STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE
TRIAL COURT CASE NO. 2010-CP-16-0332
APPELLATE CASE NO. 2013-001461

Ex Parte:	Douglas N. Truslow,	Respondent,
Ex Parte:	Tony R. Megna,	Appellant
In re:		
James Anasti,		Plaintiff
Vs.		
Lance Goodwin, Willis Goodwin, Gina L. Anasti Lee, And Richland County of Clerk of Court		Defendants
And		
Ex Parte:	Desa Ballard	Respondent,
Ex Parte:	Tony R. Megna,	Appellant
In re:		
Pee Dee Health Care P.A.,		Plaintiff.
Vs.		
Estate of Hugh S. Thompson,		Defendant.

INITIAL BRIEF OF RESPONDENT DESA BALLARD

Desa Ballard, *Pro Se*
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III. The lower court erred in allowing to proceed on a motion for sanctions filed more than ten days after remittitur of the *Anasti* case.

IV. The lower court erred in finding Appellant's discovery efforts as improper because discovery was necessary to contest the sanctions and there was no order limiting discovery.

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VI. The lower court erred in finding that Appellant misused the discovery process in *Thompson* to pursue discovery in *Anasti*.

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Statement of the Case

Appellant Tony R. Megna ("Megna") served a subpoena on Respondent Desa Ballard ("Ballard") which was received by her via certified mail on or about July 30, 2011. The subpoena was captioned in a case pending in Darlington called *Pee Dee Health Care v. Estate of Hugh S. Thompson,* Case No.2010-CP-16-0332 (hereafter the *Pee Dee Healthcare* case)[1].

Ballard filed and served an objection to the subpoena and a motion for sanctions on or about August 5, 2011. On May 15, 2012, a hearing was held on the motion, as well as motions made by attorney Douglas N. Truslow in Richland County case, *Anasti v. Wilson*, Case No. 2007-CP-40-0576 (hereafter the *Anasti* case). Following the hearing, Megna's counsel submitted an unsolicited memorandum to Judge Baxley. It is believed that this memorandum did not become part of the trial court record, and should not be included in the record on appeal in this matter. (Baxley email dated 5-29-2012)[2]

The trial judge issued separate orders in each matter on February 11, 2012. (Orders dated 2-11-2013). The order in *Anasti* did not involve Ballard. In the *Pee Dee Health Care* case, the trial judge awarded sanctions to Ballard against Megna in the amount of $17,388.75.

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[1] The Court has dealt with this case before, although not involving Ballard or Truslow. *See Pee Dee Health Care P.A. v. Estate of Thompson,* Unpublished Opinion No. 2013-UP-311, Appellate Tracking No. 2011-185767. On information and belief, Pee Dee Health Care is seeking a writ of certiorari from the Supreme Court to review this Court's decision.

[2] Ballard made a motion to strike this memorandum from Megna's designation, but that motion was denied by the Court by order dated November 15 2013.

Megna, through counsel, filed motions for reconsideration in both cases. The trial judge held a telephone hearing, with arguments limited to the amount of sanctions awarded. (Order dated 6-12-2013, page 2, footnote 1). Duplicate original orders with combined captions (for both the *Anasti* case and the *Pee Dee Health Care* case) were issued on June 12, 2013 addressing the motions for reconsideration. In the order, the trial judge granted Ballard's request to reduce the sanctions awarded her to $15,998.75.

Megna, through counsel, appealed, and the Court of Appeals consolidated the two appeals.

Megna has made several inaccurate statements in his Statement of the Case, and those are corrected here.

Item 1: On page 5 of Megna's initial brief, he states that "Ballard's partner sent Appellant an email, indicating that the packet of information he sent was under review by Ballard and indicated their offer to represent Appellant or others for an hourly fee." The actual text of the emails reflects: (Suggs ltr 2-17-2012 p. 10):

- "I passed the packet on to Desa for her review." There is no evidence that Ballard actually reviewed the packet of material. The record does not reflect that anyone in her office reviewed the materials from Megna[3].
- "The expense (we would charge hourly) would probably be more than your client [who was not identified] could handle. If you would like us to

[3] The materials were later reviewed, after Mark Matthews filed his first grievance against Ballard, so Ballard could understand what Mark Matthews was talking about. After doing so, Ballard advised Judge Baxley there was nothing in the materials submitted that relates to the *Anasti* case, about which Ballard was consulting with Mr. Truslow, or any other fact which would implicate Rule 1.7, 1.8 or 1.9 of the Rules of Professional Conduct.. (Tr. 5-16-2012, P. 31, lines 3 – 8). There is no evidence to the contrary.

> send a fee agreement, we will be happy to participate in the case." There was no discussion of who Ballard's firm would represent, if anyone.

Id.

Item 2: On page 6 of Megna's initial brief, he states that "On August 12, 2011, . . . Judge Baxley also considered Ballard's motion to quash and granted it, but did not address sanctions." This is inaccurate. There was only one motion hearing on Ballard's motion, and it occurred on May 15, 2012[4]. There is only one order ruling upon Ballard's motion for sanctions, and it was issued on February 11, 2013.

