THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Maité D. Murphy, Circuit Court Judge

Case No. 2011-CP-07-04999

Appellate Case No. 2013-002569

Steffani Walther and Michael Walther, ... Appellants,

v.

Eddie Maple and Kate Maple, individually
And d/b/a Equine Management, LLC, ... Respondents.

REPLY BRIEF OF THE APPELLANTS

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
T: (843) 785-6503
F. (843) 785-6170
Email: rmathlaw@aol.com

Hilton Head Island, South Carolina.

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ARGUMENT

The Appellants' properly raised the issue of Respondents' *ex parte* communications to the court through its Rule 52 and Rule 59 motions. The *ex parte* communications prejudiced the Appellants in several ways, including altering the ruling of the court and expanding the relief granted to the Respondents. The Respondents have not responded to the Appellants arguments regarding the propriety of the sanctions imposed. Accordingly, the Appellants request the court reverse the decision of the trial court and remand the case for further proceedings.

I. Response to Respondents' Statement of the Case

Appellants rest on their statement of the case set forth in the Initial Brief of Appellants, pp. 1-4, but would respond to the Respondents' Statement of the Case to the extent it contains argumentation which requires a response:

a. At page 8 of Respondents Initial Brief, in reciting the facts of the hearing that took place on October 28, 2013, Respondents write:

> "At that hearing, Judge Murphy ruled from the bench and granted Respondents' Motion for Sanctions finding . . . that Appellants willfully and intentionally ignored the Order of this Court issued by The Honorable Marvin H. Dukes, III, issued on July 24, 2013."

Appellants would refer the court to the transcript of hearing cited for that proposition, [Trans. of Hearing, October 28, 2013, p. 12], which contains no such finding. In fact, the court's specific rationale for its ruling at the hearing directly contradicts the findings of willfulness and intentionality that permeate all of Respondents' subsequent arguments. At the hearing, the court Ruled:

> "Based on the circumstances of the case I think it's appropriate to grant the Motion for Sanctions and Attorney's fees. *I'm dismissing the case but I'm not doing it with prejudice. I don't think that it's equitable to hold his clients to that burden if it's no fault of their own. I'm not sure whose it is. I'll grant your motion on those grounds if you will please prepare an order for me.*"

[Trans. of Hearing, October 28, 2013, p. 12, (emphasis added)]. Thus, the ruling from the bench was premised almost entirely on the fact that the court did *not find willfulness and intent* on behalf of the Appellants.

The language cited by the Respondents as the court's ruling "from the bench," actually appears for the first time on page 4 of the *ex parte* order submitted by Respondents' counsel to the court on October 29, 2013.

b. Throughout Respondents' Brief (at pages 9, 15, and 18), Respondents claim Appellants were informed of the ruling at the October 28, 2014 hearing "by the court." Appellants' counsel "learned the matter had been heard and decided," on October 28th. [Affidavit of Robert V. Mathison, Jr., Nov. 29, 2013, p. 2]. In the days following the hearing, counsel for the parties' communicated several times about the hearing, including communications regarding post-hearing submissions to the court made by both parties. [*See, e. g.* Letter from P. Florence to R. Mathison, dated October 29, 2013; Email Corresp. dated October 30, 2013]. In none of those communications did Respondents' counsel mention the proposed Order submitted to the court and signed on October 29, 2013, which differed significantly from the decision made at the hearing. c.

Contrary to the suggestion presented at the bottom of page 9 of Respondents' Brief, when Respondents' counsel objected to the submission of the Affidavit of Steffani Walther, he did not make any reference to a "signed order." [Email Corresp. dated October 30, 2014.]. In fact, it was not until November 18th that Respondents' counsel

forwarded a copy of the Order submitted *ex parte* and signed on October 29th. [Email Corresp. dated November 18, 2013]. The Order did not reflect the reasoning of the court's decision at the October 28th hearing.[1] Appellants' counsel did not learn that Respondents' counsel prepared and submitted that proposed order until Respondents' counsel disclosed that fact in its response to Plaintiff's post-hearing motions. *See* Reply to Plaintiffs' Motion for Relief, Dec. 10, 2014, p. 2.

II. The Appellants raised the issues of Notice and the Ex Parte Communication to the trial court through its post-hearing motions, and were severely prejudiced by the communication.

