

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

Supreme Court Case No. 2022-000079
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.....Respondent.

**RESPONDENT'S RETURN TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

McGUIREWOODS LLP

Robert A. Muckenfuss
(S.C. Bar No. 13903)
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 343-2052
Fax: (704) 444-8707
RMuckenfuss@mcguirewoods.com

Elizabeth Z. Timmermans
(S.C. Bar No. 100288)
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
Telephone: (919) 755-6576
Fax: (919) 755-6595
EZTimmermans@mcguirewoods.com

Attorneys for Respondent

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INTRODUCTION

Phillip Hughes (“Petitioner”) brings his petition for writ of certiorari (the “Petition”), asking this Court to reverse the South Carolina Court of Appeals’ (the “Court of Appeals”) decision with respect to Bank of America, N.A.’s (“BANA”) Motion for Sanctions. The Court of Appeals correctly found that the Court of Common Pleas (the “Circuit Court”) abused its discretion in holding that it could not consider BANA’s Motion for Sanctions prior to resolution of Petitioner’s appeal of the Circuit Court’s dismissal of his complaint (the “Merits Appeal”). Similarly, the Court of Appeals did not err in finding that BANA preserved the issue of timeliness and that the two-issue rule did not prohibit BANA from raising its timeliness arguments. None of those questions warrants the extraordinary relief of certiorari review. Accordingly, the Petition should be denied.

In 2015, Petitioner, through his counsel of record (“Petitioner’s Counsel” or “Counsel”), proceeded in federal court with claims for fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and violation of the Truth in Lending Act (“TILA”) against BANA on behalf of his mother’s estate, alleging that Petitioner’s parents were charged for an insurance product they did not request when they opened a line of credit with BANA in 2006. Petitioner voluntarily dismissed his fraud-based causes of action, recognizing that 40 years of binding precedent from this Court established that those claims did not survive his mother’s death, and the federal court dismissed the remainder of the claims as time-barred. The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court’s decision, and the Supreme Court of the United States denied certiorari.

Undeterred, Petitioner again sued BANA through the same Counsel in 2017 on nearly identical claims in the Circuit Court despite Petitioner’s previous concession that the fraud-based claims were barred by South Carolina’s survival statute. In a subsequent hearing on the claims,

Petitioner's Counsel conceded that dismissal was "forthcoming" based on that statute and the doctrine of *res judicata*, and further acknowledged that the plain text of the South Carolina Unfair Trade Practices Act ("SCUTPA") may preclude claims from being brought in a representative capacity. The Circuit Court promptly dismissed all of the claims on those conceded grounds and under the same three-year statute of limitations applied by the federal court in the 2015 lawsuit. The Court of Appeals affirmed the dismissal, finding all of the claims were barred by South Carolina's survival statute. Petitioner, through Counsel, filed a petition for writ of certiorari with this Court (Case No. 2021-001339) requesting review of the lower courts' dismissal of Petitioner's claims. That petition remains pending before this Court.

In light of Petitioner and Counsel's egregious behavior, BANA timely filed a Motion for Sanctions in the Circuit Court within ten days of the Circuit Court's dismissal of Petitioner's complaint. BANA explained that Petitioner and his Counsel's decision to proceed with claims that Counsel conceded were barred by precedent of this Court and the doctrine of *res judicata*, as well as his admission that he did not know whether an estate could pursue a SCUTPA claim under the plain language of the SCUTPA violated Rule 11 of the South Carolina Rules of Civil Procedure ("Rule 11") and South Carolina's Frivolous Civil Proceedings Sanctions Act ("FCPSA"), S.C. Code Ann. § 15-36-10 *et seq.* BANA sought to recover the mounting costs of defending against Petitioner's frivolous claims.

The Circuit Court denied the Motion for Sanctions in a three-page order, reasoning that because the Merits Appeal remained pending, the Motion for Sanctions was "untimely and premature." But the Court of Appeals reversed, explaining that "a circuit court at least has the authority to issue sanctions . . . within ten days after the entry of judgment," and remanded the Motion for Sanctions to determine whether sanctions would be appropriate. The Court of Appeals

subsequently denied Petitioner's Petition for Rehearing. Petitioner now seeks this Court's review of the Court of Appeals' decision.

