THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Appeal No. 2021-001461

Ironwork Productions, LLC., ... Appellants,

v.

Bobcat of Greenville, LLC and
Bobcat Company, Inc.,..... Respondents.

BRIEF OF RESPONDENT BOBCAT OF GREENVILLE, LLC

McAngus Goudelock & Courie

Helen F. Hiser
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Robert L. Mebane, Jr.
55 East Camperdown way, Suite 300 (29601)
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Respondent Bobcat of Greenville, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

COURT ORDERS & RULES

STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly dismissed Plaintiff's Complaint for willful repeated failures to respond to discovery requests?

II. Whether the Circuit Court properly dismissed Plaintiff's Complaint as against all parties?

STATEMENT OF THE CASE

Appellant Ironwork Productions, LLC, Plaintiff below, filed a Complaint in Greenville County Court of Common Pleas on August 29, 2018 against Bobcat of Greenville, LLC and Bobcat Company, Inc., raising three causes of action arising out of an allegedly defective T870 Compact Track Loader sold and/or serviced by the Defendants. (R. pp. 10-16).[1]

Respondent Bobcat of Greenville, LLC filed a timely Answer, raising the error in its name[2] and raising numerous affirmative defenses. (R. pp. 17-20). On that same date, Bobcat of Greenville served Interrogatories and Requests for Production on Plaintiff.[3]

Clark Equipment Company (hereinafter "CEC") also filed a timely Answer, noting Plaintiff had incorrectly named it as Bobcat Company, Inc. in the Complaint. CEC denied Plaintiff's claims and raised affirmative defenses. (R. pp. 21-28).

Subsequently, on January 25, 2019, CEC served discovery requests on Plaintiff. (R. pp. 32-48). Having received no response by March 6, 2019, CEC's counsel emailed Plaintiff asking it to provide responses. Plaintiff's counsel responded, "They are sitting right in front of me on my desk. I will look at them and get back to you before Friday." (R. p. 50). Having still received no response by March 18, 2019, CEC filed a Motion to Compel Discovery Responses. (R. pp. 29-51). That Motion was set for hearing on April

[1] The Complaint was filed by Plaintiff's initial counsel, E. Delane Rosemond, who has never formally withdrawn from this case.

[2] Plaintiff incorrectly named Bobcat of Greenville, LLC as a Defendant. The correct entity is Acme Operations, LLC; however, Plaintiff never has moved to correct this error and as a result, for the sake of consistency with the lower court record, Acme is referred to herein as Bobcat of Greenville.

[3] Plaintiff asserts, incorrectly, that Bobcat of Greenville did not serve "discovery requests on Appellant at any stage of this case." (App. Br. p. 6 n.6). In fact, Bobcat of Greenville served discovery requests to which Plaintiff provided insufficient and/or deficient responses. (R. pp. 184-185, 422-447).

3, 2018; however, at nearly 10:00 p.m. the night before the hearing, Plaintiff's initial counsel emailed responses to CEC. (R. p. 102). Consequently, the hearing was cancelled.

On May 16, 2019, CEC sent Plaintiff a letter advising that its discovery responses were deficient, noting that Plaintiff had completely failed to respond to Interrogatory No, 6 and advising that some of its other "responses need to be clarified or supplemented." CEC requested a response within ten days. (R. pp. 141-146). On the same date, CEC sent Plaintiff a second set of interrogatories and document requests. (R. pp. 147-161).

Having received no response by mid-July, CEC reached out to Plaintiff advising that, if CEC did not receive responses by July 22, 2019, it would file a Motion to Compel. The response from Plaintiff's counsel was, "No problem. It's going in the mail today." (R. p. 162). Having not received a response by August 5, 2019, CEC sent another request for a response to the long-overdue discovery. (R. p. 165).

Still having received no response, CEC filed a Motion for Sanctions and to Compel Discovery Responses on August 15, 2019. A hearing was set on this motion for October 1, 2019 before the Honorable Edward W. Miller. Although Respondents' counsel attended the hearing, Plaintiff's counsel, who had received notice of the hearing and had, in fact, advised CEC's counsel that he would be there, did not appear. (R. p. 635, lines 13-23). After explaining the history of Plaintiff's failure to meaningfully respond to discovery requests, Judge Miller stated, "Alright, well for the record I'll note that the hearing was set at 10:30, It's now 10:40, there's no representative … from the plaintiff here, uh, so I'm gonna grant your motion to compel and, uh, it's not, discovery's not fully complied with within, uh, ten days of the date [of] the Order we'll just, we'll dismiss … the complaint." (R. p. 638, lines 12-20).

