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
Appeals Tracking No: 2018-001443

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

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On August 15, 2017, Respondent filed a survival action on behalf of the Estate of Jane K. Hughes in the Spartanburg County Court of Common Pleas alleging fraud and other fraud-based causes of action, breach of fiduciary duty, and conversion against Appellant Bank of America National Association ("BANA"). (See R. at 16-29). The claims raised in Respondent's Complaint arose from fraudulent charges made by BANA against the account of John and Jane Hughes. In June 2006, Mr. Hughes and Mrs. Hughes opened a $120,000.00 line of credit through BANA, secured by a mortgage on their Spartanburg County home. (R. at 17, ¶ 7). Thereafter, between June 2006 and March 2015, BANA illegally withdrew monies from the Hughes's account for a mortgage insurance product that the couple expressly declined, in writing, at the loan closing. (R.

at 18, ¶ 11; 20, ¶ 23; 30-31). Each of BANA's withdrawals was for a relatively small amount, and the line-item descriptions of the transactions were ambiguous and did not identify the actual purpose of the charge. (R. at 20, ¶ 23). At the time the fraudulent transactions began, Mr. and Mrs. Hughes were 86 and 85 years old respectively. (R. at 18-19, ¶ 12).

John Hughes died in October 2008. (R. at 19, ¶ 13). Jane Hughes was then in poor health and after June 2006 suffered from, among other ailments, blindness, dementia, and impaired cognition and decisional capacity; she died June 3, 2015. (R. at 18-19, ¶ 12; 21, ¶ 29). Shortly before Mrs. Hughes passed away, in March 2015, BANA mailed a letter addressed to Mr. and Mrs. Hughes to notify the couple that the mortgage insurance plan was being cancelled, and they would no longer be charged for the product. (R. at 19, ¶ 14). BANA subsequently established that it had been charging the Hughes's account for the declined mortgage insurance in John Hughes's name, although he had been deceased for over six years. (R. at 19 ¶ 16; 32). BANA refused to refund the money withdrawn between June 2006 and October 2008 or to provide any documentation that John Hughes ever elected to receive the insurance product. (R. at 20-21, ¶¶ 22, 28).

Prior to initiating the August 2017 complaint against BANA, Respondent filed an action in the Spartanburg County Court of Common Pleas on November 16, 2015 based upon these transactions and occurrences. Respondent's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice, of the three fraud-based claims against BANA, leaving the breach of contract and TILA claims before the

District Court. The federal court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

After dismissing the fraud-based claims pending in the 2015 federal action, Respondent re-filed those claims in his 2017 Complaint because the District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina survival statute should be overturned. The question is one left to the State to decide but, because case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR. (See R. at 529: 1-25).

On December 21, 2017, in lieu of an answer, BANA moved to dismiss Respondent's 2017 Complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90 (1976), South Carolina's survival statute. On February 22, 2018, the Honorable R. Keith Kelly heard arguments by counsel for Appellant and Respondent on the Motion to Dismiss. During oral argument, BANA's counsel, Robert Muckenfuss, raised to the court his belief that the pursuit of claims under the 2017 Complaint by Respondent's counsel "lies close to a sanctionable type of circumstance" and that counsel is treading in a "dangerous area" by trying to overturn precedent. (R. at 525: 5-10, 16). The court entered an order on March 20, 2018 granting Respondent's motion, finding the actions barred by res judicata, the statute of limitations, and S.C. Code Ann. § 15-5-90. However, Judge Kelly declined to entertain BANA's allegations of sanctionable behavior, and stayed silent on the issue both at the hearing and in his Order. (See R. at 5-14, 519-538).

Respondent appealed the lower court's dismissal of his fraud-based claims, filing a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR. (See R. at 273-274). Two days later, on March 29, 2018, BANA responded by filing a Motion for Sanctions against

Respondent and his counsel, seeking more than $70,000.00 in attorneys' fees and costs. (R. at 292, ¶ 31). The parties argued the motion before Judge Knie on June 1, 2018, and the court subsequently denied BANA's motion. The court entered its Order on BANA's Motion for Sanctions on July 3, 2018 finding, in relevant part:

> 7. Plaintiff and his counsel objected to the granting of Defendant's Motion for Sanctions, arguing, in part, that the Court, when presented with the opportunity to consider the same conduct for which Defendant presently seeks sanctions on a prior occasion, declined to award sanctions against Plaintiff or his counsel. The Defendant, before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly, at the February 22, 2018, hearing on its Motion to Dismiss. Although Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against Plaintiff or his counsel at that time.
>
> 8. This matter is currently pending before the South Carolina Court of Appeals as Case Number: 2018-000568, and has not yet been fully adjudicated. Accordingly, Defendant's Motion for Sanctions is untimely and premature.

(R. at 3, ¶¶ 7-8). Following this denial, BANA filed a Notice of Appeal with this Court on August 1, 2018, initiating the present appeal. (See R. at 290-291).

STANDARD OF REVIEW

Appellant brings this appeal pursuant to Rule 203 of the South Carolina Rules of Appellate Practice from an Order issued by the lower court denying its Motion for Sanctions under Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and the Frivolous Civil Proceedings Sanctions Act ("FCPSA").

"The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity." Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct.App. 2011). In reviewing an equity matter, an appellate court reviews findings of fact by the lower court *de novo*, taking its own view of the evidence. Ex parte Gregory, 378 S.C. 430, 436–37, 663 S.E.2d 46, 50 (2008). However, if the

appellate court agrees with the lower court's factual findings, then it reviews the court's decision on whether to impose sanctions under an abuse of discretion standard. Pee Dee Health Care, P.A. v. Estate of Thompson, No. 2017-000681, 2018 WL 4101089, at *8, n.11 (S.C. Aug. 29, 2018); Se. Site Prep, LLC at 104, 713 S.E.2d at 654.

Appellant asserts that the lower court issued a decision of law based on undisputed fact and asks this Court to review that decision *de novo*. BANA Br. at 8. However, where the appellate court agrees with the trial court's factual determinations in a decision to award sanctions, it consistently applies an abuse of discretion standard if review. See Pee Dee Health Care P.A. at *8, n.11 ("If the appellate court agrees with the factual findings, then it reviews . . . for an abuse of discretion"); Se. Site Prep, LLC at 104, 713 S.E.2d at 653-654 (citing Ex parte Gregory at 438, 663 S.E.2d at 50 ("the abuse of discretion standard plays a role in the appellate review of a sanctions award")); Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court). The court will "also review an equity court's procedural rulings—such as a ruling on timeliness of a Rule 11 motion—for abuse of discretion." Pee Dee Health Care P.A. at *8, n.11; see also, Stoney v. Stoney, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 487 n.2 (2018). Under the abuse of discretion standard, the lower court's decision on whether to impose sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual conclusions. Se. Site Prep, LLC at 104, 713 S.E.2d at 654.

