THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood

Appellate Case No. 2015-002054
Case No. 2007-CP-40-0576

In re: Tony Megna: Respondent,

JAMES A. ANASTI, Appellant,

v.

LANCE WILSON, WILLIS GOODWIN, GINA L. ANASTI LEE, and RICHLAND COUNTY CLERK OF COURT, Defendants.

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF CASE

On January 26, 2007, Appellant Anasti filed a Complaint in the Richland County Court of Common Pleas against Ms. Lee and others. R.p. 1188. On October 26, 2007, the Circuit Court granted Appellant's Motion for Partial Summary Judgment against Lee. On November 7, 2007, Appellant filed a motion for Rule 11 sanctions. R.p. 462. Lee subsequently filed a Notice of Appeal of the Partial Summary Judgment Order on January 4, 2008. Appellant filed a motion to dismiss the appeal as untimely. The Court of Appeals ultimately dismissed the appeal as untimely without addressing the merits of the appeal. Appellant thereafter filed a motion for sanctions in the Court of Appeals raising many of the same issues that were presented to the Circuit Court. R.p. 1244. The Court of Appeals denied Appellant's Motion for Sanctions and remitted the case to the Circuit Court. R. p. 1317.

On October 21, 2011, Appellant filed an Amended Motion for Sanctions in the Circuit Court that limited the request for sanctions to Megna and excluded Ms. Lee, and requested damages in the amount of $500,000. R.p. 465. Megna filed a Motion to Dismiss the Motion for Sanctions on October 24, 2013 on the grounds that the Motion and Amended Motion did not state with particularity the grounds for relief in violation of Rule 7, South Carolina Rules Civil Procedure. R.p. 469-472.

Thereafter, Appellant filed a Memorandum In Support of the Motion for Sanctions with attachments on December 23, 2013. R.p. 786 Megna filed a Memorandum In Opposition on January 13, 2014, with attachments. R.p. 1159. Appellant filed a Return to the Memorandum in Opposition on January 23, 2014 with attachments. R.p. 1544. On July 22, 2014, the Honorable Robert Hood, conducted the first of two hearings on Plaintiff's Motion in the Circuit Court. On

July 23, 2015, in response to the Circuit Court's request for additional briefing, Megna filed a Supplemental Memorandum. R. p. 1664.

On July 23, 2015, Judge Hood conducted a final hearing on Appellant's motion. There was no additional evidence presented at the hearing and the motion was submitted to Judge Hood based upon the memoranda and exhibits filed by Appellant and Megna. Judge Hood denied Appellant's Motion for Sanctions in a written order dated August 25, 2015. R.p. 137. Appellant filed a Motion to Reconsider on September 8, 2015 asserting that Judge Hood applied the incorrect standard. R.p. 483. Judge Hood denied the Motion to Reconsider by form order entered September 10, 2015. R.p. 140. Appellant served a Notice of Appeal on September 29, 2015.

COUNTER-STATEMENT OF THE FACTS

It must first be noted that Appellant Anasti's Initial Brief contains factual assertions to which Respondent objects, as they were not presented to the lower court. At the July 22, 2014 hearing before the lower court, the parties agreed to submit the case based on the memoranda and exhibits. R.p. 294:3-9. In his brief, Appellant Anasti has mispresented that the parties agreed that the lower court could take judicial notice of all materials contained in the Clerk's files in other cases. There was no discussion at that hearing, or the second hearing on July 23, 2015, as to the lower court taking judicial notice of any other filings. Respondent Megna never agreed to any judicial notice, and there is no evidence in the record reflecting the lower court's intention to take judicial notice of the filings.[1] Thus, Respondent Megna is compelled to set forth the facts that were properly before the lower court.

[1] Judge Hood's August 24, 2015 Order does not acknowledge that any judicial notice was taken as to any court records. Furthermore, there is no indication that Appellant requested the Court

On January 26, 2007, Appellant Anasti filed a non-jury Complaint against his sister Ms. Lee, and two others, Lance Wilson ("Wilson") and Willis Goodwin ("Goodwin"), seeking to quiet title on the disputed land. (Exhibit 1, R.p. 1188).[2] The Complaint alleged that Appellant and his father obtained title to the property on or about November 17, 1978 through a deed of conveyance. R.p. 1192. The deed conveyed the property to Appellant and his father as joint tenants in common with a right of survivorship. Id. The Complaint alleged that his father died on October 24, 1995, and Ms. Lee was appointed as the Personal Representative of her father's estate on November 16, 1995. Id. Furthermore, the Complaint alleged that on or about October 25, 1996, a deed of distribution was prepared that conveyed the ownership of the disputed land to Ms. Lee. Id. However, the Complaint fails to include the fact that Appellant Anasti's father conveyed the disputed property to Ms. Lee in his will. In addition, Appellant Anasti consented to the conveyance of the property to Ms. Lee in the probate proceedings by executing a release through his general power of attorney. R.p. 1366. The release expressly provides "the undersigned releases and forever discharges the Personal Representative and the Estate from any and all rights and claims, which the undersigned may have against the Personal Representative and the Estate." R.p. 1368.

Respondent Megna served an Answer on behalf of Ms. Lee in which she asserted a number of appropriate affirmative defenses. [Exhibit 2, R.p. 1196]. Specifically, Respondent

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take judicial notice of any particular filing and Appellant did not raise any question about the Court's refusal to take judicial notice in his Motion to Reconsider. Therefore, the only evidence presented to Judge Hood for consideration was contained in the memoranda and exhibits filed by the parties in support and in opposition of the sanctions motions prior to the hearing.

