THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2012-CP-40-07200

Charles T. Brooks, III, Appellant.

v.

South Carolina Commission on Indigent Defense and Office of Indigent Defense,

Respondent,

FINAL BRIEF OF RESPONDENTS

G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT PROPERLY DISQUALIFY IRMA R. BROOKS AS ATTORNEY OF RECORD FOR CHARLES T. BROOKS WHERE SHE IS A MATERIAL WITNESS AND THE BURDEN ON RESPONDENTS AND THE COURT OUTWEIGHS ANY POTENTIAL PREJUDICE TO APPELLANT?**

II. **DID THE TRIAL COURT PROPERLY DISQUALIFY CHARLES T. BROOKS AS ATTORNEY OF RECORD FOR HIMSELF WHERE HE IS AN ATTORNEY SUBJECT TO THE RESTRICTIONS OF RULE 3.7?**

STATEMENT OF THE CASE

This matter was originally commenced with a Summons and Complaint filed on August 28, 2012 alleging that Appellant is entitled to declaratory judgment and injunctive relief that he is owed $48,696.45. He also alleges he is entitled to damages for conversion and bad faith as well as attorney's fees pursuant to S.C. Code Ann. §15-77-300. Respondents filed an Answer and Counter Claim to which Appellant replied. Appellant was originally represented by Desa Ballard in this matter. By Order of the Honorable L. Casey Manning dated February 19, 2013, Desa Ballard and Harvey M. Watson, III were relieved as counsel. Appellant was then representing himself *pro se*. On August 5, 2014, Appellant's attorney, Irma R. Brooks, forwarded a letter stating that she was filing a Notice of Appearance as attorney of record in this matter. Respondents filed a Motion to Disqualify Appellant's Counsel on August 18, 2014 based on both attorneys being necessary witnesses. The Court heard the motion on October 9, 2014. The Honorable D. Craig Brown disqualified both Appellant and his Attorney-Wife by an Order dated October 28, 2014. This appeal follows.

FACTS

Appellant devotes a substantial portion of his practice to representing indigents. In September of 2009, Respondent SCCID filed a Complaint against Appellant with the Office of Disciplinary Counsel (hereinafter "ODC") alleging overbilling and improper billing practices. ODC and Appellant agreed that Appellant had received excess compensation from SCCID in the amount of $61,826.40. The disciplinary opinion of the South Carolina Supreme Court stated:

> [D]ue to the lack of contemporaneous time records, an exact figure for excess billing and excess payments received cannot be established. However, after reviewing the record in detail with the assistance of his counsel and a forensic accountant, Respondent [Appellant herein] calculates he received $61,826.40 in excess compensation from SCCID.

(ROA pp. 117-120).

SCCID was never consulted nor did it agree with this figure. By opinion dated August 1, 2012, the South Carolina Supreme Court issued a Public Reprimand of Appellant and ordered that he make restitution to SCCID for the excess compensation he received by asking him to reduce the fees owed to him by $61,826.40 and enter into a repayment plan if the amount owed to him was insufficient to satisfy his debt to SCCID. If the amount Appellant owed SCCID was insufficient to satisfy his debt, Appellant was to submit a repayment plan for the balance owed within thirty (30) days of the date of the Opinion. As a part of his defense to the disciplinary charges, Appellant explained that some work that had been reported under his name had actually been performed by his wife, another attorney in his firm, who is now also appearing as counsel of record for Appellant in this action. (ROA pp. 117-120).

Contemporaneous with the ODC investigation, the South Carolina Attorney

General's Office, through their assigned investigator of the South Carolina Law Enforcement Division, also investigated Appellant for possible criminal conduct. This investigation was conducted by Robert H. W. Cathey, Special Investigator of the South Carolina Attorney General's Office. As a part of that investigation, Appellant was interviewed as well as the current attorney for Appellant (who is also his wife). Appellant claimed some of the time submitted under his name was for work that was performed by Irma R. Brooks, his wife and now his attorney in this action. (ROA pg. 134). In essence, that was part of his excuse as to why there was billed time in excess of twenty-four (24) hours a day. Irma R. Brooks was also interviewed and she confirmed that she performed work on files and billed under Charles Brooks' name. She also stated, "if they worked a case jointly, they both reviewed the vouchers for correctness." (ROA pg. 141). Respondents have named both Appellant and Irma R. Brooks as witnesses in their discovery responses in this action.