This case does not satisfy any of the factors found in Rule 242(b) of the South Carolina Appellate Court Rules ("SCACR"). The Court of Appeals correctly determined that the Circuit Court abused its discretion in ruling that BANA's Motion for Sanctions under the FCPSA and Rule 11 was untimely and premature. Although Petitioner paradoxically argues that the Court of Appeals' ruling is simultaneously foreclosed by this Court's precedent *and* presents novel questions that South Carolina courts have not previously addressed, neither assertion has merit. This Court's precedent establishes that a circuit court can consider a request for sanctions under the FCPSA and Rule 11 filed within ten days from the entry of judgment, even while an appeal of the underlying judgment is pending. And the Court of Appeals' application of that precedent provides no basis for the extraordinary relief that Petitioner seeks. Moreover, while Petitioner also seeks review of the Court of Appeals' rulings on forfeiture and application of the two-issue rule, he does not even contend that the Court of Appeals' case-specific, fact-bound application of those well-settled doctrines presents any novel legal issues that might warrant this Court's review.

COUNTER-QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding that the Circuit Court abused its discretion in ruling that BANA's motion for sanctions was untimely and premature under the FCPSA and Rule 11? (No.)
- II. Did the Court of Appeals err in ruling that BANA preserved the issue of timeliness for appeal? (No.)
- III. Did the Court of Appeals err in ruling that the two-issue rule does not preclude BANA's appeal on the issue of timeliness? (No.)

STATEMENT OF THE CASE

A. Petitioner’s First Lawsuit Against BANA

In 2015, Petitioner sued BANA on behalf of his mother’s estate (the “2015 Lawsuit”). Petitioner alleged that, from 2006 to 2015, BANA charged Petitioner’s parents \$28.40 per month for an insurance product that they did not request. (R. pp. 84–85, ¶ 25.)¹ Petitioner alleged that each charge appeared on the Hugheses’ monthly bank statements, listed as “Ad Insurance” and under the name of Petitioner’s father. (*Id.*) Petitioner’s father died in 2008, and his mother passed away in 2015. (R. p. 83, ¶ 14; R. p. 86, ¶ 32.) After learning of their passing, BANA refunded all of the charges made after Petitioner’s father’s death. (R. p. 85, ¶ 30.)

In a Third Amended Complaint filed in the United States District Court for the District of South Carolina, Petitioner alleged that the insurance charges amounted to fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and violation of the TILA. (R. pp. 89–96.) After BANA served Petitioner and Counsel with a Rule 11 motion because Petitioner’s fraud-based claims plainly did not survive the death of Petitioner’s parents (*see* R. p. 287, ¶ 4), Petitioner dismissed the fraud-based claims.² (*See* R. pp. 110–11.) The United States District Court for the District of South Carolina dismissed the remaining case in 2017, ruling that Petitioner’s remaining claims were barred by the applicable one- and three-year statutes of limitations for TILA and breach of contract claims, respectively. (R. pp. 113–17.) Noting that the insurance charges appeared on the Hugheses’ monthly statements from 2006 to 2015, the federal court held that equitable tolling did

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

² Petitioner also admitted in his opposition to BANA’s motion to dismiss that breach of duty of good faith and fair dealing was not a separate cause of action. (*See* R. p. 153.)

not apply because “any argument they failed to discover the purported wrongdoing by Defendant . . . is bereft of any merit.” (R. p. 116.)

The Fourth Circuit affirmed after a *de novo* review, and the Supreme Court of the United States denied Petitioner’s petition for writ of certiorari. *See Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n*, 697 F. App’x 191, 193 (4th Cir. 2017); *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n*, 138 S. Ct. 935, 200 L. Ed. 2d 204 (2018).

B. Petitioner’s Second Lawsuit Against BANA

Petitioner *again* sued BANA in 2017 in the South Carolina Court of Common Pleas on behalf of his mother’s estate (the “2017 Lawsuit”). (*See* R. pp. 16–29.) In Petitioner’s complaint, Petitioner made factual allegations that were nearly identical to the federal lawsuit that had already been adjudicated (*compare id. with* R. pp. 81–87) and included the same fraud-based claims that Petitioner had previously voluntarily dismissed (fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts). (*See* R. pp. 21–29.) The complaint also included several new claims for violation of the SCUTPA, breach of fiduciary duty, and conversion. (*Id.*) But each of those claims were based on the same allegations that had already been adjudicated and each could have been brought in the original action. (*Compare* R. pp. 16–29 *with* R. pp. 81–91.)