[2] Unless otherwise noted, the references to "Exhibit" used throughout this Brief indicate an exhibit to Respondent Megna's Memorandum in Opposition to Plaintiff's Request for Monetary Sanctions, dated January 23, 2014.

Megna asserted that Appellant was "barred and estopped from asserting any claim, however defined, against the Defendant Lee of any interest, legal or equitable, in the property because: (a) the Appellant participated in the Probate Court proceedings that led to the transfer of the property of which Appellant complains and is bound by the orders and/or deeds of transfer; (b) the Appellant acquiesced in the transfer of the property and (c) the provisions of [Section 1006 of the Probate Code[3]] bar recovery." R.p. 1197. In addition, Respondent Megna asserted the affirmative defenses of: the statute of limitations, laches and abandonment, the doctrine of adverse possession, the doctrine of ouster, and the doctrine of presumption of grant. R.p. 1197-1198. Respondent Megna also asserted cross claims against Wilson and Goodwin seeking to collect on the note and foreclose on the mortgage Ms. Lee held on the property. R. p. 1199-1202.

Although the Circuit Court ultimately granted Appellant Anasti summary judgment on his claim to quiet title, this ruling in no way determined that the defenses asserted were frivolous or interposed solely for purposes of delay. Rp. 6. In fact, the only time the Honorable J. Ernest Kinard mentioned that one party's position lacked merit, the comment was in reference to Appellant Anasti and his counsel. Footnote 2 of the Order addresses Appellant's contention that Ms. Lee's affidavit was somehow improper. The Court states "[p]laintiff has objected that the affidavit submitted by Defendant Lee was in a format inconsistent with SCRCP 56(e). *This*

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[3] S.C. Code Ann. § 62-3-1006 states: Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (i) if a claim by a creditor of the decedent, at one year after the decedent's death, and (ii) any other claimant and any heir or devisee, at the later of three years after the decedent's death or one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

objection has no merit." R.p. 7 (emphasis added.)[4]

The Order granting summary judgment concluded that Ms. Lee's conduct with regard to the property following the sale of the property to Wilson and Goodwin was insufficient to establish continuous possession during the entire 10 year proscription period to establish adverse possession. The summary judgment Order does not cite any controlling South Carolina case law contradicting Ms. Lee's argument that she maintained an equitable interest in the property following the sale through the mortgage she retained as part of her owner financing. Rather, Judge Kinard simply stated, "I disagree" with the position of Ms. Lee. R.p. 12. This ruling appears to be at odds with decisions from other states. *See* 2 *CJS Adverse Possession* § 192 ("Where there has been an adverse possession by one claimant for a part of the statutory period of limitations followed by a sale by the claimant of the land so occupied to another, who then assumes possession under the transfer, there is no interruption of the continuity of the adverse possession provided there is an actual transfer, within a reasonable time and there is no evidence of an intention to abandon the possession."). Furthermore, there does not appear to be any South Carolina cases addressing the question of whether the continuity of possession is broken when the original owner maintains an equitable interest in the property through a mortgage.

In addition, the Order for summary judgment addressed another issue of first impression-

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[4] Appellant's references to Judge Kinard's comments in the transcript are out of context and in no way form the basis for sanctions. For example, Appellant states that Judge Kinard told Respondent Megna "the defense was an attempt at a 'flim-flam' and that Lee (in reality Megna) was not playing fair...." App. Brief, p. 18. However, the transcript reveals that Judge Kinard said nothing about Respondent Megna or the defenses asserted, but stated that the client, Ms. Lee, "doesn't like the fact that the dad let the property go to the son and she is trying to flim-flam him." R.p. 211:9-12. Appellant has wrongfully attributed Judge Kinard's comment as a characterization of Respondent Megna's representation.

- whether Appellant Anasti was bound by the Probate Court order conveying the property to Ms. Lee.[5] Appellant Anasti was an heir of the Estate, received notice of the distribution and through his general power of attorney executed a release of the Estate and Ms. Lee from all claims he may have had against either regarding the distribution of property through the Estate. On this point, Judge Kinard ruled that Appellant Anasti was not bound by the Probate Court orders because the Probate Court lacked subject matter jurisdiction over the property. R.p. 12-14. The Order does not specifically address the legal effect of Appellant Anasti's release.

The Order does not address other important affirmative defenses, including the defense of statute of limitations. Section 15-3-340 S.C. Code states:

> No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.

Here, Appellant Anasti did not commence suit until January 26, 2007. The undisputed evidence in the record established the property was conveyed to Ms. Lee through a deed of distribution in 1996. Thus, Appellant Anasti did not commence suit within 10 years from the last date that "the plaintiff, his ancestor, predecessor, or grantor" possessed the property. *See also*, *Stamper v. Avant*, 104 S.E. 2d 565, 570 (S.C. 1958) (quoting *Rice v. Bamberg*, 38 S.E. 209, 212 (S.C. 1901) (holding statute of limitation commences against a remainder-man upon the death of the life tenant)). In addition, the Order does not address the defense of laches. *See Byars v. Cherokee County*, 118 S.E.2d 324, 329-330 (S.C. 1961). Ms. Lee raised both of these defenses in

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[5] In *Warner v. Hillcrest Medical Center*, 914 P.2d 1060, 1064-1065 (Okla. Ct.App. 1995), the Oklahoma Court of Appeals again looked at the issue of sanctions under its version of Rule 11 and found that "[t]he imposition of sanctions ... should not be used to punish parties with unpopular claims" or held that sanctions are not penance for the sins of presenting a novel theory of recovery if it is supported by a good faith argument.

her Affidavit submitted in opposition to Appellant's summary judgment motion. R.p. 1326.