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[4] There is an order from Judge Baxley in the *Pee Dee Health Care* case dated August 12, 2011, but Ballard's motion is not mentioned in that order. The order directs counsel for Pee Dee Health Care to "personally serve a copy of this Order on all parties affected by the Court's decision herein. . ." Ballard was not involved in the proceedings which led to that order. There is no evidence that Ballard was served with this order, presumably because she was not a "part[y] affected by the Court's decision. . . " Megna's designations do not include this order.

Statement of Facts

Ballard is not a party to either of these actions, nor does she represent any of the parties to these actions. In 2007, attorney Douglas Truslow began consulting with her for advice concerning his responsibilities regarding unprofessional behavior exhibited by Tony Megna (hereafter "Megna"), who was opposing counsel to Mr. Truslow in a Richland County case. *Anasti v. Wilson et al.*, Case No. 2007-CP-40-00576.. (Tr. 5-16-2012, P. 23, line 23 – p. 24, line 14).

In October, 2010, Megna telephoned Ballard's partner Stephanie Weissenstein and told her he wanted to consult the firm on a case involving "people who are rather connected." (Suggs ltr enclosing redacted NOI p. 10). When Ballard was advised of the inquiry, she advised Ms. Weissenstein that the firm wanted nothing to do with Megna or any case in which he was involved. (Tr. 5-16-2013 P. 30, lines 17- p. 31, line 10). Ms. Weissenstein[5] advised Megna the firm would look at his matter at our regular hourly rate, which usually discourages casual inquiries. (*Id.*) Ballard's firm did not review the materials from Megna. (Tr. 5-16-2013 p. 30, line 21 – p. 31, line 10). The materials sent by Megna to Ms. Weissenstein were not introduced into evidence before Judge Baxley, so the only evidence of record regarding the content of these materials is Ballard's

[5] The transcript of the May 16, 2012 hearing erroneously states that Ballard's partner is "Ms. Rogers." (Tr. 5-16-2013, p. 30, line 24).

statement that their content did not relate to the matter she was handling for Truslow and did not create a conflict of interest. (Tr. 5-16-2012, P. 31, lines 3-8)[6].

On July 30, 2011, Ballard received a subpoena from Megna in a case captioned in Darlington County involving Pee Dee Health Care. (Exhibit A, Motion for Sanctions dated August 4, 2011). She inquired into the matter and learned that Megna had earlier been disqualified as counsel in the Pee Dee Health Care case. Order of Judge Baxley dated April 15, 2011). Ballard filed and served an objection to the subpoena and a motion for sanctions. (Motion for Sanctions and Objection to Subpoena dated 8-5-2011).

Shortly thereafter, an individual named Mark Matthews filed a grievance against Ballard and others with the Office of Disciplinary Counsel. (Suggs ltr 2-17-2012). Ballard researched the identity of Mark Matthews and determined he was somehow related to Pee Dee Health Care, which was the party on whose behalf Megna had attempted to subpoena her. *Id.* After Judge Baxley scheduled a hearing on her motion for sanctions, Ballard filed a redacted[7] copy of the complaint from Mark Matthews as an exhibit to her motion for sanctions. *Id.* Mr. Matthews filed a second complaint against her, which she also filed with the Darlington clerk as an exhibit to the motion for sanctions. (COC Package encl addl info for NOI 3-26-2012).

As the hearing approached, Megna sent voluminous documents which required review. (Megna's Synopsis 3-9-2012). As required by the notice from Judge Baxley

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[6] Judge Baxley also concluded that the argument about Megna's attempt to communicate with Ballard did not constitute a conflict of interest preventing her from continuing to assist Truslow. (Baxley order – Darlington – 2-11-2013, footnote 2, Page 6).

[7] The original complaint sent to Office of Disciplinary Counsel by Mark Matthews complained about many lawyers. Before filing the complaint with the circuit court as an exhibit, Ballard redacted all information from the document except that portion which related to her. (Letter to Suggs dated 2-22-2012).

(Baxley email 3-21-2012), Ballard submitted an affidavit outlining the time spent in filing the motions and preparing for the hearing, including anticipated travel time for the hearing. (Affidavit of Desa Ballard dated 5-11-2012). Following the hearing and Judge Baxley's letter dated July 26, 2012, she submitted an amended affidavit which deleted the accounting of the time she spent in responding to the grievances filed against her by Mr. Matthews and included additional time incurred in the matter since the hearing.. (Amended and Supplemental Affidavit dated 8-10-2012).

Judge Baxley granted Ballard's motion for sanctions by order dated February 11, 2012. (Order of Judge Baxley dated 2-11-2012 – Darlington). Megna sought reconsideration, which was denied (with the exception of a request by Ballard to reduce the sanctions awarded to her). (Motion for Reconsideration dated 2-15-2012; Order Denying Reconsideration – Darlington – dated 6-12-2013). This appeal followed.

Issue One

The lower court erred in finding that Appellant's service of discovery violated the order of disqualification in the Thompson case because that order was the subject of a motion to alter or amend and thus not yet final.

This issue was not raised in any of the pre-hearing filings or at the hearing before Judge Baxley and is therefore not preserved for appeal before this Court. *Bean v. SC Central Railroad Co. Inc.*, 392 S.C.532 709 S.E.2d 99 (Ct.App. 2011)[8]. This issue was raised for the first time in Megna's motion for reconsideration. (Motion for Reconsideration – Darlington, p. 1, paragraph (a)). Judge Baxley declined to hear argument on this issue, and "no objection was made to the notice or limitation." (Baxley order Darlington 6-12-2013, page 2 footnote 1). The issue was not argued in the reconsideration hearing, even though Judge Baxley gave everyone an opportunity to "place a comment on the record about the issues, the reduction of issues, or the matters that are before us today." (Transcript 3-7-2013, page 5, lines 11-14).

