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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Case No. 2018-CP-23-04516

Appellate Case No. 2021-001461

Ironwork Productions, LLC, Appellant,

v.

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

FINAL BRIEF OF RESPONDENT CLARK EQUIPMENT COMPANY (IMPROPERLY NAMED IN THE UNDERLYING ACTION AND IN THE APPEAL AS BOBCAT COMPANY, INC.)

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE CIRCUIT COURT CORRECTLY EXERCISED ITS DISCRETION TO ISSUE DISCOVERY SANCTIONS UNDER RULE 37, SCRCP, WHEN APPELLANT FAILED TO APPEAR AT THE HEARING ON RESPONDENT'S MOTION FOR SANCTIONS AND FILED TO COMPLY WITH THE COURT'S DISCOVERY ORDER ISSUED AFTER A LONG PATTERN OF DISCOVERY ABUSE CONSTITUTING BAD FAITH, MISCONDUCT, WILLFUL DISOBEDIENCE, AND A CALLOUS DISREGARD FOR THE RIGHTS OF OTHER LITIGANTS?

STATEMENT OF THE CASE

This appeal arises from Orders of the Circuit Court dated October 1, 2019, October 25, 2019, and November 19, 2021. The October 1, 2019 Order granted the motion for sanctions filed by Respondent Clark Equipment Company d/b/a Bobcat Company[1] (hereinafter "CEC"), which was based on a long pattern of discovery abuse by Appellant Ironworx Productions, LLC,[2] culminating in Appellant's failure to appear at the hearing on the motion for sanctions. (R. pp. 1-3). Appellant consented to the language of the October 1, 2019 Order before it was filed, including a provision stating that Appellant's Complaint would be dismissed if Appellant failed to respond to discovery requests as required by the Order. (R. pp. 404-405).

Appellant failed to respond to the discovery requests as ordered by the Court. As a result, the Circuit Court entered its October 25, 2019 Order dismissing Appellant's Complaint, just what it warned that it would do in the October 1, 2019 Order if Appellant failed to respond to the discovery requests. (R. pp. 4-6).

The November 19, 2021 Order—issued more than two years later because Appellant did not send either of its two motions for reconsideration to the circuit judge as required by Rule 59(g), SCRCP—denied Appellant's motions to alter or amend the October 25, 2019 Order. (R. p. 644; R. pp. 7-9).

A. Suit is filed, CEC serves discovery, and Appellant fails to respond.

The Circuit Court's Orders reflect that a pattern of discovery abuse began shortly after Appellant filed this civil action on August 29, 2018. Appellant filed its Complaint alleging breach of implied warranties, breach of express warranties, a violation of the

[1] Incorrectly named in Appellant's filings as "Bobcat Company, Inc."
[2] Incorrectly named in Appellant's filings as "Ironwork Productions, LLC."

Magnuson-Moss Act, and seeking damages resulting from the sale of a Bobcat T869 Compact Tractor Loader. (R. pp. 13-15, ¶ 8-18). On December 7, 2018, CEC filed a timely answer which denied Appellant's claims and raised affirmative defenses. (R. pp. 21-28). CEC then served its First Set of Interrogatories and Requests for Production by United States mail on January 25, 2019. (R. pp. 188-194).

Beginning with that very first set of discovery requests, Appellant failed to respond to discovery. When Appellant did not respond within thirty days as required by Rules 33 and 34, SCRCP, CEC notified Appellant of the failure, and Appellant stated that it would respond by March 8, 2019. (R. pp. 196-197). However, Appellant still failed to respond, forcing CEC to file its first Motion to Compel Discovery Responses on March 18, 2019. (R. pp. 198-220). The Circuit Court scheduled a hearing on that motion for April 3, 2019.

B. Appellant avoids a hearing on the first Motion to Compel by purporting to provide written discovery responses late in the evening before the morning hearing.

At almost ten o'clock the night before the April 3, 2019 hearing on the motion to compel, Plaintiff's counsel sent what purported to be responses to the outstanding discovery. (R. p. 221). Upon receiving those responses and documents by email late the night before the hearing, CEC gave the benefit of the doubt and notified the court that night that no hearing would be necessary the following morning on the motion to compel. (R. pp. 258-259). However, upon inspection of the produced discovery responses, CEC realized that Appellant's responses did not comply with the discovery requests.

