

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie

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

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

v.

Bank of America National Association,
Appellant

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Certiorari in this matter is properly granted as: (1) there are novel questions of law; and (2) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. First, whether a motion for sanctions brought pursuant to subsection (B)(2) of the Frivolous Civil Proceedings Sanctions Act (“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. Second, the decision of the Court of Appeals that the circuit court abused its discretion in finding that BANA’s motion for sanctions was premature conflicts with *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018).

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 11, 2022.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the circuit court’s finding that Bank of America’s motion for sanctions was premature?
2. Did the Court of Appeals err in ruling that Bank of America preserved the issue of timeliness under Rule 11 and the FCPSA?
3. Did the Court of Appeals err in ruling that Bank of America’s appeal on the issue of timeliness was not precluded by the two-issue rule?

STATEMENT OF THE CASE

On August 15, 2017, Petitioner 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 Petitioner’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, Petitioner filed an action in the Spartanburg County Court of Common Pleas on November 16, 2015, based upon these transactions and occurrences. Petitioner’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, Petitioner 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, Petitioner 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 Petitioner'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 BANA and Petitioner on the Motion to Dismiss. During oral argument, BANA's counsel raised to the court his belief that the pursuit of claims under the 2017 Complaint by Petitioner'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 BANA'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).

Petitioner appealed the circuit court's dismissal of his fraud-based claims, filing a timely Notice of Appeal on March 27, 2018, pursuant to Rule 201, SCACR.¹ (See, R. at 273-274). Two days later, on March 29, 2018, BANA responded by filing a Motion for Sanctions against Petitioner and his counsel, seeking more than \$70,000.00 in attorneys' fees and costs, and alleging violations of Rule 11 and the FCPSA. (R. at 286-293). The parties argued the motion before the Honorable Grace Knie on June 1, 2018, and the court subsequently denied BANA's motion. The circuit 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 on August 1, 2018. (See, R. at 490-491).

¹ The Court of Appeals affirmed the circuit court's dismissal on September 29, 2021, regarding the survivability of fraud issue strictly on the basis of precedent (Appellate Case No. 2018-000568). Petitioner filed a Petition for Writ of Certiorari on November 16, 2021, Supreme Court Case No. 2021-001339.

The Court of Appeals reversed the circuit court's finding that BANA's motion for sanctions was untimely and premature, ruling that that the circuit court abused its discretion in finding that it could not consider a motion for sanctions before the conclusion of Petitioner's appeal. The Court of Appeals ruled that BANA preserved the issue of timeliness for appeal, and further ruled that the appeal was not precluded by the two-issue rule. However, the Court of Appeals held that BANA had abandoned its argument for sanctions under Section 15-36-10(C) of the FCPSA in the appeal.

The Court of Appeals denied Petitioner's Petition for Rehearing in an Order dated January 11, 2022. Petitioner seeks a Writ of Certiorari to review the rulings by the Court of Appeals that the circuit court abused its discretion in finding that it would not consider a motion for sanctions before the conclusion of Petitioner's appeal, that BANA preserved the issue of timeliness, and that the two-issue rule does not preclude BANA's appeal.

ARGUMENTS

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

The Court should grant this Petition for Writ of Certiorari because the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. The circuit court's decision that BANA's Motion for Sanctions under Rule 11, SCRCP, and Section 15-31-10(A) of the FCPSA was premature and untimely was reasonably based, fell within the discretion of the circuit court, and did not rise to an abuse of discretion on the facts of this case as a matter of law. The decision of the Court of Appeals conflicts with the holding of *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018) (circuit court did not abuse its discretion in declining to award sanctions before the appeal was decided).

A. *The decision of the Court of Appeals conflicts with Pee Dee Health Care, P.A. v. Estate of Thompson as the circuit court acted within its discretion in finding that BANA's motion for sanctions under Rule 11 was premature.*

The circuit court, in concluding that BANA's Motion for Sanctions was premature, did so under its discretionary authority to make such a determination, thus presenting this Court with review under the abuse of discretion standard. An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citing *Father v. South Carolina Dep't of Soc. Servs.*, 353 S.C. 254 (2003)). It is settled in South Carolina that where "the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Id.*; see also *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996)) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court).

