THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY AND DARLINGTON
Circuit Court

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

Ex Parte: Douglas N.Truslow, Respondent,
Ex Parte: Tony R. Megna, Appellant,
In re:
James Anasti, Plaintiff,

v.

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

And

Ex Parte: Desa Ballard, Respondent,
Ex Parte: Tony R. Megna, Appellant,
In re:
Pee Dee Health Care, P.A., Plaintiff,

v.

Estate of Hugh S. Thompson, Defendant.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. The issue of disqualification was preserved and Appellant was not in violation of the disqualification order.

Respondents argue that whether the motion to alter or amend the disqualification affected its finality is not preserved for appeal because it was not raised until Appellant's Motion for Reconsideration.[1] However, Judge Baxley clearly considered this argument (and all others) and ruled upon it, stating "The Court has considered all issued raised by the motions for reconsideration and concluded all to be without merit." Order Denying Motion to Rec., p. 3. Ballard has not cross-appealed that holding. Thus, the argument, having been raised to the trial court and ruled upon has 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)

Moreover, Ballard's claim that this argument is not supported by case law is not accurate. In Southeastern Housing Found. v. Smith, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) the court found that a Rule 59(e) motion removes the finality of the challenged judgment. Ballard tries to distinguish Southeastern, arguing that it held that a Rule 59 motion only stayed the one-year period for seeking relief under Rule 60. However, the opinion in Southeastern did not limit itself to the Rule 60 deadline only. Moreover, despite Ballard's protests, Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct.App.1999) does indicate that an order (in that case

1 Even though this argument only applies to the Thompson/Ballard matter, Truslow has responded in his brief. In fact, both Ballard and Thompson respond to issues pertaining to the other throughout their briefs. Appellant objects to Ballard responding to arguments that are solely directed to the Truslow appeal, and makes the same objection to Truslow's responsive arguments as to Ballard issues. Since the two Respondents filed separate briefs, they should confine themselves to the issues related to his or her specific case; otherwise, the Respondents are getting two bites as the apple.

summary judgment) was not final when a motion for reconsideration was pending , as it correctly held the court can alter the order:

> ...a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration. In such a case, a new judgment has replaced the previous judgment and the party aggrieved by the alteration may move for reconsideration. *See* 12 James W. Moore et al., *Moore's Federal Practice* ¶ 59.37 at 59-123 (3d ed. 1999) ("When a court alters a judgment, the party aggrieved by the alteration may ask for correction."). If, on the other hand, the trial court denies such a motion, the finality of the judgment is restored and the appeal time begins to run from the date the order is entered. *Id.* ¶ 59.36 at 59-123.

Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 58 (S.C. Ct. App. 1999). Ballard also sets forth a timeline in which the order purportedly became final or unfinal. However, an order is not truly final until a final decision is made by the appellate authority. Cf. 50 C.J.S. § 956 (Judgment in which appeal is pending may lack finality for res judicata purposes). In the Thompson case, the order of disqualification was issued on April 15, 2011. Megna timely filed a Rule 59(e) motion.[2] The lower court did not rule on the motion until August 12, 2011. The subpoena on Ballard (under the Thompson caption) was served on July 30, 2011 – while the motion to alter or amend was pending. Because the disqualification order had been divested of enforceability as a matter of law once the Motion to Alter or Amend was filed, Appellant was not in violation of any court order when he served the subpoena on Ballard.

Truslow, while purporting to address the issue presented by Appellant, seems to argue the Appellant misused the Thompson case to seek discovery in Anasti.[3] However,

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2 Ballard's statement that the motion was filed twelve days later was disingenuous; a motion to alter to amend does not have to be filed until "10 days after receipt of written notice of entry of the order." Appellant filed the Rule 59(e) motion on May 2, 2011 – within the ten days after he received the signed order that was mailed on April 19, 2011. See, Order of Disqualification and Appellant's Motion to Reconsider.

3 Though the issue raised by Appellant involves the effect of the motion to alter or amend the disqualification order, Truslow's response (which really does not relate to his case) goes well outside the

as made clear in Appellant's initial brief, Appellant sought discovery under the Thompson caption, with regard to Ballard's advice or participation with Rene Josey and other attorneys who were directly adverse to Appellant's client in Thompson. As discussed more fully in Appellant's initial brief, Appellant had previously raised the issue of Josey's conflict of interest in the Thompson case. Through Truslow's billing statements filed during the appeal, it was apparent that Truslow had been in conversations with Mr. Josey, and his statements also reflected conferences with Ballard, giving rise to the need to inquire whether Ballard had been involved in conferences with Truslow and/or Josey regarding the Thompson case. Thus, Appellant properly issued discovery on July 30, 2011, to Ballard as to the potential conflicts of interest or disclosure of confidential information.

As to the discovery sought in the Anasti case, the order of disqualification in Thompson has no effect. Moreover, Truslow had a motion for sanctions pending against Appellant, and despite Truslow's claim, there is no statute or rule requiring Appellant to file a motion before being allowed to conduct discovery (and Truslow cites no such authority).