At the hearing on BANA’s motion to dismiss, Petitioner’s Counsel conceded his case. In particular, Counsel conceded that some of Petitioner’s claims should be dismissed on the basis of collateral estoppel and *res judicata*.³ He admitted that “it may be clear” in the SCUTPA statute

³ “I’m inclined to concede the point [that the claims of] conversion and breach of fiduciary duty, that they may be barred by collateral estoppel and *res judicata* analysis. I would tend to perhaps agree, but the crux of this case is to challenge the state of the law on the fraud claims. And so even if the Court—and I don’t mean to try to make the Court’s job easier, as I understand a dismissal is likely forthcoming. . . . So I think I would tend to agree that the conversion claim, [and] breach of fiduciary duty claims are probably foreclosed and that we would forego those claims.” (R. p. 530, lines 1–9; R. p. 535, lines 12–15.)

that Petitioner’s SCUTPA claim could not proceed.⁴ And Counsel again acknowledged that the fraud-based claims were precluded by this Court’s precedent, stating that “the crux of this case is to challenge the state of the law on the fraud claims.” (R. p. 530, lines 5–6.)

Unsurprisingly, Judge R. Keith Kelly of the Court of Common Pleas confirmed what Petitioner’s Counsel conceded and the federal court had already decided in the 2015 Lawsuit—that Petitioner’s claims were without merit. On March 20, 2018, the court dismissed Petitioner’s action, holding that: (1) Petitioner’s fraud-based claims did not survive the death of Petitioner’s parents; (2) Petitioner’s SCUTPA claim was not allowed in a representative capacity; (3) all of Petitioner’s claims were barred by the doctrine of *res judicata*; and (4) all of Petitioner’s claims were also barred by the applicable statute of limitations and were not subject to equitable tolling. (See R. pp. 5–15.)

Petitioner appealed the dismissal of the fraud-based claims (R. pp. 273–74), but not the dismissal of the conversion, breach of fiduciary duty, or SCUTPA claims—apparently recognizing the lack of merit of those claims. See generally Appellant’s Br., Appellate Case No. 2018-000568. The Court of Appeals affirmed, finding that the Circuit Court “properly dismissed the action based on the state’s fraud statute,” and denied a petition for rehearing. *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n*, No. 2018-000568, 2021 WL 4449593, at *2 (S.C. Ct. App. Sept. 29, 2021), *reh’g denied* (Oct. 20, 2021). In November 2021, Petitioner filed a petition for a writ of certiorari, seeking this Court’s review of the dismissal of Petitioner’s fraud-based claims. (See Pet. for Writ of Cert., Case No. 2021-001339.) That petition remains pending.

⁴ “As to [the SCUTPA claim], if there is—and I may have just missed this in the research. And it may be clear in the legislation. If there’s a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there’s controlling precedent. And this is being brought in a represented capacity obviously.” (R. p. 535, lines 15–21)

C. BANA's Motion For Sanctions To Recover Costs of Defending Against Petitioner's Frivolous Claims in the Second Lawsuit

Meanwhile, nine days after the Circuit Court entered its order dismissing Petitioner's claims in the second suit, BANA filed a Motion for Sanctions under the FCPSA and Rule 11 to recover costs and fees it incurred defending against Petitioner's frivolous claims. (R. pp. 286–94.) On July 3, 2018, the Circuit Court denied the Motion on procedural grounds, relying on the merits proceedings underway in the Court of Appeals: “This matter is currently pending before the South Carolina Court of Appeals . . . and has not yet been fully adjudicated. Accordingly, [BANA]'s Motion for Sanctions is untimely and premature.” (R. p. 3.)

The Court of Appeals reversed. *See Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, No. 2018-001443, 2021 WL 4770165 (S.C. Ct. App. Oct. 13, 2021), *reh'g denied* (Jan. 11, 2022). The court first rejected Petitioner's argument that BANA had forfeited its argument that the Motion for Sanctions was timely, noting that BANA had asserted the timeliness of its Motion before the Circuit Court in its Memorandum in Support of Motion for Sanctions. *Id.* at *4–5. The Court of Appeals further rejected Petitioner's argument that the two-issue rule prohibited BANA from raising the issue of timeliness on appeal, finding that the pendency of Petitioner's Merits Appeal was the only ground for the Circuit Court's decision. *Id.* at *5. Finally, the Court of Appeals found that the Circuit Court abused its discretion in concluding that it could not consider a motion for sanctions before final resolution of Petitioner's Merits Appeal. *Id.* at *7–9. Based on these findings, the Court of Appeals remanded BANA's Motion for Sanctions for a determination on the merits. *Id.* at *9.

On January 11, 2022, the Court of Appeals denied Petitioner's Petition for Rehearing and this Petition followed.

