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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

FILED-CLERK'S OFFICE
ANDERSON IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

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Gregg Battersby,

CLERK OF COURT
CIVIL ACTION NO.: 2015-CP-04-00667

Plaintiff,

v.

**ORDER GRANTING J. KIRKMAN
MOORHEAD AND KRAUSE,
MOORHEAD, & DRAISEN, P.A.'S
MOTION FOR SANCTIONS**

J. Kirkman Moorhead, Krause, Moorhead &
Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity
Company,

Defendants.

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SC Court of Appeals

THIS MATTER comes before the Court on Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A., (hereinafter referred to collectively as "Attorneys") motion for sanctions pursuant to Rule 11, SCRPC, and The South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (the "Frivolous Proceedings Act"). Attorneys bring this Motion subsequent to a July 10, 2015 order (hereinafter "Order") of this Court granting summary judgment in Attorneys favor as to all of Plaintiff's claims. After due notice, a hearing was held in this matter on October 2, 2015. Plaintiff was represented by Donald L. Smith, Esq., and Attorneys were represented by Steven M. Krause, Esq., of Krause, Moorhead, and Draisen, P.A. Having carefully considered the Order, arguments and evidence submitted by counsel, the Court grants Attorneys' Motion and sanctions the attorney for the Plaintiff under Rule 11, SCRPC. The Court does not sanction the Plaintiff as a party or find any violation of the Frivolous Proceedings Act.

As an initial matter, Plaintiff objected to the Court's jurisdiction over the sanctions motion. Plaintiff's objection came only after this Court rendered its initial decision on January 8, 2016 communicated via email to all parties, and instructed Attorneys to prepare an order

granting the motion for sanctions. In a memorandum filed on January 27, 2016, Plaintiff argued that the Attorney's post-trial motion for sanctions was filed more than ten days after the filing of the Order and therefore this Court is divested of jurisdiction. Plaintiff misunderstands the law governing the timely filing of post-trial motions. In accordance with Rule 59(e), SCRCP, "[a] motion to alter or amend the judgment shall be served not later than 10 days *after receipt of written notice of the entry of the order.*" *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). A motion for sanctions must be filed within ten days of the *notice* of entry of judgment. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006), *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002).

On January 29, 2016, Attorneys filed with the court a verified memorandum attesting that they received the Order on July 23, 2015. A true copy of the Order filed July 10, 2015 from the clerk of court stamped July 23, 2015 was included with the verified memorandum. The Motion for Sanctions was filed with the clerk of court the next day, July 24, 2015. Based upon the Attorney's representations, this Court finds that the Motion was timely filed and therefore this Court has retained jurisdiction. *See USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008)(upholding trial court's finding that a motion to reconsider was timely filed after counsel, an officer of the court bound by the ethical and professional rules of this state, informed the court that she did not receive written notice of the order until more than a month after final judgment was entered).

Turning to the merits of the Motion, under Rule 11(a), SCRCP, 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. *Runyon v. Ex parte Gregory*, 378 S.C. 430, 437-38, 663 S.E.2d 46, 50-51 (2008) citing *Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996). The party and/or attorney may also be

sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. *Id.* It is irrefutable that a lawyer owes their client zealous advocacy, but that zeal must be constrained within the bounds placed upon them as an officer of the court and under the court's rules. Specifically, Rule 11, SCRPC, expressly sets forth the outer boundaries of acceptable attorney conduct by requiring that there be good ground to support any pleading filed before the court. Thus, that rule prohibits a lawyer from asserting claims or legal positions that are not supported by fact, well-founded under existing law, or through the modification, extension, or expansion of existing law.

Plaintiff brought a complaint alleging that Attorneys are liable to Plaintiff for damages arising out of Attorneys' performance of professional activities as attorneys for a client. Plaintiff asserted seven causes of action against Attorneys. The seven causes of action are: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED"); (4) malicious prosecution; (5) conspiracy; (6) fraud; and (7) abuse of process.

At the outset of the hearing on the summary judgment motion, Plaintiff stipulated that Attorneys were entitled to summary judgment on all causes of action except civil conspiracy. (Order p. 2; Hr'g Tr. p. 16 ll. 9-19). The Plaintiff conceded that the law in this state is that an attorney is generally immune from liability to third person arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. *See Pye v. Estate of Fox*, 369 S.C. 55, 564, 633 S.E.2d 505, 509 (2006). It is apparent to this Court that Plaintiff's counsel filed the claims without researching the law on attorney immunity to determine whether the claims were viable and supported by law. Plaintiff's counsel made no argument to the contrary. This Court finds that no reasonable attorney would have brought the

Plaintiff's claims against Attorneys given the well-established case law on attorney immunity and the facts of the case.

Regarding Plaintiff's conspiracy cause of action, this Court finds that Plaintiff's claim was based upon mere suspicion without any supporting evidence. Moreover, after reviewing Plaintiff's counsel arguments in support of the conspiracy cause of action, this Court finds that counsel alleged conspiracy to "throw it against the wall and see if it sticks". The Plaintiff made several arguments in an attempt to give some cognizable basis for his conspiracy claim, none of which this court finds are supported by law or fact.