Ms. Lee appealed the order granting summary judgment to the Court of Appeals. R.p. 1225. The Court of Appeals ultimately dismissed the appeal as untimely and never reached the merits of the case. R.p. 1239. Significantly, Appellant filed a motion for sanctions against Respondent Megna in the Court of Appeals raising the same issues that are now being presented to this Court. R.p. 1244. Respondent Megna submitted a response to the sanctions motions. R.p. 1298. In a unanimous ruling, the Court of Appeals denied Appellant's motion for sanctions. R.p. 1317.

After the case was remanded to the Circuit Court, Appellant filed an amended motion for sanctions. The original motion merely asserted that Appellant was seeking fees and costs against "Lee and/or her attorney for reasons set forth in a Memorandum to be filed with the Court." R.p. 463. In the Amended Motion, Appellant alleged "Lee's counsel injected frivolous defenses, pleadings, Affidavits and otherwise engaged in wrongful conduct." R.p. 465. Megna through counsel thereafter filed a Motion to Dismiss the Sanctions motion because the motion and amended motion failed to set forth with particularity in violation of Rule 7, S.C. Rules Civ. P. R.p. 469.

At some point prior to the July 22, 2014 hearing, the parties agreed to submit all of the information and evidence on which they were relying to Judge Hood. R.p. 294:3-9. However, as noted above, Respondent did not, as Appellant Anasti asserts, agree to have "judicial notice [] taken of all matters of records contained in the various Clerks of Court's files" (App. Brief. P.

28) and there was no indication that the lower court intended to take such judicial notice.[6] The lower court held a hearing on the motion for sanctions on July 22, 2014 and a second hearing a year later, on July 23, 2015.

By order filed August 25, 2015, the Honorable Robert E. Hood denied the Appellant's request for sanctions. R.p. 137. Judge Hood concluded that Appellant had not demonstrated proof of the mental state required for sanctions under Rule 11. In addition, Judge Hood concluded that Appellant's counsel did not follow Rule 26(b)(5)(B)'s[7] established procedures when being notified that opposing counsel had inadvertently produced an attorney client privileged letter from Megna to Ms. Lee dated January 13, 2005, but concluded that Appellant's counsel's misconduct did not rise to the level of being sanctionable.[8]

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[6] While a court can take "judicial notice of its **own** records, files and proceedings for all proper purposes including facts established in its records" (see, Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) (emphasis added)), a court cannot take judicial notice from other cases and other courts. *See, e.g.,* Trial Handbook for South Carolina Lawyers § 11:3, citing *In re Abestosis Cases*, 274 S.C. 421, 266 S.E.2d 773 (1980) (finding that the court could not take judicial notice of facts from another case where the record was devoid of any such evidence).

[7] Rule 26(b)(5)(B) states "If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. *After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.* A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved. (emphasis added).

[8] Despite Judge Hood's ruling, Appellant's counsel continues to rely upon the attorney-client privileged letter in violation of Rule 26(b)(5)(B) in briefing before this Court. See Appellant's Initial Brief, p. 8 (¶ 10, Statement of Facts). Furthermore, Lee does not appeal the portion of Judge Hood's Order finding that Lee's counsel did not comply with Rule 26(b)(5(B).

STANDARD OF REVIEW

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon,* 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App.1987). A trial court's exercise of its discretionary powers with respect to sanctions imposed will be interfered with by the Court of Appeals only if an abuse of discretion has occurred. *Clark v. Ross,* 284 S.C. 543, 328 S.E.2d 91 (Ct.App.1985). The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion. *Clark,* 284 S.C. at 570, 328 S.E.2d at 107. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Karppi v. Greenville Terrazzo Co., Inc.,* 489 S.E.2d 679, 681-82 (S.C. App. 1997).

ARGUMENT

I. Respondent Megna represented his client ethically and professionally and the lower court correctly held that Respondent Megna did not interject frivolous defenses into the case.

The imposition of Rule 11 sanctions is left to the discretion of the trial court. *Lawson v. Sumter County Sheriff's Office*, 339 S.C. 133, 528 S.E.2d 86 (2000). A party seeking sanctions under Rule 11 must prove an attorney signed a pleading or motion "to cause delay or when no good grounds exist to support the filing." *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 713 S.E.2d 624, 628 (S.C. 2011). Respondent Megna had solid grounds to support each of the affirmative defenses presented in response to Appellant Anasti's claims and the lower court properly found that this case had a "unique factual context" and that Appellant had not demonstrated proof of the mental state required for sanctions under Rule 11.

Respondent Megna had a duty to zealously represent his client, which included pursuing the defenses of which Appellants now complain. *See* Rule 407, SCACR, Comments to Rule 1.3; *Watson v. Sellers*, 385 S.E.2d 369, 372 (S.C. Ct. App. 1989). Respondent Megna provided his client with sound legal advice for her consideration. Ms. Lee's affidavits and deposition testimony clearly indicate she was of the firm belief the Two Notch property belonged to her, and that the transfer of the property to her during the probate proceedings was her deceased father's desire.

In her affidavit to this court dated September 12, 2007 (R.p. 1321), Ms. Lee stated:

. . .