Plaintiff was sent a proposed Order that stated that his "counsel failed to appear at the duly-noticed hearing," granted CEC's Motion to Compel, and clearly advised Plaintiff that, if it did not "provide full and complete responses to all outstanding requests … with[in] ten (10) days of receipt of" the Order, "Plaintiff's Complaint in this lawsuit shall be dismissed." Plaintiff's counsel responded that the proposed Order "is fine with me." (R. p. 663). The Order was filed on October 1, 2019. (October 1, 2019 Order, R. pp. 1-3).

Plaintiff filed a Certificate of Service on October 1, 2019 stating that it had served "the Answers to Interrogatories and Response to Request for Production on the attorneys for the Defendants." (R. p. 656). This "response," however, turned out to be nothing more than a photocopy of inadequate responses and documents previously provided in discovery.

On October 18, 2019, CEC filed a Notice of Plaintiff's Noncompliance with the Court's 10/1/19 Order and Request for Dismissal. (R. pp. 661-662). In his cover email to Judge Miller, CEC's counsel explained that "[s]eventeen days have passed, and we have received nothing in response to our May 16, 2019 deficiency letter or our May 16, 2019 second set of discovery [requests]. Plaintiff's counsel did send us a photocopy of a prior set of responses from April 2019 to discovery requests issued by another party [Bobcat of Greenville], but we have received nothing in response to the court's order." (R. p. 657). Counsel for Bobcat of Greenville emailed other counsel of record and Judge Miller, stating that Bobcat of Greenville "joins in the request of defendant Clark Equipment Company Inc. to dismiss the complaint." (R. p. 659). In response, Judge Miller requested a proposed "short order of dismissal based on the Plaintiff's noncompliance." (R. p. 665).

It was not until October 24, 2019, when counsel inquired with Judge Miller's staff as to the status of the Order, that Plaintiff's counsel responded, indicating that he had sent his discovery responses "the day after the hearing." (R. p. 668). CEC responded that Plaintiff's assertion was not correct, that what had been sent were mere "photocopies of the discovery response sent to the co-defendant on April 2," and that CEC had not received anything responsive to its May 16 deficiency letter and discovery requests. (R. p. 672).

On October 25, 2019, the Circuit Court filed an Order Dismissing Plaintiff's Complaint with Prejudice. In its Order, the Circuit Court noted that Plaintiff's counsel had "consented to the language of the [October 1] Order before it was filed," and found "that Plaintiff has been given ample notice of the discovery deficiencies but has failed to respond thereto. The Court also finds that Plaintiff has not complied with the terms of the October 1, 2019 Order." (October 25, 2019 Order, R. pp. 4-6).

On November 4, 2019, Plaintiff, who by this time had hired present appellate counsel, moved for reconsideration, arguing that, based on an affidavit of its president, Brandon McAlister, "the plaintiff's failure to timely respond to discovery was not due to any fault of the plaintiff," and that upon learning that its Complaint had been dismissed for "failure to respond to discovery requests," it moved "quickly" to seek relief. (R. pp. 166-171) ("Motion to Alter or Amend"). In his affidavit, Mr. McAlister stated that he had hired E. Delane Rosemond as Plaintiff's counsel in this lawsuit. Mr. McAlister acknowledged that Attorney Rosemond had communicated with him regarding the discovery requests, but asserted that "Mr. Rosemond never informed" him about the deficiencies in discovery, the October 1, 2019 hearing or the subsequent Court Order. Mr.

McAlister stated that, "[w]hile all of this was going on … I became frustrated with the lack of communication from Mr. Rosemond about my case in general," so, on October 31, 2019, he contacted the Eller Tonnson Bach law firm, whom he retained after learning that Plaintiff's Complaint had been dismissed. Mr. McAlister did not state that he had relieved Mr. Rosemond of his representation. (R. pp. 169-171). This motion was not sent to Judge Miller.