First, the Plaintiff argued to the Court at the summary judgment hearing that the Attorneys stepped out of the scope of the representation of their client when they advised their client to report possible criminal acts to the police and further advised their client to recommend to another alleged victim that she also report her own, similar encounters with the Plaintiff. More troubling, is that plaintiff's counsel also argued that an attorney is not acting in his capacity as an attorney when assisting a client filing a complaint before a state administrative agency. The Plaintiff argued that Attorneys stepped outside their role as attorneys when they assisted their client with an online complaint against Plaintiff filed with the South Carolina Department of Labor, Licensing, and Regulation because the client did not need an attorney to file the complaint nor were the Attorneys representing the client when they completed the complaint form. (Order p. 2; Summ. J. Hr'g Tr. pp. 19-20, ll. 10-2). The Court found that "there is simply no cognizable basis in law or fact to conclude these acts fall outside the scope of Attorneys' representation of Client." (Order p. 2).

Second, the Court rejected the Plaintiff's argument that Attorneys created, embellished or made up better facts to strengthen their client's claims, and therefore conspired with their client

because Attorney's would share in any judgment obtained as a result of the suit because such an allegation is contrary to well-established law. (Order p. 5). The Court found that Plaintiff presented no evidence to support its bald assertions that Attorneys made up or embellished facts to strengthen their client's case. (Order p. 6). The Court also found, that in accordance with case law, an attorney does not act outside of the scope their representation simply by collecting a fee. (Order p. 5 citing *Gaar v. Myrtle Beach Realty Co., Inc.*, 287 S.C 525, 529, 339 S.E. 2d 888 (holding that an attorney normally conducts the litigation solely in his professional capacity and he has no personal interest in the suit)). The Court then found that there is no evidence here that Attorneys had any personal interest in their representation of their client. (Order p. 5).

Third, Plaintiff argued that Attorneys violated Rule 3.3 Candor Toward the Tribunal of the South Carolina Rules of Professional Conduct and that the rule also imposed a duty on Attorney to Plaintiff. The Court dismissed Plaintiffs argument that Rule 3.3 imposed Attorneys a duty to the Plaintiff, finding that the plain language of the rule creates no such duty. (Order p. 6). The Court also found that even if a duty was owed, the Plaintiffs breached no such duty. Plaintiff alleged that Attorneys should have recognized their client was lying when she informed them that Plaintiff was wearing a robe during the incident, but then later reported to law enforcement that Plaintiff was wearing a towel. The Court found that "these are subtle difference of no material distinction, both figuratively and literally, to put Attorneys on notice that Client may be lying." *Id.* Second, the Court found that the police report which contained the allegedly different descriptions of Plaintiff's attire was not created until after Attorney's advised their client to report to the police. Therefore, the Court found that Attorneys "would not have had the benefit of the very report Plaintiff claims should have put them on notice."

Plaintiff's argument is not reasonably supported by the facts. Plaintiff counsel's theory is on its face factually implausible.

Based upon the foregoing, this Court finds that sanctions are warranted against Plaintiff's counsel under Rule 11, SCRPC. A sanction under Rule 11, SCRPC, may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. Rule 11(a), SCRPC.

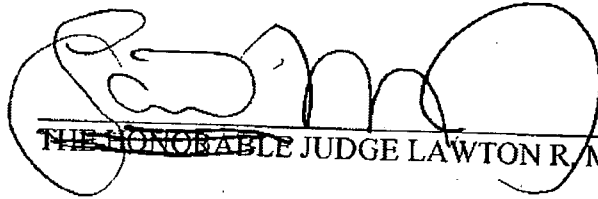
Given the facts and circumstances of this case, I am imposing as a monetary sanction which I calculate based upon the Attorneys' fees and costs for defending the underlying lawsuit and bringing this sanctions motion. Attorneys were forced to notify their malpractice carrier and retain outside counsel. Attorneys also contributed considerably to the defense of the professional association.¹ I find that counsel is responsible for the reasonable expenses, including attorney's fees. Based upon the Affidavits of Attorneys' counsel, I find that the total costs of defending this action of \$11,206.20 are reasonable. Plaintiff's counsel is required to pay to Attorneys \$11,206.20 as a monetary sanction.

¹ Attorneys did not submit and this Court did not consider any time expended by Mr. Moorhead as he is a party to this action. However, this Court notes that it could have ordered Plaintiff's counsel reimburse Attorneys for Mr. Moorhead's time because I decided to impose a monetary sanction.

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Plaintiff's counsel is ordered to pay to Attorneys \$11,206.20 for violating Rule 11, SCRPC. This amount shall be paid within thirty days of the filing date of this order.

AND IT IS SO ORDERED.



~~THE HONORABLE~~ JUDGE LAWTON R. MCINTOSH

Anderson, South Carolina

2-3, 2016

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