C. CEC serves additional discovery and continues efforts to obtain proper responses to its original discovery requests.

On May 16, 2019, CEC sent Appellant a discovery deficiency letter, providing Appellant another opportunity to provide complete discovery responses to CEC's first

discovery requests that were issued on January 25, 2019. (R. pp. 260-265). Also on May 16, 2019, CEC served its Second Set of Interrogatories and Requests for Production of Documents on Appellant. (R. pp. 266-280). Appellant acknowledged receipt of both the discovery deficiency letter and the second set of discovery requests on that same day. (R. pp. 281-282).

Two months later, on July 15, 2019, Appellant still had not responded to the discovery deficiency letter or responded to the second set of discovery requests. (R. p. 281). CEC then emailed Appellant to inquire into its progress responding, and Appellant stated the responses were going into the mail that very day. (Id.). Once again, this was false. Appellant continued its persistence in not sending the required and promised discovery responses. On August 5, 2019, CEC emailed Appellant again to inquire into its progress responding to the discovery deficiency letter and the second set of discovery requests. (R. p. 284). Once again, Appellant did not respond to this email or produce any responses.

D. CEC files its second Motion to Compel and a Motion for Sanctions, Appellant fails to appear for the hearing, and the Court grants the motions.

On August 15, 2019, CEC filed both a Motion for Sanctions against Appellant and its second Motion to Compel Discovery Responses from Appellant, pursuant to Rule 37(d) and (a), SCRCP, respectively. (R. pp. 285-400). Appellant did not file a response to either motion. The court scheduled a hearing on the motions for October 1, 2019. The day before the hearing (September 30, 2019), CEC's counsel spoke to Appellant's counsel by telephone to confirm that Appellant would be present for the hearing the following morning. Appellant's counsel expressly stated that he would be present for the hearing the following day. (R. pp. 650-651).

A duly noticed hearing on the Motion for Sanctions and second Motion to Compel was held on October 1, 2019, at 10:30 a.m. (R. p. 401). Despite Appellant's counsel expressly stating less than 24 hours earlier that he would be present for the hearing, no one appeared for the hearing on behalf of Appellant. (R. p. 650). The Circuit Court requested a proposed order granting the motion for sanctions.

Appellant was given an opportunity to review the proposed order, and Appellant consented to the language before it was submitted to the court, including a provision that Appellant's Complaint would be dismissed if Appellant failed to respond to discovery requests as required by the Order. (R. pp. 404-405). The Circuit Court then entered the order – with Appellant's consent – ordering Appellant to provide full and complete responses to all outstanding requests set forth in CEC's deficiency letter and second set of discovery requests within ten days. (R. p. 402). The October 1, 2019 Order recognized CEC's contention that Appellant had "exercised bad faith and a gross indifference to the rights of CEC by failing to comply with its discovery obligations" and granted the relief requested by CEC and consented to by Appellant. (Id.). The consent language of the Order warned: "If Plaintiff fails to respond as ordered herein, Plaintiff's Complaint in this lawsuit shall be dismissed." (Id.).

E. After entry of an Order warning Appellant that failure to fully respond to discovery will result in dismissal of the case, Appellant does not provide any new discovery responses, and the Circuit Court dismisses the case.

On October 1, 2019, after the hearing on the Motion for Sanctions and second Motion to Compel, Appellant filed a certificate of service with the court, certifying that it served "the Answers to Interrogatories and Response to Request for Production on the attorneys for the Defendants, by mailing a copy of same postage prepaid and return address clearly indicated on said envelope on October 1, 2019 . . . ." However, this representation

to the court was false. (R. p. 406). The following day—October 2, 2019—CEC received correspondence and four documents from Appellant:

1) The first document was merely a photocopy of the same deficient discovery responses originally served by Appellant on April 2, 2019 in response to Respondent Bobcat of Greenville, LLC's interrogatories—a completely different set of discovery requests issued by a completely different party. (R. pp. 407-420).

2) The second document was merely a photocopy of the same deficient responses previously served by Appellant on April 2, 2019 in response to Respondent Bobcat of Greenville, LLC's requests for production—again, a completely different set of discovery requests issued by a completely different party. (R. pp. 421-426).