A. Respondents argue that the Appellants failed to present the issue of Respondent's *ex parte* communications to the court through its post-trial motions pursuant to Rule 52 and Rule 59. The Appellants specifically raised Defense counsel's *ex parte* communications with the court by arguing the award of attorney's fees was made "without a proper evidentiary hearing" or "without proper notice." [Notice of Motions and Motions dated November 29, 2013]. The Appellants' also challenged the findings of fact in the order under Rule 52(b), noting the excessiveness of the sanctions imposed. The court denied Appellants' motions without a hearing by summary order dated January 23, 2014.[2]

A party is not required to use the exact name of a legal doctrine in order to preserve the issue. See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001) (finding issue was preserved even though defendant did not use exact words "corpus

[1] Respondents' counsel subsequently sent the re-entered version of the order with the revised filing date on November 29th.

[2] Because of the late disclosure of the October 29th Order, the Notice of Appeal in the matter was filed on November 29th, 2013, to preserve Appellants' right to appeal. The filing of the notice of appeal arguably divested the trial court's authority to rule on Appellants' Rule 60 motion, and the Appellants reserve the right to renew its Rule 60 motion should this appeal be dismissed.

delicti" in his request for a directed verdict). The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Herron v. Century BMW, 395 S.C. 461, __, 719 S.E.2d 640, 643 (2011). Courts are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Id.

Although Appellants' counsel did not identify Rule 5 by name, there could be no confusion that the error complained of was the inclusion in the Order dated October 29th, of information ostensibly received by the court and Appellants' counsel *after* the order was signed on October 29th. The Appellants asserted concerns regarding the issuance of an Order signed on October 29, 2013, which included a monetary award that was "made without a proper evidentiary hearing" or "without proper notice." Respondents admit that the Order was submitted *ex parte* as was Respondents' counsel's Affidavit of Attorney's fees. The purpose of Rule 5(b)(3) is to ensure "opposing counsel will have the opportunity to review and comment on the proposed order *before it is signed.*" Rule, 5(b)(3), Note to 1994 Amendment.[3] It specifies that proposed orders and other materials provided to the court are to be served on all counsel of record *at the same time and by the same means*. Id. Accordingly, the Appellants provided the court the opportunity to rule on the *ex parte* communication issue, and the court did rule on it by issuing an order on January 23, 2014.

In this case, the Plaintiffs' counsel did not suspect that an *ex parte* communication had occurred until November 18, when Respondents' counsel finally disclosed a copy of the Order dated October 29, 2014. Only then, did Appellants' counsel have any idea that

[3] Justin S. Kahn, South Carolina Rules Annotated, South Carolina Bar, 2014, p. 20.

the Order had been submitted to the court three weeks earlier. Accordingly, Appellants' counsel's concerns were appropriately raised in its Rule 59(e) motion.[4] *See* In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920 (Ct. App., 1998) (When a party receives an order that grants relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal).

Furthermore, the court expressly declined to make findings of willfulness and intentionality at the hearing, and the Affidavit of Steffani Walther only reinforced the initial determination. Appellants' Counsel argued the sanctions "exceed those warranted by Rule 37(b)(2), SCRCP" and "the proper exercise of discretion" based on the evidence in the record. A review of the record demonstrates that the court agreed with that assessment at the time of the hearing, but only concluded otherwise after the presentation of an *ex parte* order. Taken by surprise by the *ex parte* findings that contradicted the decision by the court at the hearing, Appellants properly raised the matter in their motions pursuant to Rule 59(e) and Rule 52(b). Thus, each of Appellants' arguments are preserved for review by this court.

B. Appellants' were prejudiced by the *Ex Parte* Communications, because the *ex parte* order altered the findings and expanded the relief granted at the hearing.

Respondents do not deny the proposed Order and Affidavit of Attorney's fees were submitted to the court without contemporaneous service on opposing counsel, in

[4] Appellants' counsel attempted to obtain a copy of the transcript in this matter in late 2013 to make a more robust argument on its post-trial motions. Letter of R. Mathison dated Dec. 9, 2013. However, the transcript was not produced until six months later.

violation of Rule 5(b)(3), only that the error was "minor, inadvertent, inconsequential and not prejudicial." Respondent's Brief, p. 19.