> 2. On or about November 16, I was appointed the Personal Representative of my father's estate. My father told me that the Two Notch property would belong to me because he assisted Jim with attorney's fees and living expenses when Jim left the country in the early 1990's after being accused of sex crimes concerning a minor with another man in Florida. I learned of the allegations based on newspaper articles... My father told me he had paid Jim's attorney fees and was assisting Jim with living expenses even though it caused him personal and financial stress. Jim and I were my father's sole beneficiaries and I know my father intended to make as certain as possible that I was provided equivalent funds that Jim had received while he was trying to elude prosecution of the molestation charges made against him.

Furthermore, the undisputed evidence established that Appellant Anasti, through his general power of attorney, executed a complete release of claims against Ms. Lee knowing that the disputed property was being conveyed to her as directed by their father in his will. R.p. 1377:7-9; 1364:8-25; 1366; 1368. When questioned about the release and waiver in his deposition, Appellant Anasti testified as follows:

Q. [**Megna**]: Would you agree this is a waiver of notice filed in Richland County Probate Court. Is that what it is?

A. **[Appellant Anasti]**: Well it says waiver of notice, yes.

Q. **[Megna]**: Who signed that document, please?

A. **[Appellant Anasti]**: Joe Gravelyn

Q. **[Megna]**: On whose behalf?

A. **[Appellant Anasti]**: Mine.

Q. **[Megna]**: Would you agree that he was fully authorized to sign that document?

A. **[Appellant Anasti]**: Yes.

R.p. 1372:7-16.

Moreover, Appellant Anasti never had any justification for ignoring his interest in the property after their father's death. First, Appellant never claimed that he was misled by Ms. Lee about the property. When asked specifically during her deposition as to whether or not Appellant Anasti knew of any false statements Ms. Lee had ever made to Appellant Anasti in regard to the Two Notch property, he testified as follows:

Q. **[Megna]**: Do you know of any false statements that Ms. Lee has made to you in regard to the property on Two Notch Road?

A. **[Appellant Anasti]**: No. None whatever.

R.p. 1374:22-25.

Q: **[Megna]**: Do you claim you have been misled by Ms. Lee in any particular way?

A: **[Appellant Anasti]**: No.

R.p. 1377:7-9.

Moreover, on January 6, 2000, the Dallis Law Firm conducted a real estate closing wherein Ms. Lee sold the Two Notch property to Wilson and Goodwin. The sales price was $177,000.00. The Dallis Law Firm reported that Ms. Lee had good, marketable title to the Two Notch property. The closing/sale was accomplished by general warranty deed, a $50,000.00 down payment and owner financing. Ms. Lee received a note and mortgage for $127,000.00. However, on December 16, 2002, the South Carolina Department of Transportation filed a lawsuit against Appellant Anasti, Ms. Lee, Wilson and Goodwin requesting the Court condemn a portion of the Two Notch Road property to widen the Two Notch Road. Appellant Anasti took no action in the matter. R.pl 1379. When asked about the matter during his deposition, Appellant Anasti stated:

> A. **[Appellant Anasti]**: Well, when I was notified about this Highway Department situation, and something had to be settled on it, and I was in Australia. I had no way of handling any of that, and I just told Joe to take that and just take it to James L. Mann's office and give it to Jimmy Mann and let him handle it, because I didn't know. There was no way I could handle anything.
>
> Q. **[Megna]**: So you first became aware that – well you tell me what did you become aware something needed to be handled by Mr. Mann?
>
> A. **[Appellant Anasti]**: It was something to do with the sidewalk or easement on the place that they have -- a decision had to be made or something. They wanted to fix the place it or put a sidewalk in or some deal, and I mean I wasn't in any position, I was gone, so nothing I could do, and I said just take it to Jimmy Mann and give it to him and let him handle it.

R.p. 1375:14-1376:5.

> Q. **[Megna]**: So, in other words, you didn't do anything about it at all?
>
> A. **[Appellant Anasti]**: Only that they were going to pay for the property they wanted to put a sidewalk down.
>
> Q. **[Megna]**: You operated entirely through your power of attorney?

A. **[Appellant Anasti]**: Yes. Well. I mean I gave it to Jimmy Mann, for the legal thing, and is why I told Joe (Gravelyn) to take it and give it to Jimmy.

R.p. 1376:6-16.

On November 12, 2004, Wilson and Goodwin initiated a suit against Ms. Lee (2004-CP-40-5333). They alleged Ms. Lee was not the owner of the property she had sold them. They did not seek to quiet title; they alleged negligence and fraud – and sought damages. On March 24, 2005, Respondent Megna answered Wilson and Goodwin's complaint on behalf of Ms. Lee, with her understanding being that that she owned the Two Notch property based on the release and waiver of any claims regarding the ownership of all real property distributed through the Estate signed by Appellant Anasti's attorney-in-fact (Mr. Gravelyn) during the probate court proceedings. R.p. 1368. Similarly, Ms. Lee claimed ownership based on adverse possession and ouster. Ms. Lee also sought to foreclose on the note and mortgage provided by Wilson and Goodwin to Ms. Lee. In a Third Party/Crossclaim negligence suit against Dallis Law Firm, Respondent Megna alleged that if Ms. Lee did not own the property, the defect in title was due to the negligence of the Dallis Law Firm.

On January 26, 2007, more than ten years following the signing of the written release to the Two Notch property by Appellant Anasti (though Mr. Gravelyn as Anasti's attorney-in-fact) and more than ten years following the filing of the probate court deed of distribution, attorney Truslow filed a new and separate lawsuit against Ms. Lee, as well as Wilson and Goodwin seeking to quiet/clear title to the Two Notch property, and for an accounting and for damages. R.p. 1190.

