THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY AND DARLINGTON COUNTY
J. Michel Baxley, Circuit Court Judge

Unpublished Opinion No. 2015-UP-067
(Filed February 11, 2015)

Ex Parte: Tony R. Megna, Petitioner

Ex Parte: Douglas N.Truslow, Respondent,

In re:

James Anasti, Plaintiff,

v.

Lance Wilson, Willis Goodwin, Gina L. Anasti Lee and Richland County Clerk of Court, Defendants.

And

Ex Parte: Tony R. Megna, Petitioner,

Ex Parte: Desa Ballard, Respondent,

In re:

Pee Dee Health Care, P.A., Plaintiff,

v.

Estate of Hugh S. Thompson, Defendant.

PETITION FOR WRIT OF CERTIORARI

Petitioner Tony Megna ("Megna") petitions this Court, pursuant to Rule 242, SCACR, for a writ of certiorari.

CERTIFICATION OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and ruled on by the South Carolina Court of Appeals on April 16, 2015.

QUESTIONS PRESENTED

The Court of Appeals issued an unpublished opinion, filed February 11, 2015, finding that six of the issues asserted by Petitioner Megna and ruled upon by the lower court were not preserved because they had been raised for the first time in his Rule 59(e) motion. This decision by the Court of Appeals is contrary to prior precedent of this Court and the issues presented involve novel questions of law. The questions presented are:

I. Whether the Court of Appeals erred in finding that the following issues were not preserved for appeal even though they were presented to and ruled upon by the lower court:

A. The untimeliness of Respondent Truslow's sanctions motion;

B. The propriety of discovery where the Court of Appeals had already considered the same and declined to award sanctions;

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

D. The good faith basis to issue a subpoena to Respondent Ballard?

II. Whether the Court of Appeals also erred in finding that the lower court could properly circumvent the prohibition against awarding attorneys' fees to a pro se attorney by simply calling the award a sanction?

STATEMENT OF THE CASE

This appeal involves two separate cases in two different counties. Anasti v. Wilson et al. ("the Anasti case") was a case that originated in Richland County Circuit Court. Pee Dee Health Care v. Estate of Thompson ("the Thompson case") challenged the denial of a probate claim and was filed in Florence County Circuit Court. Petitioner Tony R. Megna served as counsel for Defendant Gina Anasti Lee in the Anasti case and as counsel for Plaintiff Pee Dee Health Care ("Pee Dee") in the Thompson case.

1. Anasti Case

In Anasti, attorney Doug Truslow ("Truslow") brought suit on behalf of his client, James Anasti, against several defendants, including Petitioner's client Gina Lee. The Circuit Court granted summary judgment to Plaintiff Anasti (R. 1-10), and thereafter, Gina Lee, though Petitioner, appealed to this Court (R. 12-13).[1] After the Court of Appeals dismissed Gina Lee's appeals, Truslow filed a motion in the Court of Appeals seeking sanctions against Petitioner. (R. 368-420). The attachments to the appellate motion for sanctions indicate that Truslow conferred with attorney Desa Ballard on the matter starting in 2008 and conferred with attorneys and parties in the Thompson case (Jay James and Rene Josey.) Id. Truslow also conferred with attorneys (Celeste Jones and Bobby Stepp) that are representing parties in other litigation in which Petitioner and Pee Dee are involved. Id. The Court of Appeals denied Truslow's appellate motion for sanctions (R. 64-66) and thereafter remitted the Anasti appeal to the Richland County Circuit Court on October 7, 2011 (R. 72).

On November 22, 2011, Truslow filed another motion for sanctions against Petitioner in the Circuit Court ("Truslow's second sanctions motion"). (R. 441-443). In this motion, Truslow

[1] Gina Lee actually appealed two orders of the Circuit Court which were consolidated for appeal. (R. 48-50). She also filed for Bankruptcy which resulted in a stay of the appeal for a short period. Id. (SR. 6).

sought damages and sanctions against Petitioner that were expected to exceed $500,000.00. Id. Truslow requested a status conference as to the second sanctions motion and indicated that he planned to call several witnesses as to the amount of damages, including Desa Ballard, Rene Josey, Celeste Jones, and Bobby Stepp. (R.1181-1183; 241-260). The Honorable James R. Barber found that Truslow should be limited to two or three witnesses. Judge Barber did not impose any other limitations.