Before allowing argument, Judge Baxley offered a second time for Megna's counsel to address any issues other than the amount of the sanctions. (Tr. 3-7-2013, Page 6, lines 17-19). Megna's counsel made no objections to Judge Baxley's decision that

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[8] Megna did argue in his "Synopsis" that Ballard's hearing could not proceed because the order of disqualification was on appeal. (Synopsis Page 5). His "Synopsis" stated "[t]he Court of Appeals has held all other matters in abeyance until the disqualification matter is determined." The reference is to Exhibit N. Exhibit N begins on unnumbered Page 192 of Megna's Synopsis, and contains: (1) a letter from J. Rene Josey dated 4-19-2011 serving Judge Baxley's order dated 4-15-2011; (2) Letter from Judge Baxley to J. Rene Josey dated April 15, 2011 enclosing the original order with a request for Mr. Josey to arrange for filing and service; (3) Mr. Josey's certificate of service as to the order; and (4) Order of Judge Baxley dated 4-15-2011, filed 4-18-2011disqualifying Mr. Megna from serving as counsel in the *Pee Dee Health Care* Case. The next page is the Cover Sheet for Exhibit O. There is no order from the Court of Appeals contained in Exhibit N. (Synopsis unnumbered page 194).

argument was limited to the amount of sanctions which had been awarded against Megna. (Tr. 3-7-2013, Page 6, line 20 – p. 7, line 3). Mr. Truslow raised several procedural issues "that may have barred the Court's consideration of the Motions for reconsideration, and those objections were noted but not necessary to be ruled upon." (Baxley order Darlington 6-12-2013, pp. 2-3).

Even though Judge Baxley limited the argument and did not expressly address Mr. Truslow's procedural arguments, he "considered all issues raised by the motions for reconsideration and concluded all to be without merit." (Baxley order Darlington 6-2-2013, p. 3). Nonetheless, since this issue was not raised until the motion for reconsideration, it is not preserved for review. *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990).

Judge Baxley's ruling on the merits of this issue on reconsideration did not preserve it for appeal. "A party cannot use Rule 59 (e), SCRCP, to present to the trial court an issue the party could have raised prior to judgment but did not." *Crary v. Djebelli*, 321 S.C. 38, 43, 467 S.E.2d 1128, 131-32 (Ct.App. 1995) *reversed on other grounds* 329 S.C. 385, 496 S.E.2d 21 (1998). *See also Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000).

Megna's argument that the pendency of a motion pursuant to Rule 59 (e) somehow suspends the validity of a judgment is not supported by any law. The cases cited by him do not so hold. Megna argues that filing of the motion "divested the order of its finality and enforceability," citing *Southeastern Housing Foundation v. Smith*, 380

S.C. 621, 670 S.E.2d 680 (Ct.App. 2008) and *Coward Hund Construction Co. Inc. v. Ball Corp.*, .336 S.C. 1, 518 S.E.2d 56 (Ct.App. 1999).

The first case, *Southeastern*, discussed whether the filing of a motion for relief under Rule 59, SCRCP suspends the one-year deadline set forth in Rule 60, SCRCP, for seeking relief from a judgment. In concluding that the Rule 59, SCRCP motion stayed the one-year period for seeking relief under Rule 60, SCRCP, the Supreme Court did stated that "while a 59(e) motion is pending . . . the finality of the challenged judgment has been removed. . ." it did so only in the context of deciding when the time begins to run for the filing of a Rule 60, SCRCP motion. *Southeastern Housing Foundation, supra.*, 380 S.C. @ 640. The decision in *Coward* addressed only whether a second motion for reconsideration stayed the time for appeal. *Coward Hunt Construction Co., supra*, 336 S.C. @ 2.

A "judgment" is "effective" when "entered." Rule 58(a)(2), SCRCP. A judgment is effective "the moment. . . [the order] is filed by the clerk of court, it becomes the judgment of the court, and fixes the right of the parties." *Upchurch v. Upchurch*, 367 S.C. 16, 22-23, 624 S.E.2d 643 (2006). *See also Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854 (Ct.App. 1996). "The final written order contains the binding instructions which are to be followed by the parties." *Corbin v. Kohler Co.*, 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct.App. 2002).

Under Megna's theory, the order disqualifying him was, in fact, final when it was entered on April 19, 2011, but became "unfinal" when he filed motions for reconsideration under Rule 59 (e), SCRCP. According to Megna's initial brief, he filed a

Rule 59(e), SCRCP motion on May 2, 2011, and the motion was denied on August 15, 2011. (Initial Brief p. 8). Under this theory, the order of disqualification of Megna was effective on and off, at his whim and within his sole control, as follows:

- From the date of issue, for twelve (12) days (until the Rule 59, SCRCP motion was filed) the order was final;
- Then the order became "unfinal" for a period of more than three months, until the judge issued his order denying reconsideration on August 15, 2011;
- The order became final again on August 15, 2011 when reconsideration was denied. (Order denying Reconsideration, Case 2013-UP-0311).
- Megna's appeal was filed on February 16, 2011, so the order was "unfinal" again for more than two (2) years, until this Court affirmed the disqualification by its decision issued July 3, 2013. *Pee Dee Health Care P.A. v. Hugh S. Thompson III et al.*, Unpublished Case No. 2013-UP-0311[9].
- The order became final on July 3, 2013 and remained final until July 18, 2013, when Megna made his next filing.
- Megna caused the order to be "unfinal" again when he filed a Motion to Reconsider the July 3, 2013 decision of this Court. (Motion for Reconsideration dated 7-18-2013)[10].
- The disqualification became final again when this Court denied Megna's Motion for Reconsideration on August 21, 2013.