After a failed negotiation between Appellant and Respondents over the issue of offsets due from the funds paid to Appellant by other attorneys to assume their indigent representation duties, Appellant commenced this action. (That question is presently being answered by the South Carolina Supreme Court in an original jurisdiction action.) Thereafter, Appellant's counsel, Desa Ballard and Harvey M. Watson, III were relieved as counsel (ROA pp. 1-2), and Appellant began representing himself *pro se*. On August 5, 2014, the Plaintiff's attorney, Irma R. Brooks, forwarded a letter stating that she was appearing as attorney of record in this matter. Respondents thereafter filed their motion to disqualify both Appellant and his counsel because they are both necessary witnesses and are barred from also acting as advocates in this action.

ARGUMENT

Rule 3.7 of Rule 407, SCACR, generally prohibits lawyers from acting as advocates at trials in which the lawyers will be necessary witnesses. Specifically, Rule 3.7 "Lawyer as a Witness" states:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in this case; or,
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.

Rule 407, SCACR.

Comment 1 to Rule 3.7 explicitly recognizes that "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party . . . ." Comment 2 also explicitly gives opposing parties the right to object to a lawyer serving as both advocate and witness because the combination of roles may prejudice those parties' rights. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof." Rule 3.7 of Rule 407, SCACR. *See also State v. Sanders*, 337 S.C. 368, 523 S.E.2d 187 (Court App. 1999).

In *Collins Entm't, Inc. v. White*, 363 S.C. 546, 564, 611 S.E.2d 262, 271 (Ct. App. 2005), *reh'g denied* April 21, 2005, *cert. denied* August 15, 2006, the South Carolina Court of Appeals affirmed the trial court's finding that an attorney could not act as both an attorney and a fact witness in a case. In applying Rule 3.7 the Court of Appeals found "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate

is to advance or argue the cause of another, while that of a witness is to state facts objectively." *Collins.* at 564, 661, S.E.2d at 271 (*citing State v. Capps*, 276 S.C. 59, 65, 275 S.E.2d 872, 875 (1981) (Lewis, C.J., dissenting) (*quoting* Ethical Consideration 5-9 of the Code of Professional Responsibility). *See also Lot v. Westinghouse Savannah Rivers Co. Inc.*, 200 F.R.D. 539, 548-49 (D.S.C. 2000) (*quoting Spivey v. United States*, 912 F.2d 80, 84 1st Cir. 1990)) (providing "in so far as an Affidavit of Counsel may attempt to introduce substantive evidence, it is elementary that counsel may not participate as both an advocate and a witness, absent special circumstances").

I. THE TRIAL COURT PROPERLY DISQUALIFIED IRMA R. BROOKS AS ATTORNEY OF RECORD FOR CHARLES T. BROOKS BECAUSE SHE IS A NECESSARY WITNESS AND THE BURDEN ON RESPONDENTS AND THE COURT OUTWEIGHS ANY POTENTIAL PREJUDICE TO APPELLANT.

A. Irma R. Brooks is a necessary witness both for Appellant and Respondents.

Irma R. Brooks is a necessary witness in this action having been involved in Appellant's billing irregularities and having then acted as witness for Appellant in the ensuing ODC investigation as well as the Attorney General's investigation. As a part of both of those investigations, Appellant explained away his massive daily billings by claiming that some of the work reported under his name was actually performed by his wife, Irma R. Brooks. (ROA pg. 134). Also, Appellant's spreadsheet offered in discovery purports to reallocate Appellant's overbilled time. In this reallocation, there is a column entitled "Irma," again asserting Appellant is entitled to fees for services actually performed by his wife.

In fact, the origin of Respondents' suspicions of overbilling was Irma R. Brooks'

participation in an appeal involving Client Cooper. When SCCID obtained the briefs to the companion appeals of Cooper and Client Epps, its staff noticed the briefs were exactly the same. Despite them being almost duplicate briefs, there were individual vouchers for separate preparation of the briefs by Appellant and his wife, Irma R. Brooks. Given Mrs. Brooks' entanglement in the disputed work and her special knowledge of the facts and circumstances which would assist Respondents in their defense against Appellant's claims and in the prosecution of their counterclaims, Respondents named her a witness in discovery well before she appeared as counsel in this matter. Mrs. Brooks' testimony will be at the core of both Appellant's and Respondents' cases and cannot be limited to uncontested matters. Her testimony is not about attorney fees incurred in this action.

B. Respondents will be substantially prejudiced by Mrs. Brooks appearing as both counsel and witness and the burden on Appellant to hire a non-witness attorney will not work substantial hardship on him.