Following the status conference, Petitioner served 11 interrogatories and 13 requests for production on Truslow and noticed witness depositions, in order to determine the specific damages that Truslow claimed amounted to $500,000.00. On March 9, 2012, Truslow moved to quash the discovery requests (R. 444-489) and for, a third time, sanctions ("Truslow's third sanctions motion). (R. 490-508).

2. *Thompson Case*

Concurrent with the Anasti case, Petitioner was also representing Pee Dee Health Care ("Pee Dee") in the Thompson case. In the Thompson case, Pee Dee sought to recover reimbursement for losses created by the actions of the Decedent, Hugh Thompson, while he was employed by Pee Dee.[2] The Defendant Estate was originally represented by attorney Jay James.[3] Mr. James then associated attorney Rene Josey of Turner Padget Graham and Laney,

[2] After Thompson left Pee Dee's employment, Pee Dee was notified by Medicare that it owed more than $200,000 for "overpayments" because Thompson, who had been suspended from participation in the program at one point, had not been reinstated by the Medicare Office at the time the Medicare payments for Thompson's services had been made.

[3] These facts are drawn from the appeal of Pee Dee Health Care, P.A., v. Estate of Hugh Thompson, 10-CP-16-0332, in which Petitioner moved the Court of Appeals, on August 24, 2011, to disqualify Mr. Josey and his firm (SR. 58-72). Petitioner has not included all of the Record on Appeal from that case but for any records not so included, the Court can take judicial notice of them. See Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App.1984). ("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.")

P.A. However, Mr. Josey's partner, Brad Hylton, had been representing Pee Dee on a workers' compensation case that had been ongoing since 1994. Pee Dee notified Mr. Josey of the conflict and refused to waive the same. Subsequently, Turner Padget unilaterally withdrew from representation in Pee Dee's worker's compensation case and continued representing the Defendant Estate in the Thompson case. Pee Dee later sought disqualification of Mr. Josey while the Thompson case was on appeal, but ultimately, the Court of Appeals refused to disqualify Josey from representing that defendant.

On January 31, 2011, the Defendant Estate moved to disqualify Petitioner Megna from representing Pee Dee because he was a necessary witness.[4] (S.R. 58-71). The Circuit Court granted the motion by Order dated April 15, 2011(R. 55-63), but provided an exception that Petitioner would be permitted to argue a then pending motion for summary judgment. On May 2, 2011, Petitioner filed a motion to alter or amend the order of disqualification under Rule 59(e), SCRCP. (R. 67). Upon denial of that motion (R. 67-68), Petitioner filed a Notice of Appeal of the disqualification. While that appeal was pending, the Circuit Court granted the Defendant Estate's motion for summary judgment. Petitioner filed a motion to alter or amend the summary judgment order on behalf of Pee Dee. The Court denied the motion and Pee Dee appealed that order.[5]

During this same time period – May 2011 – Petitioner learned for the first time in Truslow's appellate motion for sanctions in the Anasti case, that Dessa Ballard, an attorney Petitioner contacted in 2010 regarding representation of himself, Pee Dee, and others in litigation

[4] Petitioner is the CEO of Pee Dee.