ARGUMENT

I. BANA FAILED TO PRESERVE THE ISSUES IT SEEKS TO RAISE ON APPEAL.

In its Order on Motion for Sanctions, the court, among other findings, determined that the motion is untimely and premature. BANA objects to this finding, arguing that its motion was timely and ripe for consideration. Specifically, BANA asks this Court to review whether the lower court erred as a matter of law in concluding that 1) BANA's Motion for Sanctions under Rule 11 was premature and untimely; and 2) BANA's Motion for Sanctions under the FCPSA was premature and untimely. BANA Br. at 3. Appellant lastly raises the third, very vague issue of "[s]hould the Court of Common Pleas grant BANA's Motion for Sanctions?" Id. Because BANA failed to preserve any of these three issues for appeal, this matter is not properly before court, and BANA's appeal is rightfully denied.

A. BANA Failed to Preserve the Issues of Timeliness Under Rule 11 and the FCPSA.

The lower court held that BANA's Motion for Sanctions was "untimely and premature" sua sponte. The record below is devoid of any argument by either party as to whether the filing was timely and/or premature; BANA cannot, and does not attempt to, establish where in its designated matters it raised the issues now before this Court. Neither in BANA's Motion for Sanctions, its Memorandum in Support thereof, nor its oral argument, does BANA even make a standard note that it timely filed the Motion for Sanctions. Fatally, before filing its Notice of Appeal, BANA did not move to alter or amend the lower court's ruling pursuant to Rule 59(e), SCRCP ("Rule 59(e)") or otherwise notify the court of its objection to the court's decision on the issue of whether BANA filed its Motion for Sanctions in an untimely and premature fashion.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial court to be preserved." Pye v. Estate of Fox, 369 S.C. 555,

564, 633 S.E.2d 505, 510 (2006). Nor may an argument be raised on appeal unless it has been presented to the lower court for its consideration. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Should a party wish to appeal an issue that was not raised and ruled upon by the lower court, it must file a motion under Rule 59(e), to alter or amend the judgment, in order to have the issue preserved. Elam v. S. Carolina Dep't of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In fact, the purpose of a Rule 59(e) motion is to ask the judge to reconsider matters contained in—or omitted from—its decision. Coward Hund Const. Co. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct.App. 1999). Then, once the issue has been raised by a Rule 59(e) motion, that issue is preserved. Id. (citing James F. Flanagan, South Carolina Civil Procedure 475 (2d ed. 1996)).

This standard applies not only to circumstances where a party raises an issue but the judge fails to enter a ruling on that issue; a party must also file a Rule 59(e) motion interposing an objection to a ruling where, as in the present case, the court rules on an issue *not* presented by the parties in order to preserve that issue for appeal. Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). "Post-trial motions are required in two primary circumstances: to preserve issues that have been raised to the trial court but not yet ruled upon or when the trial court grants relief not requested or rules on an issue never raised at trial." Elam at 29, 602 S.E.2d 782-83 (citing Hoefer Toal, et al, Appellate Practice in South Carolina 59–60 (2d ed. 2002)) (Waller, J., dissenting) (emphasis added). BANA had the opportunity to raise its objection to the lower court's ruling on timeliness through a Rule 59(e) motion and failed to do so. Because BANA never raised to the circuit court the issues and arguments now on appeal, they are not properly preserved and thus not properly presented to this Court for meaningful review. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628

S.E.2d 902, 919 (Ct. App.2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

B. BANA Failed to Preserve the Issue of "Should" BANA's Motion Be Granted?

The final issue BANA raises on appeal is whether the lower court should grant its Motion for Sanctions. This stated issue not only fails to comply with Rule 208(b)(1)(B), SCACR, requiring that the statement be "concise and direct as to each issue," but it, too, was not preserved for appeal.

As set forth above, for an issue to be preserved for appeal, it must be raised *and* ruled upon by the lower court. Pye at 564, 633 S.E.2d at 510. Now, BANA asks this Court to decide its Motion for Sanctions on the merits while contending that the circuit court denied its motion strictly on procedural grounds—timeliness. BANA Br. at 7. BANA's own brief inherently precludes it from asking this Court to issue a determination as to whether it offered a meritorious argument, as BANA claims that the lower court failed to issue a ruling on the merits. Id. Based on this contention, and because BANA did not ask the court to reconsider its decision pursuant to Rule 59(e), the question of whether BANA should prevail on the merits is not properly preserved and presented to this Court for appellate review.

Because BANA failed to protect any of the three issues it stated on appeal—none of which was both raised to and ruled upon by the lower court—by filing a Rule 59(e) motion, it failed to preserve the issues for appellate review. Therefore, BANA's arguments are not properly before this Court for consideration, for the first time, on appeal.

II. THE TWO ISSUE RULE PRECLUDES BANA'S APPEAL ON THE ISSUES OF TIMELINESS.

Even if BANA had properly preserved the stated issues on appeal relating to the timeliness of its Motion for Sanctions, those issues are nonetheless precluded under the two issue rule. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012). "'Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.'" Id. (citing Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

BANA's argument that the lower court's denial of sanctions rests solely on its finding that the motion was untimely and premature is an inaccurate representation of the findings and considerations set forth in the court's Order. BANA Br. at 7, n.3. In addition to its determination that the underlying case had not yet been fully adjudicated, the lower court relevantly included in its findings that BANA previously raised the issues for which it seeks sanctions, as well the question of sanctions, to Judge Kelly at the parties' hearing on BANA's Motion to Dismiss. (R. at 3, ¶ 7). BANA briefly mentions this finding in a footnote, deeming it an inaccurate "aside" by the lower court and irrelevant to the issues on appeal, and emphasizes that BANA did not specifically ask for sanctions at the merits hearing. BANA Br. at 7, n.3. It is BANA's contention, however, and not the lower court's finding, that is inaccurate.