Appellant Anasti improperly relies upon certain attorney-client communications between Respondent Megna and Ms. Lee asserting that the defenses were acknowledged to be frivolous

and pursued solely for purposes of delay. App. Brief, p. 13. As explained in Section II.C. herein, the Court should disregard all references to these attorney-client privileged documents from Plaintiff's memorandum and argument.[9] Moreover, the two letters were written in January 2005, two years before Appellant Anasti filed suit against Ms. Lee. These two letters discuss the separate lawsuit brought by Wilson and Goodwin that was subsequently dismissed. Lastly, the factual predicate being discussed is significantly different because by the time Appellant Anasti filed suit against Ms. Lee, ten years had lapsed from the date the property was deeded to her through the probate court. In 2005 however, the prescription period under adverse possession had not yet been satisfied solely by Ms. Lee's acquisition. In addition, the 10 year statute of limitations had not yet expired on any claim held by Appellant Anasti.

Appellant Anasti also argues that Respondent Megna, on behalf of Ms. Lee, took inconsistent positions in the 2005 lawsuit. Appellant asserts that the professional negligence claims brought against the Dallis Law Firm alleging a defect in marketable title are inconsistent with the defense in the 2005 lawsuit brought against Wilson and Goodwin. First, there is nothing improper about asserting alternative theories or positions in litigation. In fact, the Rules of Civil Procedure provide for it. Under Rules 8 and 18, SCRCP, a party may join "as alternate claims as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent." *Harper v Ethridge*, 348 S.E.2d 374, 377 (S.C. Ct. App.1986). Lastly, Appellant does not have any standing to complain about the defenses raised or claims made on behalf of Ms. Lee in the 2005 action or any crossclaim she alleged against the Dallis Law Firm. None of

[9] The lower court noted that Appellant's counsel did not follow the established protocol for Rule 26(b)(5)(B), SCRCP, for inadvertent disclosures. R.p. 139.

the parties in that litigation asserted any allegation of misconduct against Ms. Lee or Respondent Megna and the time has long passed for anyone to do so.

There is absolutely no validity to Appellant's assertion that Respondent Megna and his client pursued frivolous defenses to Appellant's claims. Rather, Appellant, by his total failure to assert any ownership interest in the property at the time of their father's death, by his consent to the property distribution in the probate court, and by his failure to assert any claim of ownership until more than 10 years after the property was deeded to Ms. Lee, is responsible for the confusion that existed over the ownership of the property.[10]

II. Respondent Megna has presented multiple additional sustaining grounds that support the lower court's denial of sanctions.

The lower court's order was based on its finding that there was insufficient evidence of Respondent Megna's mental state to find that he violated Rule 11. However, Respondent Megna's memorandum in opposition to the motion for sanctions set forth multiple other bases which provide additional sustaining grounds for the lower court's refusal to impose sanctions. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding the winner in the lower court may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court); *Sims v. Amisub of S. Carolina, Inc.*, 408 S.C. 202,

[10] Moreover, Appellant's claim for attorney's fees in the amount of $188,198.81 is likewise without merit. First, there is absolutely no basis to support any award of sanctions against Respondent Megna. In addition, there is no evidence that attorney's fees and costs were actually incurred by Appellant Anasti in the first instance. Nor is there any evidence before this Court as to the justification of the fees and costs requested by Truslow. Absent such evidence, there cannot be an award for fees and costs assessed against another party. *See Williamson v. Middleton*, 681 S.E.2d 867, 870-71 (S.C. 2009) (holding that where there is no competent evidence that attorneys' fees and costs were actually incurred, they cannot be awarded).

214, 758 S.E.2d 187, 194 (Ct. App. 2014), *reh'g denied* (May 19, 2014), *cert. granted* (Nov. 19, 2014), *aff'd*, 414 S.C. 109, 777 S.E.2d 379 (2015), *reh'g denied* (Oct. 22, 2015) (holding "We note '[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record.'")

A. Appellant's motion for sanctions was previously denied by this Court on May 9, 2007 and thus, the motion in the lower court was barred by *res judicata* and the law of the case.

Judge Hood correctly ruled that jurisdiction to award attorney's fees incurred in the appeal of a case is the province of this Court. Under Rule 222(b), SCACR, attorney's fees are limited to $1,000 unless the prevailing party makes a motion under Rule 222(5). In *Bowen & Smoot v. Plumlee*, 308 S.C. 325, 417 S.E.2d 855 (1992), the Supreme Court remanded the case to the lower court for an award of attorneys' fees incurred in defending the action. The appellant sought clarification of the order and the Supreme Court ruled:

> 1) That unless otherwise stated by this Court, the prevailing party on appeal is only entitled to recover attorney's fee for the appeal in the amount of $750 as automatically provided by Supreme Court Rule 38, now Rule 222(b), (e), SCACR; 2) that respondents never requested of this Court an order modifying the amount of attorney's fees allowed; 3) that the remand was for the limited purpose of determining reasonable attorney's fees incurred in the trial court; and 4) the circuit court was not given authority to award attorney's fees for the appeal.

On May 2, 2009, while this case was in the State appellate courts, Appellant Anasti filed a motion for sanctions in the Court of Appeals [R.p. 1244, 1296] against Respondent Megna, requesting the Court grant Appellant $188,198.81 in sanctions, costs and expenses. The allegations before this Court and the documents submitted in support of the "Motion for Sanctions" are nearly identical to the memorandum and documents submitted to the lower court after remittitur. In fact, in the body of the motion before that Court, the Appellant and Truslow

specifically stated that:

> Respondent [Anasti] relies "on the entire record in this case including but not limited to the Orders of the Lower Court, the Order(s) of the Bankruptcy Court[11] and District Court and such Memorandum(s) (sic), Affidavit(s) and Exhibits as may be presented."