3) The third document was, like the first and second documents, merely a photocopy of the deficient responses previously served by Appellant on April 2, 2019 in response to Respondent Bobcat of Greenville, LLC's discovery requests, and it was identical in substance to the second document described above. (R. pp. 427-432). Although this document, like the others, was addressed to counsel for Respondent Bobcat of Greenville, LLC, someone had scratched out the name of the counsel for Bobcat of Greenville, LLC and hand-written the name of CEC's counsel.

4) Finally, the fourth document was a 166-page document purporting to be Appellant's document production; however, it was merely another copy of the deficient production that CEC previously received when Appellant partially responded to CEC's first set of discovery requests late at night on April 2, 2019. (R. pp. 433-598). It was the same set of documents that prompted and required the deficiency letter months earlier and the second Motion to Compel. (Id.).

In no way did any of the four documents respond to CEC's discovery deficiency letter to Appellant, CEC's second set of discovery requests to Appellant, or the Circuit Court's October 1, 2019 Order—the Order to which Appellant expressly consented with knowledge that failure to comply would result in dismissal of the Complaint. (R. pp. 404-405).

On October 18, 2019, CEC filed a Notice of Plaintiff's Noncompliance with the October 1, 2019 Order. (R. pp. 599-602). Appellant again failed to file any response. On October 25, 2019—as the October 1, 2019 Order stated would occur—the court dismissed

Appellant's Complaint. (R. pp. 603-605). The October 25, 2019 Order stated 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. p. 604).

F. Appellant files two contradictory motions for reconsideration but fails to send either motion to the Circuit Court judge.

After the October 25, 2019 Order, two separate and contradictory motions for reconsideration were filed on Appellant's behalf. An additional law firm made a new appearance as counsel for Appellant and filed the first "Motion to Reconsider, Amend, or Alter Judgment" on November 4, 2019—ten days after the October 25, 2019 Order was issued. (R. pp. 606-611). The first motion did not deny the failures to comply with discovery obligations but blamed those failures solely on the lawyer it described as Appellant's "previous counsel," who represented Appellant from the outset of the case and was still representing Appellant as counsel of record. (Id.).

The second "Motion for Reconsideration" was signed by the counsel who represented Appellant from the outset of the case as counsel of record and was filed on November 5, 2019—eleven days after the October 25, 2019 Order was issued. (R. pp. 612-618). The second motion took the contradictory position that there was no failure to comply with discovery obligations, despite the long history and the clear findings of the court.

Neither motion was sent to the Circuit Court Judge who issued the October 25, 2019 Order for which reconsideration was requested, as required by Rule 59(g), SCRCP. No substitution or withdrawal of counsel was requested; both law firms remained as counsel of record for Appellant.

Almost two years later, on October 5, 2021, the new counsel who made an appearance for Appellant on November 4, 2019 emailed the court to inquire about the status of the motion for reconsideration. The Circuit Court held a hearing on the motion for reconsideration on November 16, 2021. (R. pp. 7-9). Both the previously existing and the new counsel were still counsel of record for Appellant. The new counsel appeared for the hearing and argued the motion for reconsideration, acknowledging during the hearing that the previously existing counsel was still counsel of record for Appellant and referring to him as "co-counsel" as of November 16, 2021. (R. pp. 643-644). The Circuit Court denied the motions for reconsideration on November 19, 2021. (R. pp. 7-9). Again, no substitution or withdrawal of counsel was ever requested with the Circuit Court. Appellant's original counsel remained counsel of record at all times while this case was pending with the Circuit Court.

Appellant subsequently submitted a Notice of Appeal to the Court of Appeals on December 14, 2021. (R. pp. 680-683).

STANDARD OF REVIEW

"Under Rule 37, SCRCP, a trial judge may impose sanctions for a party's failure to comply with the court's motion compelling discovery, including dismissal of the action." *Halverson v. Yawn*, 328 S.C. 618, 620, 493 S.E.2d 883, 884 (Ct. App. 1997) (citing Rule 37(b)(2)(C), SCRCP). On review, sanctions are "generally entrusted to the sound discretion of the trial judge." *Id.* (citation omitted). Moreover, the "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." *Id.* at 621, 493 S.E.2d at 884 (citation omitted).