[5] On July 3, 2013, this Court issued an unpublished opinion on both of those appeals (as well as a third appeal) that had been consolidated for purposes of oral argument. (SR 21-25). The Opinion declined to reverse the Circuit Court's orders. Petitioner intends to file a petition for certiorari on the disqualification issue.

arising out of Lake City, South Carolina (the "Lake City litigation") (R. 1165-1167), had been working with Truslow on the Anasti case, and on matters directly adverse to Petitioner. Moreover, Petitioner learned that Truslow and Ballard had conferred with Rene Josey and Jay James in the Thompson case (as well as Celeste Jones and Bobby Stepp in the Lake City litigation), whose interests were adverse to Pee Dee. Id. At no point during Petitioner's communications with Ballard in 2010 did she disclose she had been working on matters directly adverse to Petitioner and Pee Dee in the Anasti and Thompson cases and the Lake City litigation.

Accordingly, on July 27, 2011, Petitioner issued a subpoena,6 under the Thompson caption, to Ballard requesting certain documentation to determine the context of her conversations with Rene Josey and other attorneys that were adverse to Petitioner and/or Pee Dee in the Thompson case and in the Lake City litigation. (R. 424-433). Ballard filed an objection to the subpoena on the grounds Petitioner had been disqualified as counsel for Pee Dee and moved for sanctions. (R. 436-440).

On August 12, 2011, Judge Baxley denied Petitioner's pending motion to alter or amend his disqualification as counsel for Pee Dee. Judge Baxley also considered Ballard's objections to the subpoena and quashed all discovery issued by Petition; however, he did not address Ballard's motion for sanctions. (R. 67-68). Petitioner appealed the disqualification issue. However, Ballard did not cross appeal, or file a Rule 59(e) motion regarding the Circuit Court's failure to award sanctions.

3. *Judge Baxley hears Sanctions Motions for Anasti & Thompson cases*

Following the filing of Truslow's motion to quash and his third motion for sanctions in the Anasti case, Judge Barber as the Chief Administrative Judge in Richland County, assigned

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[6] Petitioner also served discovery on Truslow that he moved to quash and which served as the grounds for Truslow's third motion for sanctions in the Anasti case.

these motions to Judge Baxley because they dealt with matters related to the Thompson case over which he presided. (R. 1198-1216). Thus, by correspondence dated March 16, 2012, Judge Baxley stated he would hold a consolidated hearing as to both Truslow and Ballard's motions for sanctions. Judge Baxley found that no live testimony was necessary and instead requested that any necessary evidence be presented by affidavit. Id. The consolidated hearing took place on May 16, 2012. (R. 261-313). Petitioner's counsel appeared to oppose the sanctions, and submitted a memorandum in opposition (R. 818-1030). Petitioner also submitted a supplemental memorandum after the hearing (R. 1030-1054).

By separate Orders dated February 13, 2013, the Circuit Court awarded Truslow $31,842.39 in fees and costs (R. 90-119)[7] and awarded $17,388.75 to Ballard (R. 77-89). Petitioner moved to alter or amend both orders. (R. 1055-1071). Judge Baxley affirmed the award to Truslow, reduced the amount awarded to Ballard to $15,998.75 to reflect a billing error by Ballard, but declined to otherwise alter the Order. (R. 128-133). Petitioner then appealed the sanctions orders. On appeal, the Court of Appeals did not address the merits of the majority of Petitioner's arguments, wrongly finding that they had not been preserved for appeal. The Court of Appeals also erred in finding that Ballard, an attorney acting pro se, could be awarded fees.

ARGUMENT

The Court of Appeals wrongly found that several of Petitioner's arguments were not preserved for appeal because the issues were raised to the Circuit Court for the first time in his Rule 59(e) motion. However, while the Circuit Court may have had the discretion to refuse

[7] On July 26, 2012, Judge Baxley issued a preliminary ruling in a letter to counsel, in which he not only granted the motions of Truslow and Ballard, but *sua sponte* found that Petitioner had violated a court order which warranted additional sanctions of thirty days in jail. (R. 1298-1302). After objection by Petitioner's counsel, Judge Baxley recognized that due process required that Petitioner be given a hearing on that issue. (R. 314-339).

consideration of any issues that may have been raised for the first time on reconsideration, it chose not to do so and considered all of Petitioner's arguments on the merits. Therefore, those issues, having been raised before the Circuit Court and ruled upon, have been properly preserved for this appeal: "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved[.]" Pye v. Estate of Fox, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006). See also, Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (holding an appellate court cannot address an issue unless it was ruled upon by the trial court).