Mrs. Brooks' testimony is central to both defending against Appellant's suit as well as in prosecuting Respondents' counterclaims which allege conversion and fraud among other causes of action. Appellant's defense is partially that the work was actually performed, though not by himself. Respondents anticipate not only deposing Mrs. Brooks but also calling her as a witness.

Appellant's main argument on appeal is that it would be unfair to force him to expend money to hire an attorney to prosecute his claims and to defend against the counterclaims where he and his wife are able to handle the matter themselves. Appellant's argument ignores the fact that for any other litigant, hiring a lawyer who is

not also a witness in the case would be necessary. Appellant implicitly recognized this necessity in the ODC and Attorney General's investigations, where Appellant was ably represented by two distinguished counsel from the firm of Ballard and Watson. Both of those attorneys are intimately familiar with the relevant facts and with the allegations in this action. The cost to re-hire either or both of them certainly be less than the cost of hiring a new attorney who would need to familiarize himself or herself with the case. However, even hiring a completely new attorney would cost less than it might for other litigants as Appellant himself is an experienced attorney who can quickly and efficiently bring counsel up to speed. Appellant has presumably paid Mrs. Brooks nothing to handle what few matters have arisen since she appeared as counsel of record. If he has paid her anything, such amounts would be minuscule as Appellant himself in his fact statement has said almost no substantive work has been done since Ballard and Watson were relieved. (Appellant's Brief at pg. 2). Moreover, Mrs. Brooks had only been involved as an attorney in this case for approximately two months prior to the trial court disqualifying her. (ROA pg. 8).

Even given the normal rule that a party has a substantial right to retain counsel of his own choosing, *c.f.*, *Hagood v. Sommerville*, 362 S.C. 191,607 S.E.2d 707 (2005), that right is not unqualified and often gives way in the face of the ethical mandates of Rule 3.7. Despite Appellant's protestations to the contrary, this is not a Rule 3.7(b) situation where one attorney from a firm may be called as a witness in a case being handled by another attorney in the firm. Here, both Appellant and his wife are material, necessary witnesses and both are expected to testify extensively.

As expressed by the federal courts and other states' courts, the rationale for

disqualifying an attorney witness is obvious:

> "If a lawyer is both counsel and witness, he becomes more easily impeachable for interest thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of a lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his/her own credibility. The role of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another while the witness is to state the facts objectively . . . When the testimony of the attorney aides his client, a 'a jury may view an attorney as possessing special knowledge of a case and therefore accord a testifying attorney's arguments undue weight." *McArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981). Additionally, 'the adverse party's attorney may . . . be handicapped in challenging the testimony of another lawyer.' *Id.* Finally, the reputation of the Bar as a whole may be diminished because of the speculation as to 'whether counsel has compromised his integrity on the stand in order to prevail in the litigation.'" *Id.*

Clinton Mills, Inc. v. Alexander and Alexander, Inc., 687 F. Supp. 226, 229 (D.S.C. 1988) (quoting the language of the Model Code of Professional Responsibility which has since been replaced by the Model Rules).

There is simply no seemly way for either Appellant or his wife to fill the roles of both witnesses and advocates in this case where their testimony, credibility, and candor will all be challenged. The trial court properly found that the prejudice to Appellant caused by its disqualification of Mrs. Brooks of having to hire counsel did not outweigh the prejudice to Respondents. Therefore, this Court should affirm the trial court's disqualification of Mrs. Brooks.

II. THE TRIAL COURT ALSO PROPERLY DISQUALIFIED APPELLANT AS ATTORNEY OF RECORD FOR THE SAME REASONS IT PROPERLY DISQUALIFIED HIS WIFE REGARDLESS OF APPELLANT'S STATUS AS A *PRO SE* LITIGANT.

Appellant is in the relatively unique position of being both a licensed South Carolina attorney as well as a *pro se* litigant. While most litigants would be in a position to proceed *pro se*, Appellant may not because of his status as an attorney. He is bound by the Rules of Professional Conduct, which preclude lawyers from acting as witnesses. Rule 3.7 notes the unique conflict created when a lawyer acts as both a witness and an advocate and the trial court quite properly applied Rule 3.7 to Appellant's situation. It concluded that Appellant was not only a necessary witness but that the hardship of hiring counsel was not substantial and did not outweigh the prejudice to Respondents. (ROA pg. 7). In so ruling, the trial court examined the Comments to Rule 3.7 which state:

> [P]aragraph (a) (3) recognizes that a balancing is required between the interest of the client and those of the Tribunal and the opposing party. Whether the Tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses.