BANA's argument on appeal provides that the lower 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." BANA Br. at 7, n.3. In fact, the Order does not state that Judge Kelly "had considered" the issue of sanctions, nor does it state that BANA expressly asked for sanctions at the hearing on its Motion to Dismiss. True to its modus operandi, BANA pulled this quotation out of context to better fit its narrative on appeal that the

lower court erred to its detriment. Actually, this language is pulled from the court's summary of *Respondent's argument* in its Order denying sanctions, stating that "Plaintiff and his counsel . . . argu[ed], in part, that the Court, when *presented with the opportunity to consider* the same conduct for which Defendant presently seeks sanctions on prior occasion, declined to award sanctions . . . ."[1] (R. at 3, ¶ 7) (emphasis added). BANA misrepresents the circuit court's summary as a finding of fact by the court, then attempts to discount its accuracy and relevancy to this appeal. Simultaneously, BANA turns a blind eye to the actual findings issued by the court in response to Respondent's argument that Judge Kelly's unwillingness to act on BANA's prior accusations of misconduct implies that the conduct did not warrant sanctions—notably the *only* argument by either party supported by findings of fact in the Order—stating that:

> [BANA], before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly, at the February 22, 2018 hearing on its Motion to Dismiss. Although [BANA] raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions against Plaintiff or his counsel at that time.

(R. at 3, ¶ 7).

In rewriting the circuit court's Order on its Motion for Sanctions, BANA glosses over the significance of the lower court's discussion of Respondent's argument regarding Judge Kelly's disinterest in BANA's allegations of sanctionable conduct. Significantly, this is the only argument made by either party that the lower court expounded upon in its Order. (R. at 2-3, ¶¶ 6-8). The Order briefly lists each of BANA's arguments in support of a sanctions award, without issuing factual findings or otherwise describing the factual basis for BANA's position. (R. at 2, ¶ 6). Conversely, the Order sets forth the issue of the court previously declining to award sanctions to

[1] Under both Rule 11 and the FCPSA, the court may impose sanctions upon its own motion. See Rule 11(a), SCRCP; S.C. Code Ann. § 15-36-10(B)(2).

the exclusion of Respondent's other, numerous arguments, and proceeds to make factual findings supportive of Respondent's position. (R. at 3, ¶ 7). The decision to include one, but not all, of Respondent's objections in its Order—especially in light of the court's provided factual support—indicates that the lower court assigned particular relevance to the issue, obviating the need to recount the remaining arguments he asserted. Accordingly, the Order on Motion for Sanctions fairly indicates that the lower court denied BANA's motion based, in part, on Judge Kelly's prior decision to decline to issue an award of sanctions despite having the discretion to do so after BANA raised the matter during oral argument. (See R. at 385-386).

Although BANA describes the lower court's discussion of Judge Kelly's reaction to accusations of sanctionable conduct as an "aside," its intentional inclusion in the Order implies otherwise. BANA, however, would have this Court adopt its myopic interpretation of the Order: that the lower court denied sanctions "on timeliness grounds, nothing else" and that Paragraph 7 of Order is "irrelevant." BANA Br. at 7-8, n.3. In fact, nowhere in its Order does the lower court state that its denial stemmed strictly from its finding that the Motion for Sanctions was untimely and premature, and BANA offers no basis for its conclusion that the court placed an "aside" prominently in the body of its Order. Rather than reading the order in a manner consistent with the deference due to the court, BANA chooses to disregard the language in its Order that is unfavorable to its argument. The conclusion drawn from an objective reading of the Order, however, is that the lower court denied BANA's Motion for Sanctions based on *two* considerations: 1) Judge Kelly did not impose sanctions against Respondent or his counsel when BANA previously raised the issue before him; *and* 2) the matter is pending before the Court of Appeals and has not yet been fully adjudicated. (R. at 3, ¶¶ 7-8).

Because the lower court denied BANA's Motion for Sanctions on two grounds, and BANA raised only the timeliness issue on appeal, the two issue error preservation rule bars BANA's arguments, making the lower court's deferral to Judge Kelly's inaction, whether right or wrong, the law of this case. See Atl. Coast Builders & Contractors, at 329, 730 S.E.2d at 285. Though BANA may attempt to argue that the issue of "[s]hould the Court of Common Pleas Grant BANA's Motion for Sanctions" encapsulates the issue of whether the lower court properly considered Judge Kelly's reaction to Respondent's arguments in reaching its decision, such an argument is contrived. BANA specifically represents that the court did *not* rely on this consideration in reaching its conclusion and goes so far as to say that "[t]he 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." BANA Br. at 7-8, n.3. It is thus apparent that BANA intended its final issue on appeal to consider solely the merits of its argument for sanctions—not whether the lower court erred in considering Judge Kelly's response to allegations of sanctionable conduct in reaching its decision to deny BANA's motion.

Accordingly, even had BANA properly preserved the issues stated on appeal, because it neglected to appeal the lower court's findings as they relate to Judge Kelly, that unappealed ruling becomes the law of this case for appellate purposes. BANA's arguments are therefore procedurally barred under South Carolina's longstanding two issue rule, precluding consideration of BANA's appeal.

III. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT BANA'S MOTION FOR SANCTIONS WAS PREMATURE.

Assuming, *in arguendo*, that BANA properly preserved the issues raised on appeal, and that the court denied BANA's motion entirely on the grounds that it was untimely and premature, the court's decision should nonetheless be affirmed.

A. A Finding that BANA's Motion for Sanctions Under Rule 11 was Premature Falls Within the Lower Court's Discretion and Must Be Upheld on Appeal.

In support of its position that the lower court erred as a matter of law in concluding that its Motion for Sanctions under Rule 11 was premature and untimely, BANA submits an argument based exclusively on the appellate court opinion issued in Pee Dee Health Care, P.A. v. Estate of Thompson, 418, S.C. 557, 795 S.E.2d 40 (Ct.App. 2016), in which the court determined that a defendant's delay in filing a motion for sanctions until final resolution of the plaintiff's merits appeal rendered the motion untimely. BANA Br. at 10-11. BANA likewise reasons that waiting to file its Motion for Sanctions until Respondent's merits appeal is decided would be contrary to the "South Carolina Supreme Court's mandate" set forth in Pee Dee Health Care requiring a party to file a Rule 11 motion within a reasonable time of discovering the alleged improprieties. Id. at 11. On the contrary, the South Carolina Supreme Court *reversed* the holding relied upon by BANA, and determined that, in certain circumstances, filing a Rule 11 motion after the resolution of a merits appeal *is* reasonable. Pee Dee Health Care, P.A. v. Estate of Thompson, No. 2017-000681, 2018 WL 4101089, at *9 (S.C. Aug. 29, 2018). Based on the Supreme Court's recent decision in Pee Dee Health Care, BANA cannot viably argue that the lower court abused its discretion in denying its Motion for Sanctions.