Appellant bears the burden of demonstrating the trial court abused its discretion, which "may be found . . . where the appellant shows that the discretion of the trial judge was without reasonable factual support and resulted in prejudice to the appellant, thereby amounting to an error of law." *Id.* (citation omitted). Rule 37, SCRCP expressly authorizes trial judges to dismiss cases where a party fails to comply with discovery. Rule 37(d), SCRCP. Furthermore, "an evasive or incomplete answer [to discovery] is to be treated as a failure to answer." Rule 37(a)(3), SCRCP.

ARGUMENT

A. THE DENIAL OF APPELLANT'S MOTIONS FOR RECONSIDERATION IS NOT PROPERLY PRESERVED FOR APPEAL BECAUSE APPELLANT FAILED TO COMPLY WITH RULE 59 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Appellant filed two motions to reconsider. The first motion was served within ten days after entry of the October 25, 2019 Order, making it timely. The second motion was served more than ten days after entry of the October 25, 2019 Order dismissing the case, making it flatly untimely. However, Appellant failed to send either motion to reconsider to the ruling judge as required by Rule 59(g), SCRCP. Therefore, neither motion was properly perfected, and this appeal should be dismissed.

1. Rule 59(e), SCRCP

Rule 59(e), SCRCP provides that a "motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." South Carolina courts have consistently held that the ten-day deadline in Rule 59(e) is "an absolute deadline." *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018). A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served . . . ." *Id.* at 256, 815 S.E.2d at 433. "[N]or does a trial court have any power to grant the moving party an extension of

time in which to file a Rule 59(e) motion. *Id.* at 256-57, 815 S.E.2d at 433. "The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal." *Id.* at 257, 815 S.E.2d at 433.

Appellant's first motion to alter or amend was filed on November 4, 2019, ten days after the court's October 25, 2019 Order dismissing Appellant's Complaint with prejudice. As such, it was timely filed pursuant to Rule 59(e), SCRCP. However, Appellant's second motion for reconsideration was filed on November 5, 2019—eleven days after Appellant was given notice of the October 25, 2019 Order through the NEF notice of the court's electronic filing system. Therefore, the second motion for reconsideration was untimely filed, and it was proper for the Circuit Court to deny the second motion on this basis alone. *See, e.g.*, *Ackerman v. 3-V Chem., Inc.*, 349 S.C. 212, 216, 562 S.E.2d 613, 615 (2002) (finding that the plaintiffs' Rule 59(e) motion was untimely when filed more than ten days after receipt of written notice of the entry of the order and finding that the "trial judge was without jurisdiction to act upon" the motion for reconsideration).

Therefore, the denial of Appellant's second motion to alter or amend judgment is not properly preserved for appeal because Appellant failed to comply with Rule 59(e) by serving the motion within ten days of the Order.

2. Rule 59(g), SCRCP

Rule 59(g) requires that a "party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." South Carolina courts have denied relief based on a party's failure to comply with Rule 59(g), SCRCP. For example, in *Smith v. Fedor*, the trial court denied the plaintiff's motion for

reconsideration because he failed to provide the motion to the trial judge within ten days of filing. 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017). The Court of Appeals affirmed, holding "Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule." *Id.* The *Smith* court also stated that because the trial court did not err in denying the plaintiff's motion for reconsideration, "the arguments presented in that motion are unpreserved." *Id.*

Here, neither the first motion to alter or amend nor the second motion for reconsideration were sent to the judge who issued the Order for which reconsideration was requested. (R. p. 644). This was the primary reason that neither motion came before the court for hearing until Appellant's counsel contacted the court almost *two years* after the motions were filed; Appellant did not properly notify the court. The first notice to the judge came when Appellant's new counsel emailed the court on October 5, 2021. (R. pp. 677-678). Because neither the first motion to alter or amend nor the second motion for reconsideration complied with Rule 59(g), SCRCP, the denial of both motions was proper, and the matters raised in this appeal are not properly preserved for appellate review.

B. THE ORDER DISMISSING APPELLANT'S COMPLAINT WAS APPROPRIATE GIVEN APPELLANT'S NONCOMPLIANCE WITH DISCOVERY OBLIGATIONS, NONCOMPLIANCE WITH THE COURT'S ORDER, AND FAILURE TO APPEAR AT THE HEARING.