ARGUMENT

“A writ of certiorari is an extraordinary form of relief[,] . . . reserved for extraordinary situations or circumstances, and is granted sparingly” and only in the absence of other effective relief. *Rowe v. City of W. Columbia*, 334 S.C. 400, 407, 513 S.E.2d 379, 383 (Ct. App. 1999); *see also In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998) (noting that this Court “will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal”). Petitioner principally urges this Court to grant review of the Circuit Court’s finding that it could not consider BANA’s Motion for Sanctions prior to resolution of the Merits Appeal. But well-settled South Carolina precedent provides that a circuit court can consider a party’s FCPSA and Rule 11 motion for sanctions when filed within ten days from the entry of judgment, even while an appeal of that judgment is pending. The Court of Appeals’ application of that well-settled precedent in this case does not present any extraordinary circumstances that would warrant this Court’s further review.

Petitioner also renews his contentions that BANA’s appeal of the Circuit Court’s order on the Motion for Sanctions was barred by forfeiture and the two-issue rule. But the Court of Appeals correctly applied those South Carolina procedural rules to determine that the issue of timeliness was preserved for appeal and that the two-issue rule does not preclude BANA from raising the issue of timeliness on appeal. Those fact-bound, case-specific determinations similarly present no extraordinary circumstance for the issuance of a writ of certiorari. Accordingly, the Petition should be denied.

I. THE COURT OF APPEALS’ RESOLUTION OF THE TIMELINESS OF BANA’S MOTION FOR SANCTIONS DOES NOT WARRANT FURTHER REVIEW

Petitioner principally contends that the Court should issue a writ of certiorari to consider whether the Circuit Court abused its discretion in determining that BANA’s Motion for Sanctions

was untimely and premature. When deciding whether to grant a petition for writ of certiorari, this Court typically considers: (1) whether the case involves novel questions of law; (2) whether there was a dissent in the Court of Appeals' decision; (3) whether the Court of Appeals' decision conflicts with a prior decision of this Court; (4) whether substantial constitutional issues are involved; and (5) whether the decision of the Court of Appeals conflicts with a decision of the Supreme Court of the United States related to a federal question. SCACR, Rule 242(b). None of those factors supports issuing a writ of certiorari here. The Court of Appeals relied on well-established South Carolina precedent to unanimously hold that a circuit court can consider a motion for sanctions under the FCPSA and Rule 11 filed within ten days from the entry of judgment, even while an appeal is pending, and that parties are not required to delay in bringing a motion for sanctions until final resolution of the appellate court. The Court of Appeals' decision does not conflict with any prior decision of this Court. And Petitioner does not even contend that it presents any issue (substantial or otherwise) of constitutional or federal law. Further review of the timeliness of BANA's Motion for Sanctions should be denied.

a. BANA's Motion for Sanctions was timely under the FCPSA and Rule 11.

Under well-settled South Carolina law, BANA's Motion for Sanctions, filed within ten days of the Circuit Court's dismissal order, was timely and ripe for consideration. Neither the FCPSA nor Rule 11 requires that parties delay in bringing a motion for sanctions until final resolution of an appeal of the underlying judgment, and this Court's precedent clearly provides that a circuit court *can* issue sanctions while such an appeal is pending. As a result, the Circuit Court abused its discretion by concluding that it could not consider BANA's Motion for Sanctions until the resolution of Petitioner's Merits Appeal.

Subsection (A) of the FCPSA provides that an attorney may be sanctioned for "filing a frivolous pleading, motion or document" (S.C. Code Ann. § 15-36-10(A)(4)(a)), "making

frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts” (S.C. Code Ann. § 15-36-10(A)(4)(b)), or “making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law” (S.C. Code Ann. § 15-36-10(A)(4)(c)). Where a party violates subsection (A)(4) of the FCPSA, “the court, upon its own motion or motion of a party, may impose on the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.” *Id.* at (B)(2). Such sanctions may be awarded when “the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the FCPSA.” *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 153, 758 S.E.2d 483, 491 (2014).

As the Court of Appeals correctly recognized, the FCPSA does not require that the parties delay in bringing a motion until final resolution of the case, including any appeal. To the contrary, this Court has expressly held that “[m]otions made pursuant to the FCPSA are post-trial motions. . . . As such, a party has ten days after the filing of a [trial] court order to file a motion pursuant to the FCPSA.” *Id.* at 160, 758 S.E.2d at 495; *see Russell v. Wachovia Bank*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (“[A] motion for sanctions must be filed within ten days of the notice of entry of judgment”); *see also Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) (“[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCF, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment.” (alteration in original)); *In re Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (holding that a motion for sanctions under the FCPSA must be filed within ten days of the notice of entry of judgment); *see, e.g., Pitman v. Republic Leasing Co.*, 351 S.C. 429, 432–33, 570 S.E.2d 187, 189–90 (Ct. App.