The Supreme Court, in Pee Dee Health Care, considered the question of whether a trial court abused its discretion in determining that a litigant filed a timely motion for sanctions under Rule 11 after waiting for the resolution of three pending appeals before moving for sanctions. The Supreme Court found no abuse of discretion based on several considerations: 1) whether the court maintains jurisdiction over the case; 2) timing of the motion in light of Rule 11's objectives; 3) laches; and 4) reasonableness. Id. In finding that the lower court retained jurisdiction to hear the motion for sanctions and that waiting to pursue the motion comported with the objectives of Rule

11, but did not amount to laches, the Supreme Court ultimately determined that the filing of the litigant's Rule 11 motion was timely. Id. In addition to the supporting factors offered by the moving party, the Court stated that:

> We are also persuaded by the fact Rule 11 permits a trial court to award sanctions "upon its own initiative," . . . and there is no stated restriction on when the trial court must do so. Certainly, *it would be reasonable for a trial court . . . that wishes to grant sanctions on that basis, to wait to see if its order on the merits is upheld on appeal before granting sanctions.*

Id. (emphasis added).

Likewise, in the instant case, Respondent filed an appeal challenging the merits of a lower court decision prior to BANA moving for sanctions. Respondent posed the same question considered in Pee Dee Health Care to Judge Knie during oral argument on BANA's motion for sanctions—"Suppose you sanction me, Your Honor, and then our Court of Appeals case . . . is successful"? (R. at 514: 3-9). Indeed, BANA seeks sanctions against Respondent and his counsel for filing pleadings it alleges to be frivolous, while Respondent pursues an appeal of the Order of Dismissal relied upon by BANA to support its argument. Judge Knie's reluctance to rule on the frivolity of a pleading that may be subsequently deemed viable is certainly reasonable and is consistent with the objectives of Rule 11 to streamline court dockets and facilitate court management by minimizing the amount of court resources dedicated to this matter. See Pee Dee Health Care, P.A. at *6-7. In the event that Judge Knie prematurely deemed Respondent's filings frivolous and granted an award of sanctions, and Respondent successfully appealed its claims, further litigation would inevitably ensue. In fact, the Pee Dee Health Care opinion anticipated this very situation, reasoning that a circuit court might decline to hear a sanctions motion, pending the appeal of related matters, which would arguably be stayed pursuant to Rule 241(a), SCACR. Id. at *7.

The lower court's decision not to issue a ruling on the merits of BANA's sanctions motion pending Respondent's appeal, under the factors set forth by the Supreme Court in Pee Dee Health Care, does not preclude BANA from refiling a Rule 11 motion at the conclusion of Respondent's appeal should it prevail in that action. The jurisdiction of the lower court to hear matters relating to an action does not lapse after the expiry of the ten day window to file a motion to alter or amend prescribed by Rule 59(e), SCRCP. In the case of an action appealed by a party, it is well established that the circuit court retains jurisdiction to hear matters after remittitur and take action consistent with the appellate court's ruling. Id. at *5 (citing Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct.App. 2001)). The lower court's jurisdiction to consider a Rule 11 motion is not subject to set time constraints, but continues for a period deemed fair by the lower court in light of equitable considerations. Id. at *5. The Pee Dee Health Care decision indicates that this jurisdiction continues until the timing of a Rule 11 motion would be precluded under the doctrine of laches for unreasonable and unexplained delay resulting in prejudice to an adversarial party. Id. at *8. Thus, should the final outcome of Respondent's appeal warrant reconsideration by the lower court on the issue of Rule 11 sanctions, BANA may refile its motion at that time.

In light of the South Carolina Supreme Court's opinion in Pee Dee Health Care, BANA cannot establish that the lower court abused its discretion by deciding that BANA's motion was premature in light of Respondent's pending appeal. Though the law would not have prohibited the lower court from deciding BANA's motion at the time of filing, Pee Dee Health Care indicates that a lower court may reasonably decline to issue a decision until its order on the merits is upheld on appeal. Id. at *7, 9. Thus, BANA's brief fails to viably assert that the circuit court ruling is predicated on an error of law.

B. The Lower Court Did Not Abuse Its Discretion in Concluding that BANA's Motion for Sanctions Under the FCPSA was Premature.

The circuit court likewise declined to award sanctions to BANA pursuant to its request for attorney fees and costs under FCPSA. BANA asserts that because it filed its FCPSA motion within ten days of the lower court's order dismissing Respondent's Complaint, the motion was timely, and emphasizes that the South Carolina Supreme Court requires FCPSA motions to be filed within ten days of the entry of judgment.[2] BANA Br. 11. While it is true that our courts require that a motion under certain provisions of the FCPSA be filed within ten days of a final order or judgment, BANA's motion does not fall under one of these provisions, and whether its motion under the FCPSA is premature should be determined by the same equitable considerations applied to Rule 11 motions in Pee Dee Health Care. Accordingly, as it was within the lower court's discretion to conclude that BANA's Motion for Sanctions was premature under Rule 11, the court's dismissal of BANA's FCPSA claim should likewise be upheld.

In support of its position that a FCPSA motion for sanctions must be filed within ten days of the notice of entry of judgment, BANA relies on two cases decided under a dated version of the FCPSA, Russell v. Wachovia Bank, 370 S.C. 5, 633 S.E.2d 722 (2006) and In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct.App. 2004). In In re Beard, the Court of Appeals noted that the general time limit to bring an action under a statute is three years unless the "statute imposing [the action] prescribes a different time limitation." In re Beard at 358, 597 S.E.2d at 838 (citing S.C. Code Ann. § 15–3–540 (1976)). The court determined that the language of FCPSA § 15-36-30 stating that "[t]he entitlement of the aggrieved person must be determined by the trial judge *at the*

[2] BANA notes, in error, that its motion is timely because the Clerk has yet to enter a notice of entry of judgment. BANA Br. at 12, n.4. In fact, the clerk entered its notice on March 20, 2018. (See R. at 271-272; see also, Rule 54(a), SCRCP (defining "judgment" to include any decree or order which dismisses the action as to any party)).

conclusion of a trial upon motion of the aggrieved party . . ." clearly implied a time limitation to bring motions under the Act. Id. (citing S.C. Code Ann. § 15–36-30 (Supp. 2003) (emphasis in original)). The court interpreted this language to mean that a motion under that version of the FCPSA constitutes a post-trial motion, analogous to a motion raised under Rule 59(d) or (e), SCRCP, and thus subject to the same ten day filing limitation. Id. at 357-358, 597 S.E.2d at 838. Because case law provides that a trial judge loses jurisdiction over a case when the ten day period to file post-trial motions has lapsed, the trial judge also loses jurisdiction over FCPSA motions, and therefore such motions must be filed within the ten day time frame to constitute a timely filing. Id. (citing Pitman v. Republic Leasing Co., 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct.App.2002)). Similarly applying since-repealed provisions of the FCPSA and relying on In re Beard and Pitman, the South Carolina Supreme Court opined in the Russell case that a motion for sanctions must be filed within ten days of notice of an entry of judgment. Russell at 21, 633 S.E.2d at 730.