Rule 37 expressly grants a circuit court power to order dismissal for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests. Rule 37(b)(2)(C) & 37(d), SCRCP. "Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action." *McNair v.*

Fairfield Cty., 379 S.C. 462, 465, 665 S.E.2d 830, 832 (Ct. App. 2008). Rule 37(d) provides that if a party:

> fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. . . .
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Rule 37(d), SCRCP.

Rule 37(b) provides that the court may enter:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

Rule 37(b)(2)(A)-(C), SCRCP.

In other words, Rule 37(b) provides sanctions for the violation of a court order to provide or permit discovery, while Rule 37(d) "provides for sanctions against a party who fails to answer interrogatories or attend his own deposition." *Downey v. Dixon*, 294 S.C.

42, 44, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987). The distinction between Rule 37(b) and Rule 37(d) is that there must be an order of the court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions. *Id.* Before dismissing a complaint, the court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants. *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (citations omitted).

Appellant's conduct showed bad faith, willfulness, and gross indifference to CEC's rights in ways that were prejudicial to CEC and intensified over time to the point of willfully contravening a direct Order of the Circuit Court. This bad faith, willfulness, and gross indifference appeared in all of the particulars listed below:

1. Appellant repeatedly failed to respond to written discovery properly and completely failing to respond at all despite repeated notices.

Appellant failed to respond to CEC's First Set of Interrogatories and Requests for Production in time, thus necessitating a Motion to Compel. (R. pp. 196-197; R. pp. 198-220). To avoid a hearing on the Motion to Compel, Appellant waited until the eleventh hour to purportedly provide responses. In reliance on that representation, CEC dismissed its first motion that same evening. (R. p. 221). However, as described above, those responses were actually inadequate and deficient in numerous ways. Despite being given multiple opportunities, Appellant never even attempted to cure the deficiencies. (R. pp. 260-265). As the intensity of Appellant's failures continued to build, Appellant later also failed to respond to CEC's Second Set of Interrogatories and Requests for Production in time, thus necessitating a second Motion to Compel. (R. p. 281; R. pp. 285-400). Ultimately, Appellant chose simply to ignore its obligations under the Rules of Civil

Procedure – a willful disobedience to the rules and a gross indifference to CEC's rights as a litigant.

2. Appellant repeatedly strung CEC along by affirming that Appellant would comply with discovery obligations but then repeatedly failing to do so.

Appellant avoided the first motion hearing by providing deficient responses. Then, Appellant claimed that it would work on responding to the discovery deficiency letter and second set of discovery requests but did not do so, even though Appellant voluntarily established a deadline for itself. (R. pp. 281-282). Then, after not doing anything, Appellant stated two months later that its responses were going out in the mail, but this was not true. (R. p. 281). Then, three weeks after that, Appellant continued its persistence in not responding to yet another correspondence from CEC regarding Appellant's failure to provide *any* answers to CEC's discovery requests. (R. p. 284). This practice of delay by empty promises that responses would be forthcoming showed a gross indifference to CEC's rights in this case and an indifference to the Rules of Civil Procedure.

3. Appellant ignored CEC's motion for sanctions and failed to file any response.

Even when CEC filed its second motion to compel and its first motion for sanctions, Appellant failed to respond to either motion. Moreover, despite the filing of the motions, Appellant failed to correct the deficiencies in its original discovery responses and failed to respond at all to the second set of discovery.

4. Appellant failed to appear at the hearing on CEC's motions.

Appellant ignored the court's notice of hearing and failed to appear at the hearing on CEC's motion for sanctions and second motion to compel, despite Appellant's counsel expressly affirming the day before that he would be present. (R. pp. 650-651).

5. Appellant failed to comply with the Court's October 1, 2019 Order.

Appellant failed to comply with the October 1, 2019 Order requiring Appellant to provide full and complete responses to all outstanding requests set forth in CEC's deficiency letter and second set of discovery requests with ten days, despite consenting to the language of the October 1, 2019 Order before it was filed, including the provision stating that Appellant's Complaint would be dismissed if Appellant failed to comply. (R. pp. 404-405; R. pp. 599-602).