2002) (finding a party’s motion for sanctions untimely where the party “waited almost two months after the grant of summary judgment to move for sanctions under the Act”).

Moreover, this Court has held that motions for sanctions brought pursuant to Rule 11 must be filed within a reasonable time of discovering the sanctionable behavior—further justifying the timeliness of BANA’s Motion for Sanctions under Rule 11. *See Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 537, 818 S.E.2d 758, 767 (2018) (holding that a Rule 11 motion for sanctions “must be filed within a reasonable time of discovering the alleged improprieties”). “[A] rule 11 motion is untimely if the circuit court—*considering all relevant circumstances in the context of the litigation*—determines the motion was not filed in a reasonable period of time after the discovery of the alleged misconduct.” *Id.* (emphasis added). South Carolina courts have found under this standard that because a circuit court can timely consider a request for sanctions under the FCPSA filed within ten days of judgment, sanctions under Rule 11 can also be decided in the same case. *See Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11 (stating that because a motion for sanctions under the FCPSA was “proper[,] it is only logical that the Rule 11 motion was timely according to *Ex parte Beard*.”); *see also The Father v. S.C Dep’t of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (stating that “[t]he criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA].”).

The pendency of an appeal on the merits of a dispute does not affect the circuit court’s ability to resolve such a motion for sanctions. Rather, this Court has consistently held “that the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion.” *Holmes*, 408 S.C. at 161, 758 S.E.2d at 496; *see Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341 (1986) (“We now hold that the service and filing of a Notice of Appeal . . . does not deprive the lower court of jurisdiction to consider the motions.”). And this

Court has previously upheld sanctions the circuit court awarded under the FCPSA while an appeal was still pending in *Holmes v. E. Cooper Cmty. Hosp., Inc.* See 408 S.C. at 160–62, 758 S.E.2d at 495–96.

In *Holmes*, the defendants moved for sanctions pursuant to subsection (C)(1) of the FCPSA ten days after the circuit court entered summary judgment in favor of the defendants. *Id.* at 148, 758 S.E.2d at 489. A few days later, the plaintiff appealed the circuit court’s decision and filed a response to the motion for sanctions, arguing that defendants’ motion was “premature because of the pending appeal of the Summary Judgment Order.” *Id.* The circuit court nevertheless awarded sanctions under the FCPSA. *Id.* at 149, 758 S.E.2d at 489. On appeal, the plaintiff argued, similar to Petitioner, that the trial judge should have delayed ruling on sanctions because “to allow the circuit court to determine whether a claim is frivolous on a motion for sanctions under the FCPSA while the order dismissing the case is under appeal creates conflict with the South Carolina Appellate Court Rules, and causes unnecessary litigation.” *Id.* at 160, 758 S.E.2d at 495. The plaintiff asserted that circuit courts should be required “to stay their consideration of frivolity until after the resolution of the appeal of the underlying dispositive judgment.” *Id.* But this Court disagreed, finding that the plaintiff’s assertion that the FCPSA conflicts with South Carolina’s appellate rules “lacks merit.” *Id.* at 162, 758 S.E.2d at 496. The court held that “the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion” and thus, “the circuit court acted properly and well within its jurisdiction in hearing [defendants’] sanctions motion.” *Id.* at 160–62, 758 S.E.2d at 495–96. So it is here.

- b. The Court of Appeals’ decision does not conflict with any prior decision of this Court.

Petitioner argues that the Court of Appeals’ decision conflicts with this Court’s decision in *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018). But the

Court of Appeals correctly found Petitioner’s “heav[y] reliance” on *Pee Dee* misplaced. *See Hughes*, 2021 WL 4770165, at *8. Far from conflicting with the Court of Appeals’ decision, this Court’s decision in *Pee Dee* provides further support for the decision below.

In *Pee Dee*, the defendant waited until after the appellate court issued a remitter of the action before filing its motion for sanctions under Rule 11 and subsection (C) of the FCPSA. *Pee Dee*, 424 S.C. at 528, 818 S.E.2d at 762. This Court affirmed the circuit court’s ruling that the motion for sanctions untimely under the FCPSA, holding that the Act “require[s] a party to file its motion for sanctions . . . within ten days of the entry of judgment.” *Id.* at 529, 818 S.E.2d at 763. And this Court further opined that it could not “disagree with the court of appeals’ holding ‘that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties.’” *Id.* at 537, 818 S.E.2d at 767.