II. Any conduct previously rejected by this Court as grounds for sanctions cannot form the basis for the lower court's award of sanctions.

Both Truslow and Ballard misconstrue Appellant's argument with regard to this Court's prior dismissal of a sanctions claim. Appellant merely argues that conduct which was previously rejected by this Court cannot be the basis for the lower's court's order. If this Court has determined it was not sanctionable, the lower court cannot use it as the basis of sanctions. Moreover, the case upon which Ballard, (to whom this issue does not

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issue and is confusing at best).

apply but responded anyway), relies upon, Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 750 S.E.2d 78 (2013), for the proposition that a circuit court can sanction for appellate misconduct, does not apply. In that case, the appellate court, in its discretion, denied fees, but the circuit court was mandatorily *required* to award of fees to prevailing party under a statute known as the Dealer's Act. There is no such statute here and this is not a matter of awarding fees to a prevailing party.

IIII. Even if the sanctions motion for which Appellant sought discovery has not been heard, he did not misuse the discovery process because it was necessary to contest the sanctions.

Ballard argues that Appellant's use of the discovery process is somehow improper because Truslow's Amended Motion, filed November 21, 2011 has not been heard.[4] However, whether or not that motion has been heard has no effect on whether discovery was needed. Truslow sought damages and sanctions against Appellant of $500,000, and provided no support for this significant amount, although he did indicate that he, Ballard and others would be witnesses.[5] Appellant sought discovery on this large monetary sanction by issuing certain subpoenas to which Truslow not only objected, but then sought sanctions for; in fact, the majority of Truslow's time was not to object or quash to a subpoena but in pursuit of sanctions. (SR. 41-43).

As a matter of due process, Appellant must be afforded an adequate opportunity to contest the sanctions. *See, e.g.*, In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990)("We find that appellants were not given an adequate opportunity to respond to the type and

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4 Truslow argues that the Amended Motion of November 21, 2011 relates back to a 2007 motion, and is not the motion decided before the circuit court on May 15, 2012. While Truslow is correct and the 2007/2011 motions were not before Judge Baxley (R. 333-335), the 2011 did increase the amount of sanctions sought from $183,000 to $500,000 with no support.

5 The subpoena served on Ballard in the Thompson case was related to a conflict of interest of the defense counsel, as more fully discussed in Section V, *infra.*

amount of sanction imposed, ***particularly in light of the large monetary sanction.***") (emphasis added). It appears that Appellant is being punished for exercising his due process rights to contest the sanctions sought by the Amended Motion.

Truslow claims that Appellant's need for discovery as to "damages" cannot justify his actions. Truslow's main objection seems to be the use of the word "damages" and he argues that Appellant had no interest in the damages hearing against Wilson and Goodwin (in the *Anasti* case). However, the Amended Motion for sanctions, directed solely to Appellant,6 stated that "**[d]amages and sanctions** are expected to exceed $500,000." Truslow November 21, 2011 Am. Motion, p. 1 (emphasis added). Thus, to the extent Appellant has referenced "damages" in connection with the discovery sought, he is merely parroting the words found in Truslow's own motion, which appeared to seek both damages and sanctions from Appellant only. The only method by which Appellant could contest the "damages and sanctions" sought was through discovery.

IV. The monies awarded to Ballard by the lower court are merely attorney's fees awarded to a pro se attorney in the disguise of sanctions.

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.

Thus, while attorney's fees are a proper measure of sanctions where they are actually incurred, South Carolina case law is clear that attorney's fees cannot be awarded to pro se

6 While Truslow also claims that Appellant was acting without his client's knowledge, she was provided copies of the discovery served on Truslow. (R. 1303-1333).

litigants: Attorneys' fees have also been denied to *pro se* attorney/litigants for the policy reason that it would simply be unfair to allow *pro se* attorneys to recover fees, while denying such fees to *pro se* laymen. Hopkins v. Hopkins 343 S.C. 301, 540 S.E.2d 454 (2000).

Ballard[7] argues that her fees are an appropriate measure for sanctions, relying on Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 600, 713 S.E.2d 624, 629 (2011). However, the case merely reflected the language of Rule 11 and stated

> The award to the other party of its detailed, itemized costs and fees incurred as a result of the improper removal plainly is allowed under the express language of Rule 11, SCRCP.

Ex parte Bon Secours-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 600, 713 S.E.2d 624, 629 (2011). The attorney's fees awarded in that case were not awarded to a *pro se* party/attorney,[8] and furthermore, were not even the subject of the appeal as that part of the sanctions order had been resolved. See, Bon Secours, Footnote 7. The court found that the unappealed sanctions, awarding attorney's fees to the prevailing party's attorney was permitted by Rule 11, but that the judge has abused his discretion in going beyond "the conventional costs and fees." Id.

Here, the lower court, by its own admission clearly reimbursed Ballard for attorney's fees by acknowledging that the amount awarded:

> 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). In other words, the lower court awarded attorney's fees to a pro se litigant, which is error.

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7 As set forth previously, Appellant objects to Truslow's response to a Ballard issue.
8 Ballard acknowledged that she was appearing pro se. (SR. 40).