Plaintiff's initial counsel also moved for reconsideration the very next day, arguing that the October 1, 2019 Order "did not say anything regarding dismissal *with prejudice*." Mr. Rosemond also asserted that the reasons he failed to attend the October 1, 2019 motions hearing were that: 1) "he had a South Carolina Department merits hearing scheduled at 10:30 am in Oconee County," and, 2) that he had been under the mistaken impression that both hearings were in Oconee County as the "Plaintiff resides in Oconee County, as does many of the witnesses and counsel." Although Mr. Rosemond stated that he realized his error the morning of the hearing, he acknowledged that he "did not notify the court of the conflict in cases." (R. pp. 172-178).[4] This motion was not sent to Judge Miller either.

CEC filed an opposition to the "two separate and conflicting motions for reconsideration," pointing out that the second Motion for Reconsideration, filed by Mr. Rosemond, was filed "after the ten-day period required by Rule 59(e) had expired." CEC noted that neither Motion was sent to Judge Miller, as is required by Rule 59(g), SCRCP. (R. pp. 179-633).

[4] Plaintiff characterizes this second Motion for Reconsideration as a "purported, but unauthorized, Motion to Reconsider." (App. Br. p. 6, n. 7). As Plaintiff acknowledges, the "unauthorized" Motion to Reconsider filed by Mr. Rosemond also was "untimely." (App. Br. p. 10).

The parties appeared before Judge Miller on November 16, 2021. Present at that hearing were Plaintiff's current appellate counsel, as well as counsel for Bobcat of Greenville and for CEC. At the outset of the hearing, Plaintiff's current counsel noted that Mr. Rosemond was not present. When asked if Mr. Rosemond was "essential" to the hearing, Plaintiff's counsel responded, "Your Honor, he—he filed a motion to reconsider. I mean, he's still technically counsel of record for the plaintiff. You know, we're co-counsel. I have a motion and he has a motion, so. I assumed he'd be here, but obviously it's 1:15 and he's not. I guess if you refamiliarize yourself with this, it's not the first time, so, he hasn't appeared for a hearing." (R. p. 643, lines 7-17). Plaintiff's counsel later described Mr. Rosemond as "Plaintiff's previous attorney … or still current but not present attorney …" (R. p. 644, lines 23-24). Judge Miller initially explained that, due to the passage of time, he did not have an independent memory of what had occurred previously, but stated that "if I had dismissed the complaint, there must have been some judicial frustration. Normally I wouldn't impose such a harsh—harsh sanction." (R. p. 649, lines 4-8). Plaintiff's counsel stated, "[w]e certainly understand the Court's frustration." (R. p. 648, lines 3-4). After having been reminded of the history of the discovery dispute and Plaintiff's repeated failures to respond meaningfully to discovery and failure to comply with the October 1 2019 Order, as well as Plaintiff's initial counsel's failure appear at hearings, Judge Miller denied the motion to reconsider, allowing the dismissal to stand.

The Circuit Court issued a Form 4 Order, denying Plaintiff's Motion for Reconsideration. (Form 4 Order, filed Nov. 19, 2021, R. pp. 7-9).

Plaintiff timely appealed to this Court.

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), *citing Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "A dismissal under Rule 37(B)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion." *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d. 369, 372 (1990). "[W]hatever sanction is imposed should serve to protect the rights of discovery provided by the Rules." *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. Indeed, "the most severe in the spectrum of sanctions provided by statue or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.*

"A trial judge's exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). Thus, Plaintiff bears the burden of demonstrating "that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543.

ARGUMENTS

I. The Circuit Court properly dismissed Plaintiff's Complaint as a discovery sanction.

Plaintiff asserts two arguments in support of its position that the Circuit Court should not have dismissed its Complaint: 1) there is no or insufficient evidence of bad faith, willful disobedience or gross indifference to the rights of Respondents; and, 2) Plaintiff should not be sanctioned for the actions or inactions of its initial counsel, who Plaintiff asserts abandoned it. Neither argument is supported by the evidence and neither demonstrates any abuse of discretion on the part of the Circuit Court.

A. There is sufficient evidence of bad faith, willful disobedience or gross indifference to the rights of Respondents to justify dismissal.

Plaintiff's position appears to be that dismissal is proper only where the moving party demonstrates sufficiently repetitive disobedience of the discovery rules and/or the court's "instructions," coupled with the lack of a good faith excuse for the litigant's misconduct. This "test," however is not articulated in either Rule 37 or case law.