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[9] It is respondent's position that the order constitutes "an order granting an injunction or temporary restraining order" such that there was no automatic stay during the earlier appeal (decided by this Court in 2013-UP-0311). Rule 241(b)(8), SCRCP. There is no provision of law which stays the effectiveness of the order during a Motion for Reconsideration. A judgment is a judgment.

[10] In that motion for reconsideration, Megna argued before this Court the same issue he argues here: He can make the order "final" or "unfinal" based on when he files something challenging the ruling of disqualification. *See* (Motion p. 10)

- Megna filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on September 9, 2013 challenging this Court's decision in 2013-UP-0311. So, according to him, the disqualification became "unfinal" on that date and is not currently in effect. As of the date of t his initial brief, that petition remains pending.

Megna argues that his motion for reconsideration "divested" the order of its "enforceability as a matter of law." Stated differently, Megna is arguing that he had no obligation to comply with the order of disqualification on those days when he had filed something, anything at all, challenging the ruling, including today (since the Petition for Writ of Certiorari is currently pending). Megna's position is the disqualification is final only when he allows it to be.

Respondent Ballard respectfully disagrees.

> The disobedience of any order, judgment or decree of a court having jurisdiction to issue it is a contempt of that court, however erroneous or improvident the issuing of it may have been. Such order is obligatory until reversed by an appellate court, or until corrected or discharged by the court which made it. <u>But if, in making such order, the court was without jurisdiction, disobedience of is not a contempt."</u>

(emphasis added). *State v. Nathans*, 49 S.C. 199, 27 S.E. 52 (1897). *See also Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792 (Ct.A[p. 2009)(discussing the distinction between a "void" judgment and one that is merely "voidable."); *Fryer v. South Carolina Law Enforcement Division*, 369 S.C. 395, 631 S.E.2d 918 (Ct.App. 2006)(discussing the obligation to obey a court order that is voidable until it is actually voided).

The only relief which Megna could obtain is to argue that the disqualification order was "void" at the time it was issued. *See Long v. McMillan*, 226 S.C. 598, 86 S.E.2d 477 (1955). Otherwise, he had to obey the order until it was reversed or until he

obtained an order from a court with jurisdiction lifting the effect of the order. He did not do so.

Issue Two

The lower court erred in finding that the discovery sought by Appellant was frivolous where the Court of Appeals had already considered the same allegations and rejected them.

The Court of Appeals never reached any decision on the merits in the *Anasti* case. On the contrary, most of the *Anasti* appeal was devoted to determining whether Megna had been truthful with the various courts in which he made representations as to when or whether he received copies of orders or other documents. (Order of Judge Manning filed 4-3-2008; Court of Appeals order in *Anasti v. Wilson* dated April 16, 2008; Court of Appeals order (Judge Goolsby) filed December 5, 2010; Court of Appeals order filed 2-7-2011; Affidavit of Desa Ballard dated 2-25-2011).

Since this Court dismissed the *Anasti* appeals on the basis that Megna had never timely filed the Notices or other documents, this court never obtained jurisdiction to decide any substantive issues. *Hill v. South Carolina Department of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010); *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct.App. 2004). Indeed, this Court expressly *advised the parties to the Anasti appeal that* "this Court will only consider [Megna's] appeal from Judge Manning's orders filed April 3, 2008 and April 1, 2009, at this time. Final briefs, therefore, shall include only those issues relating to the timeliness of [Megna]'s appeal" (Court of Appeals order in *Anasti* filed 12-5-2010).

The only issues which are precluded by the prior appeal in *Anasti* is that Megna never timely filed his motions for reconsideration or his appeal in the prior appeal.

Moreover, according to Truslow's Motion for Sanctions filed with this Court during the Anasti appeal, he sought "sanctions, damages, legal fees and costs caused by . . . Megna's misconduct *in this frivolous appeal."* (emphasis added)(Motion dated May 9, 2011). Even if this Court had decided Truslow's motion *on the merits*, the merits were limited to the conduct by Megna in the appeal before this Court. Judge Baxley's order sanctioned Megna for entirely different conduct. (Baxley order dated February 11, 2013 in *Anasti).*

The circuit court can consider attorney misconduct which during an appeal when assessing sanctions. Even if the Court of Appeals had addressed the merits of Megna's conduct during the trial court proceedings, sanctions by the circuit court for Megna's appellate misconduct may also be warranted. *Austin v. Stokes-Craven Holding Corp.*, Opinion 27324 (Supreme Court October 23, 2013), 2013 WL 5737705.