To be sure, the Supreme Court also determined that it was reasonable for counsel in *Pee Dee* to wait for the resolution of three pending appeals before filing a motion for sanctions under Rule 11 because counsel’s specific circumstances justified the delay. *Id.* at 538–39, 818 S.E.2d at 768. In particular, counsel for the defendant believed that a “sanctions motion would only exacerbate the already contentious litigation, further delaying a decision on the merits and costing his client more money.” *Id.* at 534, 818 S.E.2d at 766. Based on these specific circumstances, the Supreme Court found that it was not unreasonable for the defendant’s counsel to wait until the resolution of the appeal to file a motion for sanctions, noting that counsel had made the understandable determination that filing the sanctions motion before then would not serve the purpose of “deter[ring] future litigation abuse” but rather would only encourage more abusive behavior. *Id.* at 533–34, 818 S.E.2d at 766–67.

But as the Court of Appeals in this case stated, *Pee Dee* cannot be read to “hold that a motion [for sanctions] filed *before* an appeal is decided is untimely.” *Hughes*, 2021 WL 4770165, at *8. Nothing in *Pee Dee* suggests that a party is *obligated* to wait until the resolution of any pending appeals before filing a motion for sanctions. To the contrary, the court in *Pee Dee* implied that a party would have to provide separate justification if it waited until resolution of an appeal to file a Rule 11 motion. *Pee Dee*, 424 S.C. at 538–39, 818 S.E.2d at 768; *see id.* at 533, 818 S.E.2d at 765 (“[E]arly filing—and quick resolution—of legal claims is always to be promoted.”). And as the Court of Appeals further noted, Justice Kittredge’s concurrence states that while there may not be a ten-day time limit for motions brought under Rule 11, “[t]he better practice under these circumstances would be to file a Rule 11 motion not later than ten days following the entry of judgment in the trial court.” *Hughes*, 2021 WL 4770165, at *8; (quoting *Pee Dee*, 424 S.C. at 541, 818 S.E.2d at 770 (Kittredge, J., concurring)).

For BANA to wait until after the appeals process to file its Motion would risk a ruling that its delay was unreasonable under the circumstances, especially where BANA intended for its Motion to serve as an immediate deterrent of further litigation abuse.⁵ *See Pee Dee*, 424 S.C. at 534, 818 S.E.2d at 766; *see also Griffin v. Sweet*, 136 N.C. App. 762, 768, 525 S.E.2d 504, 508 (2000) (finding that the plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety where he waited over thirteen months after the supreme court denied the defendants’ petition for discretionary review); *Rice v. Danas, Inc.*, 132 N.C. App. 736, 741, 514 S.E.2d 97, 101 (1999) (finding defendant’s motion for sanctions was untimely where

⁵ It would also be unreasonable to require BANA to file a motion for sanctions under the FCPSA pursuant to the ten-day time limit and then require that BANA wait to file a separate Rule 11 motion until after the resolution of Petitioner’s Merits Appeal.

defendant claimed he was aware of plaintiff's sanctionable conduct prior to filing its answer but waited until after the jury verdict to move for sanctions).

Moreover, although Petitioner suggests that the Court of Appeals' decision may leave circuit courts in the "awkward" position of determining a sanctions motion while a merits appeal is pending, the Court of Appeals correctly recognized that, by enacting a standard based on *reasonableness* rather than *success*, the "legislature considered that a plaintiff or defendant might make a good-faith or reasonable argument to reverse precedent, only to see the appellate courts decide that the precedent should stand nonetheless." *Hughes*, 2021 WL 4770165, at *9; *see* S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (providing for sanctions if "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" (emphases added)); *id.* at (C)(1)(a) (providing for sanctions if "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" (emphases added)).

In similar circumstances, numerous federal courts have taken a similar approach. *See, e.g., Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) ("Attorney's fees awards are collateral matters over which the district court retains jurisdiction."); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("A district court may resolve the merits while the court of appeals deliberates about bond, may award attorneys' fees while the court of appeals addresses the merits, and so on, because there is no concurrent exercise of power on the same subject and little overlap of issues. True, a decision reversing the judgment on the merits would

affect or nullify the award of fees, but the subjects are distinct.”); *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1328 (4th Cir. 1987) (noting, tersely, that one party “question[ed] the jurisdiction of the district court to award attorney’s fees under Fed. R. Civ. P. 11 after [the] notice of appeal has been filed. We find that the court does retain such jurisdiction.”); *Obin v. Dist. No. 9 of Int’l Ass’n of Machinists & Aerospace Workers*, 651 F.2d 574, 583 (8th Cir. 1981) (noting that two previous decisions of the court “served to clarify that the district courts retained jurisdiction to pass upon a claim for attorney’s fees even though one of the parties has filed a notice of appeal on the merits of the litigation”); *see also Pee Dee*, 424 S.C. at 537, 818 S.E.2d at 767 (“Other courts that have addressed the question of the timeliness of a Rule 11 motion have also imposed a reasonableness standard.”).