Instead, Rule 37(b)(2)(C), provides, in pertinent part, that "[i]f a party … *fails to obey an order* to provide or permit discovery … including an order made under subdivision (a) of this rule … *the court* in which the action is pending may make such orders in regard to the failure as are just, and among others the following: … an order striking out pleadings or parts thereof … *or dismissing the action* or proceeding or any part thereof …" Rule 37(b)(2)(C), SCRCP. Subdivision (a) of Rule 37 provides for a party to move to compel discovery responses, and provides that "an evasive or incomplete answer is to be treated as a failure to answer." Rule 37(a), SCRCP (emphasis added).

Plaintiff argues that dismissal was not warranted because it was not in violation of *multiple* discovery orders. However, while South Carolina appellate courts have upheld dismissal as a sanction where there were multiple violations of discovery orders, there is no case law requiring a party to violate multiple discovery orders before the sanction of dismissal is imposed. In fact, Rule 37(b) refers to the failure to comply with "*an* order made under subdivision (1) of this rule," Rule 37(b)(2)(C), SCRCP (emphasis added), which clearly contemplates the range of sanctions being available for a single and inexcusable failure to comply with a discovery order.

And, while Plaintiff asserts in its defense that it provided "thirty-six (36) pages of written responses," to the initial discovery requests, (App. Br. p. 4 n.4), and "over fifty pages of written responses and document production seeking to comply with the Court's instructions," (*Id.* p. 13), most of its interrogatory responses are repetitive lengthy lists of dates and assertions or dollar amounts without any context or supporting documentation. (R. pp. 103-129). In addition, the document production consisted largely of illegible photocopies that had been provided previously and, thus, were completely non-responsive to the Circuit Court's October 1, 2019 Order. (R. pp. 442-613).

Plaintiff asserts that the Circuit Court failed to consider the requisite factors for imposing a severe discovery sanction and that its only discovery failure "apparently, was the conduct of not providing the exact information [CEC] deemed to be sufficient in response to its discovery requests." (App. Br. p. 14). Despite Plaintiff's attempts to soft-pedal and obscure the inexcusable discovery failures, delays, continual empty promises to respond, and Plaintiff's counsel's failure to attend hearings, all of which led to the sanction, the facts are fairly straightforward. Bobcat of Greenville served discovery

requests on Plaintiff, to which it provided inadequate responses. (*See* R. pp. 184-185, 422-447). On January 25, 2019, CEC also served discovery requests on Plaintiff. (R. pp. 32-48). Having received no response by March 6, 2019, CEC's counsel emailed Plaintiff's counsel asking him to provide responses. Plaintiff's initial counsel responded, "They are sitting right in front of me on my desk. I will look at them and get back to you before Friday." (R. p. 50). However, Plaintiff did not respond to the outstanding CEC discovery requests. Having received no response by March 18, 2019, CEC filed a Motion to Compel Discovery Responses. That Motion was set for hearing on April 3, 2018; however, at nearly 10:00 p.m. the night before the hearing, Plaintiff's initial counsel emailed responses to CEC. (R. p. 102).

On May 16, 2019, CEC sent Plaintiff a letter, noting that it had completely failed to respond to Interrogatory No. 6 and advising that some of its other "responses need to be clarified or supplemented," and requesting a response within ten days. (R. pp. 141-146). On the same date, CEC sent Plaintiff a second set of Interrogatories and document requests. (R. pp. 147-161).

Having received no response to either the letter or the second set of discovery requests by mid-July, CEC reached out to Plaintiff advising that, if CEC did not receive responses by July 22, 2019, they would file a Motion to Compel. The response from Plaintiff's counsel was, "No problem. It's going in the mail today." (R. p. 162). However, again, nothing was received. CEC sent another request for a response to the long-overdue discovery on August 5, 2019. (R. p. 165).

Still having received no response, CEC filed a Motion for Sanctions and to Compel on August 15, 2019. (R. pp. 52-164). Plaintiff's counsel, who had received

proper notice of the October 1, 2019 hearing on the Motion to Compel, and who had assured CEC that he would be there, inexcusably failed to appear and failed to advise the Circuit Court of any conflict. (R, p. 635, lines 13-23). After reviewing the history of Plaintiff's failure to meaningfully respond to discovery requests, Judge Miller granted CEC's motion to compel and stated that, if Plaintiff failed to fully respond to discovery in 10 days, he would dismiss the Complaint. (R. p. 638, lines 12-20).