Issue Three

The lower court erred in allowing Truslow to proceed on a motion for sanctions filed more than ten days after remittitur of the *Anasti* case.

Respondent Ballard is not affected by this issue and does not address it on the merits here. However, she notes that it does not appear that this issue was raised by Megna to Judge Baxley in any of the pre-hearing filings (prior to the May 16, 2012 hearing) or at the hearing itself. (Megna Synopsis dated 3-19-2012; Fax from Megna's lawyer on 5-14-2012 containing 165 pages; Megna's Memorandum on Behalf of Tony Megna, Attorney for Defendant Anasti in Support of Motion to Dismiss The Richland County Case, dated 5-15-2012). The first mention of this issue of which Ballard is aware appears in Megna's Motion for Reconsideration dated 2-25-2013.

For the reasons set forth in Issue One, *supra.*, this issue is not preserved.

Issue Four

The lower court erred in finding Appellant's discovery efforts as improper because discovery was necessary to contest the sanction and there was no order limiting discovery.

It does not appear that this issue was raised by Megna to Judge Baxley in any of the pre-hearing filings (prior to the May 16, 2012 hearing) or at the hearing itself. (Megna Synopsis dated 3-19-2012; Fax from Megna's counsel 5-14-2012 containing 165 pages; Megna's Memorandum on Behalf of Tony Megna, Attorney for Defendant Anasti in Support of Motion to Dismiss The Richland County Case, dated 5-15-2012)The first mention of this issue of which Ballard is aware appears in Megna's Motion for Reconsideration dated February 26, 2013 Respondent Ballard incorporates her argument set forth in Issue One, *supra.*

Megna argues he needed to engage in discovery to in the *Anasti* case because Mr. Truslow's motion sought such a large amount of damages and sanctions, yet it offered no explanation for the source of the sum sought. (Appellant's Initial Brief p. 11). In his brief, Megna refers to Mr. Truslow's "Amended Motion, filed November 21, 2011, for sanctions", presumably in the *Anasti* case. (Initial Brief of Appellant page 11). That motion has not been heard. Judge Baxley's order in this case addressed only Mr. Truslow's motion dated March 9, 2012. (Baxley Order dated 2-13-2013, footnote 1)[11].

[11] Megna is confused. He states in Footnote 11 of his initial brief that "Judge Baxley ultimately ordered that no witness testimony would be permitted and only allowed affidavits of Truslow and Ballard." (Page 12). Judge Baxley did not address the motion for sanctions which was the subject of the status conference with Judge Barber. Indeed, the motion which was heard by Judge Baxley (and is the subject of this appeal)

Mr. Truslow's motion which led to the order on appeal does not request any specific amount of sanctions; moreover, it explains in detail the basis for the relief he sought, including exhibits which outlined the nature of the misconduct which Mr. Truslow offered to support his request.. (Motion to Quash and For Protection and Other Relief, with exhibits, dated March 9, 2012 – 48 pages). Megna's argument apparently is based upon a statement made by Mr. Truslow during a pretrial or status conference before Judge Barber on January 18, 2012 (Item 16 of Appellant's Designations). That motion has not yet been heard[12]. It does not appear that Megna ever requested discovery on that motion. As more thoroughly explained by Mr. Truslow in his brief on this issue, the *Anasti* case was over, but for a damages hearing against parties which Megna did not represent, and the still-pending Motion for Sanctions. If Mr. Megna wants to engage in discovery for the Motion for Sanctions that is still pending in the *Anasti* case, presumably he may ask a judge in Richland County to allow that.

Regardless of which motion for sanctions is involved, the motions for sanctions were filed in the *Anasti* case. Megna offers no explanation for why he sought discovery from Ballard using the *Pee Dee Healthcare* case in which he was disqualified.

Megna argues there was no order limiting discovery in the Anasti case. (Initial Brief p. 12). The undersigned notes that neither Rule 11, SCRCP nor the Friviolous Civil Proceedings Sanctions Act permits discovery. S.C.Code Ann. Section 15-36-10. The

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had not even been filed when the status conference was held with Judge Barber in January, 2012.

[12] On information and belief, the motion was scheduled to be heard on Tuesday, December 10, 2013, but was delayed because the parties agreed to submit the issue to the presiding judge on briefs, exhibits and affidavits.

focus of this inquiry should be on the stage to which the *Anasti* proceedings had matured when Megna attempted to engage in discovery. As explained by Mr. Truslow in his brief, the *Anasti* case was over, but for pending sanctions motions against Megna and a damages hearing against parties other than Megna or his former client Lee. Depositions and discovery, by definition, occur before a case has been adjudicated. *See Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 609 S.E.2d 838 (Ct.App. 2005)(discussing the right to use discovery to prepare for "trial."). *See also*, *Holly Woods Association of Residence Owners v. Hiller*, 392 S.C. 172, 708 S.E.2d 787 (Ct.App. 2011)(discussing the purpose of discovery is to prevent a trial from becoming a "surprise.").

It is difficult to address this issue further when Megna's brief so clearly misconstrues the proceedings below.

Issue Five

The lower court erred in awarding sanctions because South Carolina law provides that an attorney proceeding *pro se* is not entitled to attorney's fees and that attorney's fees cannot be awarded if not actually incurred.