Before the legislature substantially revised the FCPSA in 2005, § 15–36-30 of the Act provided the only mechanism under which a party could move for sanctions and established that a motion for sanctions must be determined by the trial judge at the conclusion of trial; § 15–36-40 further provided that, to prevail, a party seeking sanctions had the burden of proving that the proceedings terminated in his favor. See S.C. Code Ann. Former §§ 15-36-30 and 15-36-40; see also, 1988 Act No. 432, Section 6. Effective July 1, 2005, the legislature amended the FCPSA, repealing §§ 15-36-20 – 15-36-50 and adding substantially different provisions; the revised version of the Act governs the matter at hand. See 2005 Act No. 27, Sections 5 and 12. Of note, the revised Act, distinct from the version considered in In re Beard and Russell, contains two provisions under which a party may move for sanctions:

1) Section 15-36-10(B)(2) provides that, where an attorney violates subsection (A)(4) of the statute, upon its own motion or upon motion of a party, the court may impose any sanctions which the court considers "just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Subsection (A)(4) of the Act 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)).

2) Alternatively, Section 15-36-10(C)(1) states that "[a]t the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict" the court shall determine if a claim or defense was frivolous upon motion of the prevailing party, and shall sanction an attorney or a party if a reasonable attorney under 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" (§15-36-10(C)(1)(a)); "his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party" (§15-36-10(C)(1)(b)); or "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 proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings were based" (§15-36-10(C)(1)(c)).

Subsection (C)(1) of the current version of the FCPSA is substantially similar to the repealed § 15-36-30 in that both provisions provide for compulsory sanctions when, upon motion by a prevailing party at "the conclusion of trial," the court finds that an opposing party violated the Act. The inclusion, in subsection (C)(1), of the same "at the conclusion of trial" language contained in former § 15-36-30, implies a limitation on when a FCPSA motion may be raised under this provision. Our courts have, in fact, determined that a FCPSA motion brought pursuant to § 15-36-10(C)(1) must be brought within ten days of the notice of entry of judgment. See Pee Dee Health Care at *3-4 (South Carolina appellate courts have interpreted the FCPSA's subsection (C)(1) to require a party to file its motion for sanctions within ten days of the entry of judgment); see also, Holmes v. East Cooper Community Hosp., Inc., 408 S.C.138, 160, 758 S.E.2d 483, 489 (2014) (citing to § 15-36-10(C)(1) to support the determination that an FCPSA motion is a post-trial motion).

Thus, although Respondent does not dispute that a motion pursuant to § 15-36-10(C)(1) is a post-trial motion and must be filed within ten days of the entry of a notice of judgment, BANA does not contend that it is entitled to sanctions under this subsection of the FCPSA.[3] Rather,

[3] Although BANA's Motion for Sanctions alleged violations by Respondent and his counsel of S.C. Code Ann. § 15-36-10(C)(1), BANA does not pursue this allegation on appeal. (See R. at 292, ¶ 29). Notably, Respondent argued to the lower court against an award of sanctions under subsection (C)(1), in part, because the plain language of (C)(1) does not provide for an award of sanctions after dismissal of a case pursuant to a motion to dismiss, like the one filed by BANA; rather, a motion under subsection (C)(1) is only available "[a]t the conclusion of trial and after a verdict for or a verdict against damages has been rendered or *a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict.*" § 15-36-10(C)(1)(emphasis added); see also R. at 378-379. Ironically, BANA maintains the argument that Respondent should be sanctioned for asserting a cause of action under the South Carolina Unfair Trade Practices Act ("SCUTPA") because the statute does not provide for such claims to be brought in a representative capacity. BANA Br. at 14, 16 ("simply reading the statute that Plaintiff proceeded under would have made clear to Counsel that the SCUTPA claim was frivolous, and their failure to do so is sanctionable"). It further characterizes counsel's decision not to appeal the dismissal of the SCUTPA action as "apparently conceding the [claim's] lack of merit." Id. at 7.

BANA specifically alleges that Respondent acted in violation of § 15-36-10(A)(4)(a)(ii) for "filing a frivolous pleading . . . [that] 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." See BANA Br. at 13; S.C. Code Ann. § 15-36-10(A)(4)(a)(ii). Under the FCPSA, a motion alleging a violation of subsection (A)(4) is properly raised pursuant to subsection (B)(2) of the Act—not (C)(1). See S.C. Code Ann. § 15-36-20(B)(2). Whether a motion brought pursuant to subsection (B)(2) of the FCPSA is considered to be a post-trial motion subject to the ten day filing period is a novel issue that South Carolina courts have not yet considered. Based on the unmistakable likenesses between subsection (B)(2) and Rule 11, the absence of any statutory language limiting when a (B)(2) motion might be brought, and the Supreme Court's recent decision in Pee Dee Health Care, Respondent urges this court to conclude that BANA's Motion for Sanctions pursuant to subsection (B)(2) was not a post-trial motion subject to the ten day filing limitation, and therefore the lower court did not abuse its discretion by denying the motion as premature.

Respondent takes the position that the timeliness of a motion raised pursuant to § 15-36-10(B)(2) should be determined under the same factors applied to Rule 11 motions as set forth in the Pee Dee Health Care opinion. The amended version of the FCPSA clearly distinguishes motions brought under subsection (C)(1) from those made pursuant to subsection (B)(2), whose language markedly parallels that of Rule 11(a). Unlike sanctions imposed pursuant to subsection

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Applying BANA's rationale here to its own actions, BANA apparently concedes that its claim for sanctions under § 15-36-10(C)(1) lacks merit and unwittingly imputes frivolity to the claim, which was impermissible under the plain language of the provision.

(C)(1), which require a motion by the prevailing party, subsection (B)(2) offers that "the court, upon its own motion or motion of a party" may impose sanctions for a violation of § 15-36-10(A)(4); Rule 11 sanctions may likewise be imposed "by the court, upon motion or upon its own initiative." Also distinct from subsection (C)(1), neither Rule 11 nor subsection (B)(2) limits sanctions motions to the prevailing party. See Rule 11(a), SCRCP; S.C. Code Ann. § 15-36-10(B)(2). Rule 11 and subsection (B)(2) motions are further distinguishable from one brought pursuant to (C)(1) in that, under these provisions, a sanctions award is discretionary as opposed to the compulsory sanctions provided for in (C)(1).