This 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 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 circuit 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 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).

The Court in *Pee Dee Health Care* ultimately concluded that there was not an abuse of discretion in the trial court’s determination of reasonableness concerning the timing of the motion for sanctions, finding that policy considerations espoused in the majority opinion “weigh heavily in favor of allowing a party to delay filing a Rule 11 sanctions motion.” *Id.* 424 S.C. at 541, 818 S.E.2d at 769.

Likewise, in the instant case, Petitioner filed an appeal challenging the merits of a circuit court decision prior to BANA moving for sanctions. Indeed, BANA seeks sanctions against Petitioner and his counsel for filing pleadings it alleges to be frivolous, while Petitioner is actively appealing the Order of Dismissal relied upon by BANA to support its argument. The circuit court’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. *Id.*, 424 S.C. at 533, 818 S.E.2d at 765.

In the event that the circuit court prematurely deemed Petitioner’s filings frivolous and granted an award of sanctions, and Petitioner succeeds in its appeal of the dismissal, further litigation would inevitably ensue. The Court in *Pee Dee Health Care* 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.*, 424 S.C. at 538, 818 S.E.2d at 768.

The circuit court's decision not to issue a ruling on the merits of BANA's sanctions motion pending Petitioner's appeal, under the factors set forth by the Supreme Court in *Pee Dee Health Care*, does not preclude BANA from refileing a Rule 11 motion at the conclusion of Petitioner's appeal. The jurisdiction of the circuit 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), SCRCF. 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.*, 424 S.C. at 531-532, 818 S.E.2d at 764, (citing *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001)). The circuit 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.*

The Court in *Pee Dee Health Care* reasoned that the circuit court is entitled to consider "all relevant circumstances in the context of the litigation" when determining the timeliness of a motion for sanctions. *Id.*, 242 S.C. at 537, 818 S.E.2d at 767. Thus, the holding in *Pee Dee Health Care* ratified a circuit court's decision to abstain from issuing sanctions during the pendency of an appeal.

As the Court of Appeals correctly noted, there is an absence of authority in which South Carolina courts have considered sanctions solely under subsection (A) of the post-2005 FCPSA. In reversing the circuit court, the Court of Appeals acknowledged that its holding can leave circuit courts in an awkward position. Given such awkwardness, the rulings in *Ex parte Gregory* and *Pee Dee Health Care*, and the absence of any authority on subsection (A) of the FCPSA, there is no basis for a conclusion that the circuit court abused its discretion in declining to award sanctions. To the contrary, the circuit court's decision is well within the guard rails of controlling law.

Thus, because no abuse of discretion occurred here, application of the proper standard is critical, if not dispositive. The ruling by the Court of Appeals conflicts with the holding of *Pee Dee Health Care* and *Ex parte Gregory*, which establish that the circuit court did not abuse its discretion.

B. The circuit court did not abuse its discretion in finding 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. While 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 circuit 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.

Subsection (A)(4) of the FCPSA 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)). BANA contends that Petitioner acted in violation of § 15-36-10(A)(4)(a)(ii) for filing a frivolous pleading. Under the FCPSA, a motion alleging a violation of subsection (A)(4) is properly raised pursuant to subsection (B)(2) of the Act. *See* S.C. Code Ann. § 15-36-20(B)(2). 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).

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. The Court of Appeals acknowledged the lack of any authority in which South Carolina courts had considered sanctions solely under subsection (A) of the current FCPSA. Despite the lack of authority and the holding in *Pee Dee Health Care* allowing the circuit court the discretion in denying a motion for sanctions as premature, the Court of Appeals nevertheless found that the circuit court erred. This decision was in error and squarely conflicts with the *Pee Dee Health Care* decision.

Unlike sanctions imposed pursuant to subsection (C)(1) of the FCPSA, 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), SCRCPP; S.C. Code Ann. § 15-36-10(B)(2). Rule 11 and subsection (B)(2) motions are 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. 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.

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

II. BANA FAILED TO PRESERVE THE ISSUE OF TIMELINESS UNDER RULE 11 AND THE FCPSA.

The circuit court, sua sponte, determined that BANA's motion are untimely and premature. In its appeal, BANA argued that the circuit court erred as a matter of law in concluding that the Motion for Sanctions under Rule 11 and the FCPSA was premature and untimely. However, BANA failed to preserve the issue of timeliness and its appeal should have been denied.