- c. The timeliness of BANA’s Motion for Sanctions does not involve a novel question of law.

Petitioner’s attempt to identify “novel” legal questions for this Court’s review is similarly unpersuasive. Petitioner argues that certiorari review is proper because “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.” Pet. at 10. As an initial matter, that argument is difficult to square with Petitioner’s repeated assertion that the Court of Appeals’ timeliness decision was foreclosed by this Court’s decision in *Pee Dee*. Even setting that aside, however, the argument lacks merit. While this Court has not previously considered sanctions solely under subsection (A) of the post-2005 FCPSA, the Court has upheld sanctions awarded by the circuit court under subsection (C) of the FCPSA while an appeal was pending in *Holmes*. *See Holmes*, 408 S.C. at 162, 758 S.E.2d at 496. And in *Pitman*, the court of appeals interpreted the pre-2005 FCPSA and held that “[a]bsent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains

jurisdiction to consider a motion for sanctions beyond ten days after the entry of judgment.” *Pitman*, 351 S.C. at 432–33, 570 S.E.2d at 189–90 (emphasis added). As noted by the Court of Appeals in this case, the court’s rationale in *Pitman* remains directly applicable because “no language in the current subsection (A) of section 15-36-10 extends jurisdiction of the circuit court over this case.” *Hughes*, 2021 WL 4770165, at *7–8.

In any event, the issue is not whether the FCPSA *requires* BANA to have filed its Motion for Sanctions within ten days to be deemed timely, but whether a circuit court *can* consider such a motion filed during that time period. *See Hughes*, 2021 WL 4770165, at *3 (“[T]he issue before this court is whether the [C]ircuit [C]ourt was correct in its belief that ruling on [BANA]’s motion would be ‘untimely and premature[.]’”). Similarly, contrary to Petitioner’s suggestion, the issue before this Court is also not whether the Circuit Court abused its discretion in “*declining* to award sanctions” on the merits. *Id.* at *9 (“We stress that this is a decision on the timeliness of [BANA]’s motion, not the merits of that motion.”). Rather, the Court of Appeals’ decision held that the Circuit Court “erred when it found that it could not *consider* a motion for sanctions before the conclusion of [Petitioner’s] appeal” and remanded the issue of whether sanctions should be awarded. *Id.* at *8 (emphasis added).

II. THE COURT OF APPEALS’ CASE-SPECIFIC FORFEITURE AND TWO-ISSUE RULE HOLDINGS DO NOT WARRANT FURTHER REVIEW

Petitioner also contends that this Court should review the Court of Appeals’ determinations that BANA did not forfeit its challenge to the Circuit Court’s timeliness ruling and that BANA’s challenge was not barred by the two-issue rule. As Petitioner recognizes, however, the rules of forfeiture and the two-issue rule are “well settled” under South Carolina law. *Pet.* at 12; *see id.* at 14–15. When reviewing a case on a writ of certiorari, this Court must “confine its review to the correction of errors of law only, and will not review the findings of fact of an inferior Court . . .

except when such findings are wholly unsupported by the evidence.” *S.C. Bd. of Examiners in Optometry v. Cohen*, 256 S.C. 13, 18, 180 S.E.2d 650, 652 (1971); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009) (“On certiorari, review by the Court is confined to the correction of errors of law.”). Petitioner does not purport to identify any factual findings “wholly unsupported by the evidence.” *Cohen*, 256 S.C. at 18, 180 S.E.2d at 652. The Court of Appeals’ case-specific application of settled law to the facts of this case was correct and does not warrant this Court’s review.

- a. BANA preserved its timeliness arguments for appeal under well-settled South Carolina law.

The Court of Appeals correctly applied longstanding South Carolina law relating to preservation of issues and Rule 59(e) motions. *Hughes*, 2021 WL 4770165, at *4–5. “South Carolina appellate courts do not recognize the ‘plain error rule[.]’” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). As a result, a “losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” *I’On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Petitioner errs, however, in claiming that “[t]he record is devoid of any attempt by BANA to preserve the issues and arguments of timeliness to the circuit court.” Pet. at 14.