Recently, this Court found that a Circuit Court judge's implicit rejection of an argument was sufficient to preserve an issue for appeal.[8] Doe v. City of Duncan (Shearouse Adv. Sheet No. 15, April 15, 2015). Courts in other jurisdictions have also found that an issue first raised on a motion for reconsideration is preserved if the trial court rules on it. For example, a recent Utah case stated:

> 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., 345 P.3d 531, 546 (Utah 2015) (emphasis added). See also, State v. Tselios, 593 A.2d 243 (N.H. 1991) (holding issue preserved where defendant

[8] In that case, the petitioner argued to the Circuit Court that a summons and complaint were timely served because the time for service had been tolled under the Servicemembers Relief Act. In finding that service was untimely, the circuit court judge did not specifically state that the Act did not apply. This Court found that the judge's implicit rejection of the application of the Act was sufficient for preservation and remanded the matter to the Court of Appeals for a determination on the merits of the petitioner's appeal.

raised an issue in his motion to reconsider so that "his earlier failure to raise the issue did not deprive the trial court of a full opportunity to correct its error").

In denying Megna's motion for reconsideration, the Circuit Court here stated: "The Court has considered **all issues raised by the motions for reconsideration and concluded all to be without merit**." (R. 130). (emphasis added). Clearly, all issues, even ones supposedly raised for the first time in Petitioner's motion to reconsider the sanctions awards, were considered on the merits and ruled upon by the Circuit Court. In addition, the record shows that many of the specific issues were presented to the Circuit Court prior to the Rule 59(e) motion. As such, all issues have been properly preserved for appeal.

I. The Court of Appeals erred in finding that the following issues were not preserved for appeal even though they were presented to and ruled upon by the lower court:

A. The untimeliness of Respondent Truslow's sanctions motion

The Court of Appeals' opinion asserts that Petitioner raised the issue of the timeliness of Respondent Truslow's request for sanctions for the first time on reconsideration and thus, the issue was not preserved for appeal.

Truslow's motion was invalid because it was filed more than ten days after the remittitur in Anasti. Petitioner demonstrated to the Circuit Court that the Court of Appeals had previously considered a motion for sanctions (R. 818); that the Court of Appeals had denied the motion (R. 818, 1030); that remittitur was issued on October 7, 2011 (R. 1063); and that Truslow's second motion for sanctions was not filed with the Circuit Court until November 22, 2011. (R. 441-443). Petitioner pointed out that Court of Appeals' denial of sanctions was the law of the case (R. 888, 927-928). In the Supplemental Reply to Anasti's Motion to Quash Subpoenas, for Damages, and

for Sanctions, Petitioner 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, Petitioner's argument clearly follows that law in this State. After remittitur, a Circuit Court reacquires jurisdiction "to enforce the judgment and take any action consistent with the appellate court's ruling." Bunkum v. Manor Properties, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct. App. 1996); see also, Christy v. Christy, 317 S.C. 145, 151, 452 S.E.2d 1, 4 (Ct. App. 1994) ("The final disposition of a case occurs when the remittitur is returned by the clerk of the appellate court and filed in the lower court."). Furthermore, all post-judgment motions, including those for sanctions, must be filed within ten days of receipt of notice of the entry of an order. 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 sanctions must be made within ten days under Rule 59); Cox v. Fleetwood Homes of Ga., Inc., 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999) (holding a trial judge loses jurisdiction after the time for post-trial motions has elapsed).

In the Anasti case, the dismissal of Gina Lee's appeals and the remittitur to the Circuit Court constitutes a final judgment. See Bunkum and Christy, supra. Here, the remittitur was issued on October 7, 2011, but Truslow's second motion for sanctions was not filed until November 21, 2011 – much more than ten days after the remittitur. As it was untimely, the Circuit Court no longer had jurisdiction to consider the matter. Pitman, *supra.* Since the motion itself was improper, Petitioner's conduct in responding to the motion should not constitute sanctionable conduct. Thus, the order granting the motion was an abuse of discretion and must be vacated.