Perhaps most relevant is the similarity between the FCPSA's subsection (B)(2) and Rule 11—and their departure from subsection (C)(1)—as to *when* a party can move for sanctions under each rule. The limiting "at the conclusion of trial" language contained in subsection (C)(1) is conspicuously absent from subsection (B)(2) which, like Rule 11, contains no statutorily prescribed filing limitations. See Section III(A), supra. This language within § 15-36-10(C)(1) bears a striking resemblance to the "at the conclusion of a trial" provision in since-repealed § 15-36-30—language that, per the In re Beard opinion, "clearly implies a time limitation for motions under the FCPSA" and on which the court hinged the conclusion that motions filed under the FCPSA are subject to the same ten day limitation as post-trial motions rather than the default three-year statute of limitations. See In re Beard at 358, 597 S.E.2d at 838. Since the legislature's significant revisions to the FCPSA, our courts have relied on In re Beard and its progeny to characterize motions raised under (C)(1) as post-trial motions. See Pee Dee Health Care at *3-4; see also, Holmes at 160, 758 S.E.2d at 489. However, where § 15-36-10(B)(2) does not contain any limitation comparable to the "at the conclusion of trial" language fundamental to the holding

of In re Beard, BANA's attempt to also apply the same line of cases to subsection (B)(2) motions is untenable.

In fact, as compared to subsection (C)(1), and within the context of the FCPSA in its entirety, the language of subsection (B)(2) makes apparent that the legislature, by design, did not impose limitations on when motions could be brought under the provision. In addition to drafting (B)(2) without the same limiting language included in (C)(1), the legislature repealed § 15-36-40—which placed upon a party moving under the FCPSA the burden of proving that the proceedings terminated in the party's favor—and added § 15-36-10(D). Section 15-36-10(D) provides that, before sanctions may be imposed against a party alleged to have violated (A)(4), the party has thirty days to take mitigating or corrective action, including "filing a motion to withdraw the pleading, motion, document, or argument"—actions which, procedurally speaking, must occur *before* the conclusion of trial or dismissal of the case. See S.C. Code Ann. § 15-36-10(D). Because subsection (B)(2) serves as the statutory mechanism allowing sanctions awards for violations of (A)(4), and alleged (A)(4) violations may be cured prior to the final disposition of a case, the characterization of a motion for sanctions under subsection (B)(2) of the FCPSA as a post-trial motion is irreconcilable with the language of the statute itself. Thus, BANA's contention that it was required to file its Motion for Sanctions, alleging a violation of S.C. Code Ann. § 15-36-10(A)(4)(a)(ii), within ten days of the entry of judgment, is inaccurate.

As the language of the FCPSA establishes that a motion for sanctions under subsection (B)(2) is not a post-trial motion, and in light of the unmistakable similarities between this provision and Rule 11, it stands to reason that the same factors considered by the Supreme Court in Pee Dee Health Care to determine the timeliness of a Rule 11 motion would apply to FCPSA motions raised under subsection (B)(2). Thus, for the same reasons that the lower court did not abuse its discretion

by denying BANA's Motion for Sanctions as untimely and premature under Rule 11, as described in Section III(A), supra, it did not abuse its discretion in denying BANA's request for sanctions under the FCPSA.

C. Even If This Court Reverses the Lower Court's Ruling on the Issue of Timeliness, BANA's Motion for Sanctions is Properly Denied.

BANA finally asks this Court to reverse the lower court's Order denying its Motion for Sanctions and remand the matter to be "heard on the merits by the Court of Common Pleas." See BANA Br. at 11. Yet, before remanding to the lower court, BANA asks this Court to decide the issue of "Should the Court of Common Pleas Grant BANA's Motion for Sanctions?" Not only are BANA's requests duplicative and contradictory, but it also failed to preserve this issue for appeal. See Section I(B), supra. Thus, Respondent maintains its position that this issue is not properly before the Court, but offers his response *in arguendo*.

i. BANA's own conduct should preclude an award of sanctions.

Whether attorney's fees should be awarded under Rule 11, SCRCP, or under the FCPSA, is treated as a decision in equity. Se. Site Prep, LLC at 104, 713 S.E.2d 650, 653. The trial court has discretion to award or deny sanctions under Rule 11 or the FCPSA, and will not be disturbed on appeal unless the conclusions reached by the lower court are without reasonable factual support. Ex parte Gregory at 438, 663 S.E.2d at 51.

BANA moved for sanctions against Respondent and his counsel, alleging that they violated Rules 11 and the FCPSA by filing an unviable complaint; ironically, BANA brought this motion, in part, pursuant to S.C. Code Ann. § 15-36-10(C)(1), whose plain language barred BANA's claim. See n.3, supra. Respondent raised this argument before the lower court, and BANA subsequently opted not to appeal the issue of whether the lower court "should" award sanctions under subsection (C)(1) of the FCPSA. In spite of this, BANA brazenly cites to Respondent's decision to not appeal

the dismissal of his causes of action for conversion, breach of fiduciary duty, and violation of SCUTPA as "conceding the lack of merit in those claims," and takes the stance that concession of a claim is indicative of sanctionable conduct. BANA Br. at 7, 16. Moreover, BANA seeks sanctions against Respondent for filing a cause of action under SCUPTA, where the statute disallows such actions to be brought in a representative capacity, and reiterates this argument on appeal. All the while, BANA operates with the knowledge that it similarly brought a claim for sanctions under subsection (C)(1) of the FCPSA that was clearly precluded by the plain language of the statute. Thus, per BANA's own definition, it engaged in sanctionable activity in pursuit of sanctions against Respondent and continues to do so on appeal.

Not only did BANA initiate a claim for sanctions clearly barred by statute, it continues to accuse Respondent's counsel of failing to properly investigate claims prior to filing the 2017 Complaint via this appeal, in which BANA raises unpreserved issues and applies an incorrect standard of review. Clearly, BANA failed to properly investigate the viability of its arguments before filing its Notice of Appeal. Yet, BANA audaciously appeals to this Court for a decision that the lower court "should" award sanctions against Respondent, apparently considering itself beyond reproach. Equity and principles of estoppel militate a denial of BANA's hypocritical request.

ii. Prior to BANA filing its Motion for Sanctions, the Court previously declined to impose sanctions based on BANA's allegations of misconduct by Respondent.