Rather than make any legitimate effort to comply with the Order, Appellant merely re-served its previous, deficient responses to the original discovery requests and did not serve any responses to the second discovery requests. Appellant knowingly re-sent photocopies of deficient discovery responses served on another party six months earlier and claimed they were responses to CEC's discovery requests—including audaciously scratching out the name of the counsel for the other party and handwriting in the name of CEC's counsel, thereby calling attention to Appellant's actual knowledge that the responses were being deliberately passed off as something there were not. (R. pp. 407-598).

6. Appellant filed a false certificate of service with the court on October 1, 2019, representing to the court that it served discovery responses that were never served upon CEC.

Appellant filed a certificate of service with the Circuit Court representing that it served discovery responses that were not actually provided.

In summary, the above-described sequence of events and actions illuminates Appellant's bad faith, dilatoriness, and gross indifference to CEC's rights as well as a disregard for both the Rules of Civil Procedure and the Circuit Court's October 1, 2019 Order. Appellant's counsel assured—in writing—on multiple occasions that Appellant

would address all identified deficiencies, even going so far as saying responses would be going in the mail that same day, despite never doing so. (R. p. 281; R. p. 406). To make matters worse, Appellant completely disregarded CEC's second set of discovery requests entirely, not even providing a response to the correspondence regarding those requests. (R. p. 284). This repeated course of evasion and disregard of the CEC's rights as a litigant, Appellant's obligations under the Rules of Civil Procedure, and the Circuit Court's October 1, 2019 Order provide ample support for of the type of bad faith, willfulness, and gross indifference that supports the Circuit Court's discretionary decision to dismiss the case. In sum, the Order dismissing Appellant's Complaint was well within the discretion of the Circuit Court. Therefore, the Order dismissing the action was appropriate pursuant to Rule 37(d)'s authorization for such relief according to Rule 37(b)(2)(C), SCRCP.

C. APPELLANT'S CLAIM THAT IT WAS "ABANDONED" BY ITS ORIGINAL COUNSEL IS INCORRECT AND DOES NOT ENTITLE APPELLANT TO THE REQUESTED RELIEF.

Appellant's claim that its original counsel "abandoned" Appellant and that this alleged abandonment rendered the Circuit Court's sanctions order overly harsh is incorrect. Appellant's original counsel remained involved in the case at all times, including reviewing and consenting to the October 1, 2019 Order and even filing a (late) motion to reconsider.

Rule 60(b)(1), SCRCP, which authorizes the trial court to relieve a party from a final judgment where the party demonstrates "mistake, inadvertence, surprise, or *excusable* neglect." (emphasis added). The decision to grant or deny a motion to set aside a judgment for excusable neglect lies within the sound discretion of the trial court. *RRR, Inc. v. Toggas*, 378 S.C. 174, 180, 662 S.E.2d 438, 441 (Ct. App. 2008) *cert. granted, decision aff'd*, 381 S.C. 490, 674 S.E.2d 170 (2009). A party's claim of lack of fairness is not a ground for

relief under Rule 60(b), SCRCP. *Gainey v. Gainey*, 382 S.C. 414, 431, 675 S.E.2d 792, 801 (Ct. App. 2009).

Concerning a claim of attorney neglect, South Carolina law holds that "the neglect of the attorney is attributable to the client." *Graham v. Town of Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). As the Supreme Court has held:

> Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, 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 the 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.

Id. at 451, 248 S.E.2d at 599 (block quoting *Simon v. Flowers*, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957)).

Appellant's contention that a "willful and unilateral abandonment of the client by counsel" as occurred in *Graham* also occurred in this case is not supported by the facts, and there is no basis to conclude that there was accordingly an abuse of discretion by the Circuit Court in this case. Unlike the present case, *Graham* did not involve a Rule 37 sanction; it was a ruling upon the merits of the case. The circuit court in *Graham* granted the plaintiff's motion for summary judgment when the defendant's attorney failed to appear for the motion hearing. *Id.* at 445, 248 S.E.2d at 595. However, the order being appealed was a second order issued by a different circuit judge approximately two weeks later, setting aside under S.C. Code Ann. § 15-27-130 (1976)[3] the first order that granted the plaintiff's motion for summary judgment. *Id*. The primary basis for setting aside the

[3] Section 15-27-130 was the predecessor to Rule 60(b), SCRCP.

summary judgment was that the defendant did not have notice that its attorney resigned two days before the scheduled hearing on the summary judgment motion and no longer represented the defendant. Id. at 450, 248 S.E.2d at 598. The defendant did not receive notice of the resignation until the day before the hearing, and the defendant did not know about the hearing. *Id.* at 452, 248 S.E.2d at 599.