B. The propriety of discovery where the Court of Appeals had already considered the same and declined to award sanctions

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 Circuit Court, Petitioner argued multiple times that the Court of Appeals had already considered Truslow's claims and documents supposedly supporting Petitioner's misconduct and denied sanctions (R. 888; 1038-1039). However, Truslow failed to inform the Circuit Court that the Court of Appeals 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 that the Court of Appeals had denied that motion. Any conduct that has been previously rejected by the Court of Appeals as sanctionable cannot form the basis for sanctions in the Circuit Court.

Petitioner repeatedly raised these issues to the Circuit Court, properly preserving them, and the merits of this issue were properly before the court on appeal. 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 based in part on Petitioner's unsuccessful appeal, the motion for sanctions should have been denied. (R. 1031-1037).

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

According to the Court of Appeals' opinion, the issue of whether discovery was proper because of the sanctions/damages sought by Truslow was not preserved for appeal. However, in

Petitioner's Supplemental Reply to Anasti's Motion to Quash Subpoenas, for Damages, and for Sanctions, Petitioner argued that to the Circuit Court that the discovery requests to Truslow were in response to Truslow's sanctions request from November 22, 2011, which sought in excess of $500,000.00, and which provided no basis for this excessive amount. (R.p. 1039). Petitioner asserted that discovery under Rule 11 was an appropriate method to determine facts not previously raised or considered. Id. Thus, Petitioner's argument that discovery was proper (and not frivolous) was preserved for appeal.

Furthermore, denying discovery where an excessive amount of sanctions are sought is improper. See In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990) ("We find that Petitioners were not given an adequate opportunity to respond to the type and amount of sanction imposed, ***particularly in light of the large monetary sanction.***")(emphasis added). Here, at a status conference before the Circuit Court, Truslow provided a preliminary witness list for his motion that included Desa Ballard, Tom Earle, Curtis Dowling, Rene Josey, Celeste Jones, and Steve Licata. In addition, by letter dated January 9, 2102, Truslow listed as witnesses: Desa Ballard, Rene Josey, Celeste Jones and Bobby Stepp. (R. 241-260). Petitioner was entitled to discovery to determine the basis for the alleged $500,000 sanctions and to learn the substance of the witnesses' knowledge. While the lower court did limit the number of witnesses Truslow could call,[9] it put no restrictions on discovery. Furthermore, there is no rule or case law that prohibits the use of discovery in a sanctions proceeding. Thus, Petitioner was not in violation of any case law, rule or court order in serving the discovery requests. Petitioner was merely taking the necessary action to contest the sanctions, which was reasonable "***particularly in light of the***

[9] The lower court, through Judge Baxley, ultimately ordered that no witness testimony would be permitted and only allowed affidavits of Truslow and Ballard.

large monetary sanction." Kunstler, supra. (emphasis added). [10]

D. The good faith basis to subpoena Respondent Ballard

In the Circuit Court, Petitioner 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 Petitioner. (R. 1040-1042; 1043-1045). Petitioner 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 Petitioner and accepted confidential information from Megna. Id. Obviously, the good faith basis of Petitioner to seek discovery from Ballard was argued to the Circuit 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 Petitioner; or that 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 his affidavit that revealed the repeated conferences between Ballard and Truslow and conferences with the attorneys in other litigation that was directly adverse to Petitioner and Pee Dee. (R. 398-420). Because Ballard had received confidential information from Petitioner when he consulted her in 2010 while at the same time advising Truslow as to his sanctions motion, Petitioner had a good faith basis to pursue discovery to determine if there was any disclosure of his confidential information.