Plaintiff was sent a proposed Order that clearly stated that CEC's Motion to Compel and for Sanctions had been granted, and that, if Plaintiff did not "provide full and complete responses to all outstanding requests … with[in] ten (10) days of receipt of" the Order, "Plaintiff's Complaint in this lawsuit shall be dismissed." Plaintiff's counsel specifically responded that the proposed Order "is fine with me." (R. p. 663). Having received no objection from Plaintiff's counsel and, indeed being advised, that it was "fine" with him, the Order was filed on October 1, 2019.

On that same date, Plaintiff purported to "respond" to the October 1 Order by filing a Certificate of Service stating that it had served "the Answers to Interrogatories and Response to Request for Production on the attorneys for the Defendants." (R. p. 656). This "response" turned out to be nothing more than a photocopy of responses and documents previously provided in discovery. Nothing was added; nothing was corrected. (R. pp. 422-613).

As a result, and as agreed to by Plaintiff's counsel, on October 18, 2019, CEC filed a Notice of Plaintiff's Noncompliance with the Court's 10/1/19 Order and Request for Dismissal. (R. pp. 661-664). In his cover email to Judge Miller, CEC's counsel explained that "[s]eventeen days have passed, and we have received nothing in response

to our May 16, 2019 deficiency letter or our May 16, 2019 second set of discovery [requests]. Plaintiff's counsel did send us a photocopy of a prior set of responses from April 2019 to discovery requests issued by another party [Bobcat of Greenville], but we have received nothing in response to the court's order." (R. p. 657). Bobcat of Greenville joined CEC's request to dismiss Plaintiff's Complaint. (R. p. 659). In response, Judge Miller requested a proposed "short order of dismissal based on the Plaintiff's noncompliance." (R. p. 665).

It was not until October 24, 2019, when counsel inquired with Judge Miller's staff as to the status of the Order, that Plaintiff's counsel responded, indicating that he had sent his discovery responses "the day after the hearing." (R. p. 668). CEC responded that Plaintiff's assertion was not correct, that what had been sent were mere "photocopies of the discovery response sent to the co-defendant on April 2," and that CEC had not received anything responsive to its May 16 deficiency letter and discovery requests. (R. p. 672).

On October 25, 2019, the Circuit Court filed an Order Dismissing Plaintiff's Complaint with Prejudice. In its Order, the Circuit Court found "that Plaintiff has been given ample notice of the discovery deficiencies but has failed to respond thereto. The Court also finds that Plaintiff has not complied with the terms of the October 1, 2019 Order." (R. pp. 4-6). Thus, while Plaintiff is correct that the matter had been pending for just over a year at the time it was dismissed, what it fails to note is that most of those thirteen plus months were spent in frustrating attempts to get Plaintiff to respond to basic discovery requests and/or to appear at hearings, which it repeatedly failed to do.

In addition, although Plaintiff asserts that its failure to respond to discovery or to appear was not willful, the evidence demonstrates otherwise. First, as set forth in *Balloon Plantation, Inc. v. Head Balloons, Inc.*, it is sufficient for the court to find *either* "some element of bad faith, willfulness, *or* callous disregard of the rights of other litigants in order to impose" a harsh sanction such as default or dismissal. 303 S.C. 152, 154, 399 S.E.2d 439, 441 (Ct. App. 1990) (emphasis added). A finding of any one of those elements—bad faith, willfulness, *or* callous disregard—justifies a harsh sanction. Second, as noted above, Plaintiff repeatedly failed to respond to CEC's discovery requests, even after being reminded they were overdue and after repeatedly, but falsely, assuring a response was forthcoming. Plaintiff's counsel assured CEC on January 25, 2019 that the discovery requests were "sitting right in from of [him] on [his] desk" and that he would "look at them and get back to [CEC] before Friday." (R. p. 50). It was not until a hearing was scheduled on CEC's first Motion to Compel that Plaintiff sent a set of responses—at approximately 10:00 p.m. the night before the hearing. Even then, Plaintiff's responses were incomplete and deficient. (R. pp. 139-146, 236).

