THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY AND DARLINGTON
Circuit Court

J. Michael Baxley, Circuit Court Judge
Case No. 07-CP-40-0576
J. Michael Baxley, Circuit Court Judge
Case No. 40-CP-16-0332
Appellant Case No. 2013-001461

Ex Parte: Douglas N.Truslow, Respondent,

Ex Parte: Tony R. Megna, Appellant,

In re:

James Anasti, Plaintiff,

v.

Lance Wilson, Willis Goodwin, Gina L. Anasti Lee and Richland County 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,

v.

Estate of Hugh S. Thompson, Defendant.

APPELLANT'S PETITION FOR REHEARING

Appellant Tony R. Megna hereby petitions this Court, pursuant to Rule 221, SCACR, for a rehearing. This Court issued an unpublished opinion, filed February 11, 2015, finding that six of the issues asserted by Megna were not preserved as they had been raised for the first time in his Rule 59(e) motion. The Court overlooked or misapprehended certain arguments and evidence in the Record.

This Court ruled that several of Megna's arguments were raised for the first time in his Rule 59(e) motion and not preserved for preserved for appeal. However, the arguments to which this Court refers were actually ruled on by the lower court. Thus, even if the lower court had the discretion to deny any issues that may have been raised for the first time on reconsideration, it chose not to do so and considered them on the merits. Therefore, those issues, having been raised to the lower court and ruled upon, have been properly preserved for this appeal: "issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 642, (2011)" A recent Utah case noted this explicitly:

> Plaintiffs first raised this argument in their motion for reconsideration. Nonetheless, it appears the district court considered this argument on its merits.... if a trial court decides, in its discretion, to address the merits of a claim raised for the first time in a motion to reconsider, that claim is preserved. Thus, though plaintiffs raised the material aid claim for the first time in the motion to reconsider, the district court, both at oral argument and in its order on the motion, expressly stated that it was considering the claim. We therefore determine that the issue was preserved.

Burdick v. Horner Townsend & Kent, Inc., __ P.3d __ , 778 Utah Adv. Rep. 15 (Jan. 23, 2015).

In denying Megna's motion for reconsideration, the lower court here stated: "The Court has considered **all issues raised by the motions for reconsideration** and concluded all to be

without merit." (R. 122) (emphasis added). Clearly, the issues were considered on the merits by the lower court and thus are properly preserved for consideration by this Court.

In addition, the record shows that many of the specific issues were presented to the lower court prior to the Rule 59(e) motion.

I. The Court overlooked or misapprehended the evidence demonstrating that the following issues were preserved for appeal:

A. The untimeliness of Truslow's motion

The Court's opinion asserts that whether Truslow's request for sanctions was invalid because it was filed more than ten days after the remittitur in *Anasti* was raised for the first time on reconsideration and thus not preserved for appeal. However, Megna demonstrated to the lower court that the Court of Appeals had already considered a motion for sanctions (R.p. 818); that the Court had denied the motion (R.p. 818, 1030); that remittitur was issued on October 7, 2011 (R.p. 72; 1031); and that Truslow's motion for sanctions was not filed until November 22, 2011 (R.p.819). Megna pointed out that Court's denial of sanctions was the law of the case (R.p. 818). In the Supplemental Reply to Anasti's Motion to Quash Subpoenas, for Damages, and for Sanctions, Megna also argued that a motion for sanctions is not timely if filed more than ten days after judgment (R.p. 1037-1038). Clearly, this issue was preserved for appeal. Moreover, because all post-judgment motions, including those for sanctions, must be filed within ten days of receipt of notice of the entry of an order, Truslow's motion, filed more than 30 days after remittitur was clearly untimely. See, e.g. Rule 59, SCRCP; Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 432-33, 570 S.E.2d 187, 189-90 (Ct. App. 2002) (holding that a motion for sanction must be made within ten days under Rule 59).