R.p. 1244.

By order dated May 9, 2009, this Court unanimously denied Appellant's "Motion for Sanctions." R.p. 1317. Appellant did not seek further review of the order denying sanctions, and therefore, this ruling is the law of the case. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.,* 525 S.E.2d 869, 871 (S.C. 2000) (stating an ruling of the Court of Appeals that is not appealed to the Supreme Court is the law of the case:"[I]t was incumbent upon Charleston Lumber to seek rehearing and/or petition this Court for a writ of certiorari (from the decision of the Court of Appeals) or be bound by *Charleston Lumber I* as the law of the case."); s*ee also, Judy v. Martin*, 674 S.E.2d 151, 153 (S.C. 2009) ("Under the law-of-the-case doctrine, a party is precluded from re-litigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, *but expressly rejected by the appellate court.*") (emphasis added). In *Nelson v. Charleston & Western Carolina Railway Co.,* 98 S.E.2d 798, 800 (S.C. 1957), the South Carolina Supreme Court held: "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *See also, Johnson v. Bd. of Comm'rs of Police Ins. & Annuity Fund of State*, 68 S.E.2d 629, 633

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[11] As noted below, a State court has no jurisdiction over matters that occur during federal bankruptcy court proceedings because the federal courts have original and exclusive jurisdiction over bankruptcy cases and claims. *See* 28 U.S.C. § 1334(a). Appellant also omitted the fact that all of the bankruptcy proceedings occurred more than one year after the Notice of Appeal was filed and after this Court had exclusive jurisdiction of the case and sanctions were ultimately denied.

(S.C. 1952) ("The rulings in a case even though admittedly wrong become the law of the case and [are] *res judicata* between the parties.") (emphasis added). The ruling on Appellant's motion was not remanded for the lower court for consideration. Rule 205, SCACR. "[A] trial court has no authority to exceed the mandate of the appellate court on remand." *South Carolina Dep't of Soc. Servs. v. Basnight,* 551 S.E.2d 274, 279 (S.C. Ct. App. 2001) (citing 5 Am.Jur.2d *Appellate Review* § 784, at 453 (1995)).

The mandate of the appellate court is jurisdictional. *Id.* The trial court has a duty to follow the appellate court's directions. *Ackerman v. McMillan,* 477 S.E.2d 267, 268 (S.C. Ct. App. 1996). The actions complained of by Appellant were resolved during the appellate proceedings, and the lower court could not take them up anew. Moreover, none of the appellate costs could ever be recovered in the lower court pursuant to the ruling in *byar & Smoot.*

B. The lower court had no jurisdiction over matters that occurred during Ms. Lee's federal bankruptcy proceedings.

Judge Hood also correctly ruled that the State Courts lack jurisdiction to impose sanctions for conduct occurring in federal bankruptcy court. Case law establishes the fact that state courts lack jurisdiction over matters happening in the bankruptcy court, and Judge Hood properly noted that he had no authority to award sanctions for conduct in the bankruptcy court. R.p. 137.[12] In *State v. Sheppard,* Case No. 2005-GS-47-20 (January 12, 2007), the court concluded that the State of South Carolina lacked jurisdiction to prosecute a defendant committing perjury in a bankruptcy proceeding. The *Sheppard* case relied on the United States Supreme Court's decision in *Thomas v. Loney*, 134 U.S. 372 (1890), which held that state courts

[12] Judge Hood also recognized that the lower court had no jurisdiction to award sanctions for conduct during an appeal. R.p. 137.

lack jurisdiction to punish witnesses for testifying falsely in a federal proceeding, stating: "the power of punishing a witness for testifying falsely in a judicial proceedings belongs peculiarly to the government in who tribunals the proceeding is had." *Id.*[13] Multiple other courts have recognized the holding of *Thomas v. Loney*. *See, e.g., State v. Warren,* 539 P.2d 184 (1975) (dismissing perjury charges arising from a deposition given in a federal civil proceeding based on lack of jurisdiction); *Commonwealth v. Kitchen*, 133 S.W. 586 (Kentucky 1911) (holding alleged perjury committed by false swearing before a United States Commissioner not subject to jurisdiction of state court); *People v. Kelley*, 38 Cal, 145 (1869) (holding state has no jurisdiction for prosecution of perjury before land officer of United States).

Furthermore, courts have consistently held that the Bankruptcy Code preempts state law claims for alleged misconduct that occurs in a bankruptcy proceedings. For example, in *Shiner v. Moriarity*, 706 A.2d 1228, 1237-1238 (Pa. Super. Ct. 1998), the court held:

> The trial court concluded that the wrongful use of process claim for damages resulting from the filing of certain papers in the U.S. Bankruptcy Court was properly brought in state court. We must first note that the trial court has misstated the issue. The issue is not whether the trial court could exercise jurisdiction over the controversy. Rather, the issue is whether the application of state tort law to the particular issue was pre-empted by the Bankruptcy Code. The bankruptcy court's exclusive jurisdiction, if any, is derivative of exclusive application of the Bankruptcy Code to the conduct at issue. Similarly, the Shiners' response is misguided. They focus on the limited jurisdiction of bankruptcy courts in arguing that that court lacked jurisdiction over their wrongful use claim. The issue is whether a wrongful use claim exists, or is it pre-empted by the remedies available under the Bankruptcy Code.