Plaintiff similarly failed to respond in any way for months to CEC's May 16 letter that outlined the deficiencies and omissions in its initial discovery response, or to CEC's second set of discovery, despite assuring defense counsel on July 22 that the responses were "going in the mail today." (R. p. 162). By mid-August, still having received no response, CEC again was forced to file a motion to compel with the Court, this time seeking sanctions. (R. pp. 52-164).

Despite receiving proper notice, Plaintiff's counsel failed to attend the October 1, 2019 hearing on CEC's Motion for Sanctions and to Compel or, prior to filing the

untimely November 5, 2019 Motion for Reconsideration, provide the Circuit Court with any excuse for such failure. Plaintiff's counsel's belated explanation for his failure was that he "had a South Carolina Department merits hearing scheduled at 10:30 am in Oconee County," and that, despite having filed suit in Greenville County, "Plaintiff was under the impression that both hearing was in Oconee County," because "The Plaintiff resides in Oconee County, as does many of the witnesses and counsel." Plaintiff's counsel acknowledged that he realized his error the morning of the hearing; however, he failed to notify the Court or opposing counsel of his conflict or that he would not appear on October 1, 2019. (R. p. 173). Regardless of Plaintiff's attempts before this Court to paint his counsel's repeated failures to respond and to appear at scheduled hearings as actual attempts to be responsive, (App. Br. pp. 14-15), the procedural history of this case demonstrates the repeated and inexcusable failures on Plaintiff's part to attend duly noticed hearings and/or to properly and adequately respond to discovery in a case it filed, seeking over a million dollars in damages. Indeed, on appeal, Plaintiff places the entire blame on its initial counsel, who it has never formally relieved as counsel.[5] Plaintiff even appears to point the finger at CEC's counsel, suggesting that many of the discovery issues "could have been resolved with clearer communication between" CEC's counsel and Plaintiff's counsel. There is no evidence whatsoever to support any allegation that CEC caused or contributed to Plaintiff's repeated discovery failures.

[5] Plaintiff references the Supreme Court's order dismissing Mr. Rosemond from the practice of law "until further order at this Court," *In re Edward Delane Rosemond*, 2022-03-10-01 (S.C. Sup. Ct. filed March 10, 2022), (App. Br. p. 2 n.2), presumably as evidence of Mr. Rosemond's failures in this case. However, that suspension took place in March 2022; whereas, the discovery failures attributable to Plaintiff in this case occurred throughout 2019. Furthermore, as noted elsewhere herein, Plaintiff has never officially relieved Mr. Rosemond as counsel.

B. The actions and inactions of Plaintiff's counsel are attributable to Plaintiff.

Plaintiff argues that its initial counsel, Mr. Rosemond, attempted to comply with the discovery obligations while, at the same time, insisting that it should not be bound by Mr. Rosemond's failures, "given Mr. Rosemond's abandonment of [Plaintiff] during the litigation." (App. Br. pp. 15-16). The main problem with this argument is that Mr. Rosemond did not abandon Plaintiff during the litigation, nor did he move to be relieved as counsel. While Plaintiff avers that Mr. Rosemond failed to communicate with its President, Mr. McAlister, as frequently as was wished or expected, such failure does not constitute abandonment for purposes of determining whether a plaintiff is bound by the acts of its attorney.

As Plaintiff concedes, "[t]he general rule in [South Carolina] is that the neglect of the attorney is attributable to the client." *Graham v. Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). While there is an exception to this general rule, *i.e.*, when the attorney willfully and unilaterally abandons his or her client, that exception does not apply here. Plaintiff argues that Mr. Rosemond's actions in discovery, which Plaintiff also describes as good faith efforts to respond and understandable—(App. Br. pp. 7, 10 (Mr. Rosemond "believed he had complied with the circuit court's October 1, 2019 order"); p. 8 (Mr. Rosemond "endeavored to and believed he had provided all information in his possession"); pp. 14-15 (asserting that Plaintiff, through Mr. Rosemond, "offered to make itself available for a deposition," "propounded responses and communicated with [CEC] as recently as three weeks prior to the Order striking its complaint," "Mr. Rosemond immediately agreed to [CEC's] proposed order via email," and "served supplemental discovery in his possession on [CEC]"))—somehow constitute a unilateral abandonment

of representation of Plaintiff, attempting unsuccessfully to compare Plaintiff's circumstances to that of the Town of Loris in *Graham*. In contrast to the instant case, in *Graham*, the Town's attorney presented it with a letter withdrawing its representation the day before a hearing on a motion for summary judgment was scheduled, failed to advise the Town of the hearing, and then secreted himself away so that the sheriff could not locate him. The Supreme Court held that "under the rare circumstances of this case," this constituted a willful and unilateral abandonment and the Town's failure to attend the hearing was due to excusable neglect.