B. Discovery was not frivolous where the Court of Appeals had already considered the same allegations and rejected them

Our case law is very clear that an unappealed ruling, "right or wrong, is the law of the case...." Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970). In the lower court, Megna argued multiple times that the Court of Appeals had already considered Truslow's claims and documents supposedly supporting Megna's misconduct and denied sanctions (R.p. 888; 1038-1039). However, Truslow failed to inform the lower court that this Court had considered a Motion for Sanctions and denied it. Truslow's Amended Motion for Sanctions asserted that the damages and sanctions were expected to exceed $500,000. The Amended Motion also cited, as grounds for the sanctions, the fact that the appeals had been determined adversely to Truslow's client, but again, failed to mention that he moved for sanctions with regard to the appellate matter, but this Court had denied that motion. Megna repeatedly raised these issues to the lower court, properly preserving them, and the merits of this issue are properly before this Court. Because the appellate motion for sanctions (using the same documents Truslow then submitted to the Circuit Court) had been denied and Truslow's motion was in part on Megna's unsuccessful appeal, the motion for sanctions should have been denied. (See R 1031-1037).

C. The propriety of discovery to inquire into Truslow's unsupported and excessive sanction request

According to this Court's opinion, the issue of whether discovery was proper because of the sanctions/damages sought by Truslow was not preserved for appeal. However, in Megna's Supplemental Reply to Anasti's Motion to Quash Subpoenas, for Damages, and for Sanctions, Megna argued to the lower court that the discovery requests to Truslow were in response to

Truslow's sanctions request for November 22, 2011, which sought in excess of $500,000.00, and which provided no basis for this excessive amount. (R.p. 821-822; 1039). Megna asserted that discovery under Rule 11 was an appropriate method to determine facts not previously raised or considered. Id. Thus, Megna's argument that discovery was proper (and not frivolous) was preserved for appeal.

Furthermore, as noted in his briefs to this Court, at status conference before the lower court, there were no restrictions placed on discovery, only on the number of witnesses Truslow would be permitted to call. In addition, there is no rule or case law that prohibits the use of discovery in sanctions proceeding. Thus, Megna was not in violation of any case law, rule or court order in serving the discovery requests. Megna was merely taking the necessary action to contest the sanctions, which was reasonable "*particularly in light of the large monetary sanction.*" In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990)("We find that appellants were not given an adequate opportunity to respond to the type and amount of sanction imposed, *particularly in light of the large monetary sanction.*")

D. The good faith basis to subpoena Ballard

In the lower court, Megna asserted that the discovery sought from Ballard was necessary based on the fact that she or her partner had confidential communications with Megna, agreeing to represent him, but failed to disclose she had been working with Truslow on matters directly adverse to Megna. (R.p. 1040-1042; 1043-1045). Megna also introduced the evidence of the emails from Ms. Ballard's office (which became known as the "Weissenstein e-mails"), in which her firm agreed to represent Megna and accepted confidential information from Megna. Id. Obviously, the good faith basis of Megna to seek discovery from Ballard was argued to the lower court and preserved for appeal.

With regard to the merits of this issue, it is apparent that neither Ballard nor her partner revealed that: 1) Ballard was involved in the Anasti litigation, including advising Truslow on sanctions against Appellant; or 2) Ballard and Truslow had consulted with attorneys in the Thompson case and in the Lake City litigation. When Truslow filed a Motion for Sanctions in the Anasti appeal on May 9, 2011, the filing was accompanied by both his affidavit and an affidavit by Ballard. (R. 398). The affidavits revealed the repeated conferences between Ballard and Truslow and conferences with the attorneys in other litigation that was directly adverse to Appellant and Pee Dee. Id. Because Ballard had received confidential information from Megna while at the same time advising Truslow as to his sanctions motion, Megna had a good faith basis to pursue discovery to determine if there was any disclosure of his confidential information.

II. The Court also misapprehended the argument that Ballard, as an attorney appearing pro se, could not be awarded attorney's fees.

The law in South Carolina holds that pro se lawyer/litigant is not entitled to fees. *Calhoun v. Calhoun,* 331 S.C. 157, 501 S.E.2d 735 (1998) (A *pro se* litigant is not entitled to an award of attorney fees, even when the litigant is a practicing attorney); see also, *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 571, 511 S.E.2d 372, 381 (Ct. App. 1998).