BANA raised the issue of timeliness in its Memorandum in Support of Motion for Sanctions, stating that “[t]he court retain[ed] jurisdiction to consider BANA’s Motion for Sanctions despite [Petitioner] appealing this Court’s order on BANA’s Motion to Dismiss” and citing relevant authority. (R. p. 335.) The Court of Appeals correctly held that BANA’s reference to the issue of timeliness in the Memorandum was sufficient to preserve the issue for appeal under South Carolina law. *Hughes*, 4770165, at *5; see *Herron v. Century BMW*, 395 S.C. 461, 466,

719 S.E.2d 640, 642 (2011) (stating that “the appellate court may . . . consider the issue if it is reasonably clear from an appellant’s arguments”).

Petitioner’s argument that BANA was obligated to file a Rule 59(e) motion prior to seeking an appeal of the Circuit Court’s decision is incorrect. Although South Carolina law “arguably” imposes a duty to file a Rule 59(e) motion where “the circuit court digresses from what the parties have argued and rules *sua sponte* on another issue,” *Hughes*, 4770165, at *4 (quoting *Elam*, 361 S.C. at 24, 602 S.E.2d at 780), “[a]s long as the judge had an opportunity to rule on an issue, and did so, it is not ‘incumbent upon . . . counsel to harass the judge by parading the issues before him again.’” *Id.* (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185–86 (3d ed. 2016) (quoting *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995))). Petitioner errs in insisting that BANA was obligated to engage in such a futile exercise here.

b. The two-issue rule did not preclude BANA from raising its timeliness arguments on appeal.

The Court of Appeals’ straightforward application of the two-issue rule also does not warrant this Court’s review. The two-issue rule provides that “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 the law of the case.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (citation omitted). That well-established and well-founded rule reflects the reality that where a trial court’s judgment rests on more than one independently sufficient ground, identifying an error in only one of those grounds provides no basis for disturbing the ultimate judgment. But the rule does not apply to this case because, as the Court of Appeals correctly found, there was only one ground for the Circuit Court’s determination that BANA’s Motion was untimely and premature—Petitioner’s pending Merits Appeal. *Hughes*, 4770165, at *5; *see* R. p. 3 (“This matter is currently pending before the South Carolina Court of

Appeals . . . and has not yet been fully adjudicated. Accordingly, Defendant’s Motion for Sanctions is untimely and premature.”).

South Carolina courts have repeatedly refused to manufacture an alternative holding out of a court’s recitation of the facts and procedural history, as Petitioner attempts to do here. *See, e.g., McKinney v. Pedery*, 413 S.C. 475, 489, 776 S.E.2d 566, 573 (2015) (holding that the two-issue rule did not apply because the lower court did not rule on the alleged second issue but “merely made factual findings summarizing the testimony presented at the hearing”); *Graves v. Horry-Georgetown Tech. Coll.*, 391 S.C. 1, 9, 704 S.E.2d 350, 355 (Ct. App. 2010) (holding that the two-issue rule did not apply because the “lengthy discussion regarding exhaustion of remedies, and the trial court’s explanations” made clear that the trial court “based its ruling upon procedure” only); *see also Eubank v. Eubank*, 347 S.C. 367, 375, 555 S.E.2d 413, 417 (Ct. App. 2001) (“In our view, this finding is dicta and not an additional sustaining ground for the court’s decision as urged by Wife.”). The Court of Appeals properly recognized that Petitioner’s reading of the Circuit Court’s decision is “strained at best.” *Hughes*, 4770165, at *5. After all, it would make little sense for the Circuit Court to have found that BANA’s request for sanctions was both premature *and* previously denied. Petitioner provides no sound basis for this Court to revisit the Court of Appeals’ determination here.

CONCLUSION

For these reasons, BANA requests that this Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,



Robert A. Muckenfuss

(S.C. Bar No. 13903)
MCGUIREWOODS LLP
201 N. Tryon Street, Suite 3000
Charlotte, NC 28202
Telephone: (704) 343-2052
Fax: (704) 444-8707
RMuckenfuss@mcguirewoods.com

Elizabeth Z. Timmermans
(S.C. Bar No. 100288)
MCGUIREWOODS LLP
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
Telephone: (919) 755-6576
Fax: (919) 755-6595
EZTimmermans@mcguirewoods.com

Attorneys for Respondent