Here in contrast, Plaintiff vacillates between attempting to justify Mr. Rosemond's conduct of discovery while, at the same time, asserting he had unilaterally abandoned Plaintiff. However, at the hearing on its Motions to Alter or Amend and for Reconsideration, Plaintiff's current appellate counsel acknowledged that Mr. Rosemond "filed a motion to reconsider. I mean, he's still technically counsel of record for the plaintiff. You know, we're co-counsel. I have a motion and he has a motion, so. I assumed he'd be here." (R. p. 643, lines 10-14). In fact, one of the unusual aspects of this case is that Plaintiff's current appellate counsel filed a Motion to Alter or Amend, and a day later, Mr. Rosemond filed a Motion for Reconsideration, making completely different and fairly contradictory arguments. Thus, far from unilaterally abandoning Plaintiff, Mr. Rosemond remained counsel of record and continued to file pleadings on Plaintiff's behalf, even as he also continued his pattern of failing to attend hearings.

In *Mitchell Supply Co. v. Gaffney*, this Court addressed the situation where "[t]he inadvertence or mistake involved … is clearly that of the [plaintiff's] attorney" and the plaintiff "in no way contributed to [its] predicament," explaining that, "[w]hile some

federal cases have made a distinction between the neglect of a defaulting party's attorney and the neglect of a party himself [citations omitted] we have been unable to locate a case from this state which makes that distinction." 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). Thus, it long has been and continues to be the rule in South Carolina that errors made by an attorney are "directly attributable to his client." *See*, *e.g.*, *Simon v. Flowers*, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957) ("The general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client"); *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client"). Thus, despite its attempts to distance itself from Mr. Rosemond's actions, those actions and failures are attributable to Plaintiff.

Plaintiff bears the burden of establishing the fact of willful and unilateral abandonment by its initial counsel. *See Stearns Bank, N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 344-345, 644 S.E.2d 793, 800 (Ct. App. 2007) (noting that a court cannot assume that an attorney's negligence "transcends mere neglect and rises to the level of willful abandonment or withdrawal from the case," and noting that, in *Graham*, "the moving party established that its attorney affirmatively withdrew by resigning on the eve of a summary judgment hearing"). Here, Plaintiff has not met that burden and, in fact, argues against any such finding. *See* App. Br. pp. 7, 10 (Mr. Rosemond "believed he had complied with the circuit court's October 1, 2019 order"); p. 8 (Mr. Rosemond "endeavored to and believed he had provided <u>all</u> information in his possession"); pp. 14-

15 (asserting that Plaintiff, through Mr. Rosemond, "offered to make itself available for a deposition," "propounded responses and communicated with [CEC] as recently as three weeks prior to the Order striking its complaint," "Mr. Rosemond immediately agreed to [CEC's] proposed order via email," and "served supplemental discovery in his possession on [CEC]"); *see also* Motion for Reconsideration. (R. pp. 172-178).

This Court should hold that the actions and inactions of its counsel are attributable to Plaintiff and, consequently, dismissal of its Complaint was proper.

II. The Circuit Court properly dismissed Plaintiff's Complaint as against all parties.

The Circuit Court properly dismissed Plaintiff's Complaint as to Bobcat of Greenville as well as to CEC. Plaintiff's arguments to the contrary fail for a number of reasons. As an initial matter, this issue is not preserved for appellate review because Plaintiff first raised it in its motion and argument on rehearing. *See*, *e.g.*, *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (an issue cannot be raised for the first time in a motion for reconsideration); *Kiawah Prop. Owners Group v. PSC*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (issue first raised in motion for reconsideration is not preserved for appellate review). The first time Plaintiff argued that its Complaint should be dismissed against CEC only was in the late-filed Motion for Reconsideration filed by Mr. Rosemond. (R. p. 173 n.2). Plaintiff's current appellate counsel did not even raise this argument in the Motion to Alter or Amend, although he did address it at oral argument during the 2021 motions hearing. (R. p. 649, lines 11-23). Because this argument was first raised on reconsideration, this Court should dismiss Plaintiff's arguments as unpreserved.