On the date of the hearing in *Graham*, the attorney did not appear because he no longer represented the defendant. *Id.* The court also did not know about the resignation and, therefore, did not know the defendant was unrepresented. The attorney had unexpectedly resigned "without prior notice[,] secreting himself beyond the ability of the sheriff to find him." *Id.* at 453, 248 S.E.2d at 599. On those unique facts, the Supreme Court recognized that the defendant "was not represented by counsel at the hearing," not merely because the counsel failed to appear, but because the counsel had unexpectedly resigned and left the defendant without legal counsel and without notice that a hearing was about to occur. *Id.* at 448, 248 S.E.2d at 597. Moreover, the judge that issued the summary judgment after the first hearing "was unaware that [the defendant's attorney] had resigned as counsel." *Id.* at 450, 248 S.E.2d at 598. The Supreme Court stated that "the attorney's action in withdrawing from this case at a crucial stage without reasonable notice to his client is one of willful abandonment." *Id.* at 452, 248 S.E.2d at 599. The court held that "under the ***rare*** circumstances of this case, the respondent should not be charged with the abandonment of the case by its counsel." *Id.* (emphasis added).

In stark contrast, Appellant's original counsel in this case did not abandon Appellant and did not withdraw from his representation prior to the hearing or prior to entry of the dismissal. In fact, there is no contention that Appellant's original counsel resigned

or ceased representing Appellant, either with or without notice. By contrast, the day before the hearing on CEC's motion for sanctions, (September 30, 2019), CEC's counsel spoke to Appellant's counsel by telephone to confirm that Appellant would be present for the hearing the following morning. (R. pp. 650-651). Appellant's counsel expressly stated that he would be present for the hearing the following day. (Id.). Although Appellant refers to its original counsel as "previous counsel," the original counsel never resigned or withdrew from presentation and was never replaced through a substitution of counsel.

To the contrary, Appellant's original counsel remained active in this case even after the court's dismissal Order. For example, rather than withdrawing, Appellant's original counsel explained that he meant to show up for the October 1, 2019 hearing in this case but on "the morning of the hearing Plaintiff realized that the belief was in error, and he had to appear in Oconee, not Greenville." (R. p. 173, n. 1). After the hearing, Appellant's original counsel consented to the language of the October 1, 2019 Order before it was filed. (R. pp. 404-405). He also remained active in the case after issuance of the October 1, 2019 Order. Although it was false, he filed a Certificate of Service with the court certifying that he served "the Answers to Interrogatories and Response to Request for Production on the attorneys for the Defendants, by mailing a copy of same postage prepaid and return address clearly indicated on said envelope on October 1, 2019 . . . ." (R. p. 406). Thereafter, Appellant's original counsel continued appearing on Appellant's behalf when he filed a motion for reconsideration on November 5, 2019. (R. pp. 612-618). Still further, Appellant's original counsel remained involved as counsel of record *two years later* when the motions for reconsideration were finally brought to the court's attention and came before the court for a hearing. Appellant's new counsel acknowledged during that hearing

that the original counsel still remained counsel of record, referring to him as "co-counsel," and still had a motion pending with the court. (R. pp. 643-644). Appellant's original counsel continued to be listed as counsel of record at all times while this case was pending with the Circuit Court.

Therefore, Appellant's claim that its original counsel "abandoned" Appellant and that this alleged abandonment rendered the Circuit Court's sanctions order overly harsh is incorrect. Appellant's original counsel remained involved in the case at all times. Any failures of Appellant's chosen counsel are attributed to Appellant.

CONCLUSION

For all the reasons stated herein, Respondent Clark Equipment Company respectfully request that this Court affirm the dismissal of Appellant's Complaint as to both Respondents. Appellant has not shown the Circuit Court abused its discretion.

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August 24, 2022
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Case No. 2018-CP-23-04516

Appellate Case No. 2021-001461

Ironwork Productions, LLC, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Clark Equipment Company (improperly named in the underlying action and in the appeal as Bobcat Company, Inc.) complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief 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.

<< Signature of Counsel on Next Page >>

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