Ballard was an attorney acting pro se. This Court's opinion found that the lower court awarded sanctions, not attorney's fees. However, Ballard is not entitled the award regardless of the fact that the lower court tried to classify the award as "sanctions." It is apparent that the lower court awarded attorney's fees but improperly cloaked the award in the guise of "sanctions." The lower court noted that Ballard submitted an "affidavit of attorney fees" (R.85) for her time and costs and concluded that the award of "sanctions"

> constitutes reimbursement for time and expenses set forth in Ms. Ballard's

> amended affidavit dated August 8, 2012. These sanctions are not punitive but are compensatory....

(R.86). The plain language of the order makes it apparent that Ballard was awarded attorney's fees and costs for representing herself, which cannot be paid to a pro se attorney under South Carolina case law because a pro se litigant has not had to pay any attorney's fees:

> We found a *pro se* litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney."

Hopkins v. Hopkins, 343 S.C. 301, 306, 540 S.E.2d 454, 457 (2000). The classification of the lower court's award is merely semantics,[1] whereas the policy reasons underlying the court's prohibition for an award of pro se attorneys' fees is clear:

> Attorneys' fees have also been denied to *pro se* attorney/litigants for the policy reason that it would simply be unfair to allow *pro se* attorneys to recover fees, while denying such fees to *pro se* laymen.

Hopkins v. Hopkins, 343 S.C. 301, 306, 540 S.E.2d 454, 457 (2000). Regardless of the lower court's attempts to manipulate the semantics, the award to Ballard constitutes an improper award of fees to a pro se attorney/litigant. See, e.g. *Town of Forest Acres v. Town of Forest Lake,* 226 S.C. 349, 85 S.E.2d 192 (1954)("The question must be decided not by the letter, but by the spirit and practical operation of the act.")

CONCLUSION

As set forth herein, this Court overlooked the fact that the issues allegedly raised for the first time on a Rule 59(e) motion were ruled on by the lower court and thus preserved for appeal.

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1 *See also, Kravitz v. Superior Court*, 91 Cal. App. 4th 1015, 111 Cal. Rptr. 2d 385 (2001)(A pro se lawyer cannot recover attorney fees as a discovery sanction, although he or she may be entitled to an award to recover other reasonable expenses actually incurred). The *Kravitz* decision also noted that if a pro se lawyer could recover his "reasonable attorney's fees," that would not necessarily mean that he could recover the usual hourly rate (including both profit and overhead) at which he bills his clients for similar services or calculates his fees for other purposes, or that he could recover for all of the time he devoted to his own case. Id. 91 Cal. App. .4th 1015, 1021, 111 Cal. Rptr. 2d 385, 390 (2001).

In addition, the record also shows that most of the issues were raised to the lower court prior to the Rule 59(e) motion. These issues must be determined by this Court on the merits and upon consideration of the merits, the sanctions orders should be reversed. In addition, the Court misapprehended the argument on pro se attorney's fees. Appellant Tony R. Megna respectfully requests that the the petition for rehearing be granted.

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ATTORNEYS FOR APPELLANT
TONY R. MEGNA

Columbia, South Carolina
February 25, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin LLP, attorneys for Tony R. Megna, do hereby certify that I have served a copy of the foregoing **Appellant's Petition for Rehearing**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

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P.O. Box 1465
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Jaime Harmon

Columbia, South Carolina
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February 26, 2015

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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Ex Parte*: Douglas N. Truslow (Desa Ballard)
Appellant Case No. 2013-001461

Dear Ms. Abbott Kitchings:

Enclosed please find the original and three copies of Appellant's Petition for Rehearing along with the filing fee of $25.00 in the above-referenced case. Please file these documents and return the clocked copies to this office via our courier.

By copy of this letter and as evidenced on the Proof of Service, I am serving counsel of record.

If you have any questions, please do not hesitate to contact this office.

With kind regards, I am

Very truly yours,

Jaime Harmon

Enclosures

cc: Douglas Truslow
Desa Ballard