Megna's own statement of the issue answers this question. Judge Baxley did not award attorney fees. He awarded sanctions, and used as the basis for his sanctions the amount of time the respective attorneys had necessarily devoted to responding to Megna's frivolous discovery pursuit. Judge Baxley could have used another method to calculate the sanctions he awarded against Megna. Here, he chose the simplest and most definitive (and fair) method of calculation: the amount of time the affected attorneys had to spend in dealing with the abusive discovery requests and/or subpoenas from Megna and in seeking sanctions. That method by which the judge determines the amount of sanction is within his sound discretion. *See Ex Parte Bon Secours-St. Francis Xavier Hospital Inc., In re: Wieters*, 393 S.C. 590, 713 S.E.2d 624 (2011).

All of the cases cited by Megna in support of his argument that a *pro se* litigant cannot recover attorney fees are based on fee-shifting statutes which permit one side to recover attorney fees from the other side according to the terms of the specific statute involved. None of the cases relied upon by Megna for his assertion of "well-settled law" have anything to do with an award of sanctions or the method by which an amount of sanctions should be calculated. (Initial Brief of Appellant, p. 13). To wit:

- *Kay v. Ehrler*, 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed2d 486 (2011): construing fee-shifting under 42 U.S.C.A. §1988.

- *Hopkins v. Hopkins*, 343 S.C. 301, 540 S.E.2d 454 (2000): discussing fees awarded in a family court matter under the predecessor fee-shifting statute S.C.Code Ann. §63-3-530(A)(2) (2012).

- *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App. 1998):

Megna's citation to *Williamson v. Middleton*, 383 S.C. 490, 681 S.E.2d 867 (2009) is especially troublesome Megna and his counsel have already been told that the *Williamson* case involved the specific interpretation of S.C.Code Ann. § 39-65-30, a fee-shifting statute which allowed recovery against the unsuccessful party of attorney fees which had been "actually and necessarily incurred." *Id.* (Transcript 3-7-2013, Page 13, line 25 – p. 14, line 9). The decision itself makes that clear. The *Williamson* case does not establish any general law regarding awards of attorney fees under any fee-shifting statute other than the specific one involved in that case. It has nothing to do with an award of sanctions.

Judge Baxley made clear in both his initial order and in his order denying rehearing that the award made in the case were sanctions. (Baxley Order – Darlington-dated 2-11-2012, ¶ 30; Baxley order – Darlington – clocked 6-12-2012, Page 3). In his initial order, Judge Baxley noted several times the nature of Megna's conduct which justified an award of sanctions:

- "[G]ross civility and professionalism violations." (P. 1)
- "Megna made false statements to the circuit court and the appellate court" (Page 4)

- "Megna provided the Court. . . entitled 'Synopsis'. . . a rambling diatribe of challenges of unethical behavior against Truslow, Ballard, and others." (Page 5).
- " . . . [P]art of an improper and impermissible attempt by Megna to engage in discovery for the purposes of defending himself (not his client) against motions for sanctions that were pending against him in the Richland County case." (Page 6).
- " . . . The subpoena . . . constituted a fishing expedition into what other discussions she or others may have had with Truslow, all apparently for the purpose of, *inter alia*, seeking to deflect sanctions against himself in the Richland case." (Page 7).
- ". . . Megna has shown little regard for the Orders of this Court or for the legal limitations imposed upon him in his representative capacity as counsel for his client." *Id.*
- ". . . he did so, at least in part, as a pretext to harass her and apparently to dissuade her from providing legal advice to Truslow. . . " *Id*
- "Megna has willfully, deliberately and unapologetically attempted to misuse the legal process through . . . this case and he is in willful violation of this Court's orders, specifically including the Order disqualifying him as counsel . . . " *Id.*
- "Megna's conduct is willful, deliberate and unapologetic." (Page 8).

- "Perhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless." *Id.*
- "The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court." *Id.*
- ". . . Megna's conduct is ill-conceived, vitriolic, and abusive. . . [and is] alarming and disbturbing. He has engaged in a concerted effort to abuse the legal process. . . for his own purposes, abusing this Court and his colleagues in the process." *Id.*

Judge Baxley left little doubt that his award against Megna in favor of Ballard was an award of sanctions. ". . . [S]he should be compensated by way of sanctions against Megna." (Baxley order – Darlington – 2-11-2012 Page 9, ¶ 34). While he chose to calculate the award of sanctions based on the time spent in responding to the abusive subpoena and these proceedings, it is clear that the award was intended to sanction Megna for his wrongful conduct. It is further clear that the amount awarded was done so pursuant to Rule 11, SCRCP. *Id.* Page 9, ¶35). Ballard's Affidavit for Attorney Fees specifically indicated that her request for an award was based on Rule 11 (and Rule 37), SCRCP. (Ballard affidavit dated 5-11-2012, page 5, ¶ 17).

Megna's argument that the judge's use of time spent by an attorney in calculating an award of sanctions is "an error of law and must be reversed" is simply incorrect. (Initial Brief of Appellant p. 14). To the contrary, the amount was within the discretion of the trial court and was supported by the evidence. *Ex Parte: Bon Secours, supra.*

Issue Six

The lower court erred in finding that Appellant misused the discovery process in Thompson to pursue discovery in Anasti.