The FCPSA allows the court, in its discretion, to initiate an action for sanctions under S.C. Code Ann. § 15-36-10(A)(4) absent any motion by a party. See S.C. Code Ann. § 15-36-10(B)(2). Similarly, Rule 11 provides that a court may, upon its own motion, impose sanctions on a party. See Rule 11(a), SCRCP. Before BANA filed its Motion for Sanctions, during oral argument before Judge Kelly at the February 22, 2018 hearing on Defendant's Motion to Dismiss, BANA's counsel

accused Respondent and his counsel of engaging in sanctionable conduct. (R. at 525: 5-16). Attorney Robert Muckenfuss argued before the court that, although BANA had not moved for sanctions at that time, he believed that Respondent and his counsel entered "dangerous area" by re-filing fraud claims in the 2017 complaint, and their attempt to overturn precedent by through court proceedings came "close to a sanctionable type of circumstance." Id. Yet, Judge Kelly, who read both parties' briefs and heard oral argument on BANA's motion and Respondent's rebuttal, declined to entertain counsel's accusations either at the hearing or in his Order of Dismissal. The fact that the Court did not take the initiative to pursue sanctions or otherwise reprimand Respondent or his counsel, despite BANA's allegations, is telling. That BANA's in-court accusations prompted no response from the Court indicates that, perhaps, Respondent's complaint and counsel's conduct was not, in fact, as egregious as BANA would represent and did not constitute a "sanctionable type of circumstance."

The lower court considered Judge Kelly's decision to not award sanction when issuing its own denial. (R. at 3, ¶ 7). The court made no legal error in doing so. See S.C. Code Ann. § 15-36-10(E)(7) (stating that, in determining if an attorney or party violated the FCPSA, the court shall consider factors the court considers just, equitable, or appropriate under the circumstances); See also, Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (stating in an equity case, an appellate court is not required to disregard the findings of the trial judge who was in a better position to judge credibility). Although BANA chooses to pretend that the findings regarding Judge Kelly were an "aside," in fact, they establish a fair factual consideration for the denial of BANA's Motion for Sanctions. Likewise, in reaching a decision as to whether the court, on remand, should award sanctions, this Court properly considers Judge Kelly's reaction to BANA's allegations of misconduct.

iii. Respondent's counsel did not act unreasonably nor in bad faith.

In light of its own flawed filings and procedural errors, BANA's attempts to place a burden of perfection upon Respondent's counsel are untenable. Neither Rule 11 nor the FCPSA suggests that a party cannot make an error without being subject to sanctions for pursing a frivolous action or argument, and "the mere loss of a case does not subject a party . . . to a suit by the winner for sanctions. If it did, the Court System could not function." Se. Site Prep, LLC at 104, 713 S.E.2d at 653. The law does not hold a lawyer to a standard of brilliance in predicting the outcome of a case; rather, it only requires a lawyer to be competent. Id. Under Rule 11(a), [t]the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the *best of his knowledge, information and belief* there is good ground to support it; and that it is not interposed for delay. . . ." Rule 11(a), SCRCP (emphasis added). The FCPSA's language requires only that "a reasonable attorney under the same circumstances" would believe his claim was "clearly not warranted" under existing law, or that a good faith argument exists for the extension, modification, or reversal of existing law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii).

BANA advised the lower court it does not take issue with the fact that Respondent and his counsel pursued claims they believed to have merit, but that "based on res judicata, a ruling on Statute of Limitations, and a very clear fraud statute, and the South Carolina Unfair Trade Practices Act Statute, they proceeded with a 2017 case on identical claims knowing that it was, in their own words, an exercise in futility. . . ." (R. at 515: 10-19). Not only is this representation misleading, it is apparent that BANA seeks sanctions against Respondent's counsel simply because the lower court ruled in BANA's favor—not because counsel engaged in sanctionable conduct. However, counsel may not be subject to sanctions for losing a claim—such consequences would chill the

court system. Instead, BANA must show that counsel engaged in clearly unreasonable misconduct, and it cannot meet that burden.

At oral argument on BANA's Motion for Sanctions, Respondent's counsel presented to the circuit court that five attorneys—three attorneys at Mike Kelly Law Group, LLC, a fourth attorney with whom counsel regularly consults, and Respondent, who is an attorney himself—reviewed the case at issue before filing, and all five attorneys believed the case to have merit. (R. at 512: 12-17, 513: 2-9). BANA liberally pulls out of context counsel's statement that "there is controlling binding precedent on the primary issues in this case . . . [t]hat the lower court is handcuffed as to what it can do based in part on a 1941 decision . . . [a]nd so I recognize this may be at this stage in the proceeding an exercise in futility in terms of what the Court can do on fraud based claims . . . ." (R. at 528: 14-18, 529: 1-3). Counsel for respondent did *not* represent to the lower court that this proceeding is futile; he acknowledged that the circuit court cannot overturn South Carolina Supreme Court precedent and that an argument to overturn precedent before the lower court would not generate the intended relief.

Counsel advised that Respondent seeks to "challenge the state of the law through the Circuit Court and ultimately through the appellate courts" which is a necessary course of action to overturn binding case law. (R. at 529: 13-15). Respondent provided the lower court with a detailed analysis as to why this change in precedent is necessary, and reiterated the rationale in response to BANA's Motion for Sanctions. (See R. at 264-269; see also, R. at 380-383). And, despite BANA's contention that Respondent seeks this relief in light of a "very clear fraud statute," the survival statute referred to by BANA does not touch on the fraud cause of action; that fraud does not survive death is an exception based strictly on the South Carolina Supreme Court's

interpretation of that statute in 1941. See Mattison v. Palmetto State Life Ins. Co. 197 S.C. 256, 15 S.E.2d 117 (1941); see also, S.C. Code Ann. § 15-5-90 (1976).

BANA further contends that Respondent's counsel "knew" that the 2017 Complaint was barred by the doctrine of *res judicata*, ignoring the lengthy argument presented by counsel to the circuit court both in response to BANA's Motion to Dismiss and its Motion for Sanctions as to why *res judicata* does not apply to the 2017 claims. (See R. at 257-258, 262-264; see also, R. at 383-385). Respondent appealed the lower court's Order of Dismissal as it applies to the issue of *res judicata* of his fraud-based claims and maintains its position that *res judicata* does not apply to those claims. Though BANA suggests to this Court on appeal that Respondent's filing was unreasonable under *res judicata* principles, so as to warrant an award of sanctions, BANA's attorney, Robert Muckenfuss, at oral argument on BANA's motion to dismiss, admitted to the lower court that "[i]n re-filing this case, it appears to survive res judicata." (R. at 523: 10-11). Moreover, BANA's counsel, a mere day before oral argument, sent an unsolicited email to Respondent's counsel requesting a demand in an attempt to settle the case.[4] (See R. at 390-391). Counsel's attempt is inconsistent with, and serves to negate, its contention that Respondent's