Courts apply a subjective test to determine whether an ex parte communication results in prejudice to an excluded party. Brailsford v. Brailsford, 669 S.E.2d 342, 380 S.C. 443 (Ct. App. 2008). Prejudice may be observed where the oral order of the court differs substantially from the written order. *Cf.* Brailsford, 669 S.E.2d 342, 380 S.C. 443 (Ct. App., 2008) (noting the excluded party could show no prejudice from an *ex parte* communication that occurred between a hearing and the submission of a written order, where the oral and written orders were substantially similar).

As noted above, the *ex parte* order dramatically changed the court's findings and rationale for its ruling on the motion for sanctions. The court specifically stated it could make no finding of whether the Appellants were at fault for the missed depositions. The failure to find willfulness and intent on the part of the Appellants was the very reason the court dismissed the case without prejudice. The written order contradicts the oral order because it includes specific findings that the court declined to make regarding willfulness and intent.

Additionally, the oral order contained no fixed amount of attorney's fees, and stated that fees would be awarded for Defense Counsel's efforts to notice and take Appellants depositions. The subsequent *ex parte* submissions filled that hole with a figure that included numerous extraneous attorney's fees and costs that were inappropriate under Rule 37, and unrelated to the specific directive of the court.

Finally, as is more thoroughly discussed in Appellants Brief (p. 11), the concealment of the proposed order for over three weeks, resulted in the material

alteration of the relief granted, transforming the intended sanction of a dismissal without prejudice, into a dismissal with prejudice.

The prejudice resulting from Respondents' failure to disclose the proposed order is underscored in Respondents' final argument at pages 19 and 20 of its brief. Paradoxically, Respondents claim that because the *ex parte* order was signed on October 29th, the Appellants' right to refile within the statute of limitations was not infringed, even though no notice of the written order was provided until after the running of the statute of limitations.[5] Clearly, Appellants had no idea that any written order dismissing the case and fixing the rights of the parties existed, even if it was aware of what occurred at the hearing. *See* Upchurch v. Upchurch, 367 S.C. 16, 22-23, 624 S.E.2d 643, 646 (2006) (written order fixes the rights of the parties). As a result, Appellants were precluded from exercising their right to refile, because they believed the present action was still pending. *See*, Rule 12(b)(8), SCRCP (pendency of prior suit between the same parties on same claim as grounds for dismissal).

Notably, Appellants' counsel's presence at the hearing could not have protected Appellants from the subsequent overreaches and contradictions between the order and the events of the hearing. The fact that Appellants' counsel was aware of the court's ruling on October 28, but not the significantly different written order signed on October 29, simply reinforces the unavoidable prejudice to the Appellants. Appellants' counsel was never provided an opportunity to review the order to confirm that it conformed to the court's decision on October 28, 2013. Thus, Appellants' counsel's absence did not create the prejudice resulting from the *ex parte* communication as suggested by Respondents.

[5] The Respondents then cite several communications between Judge Murphy's Clerk and Respondents' Counsel, which the undersigned learned of for the first time in reading Respondents' Brief.

III. Respondents have Failed to Address the Issues Identified in the Appellants Brief, namely, (1) that the Sanctions imposed were not Proportional to the Alleged Misconduct and (2) that the Relief granted was not Supported by the Evidence.

A. Respondents' Brief is not Responsive to the Issues Presented.

In responding to the Appellants' brief, the Respondents have failed to address the issues presented to the court. Appellants have not argued that the court abused its discretion in imposing sanctions pursuant to Rule 37, SCRCP, but that those sanctions were unduly harsh under the circumstances or unsupported by the evidence. In rebuttal, the Respondents have only identified and addressed the uncontested issue of whether or not sanctions may be ordered. It is undisputed that the court may order sanctions pursuant to Rule 37. However, Respondents have totally ignored whether those sanctions were warranted under the law or the evidence presented.

Accordingly, the Appellants refer to sections I, II and III of their Initial Brief in reply to Respondents first two Issues on Appeal.

B. Attorney's Fees & Costs

Respondents argue the court did not abuse its discretion in awarding attorney's fees and costs because "Judge Murphy determined the Appellants willfully and intentionally failed to appear for their properly noticed depositions on multiple occasions." [Respondents' Brief, p. 18]. Appellants have not argued the court erred in making an award of attorney's fees.[6] Instead, Appellants argued that the court erred in awarding fees that are not supported by the evidence and that the award was made without notice to the Appellants, because they were included in an *ex parte* order premised on an *ex parte* affidavit.

[6] The court's findings of willfulness and intentionality are discussed above.