The record is devoid of any argument by either party as to whether the filing was timely or premature. BANA cannot establish where it raised the issues of timeliness that were ruled on by the Court of Appeals. Neither in the 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.

Critically, the Court of Appeals' conclusion that a vague reference in a footnote is sufficient to "present" an issue for consideration by a trial court, undermines the standard for preserving an issue for appeal.² This nebulous footnote did not serve to inform the circuit court about the issue of timeliness.

"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,

² In the subject footnote, BANA stated only that "This court retains jurisdiction to consider BANA's Motion for Sanctions despite Plaintiff appealing this Court's Order on BANA's Motion to Dismiss." (R. at 335, n. 2) (citations to rule and case law omitted).

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 to circumstances where a party raises an issue but the judge fails to enter a ruling on that issue, and also requires a party to 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 Hoefler 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 circuit 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 presented on appeal, they were not properly preserved for appellate 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.”).

BANA failed to submit even the bare minimum of what was required to preserve its appeal by neglecting to raise the issue of timeliness in its Motion for Sanctions, Memorandum in Support of Motion for Sanctions, or at the hearing before the circuit court. BANA then had yet another opportunity to raise its objection to the circuit court’s ruling on timeliness through a Rule 59(e)

motion, but yet again failed to raise the issue. Allowing a sophisticated litigant like BANA to redefine the standard for “issue preservation” to a mere mention of a general topic in a footnote risks the unraveling of long existing standards.

BANA, as the losing party, was required to first try to convince the circuit court that it ruled wrongly. *See, I’On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The record is devoid of any attempt by BANA to present the issues and arguments of timeliness to the circuit court. The inclusion of a footnote vaguely referencing jurisdiction is not the equivalent of addressing the issue of timeliness and cannot suffice as satisfying the existing standards of issue preservation.

BANA undeniably failed to raise the issue of timeliness at any point to the circuit court, and a passing footnote about jurisdiction cannot salvage preservation of the issue. The Court of Appeals erred in finding that BANA preserved the issues of timeliness under Rule 11 and the FCPSA.

III. THE TWO-ISSUE RULE PRECLUDES BANA’S APPEAL ON THE ISSUE 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)).

“A respondent ‘may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.’” *See, Jones v. Lott*, 387 S.C. at 346-347, 692 S.E.2d at 904 (citing *I’On v.*

Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); *see also* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

An objective reading of the circuit court’s Order denying BANA’s Motion for Sanctions indicates that the denial was based, in part, on Judge R. Keith Kelly’s decision not to award sanctions at the hearing on February 22, 2018. The circuit court found that BANA, “before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly”, and that “[a]lthough Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions....” (R. at 3; ¶ 7).

The record establishes that the circuit court specifically found that Judge Kelly had previously considered the same issues raised by BANA but declined to impose sanctions. Rule 11’s allowance for a trial court to award sanctions upon its own initiative in combination with Judge Kelly’s refusal after considering the same issues further supports that the circuit court’s denial of BANA’s motion was based, in part, on Judge Kelly’s prior decision. There is a ground for the circuit court’s decision declining to award sanctions from which no appeal was taken. Thus, the two issue error preservation rule bars BANA’s arguments.

The decision to include one, but not all, of Petitioner’s objections in its Order—especially in light of the court’s provided factual support—indicates that the circuit court assigned particular relevance to the issue, obviating the need to recount the remaining arguments. Accordingly, the Order on Motion for Sanctions fairly indicates that the circuit 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. pp. 385-386, 525-526).

Because the circuit 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 circuit court's deferral to Judge Kelly's inaction, whether right or wrong, the law of this case.

In sum, even had BANA properly preserved the issues stated on appeal, because it neglected to appeal the circuit court's findings as they relate to Judge Kelly, that unappealed ruling became 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. The Court of Appeals erred in finding that BANA's appeal on the issues of timeliness were not precluded by the two-issue rule.

CONCLUSION

Based on the foregoing, Petitioner requests the Court grant the Petition for a Writ of Certiorari.

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