[4] Although BANA, at oral argument, accused Respondent of violating Rule 408, SCRE by disclosing this communication, the rule clearly allows such evidence to be used for reasons beyond proving liability for or invalidity of a claim or its amount. See Rule 408, SCRE; see also, Ausherman v. Bank of Am. Corp., 212 F. Supp. 2d 435, 455 (D. Md. 2002)("For those who see within Evid. Rule 408 the reflection of their own ingenuity at having discovered a means to lie, threaten, or coerce with impunity to negotiate a settlement advantageous to their clients, the sanctuary they perceive is illusory.). In the instant proceeding, Respondent does not introduce BANA's request for a demand to prove the validity of claims since dismissed; rather, Respondent means to show that BANA's allegation, that Respondent's counsel filed a frivolous claim destined to be dismissed on the pleadings at the following day's proceedings, is disingenuous.

counsel knowingly filed a pleading clearly not warranted or brought in bad faith—conduct so egregious that it would entitle BANA to upwards of $70,000.00 in attorney fees and costs.

After hearing BANA's argument to the court on the doctrine of *res judicata*, and having read BANA's brief filed only two days prior, Respondent's counsel did agree to forgo the claims of breach of fiduciary duty, conversion, and SCUTPA. (R. at 535, ll. 12-20). However, agreeing to forego a claim after being advised of opposing counsel's position, and where the parties agree that the claims otherwise appear viable, does not amount to knowingly engaging in misconduct or even engaging in unreasonable conduct. In fact, the FCPSA considers withdrawal of pleadings, after being notified of an allegation that the pleading violates the statute, to be an appropriate response that a party may take before the court will impose sanctions. See S.C. Code Ann. § 15-36-10(D). Pursuant to the FCPSA, when a motion is raised under its provisions, the court is to take into account such a response in deciding whether a party has violated provisions of this section, as well as factors such as the complexity of the claims and previous violations of the section, of which Respondent's counsel has none. See S.C. Code Ann. § 15-36-10(E)-(F). In this instance, BANA moved for sanctions against Respondent's counsel *after* counsel agreed to forego certain claims in response to BANA's argument for dismissal and after the circuit court dismissed Respondent's pleadings. That Respondent cured the conduct alleged by BANA to be sanctionable before BANA moved for sanctions serves to further establish Respondent's continued efforts to act reasonably and in good faith—not in the egregious pursuit of clearly frivolous claims as BANA would have this Court believe.

iv. BANA failed to give adequate notice of its intent to seek sanctions on certain grounds.

Finally, BANA contends that, in response to its Motion for Sanctions, Respondent's counsel "did not address or offer a justification for bringing the claims for conversion, breach of

fiduciary duty, and violation of SCUTPA" and "[a]t no point did Counsel raise an argument for a change in the relevant law with regard to the statute of limitations." In fact, prior to receiving an electronic notification that BANA filed a memorandum supporting its eight-page Motion for Sanctions *the day before oral argument*, Respondent had no notice of BANA's intent to raise these issues as grounds for sanctions. (See R. at 370-371). As such, an imposition of sanctions based on these grounds would not have passed constitutional muster and would be improper.

Both the FCPSA and Rule 11, SCRCP entitle a party to notice of the conduct alleged to have constituted a violation of the rules and an explanation for the basis of the potential sanction imposed so as to have an opportunity to respond. See § 15-36-10(D); Burns v. Universal Health Servs. Inc., 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct.App. 2000) ("We hold that a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11, SCRCP"). "In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him." Id. (quoting Griffin v. Griffin, 348 N.C. 278, 500 S.E.2d 437, 438 (1998)).

In its Motion to Dismiss, BANA provided as its basis for seeking sanctions case law affirming a sanctions award "where, like here, a plaintiff pursues claims barred both by res judicata and binding legal precedent . . . ." (R. at 292, ¶ 30). BANA's Motion for Sanctions concentrated on Respondent's fraud-based claims and argument for overturning precedent barring those claims. (R. at 289-290, ¶¶ 18-22). Though it made note of Respondent's claims for breach of fiduciary duty, conversion, and violation of SCUTPA, as well as the lower court's dismissal of the action based, in part, on the statute of limitations, the detailed Motion for Sanctions offers no indication that BANA sought sanctions on these grounds, nor does it provide any basis for doing so. (See id). Because BANA specifically alleged that claims "barred by both res judicata and binding legal

precedent" are the sort of claims warranting sanctions, Respondent had notice only of BANA's intent to seek sanctions based upon its fraud-based claims, which the lower court found to be barred by *both* res judicata and binding precedent and which BANA's motion contended met both criteria.

Thus, relying on BANA's Motion for Sanctions for notice, Respondent included in its opposing argument justifications for filing its fraud-based claims, why Respondent reasonably sought to modify existing law related to these issues, and why res judicata did not bar Respondent from bringing fraud-based claims. (See generally R. at 372-389). Having no notice of BANA's intent to seek sanctions based on other grounds until one day before oral argument, Respondent did not have adequate opportunity to respond, and an award for sanctions by the court pertaining to these newly raised issues would be improper. BANA now relies on Respondent's lack of response to issues of which he had no notice for its argument that the lower court should issue an award of sanctions, and in doing so, raises a meritless appeal. BANA Br. at 13-16.

CONCLUSION

In sum, BANA asks this Court to address on appeal issues which it failed to preserve or which otherwise are precluded under South Carolina's two-issue rule. Further, BANA asks this Court to determine how the lower court should rule on remand, and in doing so relies on an attack against Respondent for failing to respond to BANA's allegations of sanctionable conduct, where BANA failed to provide notice of its intent to raise such complaints. All the while, BANA has unapologetically engaged in the very conduct for which it seeks sanctions against Respondent, and should be precluded from raising its claims through principals of equity and estoppel. Because BANA's appeal is not properly before this court, and because the lower court made no reversible error, Respondent urges this Court to deny BANA's appeal.

Respectfully Submitted,

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December 28 2018

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
Appeals Tracking No: 2018-001443

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

v.

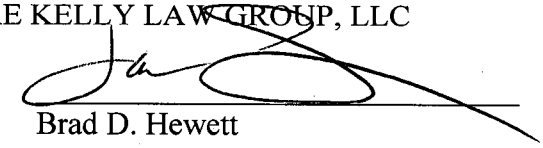
Bank of America National Association .....Appellant.

CERTIFICATE OF COUNSEL

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

December 28, 2018

MIKE KELLY LAW GROUP, LLC

By: 

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