Second, the Motion for Reconsideration, which raises this issue for the first time, was filed out of time and, therefore, of no effect. Rule 59(e) provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt." Rule 59(e), SCRCP. The Supreme Court has stated unequivocally that "the ten-day limit for serving a Rule 59(e) motion is an absolute deadline," and the Circuit Court has no power "to grant the moving party an extension of time in which to file" such a motion. *Overland, Inc. v. Nance*, 423 S.C. 253, 256-257, 815 S.E.2d 431, 432-433 (2018). Thus, this Court should hold that this issue, raised for the first time in the late-filed Motion for Reconsideration was untimely and, therefore, never properly before the Circuit Court, let alone this Court.[6]

Third, neither the Motion to Alter or Amend nor the Motion for Reconsideration was sent to Judge Miller as is required by Rule 59(g), SCRCP. This failure provides an additional supporting reason to uphold the Circuit Court's denial of those Motions. *See Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017) (providing that failure to provide a Rule 59 motion to the presiding judge can serve as the sole basis for

[6] Plaintiff did not make any arguments concerning Rule 60, SCRCP, or even cite that Rule in its main Brief, even though both the Motion to Alter or Amend and the Motion for Reconsideration relied, in part, on Rule 60. Therefore, any argument that the Motions were timely under Rule 60 are abandoned on appeal. *See*, *e.g.*, *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 270, 818 S.E.2d 447, 455 (2018) (explaining that South Carolina "appellate jurisprudence has clearly established that '[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court'"). In addition, even if an argument under Rule 60 was preserved, which it is not, it would be of no avail, as relief under Rule 60 is "within the sound discretion of the circuit court and will not be disturbed absent a clear abuse of that discretion." *Goodson v. Am. Bankers Ins. Co. of Fla.*, 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988). Moreover, mere neglect is insufficient to show mistake, inadvertence, surprise or *excusable* neglect under Rule 60. *See*, *e.g.*, *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) (noting that the standard for relief under Rule 60 is "more rigorous" and requires "a more particularized showing" of mistake, inadvertence, or excusable neglect).

denial of the motion); *see also* Rule 220(c), SCACR (an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); *see also Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994) (same). This Court should affirm the dismissal as to both Respondents on this basis as well.

Even if this Court addresses the substance of this issue, which it should not, it is without merit. "The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Smith*, 422 S.C. at 124, 809 S.E.2d at 615. Although Plaintiff asserted in its November 5 Motion for Reconsideration, that its Complaint should not have been dismissed as to Bobcat of Greenville because "[o]nly CEC sought the motion to compel," (R. p. 173 n.2), Bobcat of Greenville specifically joined in CEC's "request … to dismiss the complaint." (R. p. 659). Moreover, Plaintiff's responses to Bobcat of Greenville's discovery requests were incomplete and deficient, (*see*, *e.g.*, R. pp. 184-185, 422-447), and Plaintiff cannot demonstrate otherwise. *See*, *e.g.*, *Karppi*, 327 S.C. at 542, 489 S.E.2d at 681 ("The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion"). This Court should affirm the dismissal of Plaintiff's Complaint as to both Respondents.

CONCLUSION

For all the reasons stated herein, Respondent Bobcat of Greenville respectfully request that this Court affirm the dismissal of Plaintiff's Complaint as to both Respondents because dismissal was an appropriate sanction, and Plaintiff has not shown the Circuit Court abused its discretion.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE

August 22, 2022

s/Helen F. Hiser

Helen F. Hiser, S.C. Bar No. 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Robert L. Mebane, Jr., S.C. Bar No. 78043
55 East Camperdown way, Suite 300 (29601)
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000
robert.mebane@mgclaw.com

Attorneys for Respondent Bobcat of Greenville, LLC

RECEIVED
Aug 22 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Appeal No. 2021-001461

Ironwork Productions, LLC., ... Appellants,

v.

Bobcat of Greenville, LLC and
Bobcat Company, Inc.,..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent Bobcat of Greenville, LLC complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of /Respondent complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

August 22, 2022

McAngus Goudelock & Courie, LLC

s/Helen F. Hiser

Helen F. Hiser, S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for Respondent Bobcat of Greenville, LLC