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[10] The lower court also claims that in the Anasti matter, Petitioner's client Gina Lee was not aware of the actions Megna was taking. However, this finding is not supported by the facts, as Petitioner's memorandum to Ms. Lee indicates that she was informed of the sanctions motion and that it was against Megna only. (R.p. 891). Thus, there was no need for her to authorize discovery. Furthermore, Ms. Lee authorized all appeals and bankruptcy actions taken on her behalf, and recently achieved a successful result in her bankruptcy case.

II. The Court of Appeals also erred in finding that the lower court could properly circumvent the prohibition against awarding attorneys' fees to a *pro se* attorney by simply calling the award a sanction.

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"). Our courts have adopted this holding in a variety of cases. See, e.g., Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991) (holding *pro se* lawyer/litigant is not entitled to fees under Civil Rights Attorney's Fees Awards Act); Hopkins v. Hopkins, 343 S.C. 301, 306, 540 S.E.2d 454, 457 (2000) (holding a *pro se* litigant, whether an attorney or layperson, does not become "liable for or subject to fees charged by an attorney"); First Union Nat. Bank of S. Carolina v. Soden, 333 S.C. 554, 571, 511 S.E.2d 372, 381 (Ct. App. 1998) (denying a *pro se* litigant to recover attorney fees for work of lawyer/husband). 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, supra.

Rule 11, SCRCP, sets forth available sanctions:

> Sanctions imposed on a party, a party's attorney or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing may include: an order to pay the reasonable costs and attorneys' fees incurred by the party defending against the action brought in bad faith; a reasonable fine to be paid to the court; a reasonable monetary penalty to the party defending the action brought in bad faith; or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future action in bad faith.

Furthermore, one main purpose of sanctions is to compensate the offended party for the losses or expenses incurred and must be related to those expenses. *See* Floyd v. Floyd, 365 S.C. 56, 80, 615 S.E.2d 465, 478 (Ct. App. 2005) (holding civil sanctions are for the purpose of coercing compliance or compensating the complainant for losses); Karppi v. Greenville Terrazzo Co.,

Inc., 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (holding sanction should be aimed at the specific misconduct of the party sanctioned). Thus, while attorneys' fees are a proper measure of sanctions where they are actually incurred, South Carolina case law is clear that attorneys' fees cannot be awarded to *pro se* litigants.

Ballard was an attorney acting *pro se*. The Court of Appeals found that the Circuit Court awarded sanctions, not attorney's fees and affirmed the Circuit Court's ruling. However, Ballard is not entitled to an award derived from evidence of Ballard's attorneys fees simply because the Circuit Court labeled the award as "sanctions." It is apparent that the Circuit Court awarded attorney's fees but improperly cloaked the award in the guise of "sanctions." The Circuit Court noted that Ballard submitted an "affidavit of attorney fees" (R. 85) 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 is contrary to South Carolina case law. The classification of the Circuit Court's award is merely semantics,[11] whereas the policy reasons underlying the court's prohibition for an award of pro se attorneys' fees is clear:

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[11] 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. at 1021, 111 Cal. Rptr. 2d at 390.

> 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, 343 S.C. at 306, 540 S.E.2d at 457. Regardless of the Circuit Court's attempts to manipulate the semantics, the award to Ballard constitutes an improper award of fees to a *pro se* attorney/litigant.

CONCLUSION

As set forth herein, the Court of Appeals erred by finding several of Megna's issues on appeal were not properly preserved because South Carolina precedent clearly preserves an issue for appeal where it is considered by the lower court for the first time in a Rule 59(e) motion. In addition, the record also shows that the issues rejected by the Court of Appeals were actually raised to the Circuit Court prior to the Rule 59(e) motion. Finally, the Court of Appeals erred in finding that *pro se* attorney's fees could be awarded to Ballard. Thus, a writ of certiorari is warranted.

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Columbia, South Carolina
May 15, 2015

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for the Petitioners, do hereby certify that I have served a copy of the foregoing **Petition for Writ of Certiorari,** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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Columbia, South Carolina
May 15, 2015