On the facts presented here, the trial court found "that there may be confusion as to whether statements made by the Pro Se Plaintiff as an advocate witness would be taken as proof as a fact witness or as an analysis of proof as an attorney. This Court finds that those roles inherently conflict with one another when an attorney attempts to represent himself Pro Se. Accordingly, the effect on the Trial Court and the prejudice to the Defendants with the Plaintiff being both attorney and a witness, far exceeds the hardship on the Plaintiff if he is disqualified from representing himself." (ROA pg. 8)[1] The trial court's reasoning is supported by not only the comments but by the ordinary rules of statutory construction.

[1] The trial Court's order also permits Appellant to elect to proceed as his own attorney but not testify as a witness unless called by Respondents. (ROA pg. 8).

The ABA's Model Code used to have an exception to the attorney witness rule for an attorney who was a party to an action and who was appearing *pro se*. *See e.g.*, *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1309 n.3 (5th Cir. 1995). The Model Rules were replaced by the Model Code of Professional Conduct, which did not contain such an exception. Similarly, in 1990, when South Carolina adopted the South Carolina Rules of Professional Conduct including Rule 3.7, it expanded the scope of the Rules to cover attorneys acting as advocates in cases where they are also witnesses, whether they have a client or are *pro se*. Our Rule quite simply does not have the "attorney as *pro se* litigant" exception. Implicit in South Carolina's adoption of Rule 3.7 is its rejection of the notion that a licensed attorney appearing *pro se* is exempt for the operation of the general rule that an attorney cannot be both a witness and an advocate in the same proceeding. Had South Carolina meant to provide such an exemption, it "could have easily stated that intention in clear explicit terms." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 490, 636 S.E.2d 598, 618 (2006)(*citing Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 385, 537 S.E.2d 543, 549 (2000)); *see also Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997) (if the legislature had intended certain result in statute, it would have said so).

Respondents know of two (2) cases in which similar situations have existed and two of our finest Circuit Court judges disqualified attorneys who were also *pro se* litigants. Both judges concluded that attorneys cannot represent themselves in actions where their testimony is necessary even if they are appearing *pro se*. *See Celeste Brunson as Personal Representative of the Estate of Ruth B. Tilly, Deceased v. Tumney*

Regional Medical Center, et al., Civil Action Number 2006-CP-43-2164 (Judge Nettles disqualified the Personal Representative who was also an attorney for the estate); *Tracy Edge v. Hatley Law Firm, LLC and Chad B. Hatley individually*, Civil Action Number 2009-CP-26-984 (Judge Hyman disqualified attorney from representing himself in a legal malpractice action).

Again, this trial court and the other trial judges all have sound reasons for disqualifying *pro se* attorney litigants. There is simply no seemly way for Appellant to fill the role of both witness and advocate in this case where his testimony, credibility, and candor will all be challenged and where there is huge potential for confusion over his statements being taken as proof as a fact witness or as an analysis of proof as an attorney. Therefore, this Court should affirm the trial court's disqualification of Appellant.

CONCLUSION

For the reasons stated, Respondents, the South Carolina Commission on Indigent Defense and the South Carolina Office of Indigent Defense, request that this Court affirm the judgment of the Circuit Court in all respects.

Respectfully submitted,

G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL 15 2015
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2012-CP-40-07200

Charles Thomas Brooks, III,..... Appellant.

v.

South Carolina Commission on Indigent
Defense and Office of Indigent Defense.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents hereby certifies that the Respondents' Brief complies with SCAR 211(b).

RESPECTFULLY SUBMITTED.

LEE, ERTER, WILSON, HOLLER
& SMITH, LLC

G. Murrell Smith, Jr.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471 Telephone
(803) 778-1643 Facsimile
murrellsmith@leeandmoise.com

July 14, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Case No. 2012-CP-40-07200

Charles Thomas Brooks, III, Appellant,

v.

South Carolina Commission on Indigent Defense and Office of Indigent Defense,

Respondents.

PROOF OF SERVICE

I do hereby certify that I have on the 14th of July, 2015, served a copy of the **FINAL BRIEF OF RESPONDENTS,** and a **PROOF OF SERVICE**, by depositing a copy of the same in the United States mail, with first class postage affixed hereto, addressed as follows:

Irma R. Brooks
Attorney for Appellant
THE BROOKS LAW OFFICE, L.L.C.
309 Broad Street
Post Office Box 3512
Sumter, South Carolina 29151

Respectfully submitted,

G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
(803) 778-1643 (facsimile)
murrell@leeandmoise.com
Attorney for Respondents