Megna has come up with a new argument to explain why he served a subpoena on Ballard in the *Pee Dee Health Care* case. He argues that he had a motion pending in the Court of Appeals in the *Pee Dee Health Care* case that related to efforts to disqualify attorney Rene Josey[13], and he suspected Ballard may have spoken to Josey. (Appellant's Initial Brief p. 15). This is a "new and improved" argument, raised for the first time by Megna's current counsel in the Motion for Reconsideration. (Motion for Reconsideration – Darlington – dated 2-26-2012, pages 1 – 2, ¶ b and ¶ c). .

Aside from being the first time this argument has been made (and therefore not preserved, *see* Issue One, *supra.*), the argument is specious. If, in fact, a motion for disqualification in the *Pee Dee Health Care* case was pending the Court of Appeals when Megna served the subpoena with that caption on Ballard, then all trial court proceedings at the trial level were stayed and Megna had no right (setting aside his disqualification) to engage in discovery of any kind. He violated the automatic stay by undertaking discovery while the matter was on appeal. Rule 241 (a), SCACR.

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[13] Megna has designated a motion filed in the Court of Appeals by Pee Dee Health Care on August 24, 2011. (Appellant's designations dated 8-26-2012, Item 13). There is nothing that Respondent can find to indicate this motion was ever provided to Judge Baxley or considered by him. Mr. Truslow recited everything that was submitted to Judge Baxley at the conclusion of the hearing. (Tr. 5-15-2012, Page 50, line 21 – Page 51, line 21). On information and belief, Megna is referring to a totally separate case. *See* foonote 1.

Megna apparently believes the appellate stay applies when he is the subject of action being taken at the trial level during appeal, but not when he is the one taking action.

Regardless, taken to its [il]logical extreme, Megna's argument is that he can engage in discovery at the trial court level while the appeal is pending, related to an issue which is before the appellate court. He offers no explanation as to how the information he planned to discover in the trial court *via* the subpoena to Ballard would be presented to the appellate court for consideration in the motion to disqualify Josey. In fact, it could not have been. Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

In addition to the current argument not being presented to the trial court, the argument Megna made at the trial court is exactly what Judge Baxley ruled. In his Synopsis, submitted in advance of the hearing before Judge Baxley, Megna stated "The limited discovery requested to date is targeted at understanding [the attorneys (who were subpoenaed by Megna)] individual and collective involvement in the [Anasti] matter and what they intend to testify to in the Richland county case." (Synopsis Page 7.) Judge Baxley's conclusion that the discovery served on Ballard in the *Pee Dee Healthcare* case was for use in the *Anasti* case is exactly what Megna said it was for.

Additionally, Megna's own lawyer argued before Judge Baxley that Megna engaged in discovery after having received a motion for sanctions in the *Anasti* case and Megna wanted to know if there was a connection between the *Anasti* case and the *Pee Dee Health Care* case. "That is all he wanted to know." (Tr. 5-15-2012, Page 41, lines

21-22). "[Ballard's] name appeared as being in a separate case. All [Megna] wanted to know was why." (Tr. 5-15-2012, Page 42, lines 14 - 15).

Respondent finds it incredulous that Megna, on appeal, argues against the exact ground he argued for before Judge Baxley. Megna cannot argue a different ground on appeal from the argument he advanced before Judge Baxley. *Simpson v. Simpson*, 404 S.C. 563, 746 S.E.2d 54 (Ct.App. 2013)(judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with the one which he previously argued and upon which he prevailed.)

This issue is without merit.

Issue Seven

The lower court erred in finding Appellant had no good-faith basis to subpoena Ballard, who agreed to represent Appellant and Pee Dee, while at the same time consulting with attorneys who were directly adverse to Appellant and Pee Dee.

Megna's contact to Ballard's office in October, 2012 did not create an attorney-client relationship between Ballard and Megna, nor between Ballard and Pee Dee Health Care. (Exhibit to Suggs letter enclosing redacted NOI 2-17-2012). "[Ballard] was not asked to represent Megna and no confidential information concerning Megna or his client was provided to her." (Judge Baxley order – Darlington – dated 2-11-2012, page 5, ¶ 17). If Megna wanted to argue otherwise on appeal, he had an obligation to introduce into evidence the actual materials he submitted to Ballard in October, 2010. He did not do so. Appellant has an obligation to furnish a record from which the appellate court can adequately consider his arguments. *Holme v. Holme*, 287 S.C. 68, 336 S.E.2d 508 (Ct.App. 1985).

Since Megna did not introduce the documents he transmitted to Ballard's law partner in October, 2010, the only evidence of record is Ballard's own statement that the materials submitted to her office by Megna did not create a conflict with her continued assistance to Truslow (Tr. 5-15-2012, Page 30-31) and Judge Baxley's ruling that the cases in Richland (*Anasti)* and Darlington *Pee Dee Health Care)* were "completely unrelated to one another. Megna is the only common denominator." (Judge Baxley order – Darlington – dated 2-11-2013, page 3, ¶ 6; Page 6, footnote 2).

According to Megna's Initial Brief, he learned that Truslow had consulted with Ballard in the *Anasti* case in May, 2011. (Initial Brief p. 6.) His initial brief states that he also learned Truslow had spoken to other attorneys about the *Anasti* case when Truslow filed a motion with this Court at about that same time. (Initial Brief p. 2). He somehow jumped to the conclusion that if Truslow spoke to Ballard, and Truslow also spoke to other lawyers, then Ballard must have also spoken to the same other lawyers that spoke to Truslow.

