiss, the “plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act.” (R. p. 12).

Counsel’s defense to pursuing this frivolous SCUTPA claim despite this clear language is that Counsel did not read the statute before suing BANA and seeking treble damages. Even after BANA briefed this issue in its 2017 Motion to Dismiss, Counsel still declared sanctionable ignorance at the hearing:

As to [SCUTPA], if there is – and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.

(R. p. 535, lines 12-21.)

Here, simply reading the statute that Plaintiff proceeded under would have made clear to Counsel that the SCUTPA claim was frivolous for yet another reason, and their failure to do so is sanctionable under Rule 11 and the FCPSA. *See Ex parte Gregory*, 378 S.C. at 437–39, 663 S.E.2d at 50–51 (S.C. 2008) (“[A]ppellant failed to properly investigate the matter prior to filing it, and

that the action was frivolous.”); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1372, 1373 (4th Cir. 1991) (“To be reasonable, the prefiling factual investigation must uncover some information to support the allegations in the complaint.”).

At the hearing on the Motion for Sanctions, Plaintiff’s Counsel focused only on his fraud-based claims, but offered no justification or excuse for bringing the claims for conversion and breach of fiduciary duty - claims that he knew were all barred by the statute of limitations and *res judicata*; and offered no justification or excuse for bringing the claim for violation of SCUTPA – a claim clearly barred by the plain language of the statute. Nor did Counsel argue for a change in the relevant law regarding the statute of limitations and *res judicata*. Rather than refute BANA’s argument that these claims Counsel filed were obviously and admittedly frivolous, Counsel simply noted that his reputation was at stake, stating: “[T]he reason I’m here today is because my firm’s reputation is on the line.” (R. p. 511, line 14 – R. p. 512, line 1.)

Simply put, Counsel did not address or offer a justification for bringing the claims for conversion, breach of fiduciary duty, and violation of SCUTPA because he could not. There was no justification for bringing these knowingly frivolous claims and Plaintiff’s Counsel should be sanctioned pursuant Rule 11 and the FCPSA.

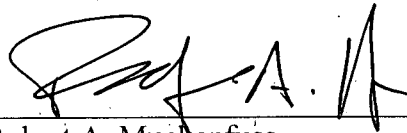
CONCLUSION

This Court should rule that the Defendant’s Motion for Sanctions was timely and remand this matter to the Court of Common Pleas for appropriate further proceedings, including the entry of appropriate sanctions, and grant any such other relief as is just and reasonable.

Respectfully submitted, December 27, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No.: 2017-CP-42-02834
Appellate Case No. 2018-001443

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SC Court of Appeals

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes..... Respondent,

v.

Bank of America National Association Appellant.

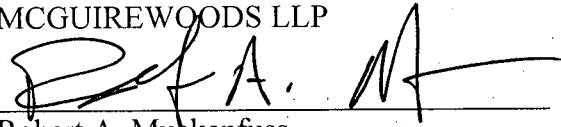
CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

December 27, 2018

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