Respondents next contend that a full evidentiary hearing on attorney's fees took place on October 28, 2013. [Respondents' Initial Brief, p. 19]. The record clearly indicates no evidence regarding the amount of fees awarded was presented to the court on October 28th. [Trans. of Hearing, p. 12-13]. Indeed, Defense Counsel's Affidavit of Attorney's Fees was signed and submitted *ex parte* on October 29th, and the figure attested therein was included in the *ex parte* order submitted the same day, not at the hearing.

Respondents provide no explanation for why fees unrelated to efforts to take Appellants' depositions could conceivably be compensable under Rule 37(b)(2), SCRCP, or the directives of the court at the hearing. Rule 37(b) states the court may "require the party failing to act . . . to pay the reasonable expenses, including attorney's fees, *caused by the failure* . . .." (emphasis added). The court's directions to Defense Counsel from the bench were to submit an order detailing "the number of times that you attempted to schedule the depositions and that he canceled so then I can fill in the blank as far as the amount of sanctions I will impose." [Trans. of Hearing, October 28, p. 12]. The court then included attorney's fees for a wide variety of activities totally outside the scope of the Rule and the court's order from the Bench.

Respondents' failure to address these specific fees highlights the courts failure to exercise discretion in making a determination of the attorney's fees awarded. Additionally, providing no explanation for how they ended up in an Order signed by the court several days before an Affidavit of Attorney's fees was received by opposing counsel, merely underscores the prejudice suffered by Appellants as a result of the *ex parte* submissions.

CONCLUSION

The Respondents fail to address the abuses of discretion outlined in Appellants' Initial Brief. Additionally, the issues described in Appellants' initial brief are properly before this court. For the reasons set forth above and detailed in Appellants' Initial Brief, the Appellants request the court reverse the decision of the trial court and remand the case for further proceedings.

Respectfully Submitted,

By: S/ Robert V. Mathison

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
T: (843) 785-6503
F: (843) 785-6170
Email: rmathlaw@aol.com

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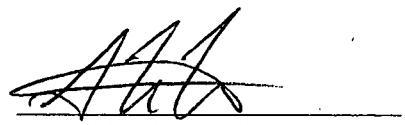
PROOF OF SERVICE

I, D. Michael Mathison, hereby certify that on December 29, 2014, I filed and served the original and copies of the Reply Brief of Appellants by depositing same, with sufficient first class postage prepaid, at the United States Post Office, addressed as follows:

The Honorable Jenny Abbott Kitchings
Clerk of the Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Phillip Florence, Jr., Esquire
Florence Law Group, LLC
Post Office Box 22497
Charleston, SC 29431



D. Michael Mathison

LAW OFFICES
MATHISON & MATHISON
POST OFFICE BOX 5271
HILTON HEAD ISLAND, S.C. 29938-5271
TELEPHONE: (843) 785-6503
FACSIMILE: (843) 785-6170
EMAIL: rmathlaw@aol.com

ROBERT V. MATHISON, JR. KERRY F. MATHISON

December 29, 2014

The Honorable Jenny Abbott Kitchings
Clerk of the Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Steffani Walther, et al. v. Eddie Maple, et al.
Case No. 2011-CP-07-04999
Appellate Case No. 2013-002569

Dear Ms. Kitchings:

Enclosed please find originals and copies of the following:

1. The Reply Brief of Appellants;

2. Proof of Service.

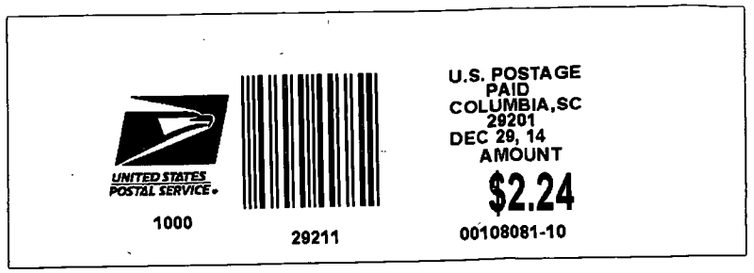
Please file the originals and stamp and return the copies in the pre-addressed, stamped envelope enclosed.

With kind regards, I am.

Sincerely,

D. Michael Mathison

Enclosures
cc: Phillip Florence, Jr., Esquire
Mrs. Steffani Walther
Mr. Michael D. Walther



Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938

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Clerk of the Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211