In his initial brief, Megna actually states this as a fact. "Ballard did not disclose. . . that . . . Truslow and Ballard had conferred with Rene Josey and Jay James in the *Thompson* case (as well as with Celeste Jones and Bobby Stepp in the Lake City litigation). . ." (emphasis added) (Initial Brief p. 6). "It was only at this time that Appellant learned of Ballard's involvement with Truslow (and others.)" Initial Brief p. 7). "Ballard and Truslow had consulted with attorneys in the *Thompson* case and in the Lake City litigation." Initial Brief p. 16).

There is no evidence in this record to support Megna's leap of logic that, since Ballard spoke to Truslow, she must also have spoken to other lawyers to whom Truslow had spoken. Megna's appellate brief cites to nothing to support these statements of "fact".

Additionally, there is no evidence in this record to support the conclusion, as stated in this Issue Seven, that Ballard "agreed to represent Appellant and Pee Dee." *See discussion, supra.*, at Page 2-3. (Appellant's Initial Brief p. 16). The evidence of record is Ballard's own statement that, when she received the subpoena from Megna in

July, 2009, the *Pee Dee Healthcare* case (which was the caption on the subpoena issued by Megna) "was . . . a case [she] had never heard [of]. [She] had no idea what it was about" (Tr. 5-15-2012, page 24, lines 23-25) and she undertook efforts "to find out what this case was." (Tr. 5-15-2012, page 25, line 2). If Megna or his counsel believe otherwise, they do so with absolutely no factual basis whatsoever.

Mark Matthews, who is believed to be associate of Megna's[14] filed two (2) grievances against Ballard, the first of which also complained about numerous other attorneys. (Sugg ltr enclosing redacted NOI 2-17-2012; COC package enclosing additional NOI 3-25-2012). Among other things, Matthews complains about Ballard undertaking representation of Pee Dee Health Care, the same argument Megna now makes here. The complaints against Ballard were dismissed by the Office of Disciplinary Counsel. (Tr. 5-15-2012, Page 27, line 9 – Page 28, line 4). The evidence reflects that Truslow consulted with Ballard for advice in dealing with the bizarre[15] actions that Megna was taking, and to determine how he should deal with them. (Tr. 5-15-2012, Page 25, lines 18-23). He also sought her assistance with appellate issues. (Tr. 5-15-2012, Page 25, line 23 – p. 26, line 11). When Megna found out Ballard was assisting Truslow, he sent her a "very nasty" letter. *Id.* (Memorandum on Behalf of Tony Megna, Attorney for Defendant Anasti in Support of Motion to Dismiss the Richland County Case dated 5-15-2012, unnumbered page 28). The grievances from Mark Matthews were apparently for the same purpose.

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[14] Ballard learned that Mark Matthews was an employee of Megna's when she received a check for her appearance as subpoenaed by Megna..

[15] The court reporter inadvertently transcribed Ballard's statement as "bazaar." (Tr. 5-15-2012, Page 25, line 21).

Ballard advised the Court that she was "under attack as a result of having provided legal advice and counsel to Mr. Truslow." (Tr. 5-15-2012, Page 27, lines 23-25). Judge Baxley concluded that the attack against Ballard was undertaken by Megna "to punish her for consulting with Truslow. . . and to deter her from continuing to assist him." (Judge Baxley Order – Darlington – dated 2-11-2013, page 6, ¶ 19).

The attack continues with the filing of Megna's initial brief. There is no evidence to support the irrational allegations Megna continues to assert against Ballard.

Additional Sustaining Ground

Megna did not appeal an alternate basis for Judge Baxley's decision to assess sanctions against him. Under the "two-issue" rule, even if Megna is correct on any of the issues he has argued, the orders on appeal must be affirmed.

Among other grounds for sanctions which were sought by Ballard, she asserted that the subpoena served upon her by Megna did not comply with the South Carolina Rules of Civil Procedure specifically Rule 45(a)(2) and (b)(2), as well as Rule 26(b)(1).. (Ballard Objection dated August 4, 2011, ¶¶ 1 – 2; Ballard Motion for Sanctions dated 4-11-2012, ¶ 4). This issue was argued before Judge Baxley. (Tr. 5-15-2012, Page 25, lines 13-15; Page 30, lines 4-7).

As far as Ballard can tell, neither Megna or his attorneys have ever disputed that the supbeona served on Ballard violated the SCRCP.

When a trial court decision is based on more than one ground, the appellate court will affirm unless the appellant seeks review of all grounds which formed the basis of the trial judge's decision. *McKinney v. Pedery*, __ S.C. __, __ S.E.2d __, 2013 WL 4082327 (Ct.App. 8-14-2013); *Miranda v. Nisson Motor Co. Ltd.*, 402 S.C. 577, 741 S.E.2d 34 (Ct.App. 2013).

This Court need not consider any of Megna's arguments, even the ones that are preserved, because Megna has failed to appeal Judge Baxley's ruling that the subpoena served on Ballard violated the SCRCP.

Conclusion

The issues raised by Megna in this appeal are without merit. In addition, no relief should be afforded to Megna because he has failed to appeal the second ground upon which Judge Baxley relied in assessing sanctions against him.

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December 12, 2013