V. Appellant acted in good faith and with a valid purpose in issuing a subpoena to Ballard, who agreed to represent Appellant and Pee Dee, while at the same time consulting with attorneys who were directly adverse to Appellant and Pee Dee.

Ballard attempts to distance herself from the relationship created with Appellant. However, it is undisputed that Appellant did contact Ballard's office by email on October 12, 2010. Furthermore, it is clear that Appellant or her partner reviewed the confidential material provided[9] and agreed to provide representation: "But if you would like us to send a fee agreement, we will be happy to participate in the case." (R. 1165).[10] Thus, Ballard or her partner agreed to represent Appellant and his client, Pee Dee Health Care.[11] At the same time, however, Ballard was providing representation to Truslow in a matter adverse to Appellant.

Neither Ballard nor her partner revealed that Ballard was involved in the Anasti litigation since 2008 (R. 639-694), including advising Truslow on sanctions against Appellant. Moreover, Truslow's Motion for Sanctions in the Anasti appeal on May 9, 2011, indicated that he had repeated conferences with Ballard, as well as conferences with other attorneys in the Thompson litigation that was directly adverse to Appellant and Pee Dee. At the time that Appellant issued the subpoena to Ballard, he was in a dispute with attorney Rene Josey, who was serving as counsel to the defendant in Thompson, over whether Josey had a conflict of interest. The discovery that Ballard had been

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9 Respondents claim that the material Appellant sent to Ballard was not provided to trial court but it appears that the entire file regarding the Lake City litigation that is the subject of the email was provided to the court. (R. 267:19-268:2)

10 Contrary to Ballard's claims that she or her office quoted a fee to cause people to be less than interested in retaining her services and that didn't "want anything to do with a case that Mr. Megna was involved in," (R. 290:17-291:3) Ballard neither quoted a fee nor turned Appellant down. Instead, the email indicates her acceptance of representation.

11 The fact that Ballard stated the amount she would charge would probably be more than Appellant's client could pay indicates that she had reviewed the matter and knew that the fees would be costly. Ballard now claims, despite the indication of the email, that no one in her office reviewed the documents and she never intended to take the case.

advising Truslow, who in turn had been conferring with Josey and others in the Thompson case raises a legitimate concern that Ballard may have provided advice as to that litigation as well. Appellant had a good faith basis to investigate the substance of those conversations through the subpoena to Ballard, and the subpoena was not a sham or attempt to pursue discovery in Anasti.

The evidence (email) indicates that Ballard or her partner received and reviewed confidential information about Pee Dee while at the same time she was engaged in advising Truslow about litigation directly adverse to Appellant. Even if Ballard herself did not agree to represent Appellant, her partner did, and under the rule of imputed disqualification, neither Ballard nor her partner could represent Appellant while at the same time representing a party adverse to Appellant. See, Rules of Professional Conduct, Rule 1.10 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9. ..." and Comment to Rule 1.7 ("Concurrent conflicts can arise from a lawyer's responsibilities to another client, a former client or third person or from the lawyer's own interests.").

VI. Ballard's additional sustaining ground provides no support for the lower award of sanctions.

Ballard claims, as an additional sustaining ground, that the subpoena served by Appellant did not comply with Rule 45, SCRCP and that Appellant failed to contradict that at the trial court level.[12] However, Appellant argued, without conceding, that even if there was a Rule 45 procedural violation, Ballard submitted an objection to the subpoena which she was all she was required to do. (SR. 35-47). The objection cost her

12 The circuit court's order awarding sanctions makes no mention of Rule 45, SCRCP.

approximately $800 in time to prepare.13 Id. Appellant did not pursue the matter by filing a motion to compel. Id. The remainder of the sanctions sought by Ballard was for time and expenses in pursuing the sanctions. Id. The fact that there may have been a technical violation under Rule 45, SCRCP does not sustain the lower court's award of an award of sanctions of over $15,000.

CONCLUSION

As set forth herein, the lower court's order was not supported by the facts and was based on errors of law. Thus, it is respectfully submitted that the lower court abused its discretion in awarding sanctions and the orders must be reversed.

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March 25, 2013

13 Of course, as already argued, Ballard is not entitled to even that $800 as she is a pro se litigant, and as such is not entitled to attorney's fees. See *Hopkins v. Hopkins, supra.*

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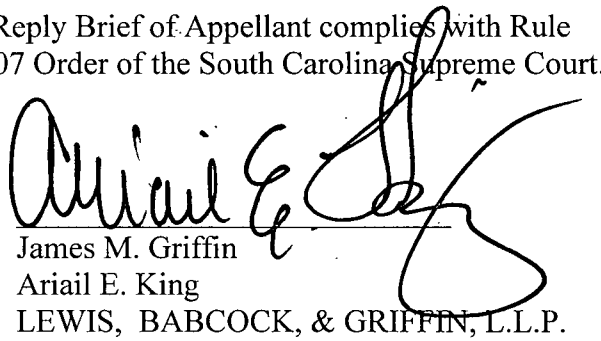
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Reply Brief of Appellant complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.



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