(internal citation omitted). In reversing the lower court, *Shiner* held that "the Bankruptcy Code permits no state law remedies for abuse of its provisions…". *Id.* Similarly, in *Gonazles v. Park,*

[13] Of course, Respondent Megna disputes that he acted improperly with regard to the bankruptcy or that Ms. Lee testified falsely in the bankruptcy matter. However, even if there had been improprieties, the Circuit Court was without jurisdiction to assess sanctions under *Thomas v. Loney*.

830 F.2d 1033 (9th Cir. 1987), the Ninth Circuit held that the state court was without jurisdiction to hear a state law claim asserting that the filing of a bankruptcy petition was an abuse of process.

While is clear that a state court cannot assess sanctions for conduct in the bankruptcy court, it is important to note that that there were no improprieties in Respondent Megna's conduct with regard to Ms. Lee's bankruptcy. There were no sanctions or other penalties assessed against anyone for any reason during the bankruptcy proceedings. In fact, as noted herein, the bankruptcy was extremely successful allowing Ms. Lee to save her home and discharge tens of thousands of dollars of unsecured debt. R.p. 1384.

Respondent Megna's client filed for bankruptcy protection in February 2009 because she was facing the imminent loss of her home. R.p. 1387-1449. This was explained to Truslow in writing along with an offer of settlement that would have granted Appellant Anasti complete ownership of all the Two Notch property in order to settle the litigation between the parties. R.p. 1451. Truslow, on behalf of Anasti, rejected the offer. Ms. Lee had in excess of $82,200 in debt, as well as several creditors with unknown claims for which she had no way of paying. R.p. 1387-1449. Additionally, Ms. Lee was facing potential liability of several hundred thousand dollars as a result of the litigation regarding the Two Notch property. The filing of the bankruptcy case "automatically stayed" the State appellate proceedings until the matters involved in the bankruptcy case were resolved. The bankruptcy proceedings concluded with a ruling that Ms. Lee, as a Chapter 13 debtor-in-possession, could not litigate the ownership of the

Two Notch property in federal court without permission of the Chapter 13 trustee.[14]

Furthermore, the bankruptcy court ultimately found that Ms. Lee's bankruptcy action was filed in good faith and complied with all requirements of the bankruptcy code. The lower court could not (and properly did not) assume jurisdiction over matters that occurred during Ms. Lee's federal bankruptcy proceedings. After noting some concern very early in the case and prior to considering Ms. Lee's eligibility for bankruptcy relief, the bankruptcy court subsequently confirmed a Chapter 13 plan of reorganization based on the overwhelming debts and financial obligations that she could not otherwise meet. The bankruptcy court's confirmation of Ms. Lee's Chapter 13 plan allowed her to be relieved of substantial unsecured credit debt and potential judgments due to this litigation, and to keep her family home by making additional payments to the bank to prevent foreclosure actions being filed against her. R.p. 1401-1411.

On September 13, 2013, the bankruptcy court issued its order R.p. 1384. granting Ms. Lee a full and complete discharge of all of her debts (including the damages resulting from the disputes surrounding ownership of the Two Notch property) because Ms. Lee had completed her legal obligations required by the bankruptcy court under the confirmed Chapter 13 plan of reorganization. The bankruptcy court's order of discharge specifically states the Court was granting Ms. Lee a full and complete discharge of her debts pursuant to the requirements of 11 U.S.C. § 1325(a) which requires the bankruptcy court make findings of fact, that, among other

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[14] On May 17, 2013, the Fourth Circuit reversed course and ruled that that a Chapter 13 debtor-in-possession could, in fact, bring actions on behalf of the Chapter 13 estate. This ruling reversed thirty years of prior bankruptcy case law in the District of South Carolina that had prevented Ms. Lee from bringing her action in federal bankruptcy court in the first instance. *Wilson v. Dollar General*, 717 F.3d 337, 344 (4th Cir. 2013) (quoting *Cable v. Ivy Tech State College*, 200 F.3d 467, 473 (7th Cir. 1999). ("[A] Chapter 13 debtor 'steps into the role of trustee and exercises concurrent authority to sue and be sued on behalf of the estate.'") (internal citation omitted))

things,

* * *

(3) [That Ms. Lee's Chapter 13] plan has been proposed in good faith and not by any means forbidden by law;

(7) [That the chapter 13 bankruptcy] petition was in good faith. . .

Ms. Lee was offered all the judicial means afforded to her under Federal and State laws to remedy her difficulties in a sincere desire to afford her the best possible outcome in a lengthy, emotional, and difficult situation. While the outcome of the Bankruptcy proceedings may have been less than desirable from Appellant Anasti's point of view, the outcome was within the law, and well within Ms. Lee's rights to pursue as thoughtful and prudent relief for her circumstances.

C. Sanctions cannot be based upon attorney-client privileged documents that were inadvertently disclosed to Appellant during discovery.

On or about June 14, 2007, Respondent Megna called Truslow on the telephone in an attempt to resolve Truslow's continuing accusations of unmet discovery requests. As noted by the affidavit of Respondent Megna's assistant Harriet Hobbs, Respondent Megna agreed to allow Truslow to review all non-privileged documents from his litigation file in an effort to put to rest any dispute about Ms. Lee's compliance with her discovery obligations. R. pp. 1459; 1474-1475; 1477-1478. Respondent Megna and Ms. Hobbs thought they had removed all correspondence with their client, Ms. Lee, prior to making the file available to Truslow. As Ms. Hobbs notes in her affidavit, she delivered the file to Truslow's office for his inspection and copying (R.p. 1459, ¶3), he inspected and copied the documents he wished (R.p. 1459,¶2), and Truslow ***never mentioned*** that he had located and copied a letter from Respondent Megna to Ms. Lee. (R.p.

1549, ¶3).[15]

Unknown to Respondent Megna or Ms. Hobbs, Truslow made a copy of the privileged communication from Respondent Megna to his client that Respondent Megna had unintentionally left in the file that was produced to Truslow. Truslow retained the letter from Respondent Megna to Megna's client without notifying Megna or his paralegal as required by Rule 26(b)(5)(B), Rule 407, SCACR, Rule 4.4(b) and Rule 4.4(b), Model Rules of Professional Conduct. Rule 4.4(b) provides:

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably[16] should know that the document was inadvertently sent shall promptly notify the sender."

The Official Comments to Rule 4.4(b) explain this rule recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. "If a lawyer knows or reasonably should know that such a document ... was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures." *Id.*

When Respondent Megna discovered that Truslow had copied obvious attorney-client confidential information, Respondent Megna demanded that Appellant's counsel destroy any and all copies. Truslow refused. Respondent Megna then made a Rule 26(b)(5)(B) Motion for a Protective Order. R.p. 1477. Despite the plain language of Rule 26(b)(5)(B), SCRCP that requires that Appellant "*must promptly present the information to the court under seal for a*

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[15] In addition to being privileged, that letters were not addressed to this lawsuit, but one involving the parties who bought the property from Ms. Lee and the letters pre-dated the Anasti litigation.

[16] Rule 1.0(l): "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

determination of the claim," Appellant continued to ignore Rule 26 and to use the letter in an attempt to support the frivolous sanctions motion.

Rule 26(b)(5)(B) states:

> **(B)Information Produced.** If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. ***After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved.***
>
> (emphasis added).

In addition to refusing to comply with 26(b)(5)(B), Truslow quoted from the privileged communication in his memorandum (a matter of public record) filed in the lower court, as well as in other documents. In addition, Truslow omitted the most important sentence in the document. The last sentence of paragraph 2 of the communication to Ms. Lee clearly evidences that Respondent Megna was advising Ms. Lee as to possible legal options available to her. R.p. 994.

Appellant now claims that the relied-upon privileged documents were supplied by Ms. Lee's attorney, Mr. Goings, after Respondent Megna's representation had ended. [App. Brief, p. 31, Footnote 16]. However, there is no evidence in the record to support this claim, other than Truslow's unsworn statement at the 2015 hearing. R.p. 365:16-17. The only evidence in the record is that the document was inadvertently produced and Appellant refused to comply with the rules requiring him to return it to Respondent and destroy all copies.

The lower court recognized that Truslow has not complied with Rule 26(b)(5)(b). R.p.

137. While the lower court did not impose sanctions on Truslow, Appellant cannot use any of the attorney-client protected information as a basis for sanctions. Appellant has not raised any issues in his Brief challenging Judge Hood's ruling regarding the inadvertently produced letter from Megna to his client.

D. Ms. Lee provided full written consent and agreement in actions taken on her behalf during this litigation, including defending the sanctions actions.

Ms. Lee was fully informed of all facets of the case, and as set forth in her certifications and affidavits, she was consulted and agreed with each significant decision made in the case. In the lower court, Respondent Megna submitted a compilation of non-privileged emails and correspondence in which Ms. Lee was copied. R.p. 1496-1541. As is evident from the compilation, Respondent Megna kept his client fully informed of the developments in the case consistent with his professional obligations to her. Furthermore, there is absolutely no evidence that Respondent Megna took any action in the defense of Appellant's lawsuit that Ms. Lee opposed.

CONCLUSION

The lower court properly determined that there was no basis under Rule 11 to impose sanctions against Respondent Megna. The defenses asserted by Respondent Megna on behalf of his client were well founded and appropriate. In fact, Respondent Megna would have been derelict in his duties to Ms. Lee had he not pursued these defenses. Moreover, there are additional sustaining grounds for the lower court's ruling, including the fact that most of the conduct about which Appellant complains occurred when the case was on appeal with this Court. This Court previously denied Appellant's motion for sanctions and he is bound by that ruling. In addition, Appellant's sanctions request is based in large part upon a privileged document that he

misused in violation of Rule 26(b)(5)(B), SCRCP and Rule 4.3, SCACR. Finally, the lower court lacked jurisdiction to impose sanctions for any conduct in the bankruptcy cases. And importantly, there was no such misconduct in the bankruptcy court. Respondent Tony Megna respectfully requests that this Court affirm the lower court's ruling.

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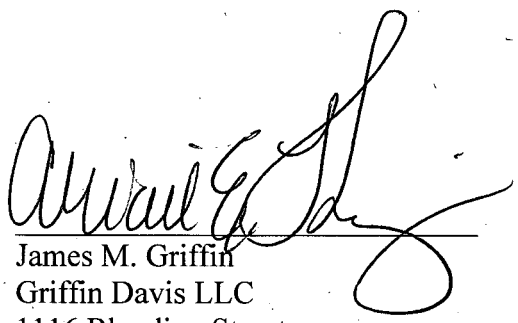

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October 7, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHALND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood

Appellate Case No. 2015-002054
Case No. 2007-CP-40-0576

In re: Tony Megna: Respondent,

JAMES A. ANASTI,

Appellant,

v.

LANCE WILSON, WILLIS GOODWIN, GINA L. ANASTI LEE, and RICHLAND COUNTY CLERK OF COURT, Defendants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and the Supreme Court's orders regarding personal data identifiers.

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