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 APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. IN THIS CASE, WHERE THERE WAS NO EVIDENCE THAT APPELLANT WILLFULLY OR REPEATEDLY FAILED TO COMPLY WITH DISCOVERY ORDERS NOR EVIDENCE OF BAD FAITH, MISCONDUCT, WILLFUL DISOBEDIENCE OR A CALLOUS DISREGARD FOR THE RIGHTS OF OTHER LITIGANTS, DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT'S COMPLAINT WITH PREJUDICE AS A DISCOVERY SANCTION?

2. DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT'S COMPLAINT WITH PREJUDICE AS TO CLAIMS MADE AGAINST A PARTY WHO HAD NOT SERVED DISCOVERY REQUESTS, FILED A MOTION TO COMPEL, OR SOUGHT A DISCOVERY SANCTION?

STATEMENT OF THE CASE

This appeal arises from an order of the circuit court, dated October 25, 2019 (hereinafter the "Order"), dismissing Appellant Ironwork Productions, LLC's complaint against both defendants in this lawsuit as a discovery sanction. (*See* R. pp. 4-6). The Order dismissing Appellant's complaint was due to a purported five month delay in responding to supplemental discovery requests from one defendant, and a purported five month delay in adequately responding to the first set of discovery requests of that same defendant. (*See id*; *see also* R. pp. 52-165). Appellant seeks review of the circuit court's order dismissing its complaint against both defendants with prejudice.

The underlying action involves a dispute between Appellant Ironwork Productions, LLC[1] ("Appellant" or "Ironwork") and Bobcat of Greenville, LLC and Bobcat Company, Inc. (collectively "Respondents") related to Appellant's purchase of a Bobcat T869 Compact Track Loader (VIN: B47C11710). (*See* R. pp. 11-16). The complaint was filed on August 29, 2018 by attorney Edward Delane Rosemond ("Mr. Rosemond" or "Appellant's former attorney"), Appellant's former attorney. (*See id.*). Mr. Rosemond was recently suspended from the practice of law by the South Carolina Supreme Court for matters unrelated to the present appeal.[2]

In the complaint, Appellant asserts claims against Respondents for breach of implied warranties, breach of express warranties, a violation of the Magnuson-Moss Act, and seeks damages resulting from the sale of a Bobcat T869 Compact Track Loader. (*See id.*). On

[1] Appellant notes that its name is spelled incorrectly in the caption of this case, filed by Appellant's prior attorney and thereafter others. Appellant's legal name is Ironworx Productions, LLC and is an LLC incorporated in and in good standing with the State of South Carolina.

[2] By order of the Supreme Court of South Carolina on March 10, 2022, Edward Delane Rosemond was suspended from the practice of law in this state upon request of the Office of Disciplinary Counsel. *In re Edward Delane Rosemond*, 2022-03-10-01 (S.C. Sup. Ct. filed March 10, 2022) (Howard Adv. Sh. No. 10 at 12 – 13).

December 3, 2018, Respondent Bobcat of Greenville (hereinafter "Acme") answered Appellant's complaint and stated it was incorrectly identified in this lawsuit and its proper name is Acme Operations, LLC d/b/a Bobcat of Greenville. (R pp. 17, 20). On December 7, 2018 Respondent Bobcat Company, Inc. (hereinafter "Clark") answered Appellant's complaint and stated it was incorrectly identified in this lawsuit and its proper name is Clark Equipment Company d/b/a Bobcat Company. (R. p. 21).

The parties engaged in written discovery. Dissatisfied with Appellant's responses to its first set of discovery requests and failure to respond to supplemental discovery requests, Clark filed one discovery motion—a motion to compel and for sanctions. The court held one hearing on the motion, which resulted in complete dismissal of the complaint. (*See* R. pp. 52-165; R. pp. 1-3; R. p. 656; R. pp. 661-664; R. pp. 4-6; R. pp. 179-633).

STATEMENT OF FACTS

The history with respect to discovery requests, responses, motions, and the single hearing leading up to the order on appeal is set forth below:[3]

- According to Clark:
    - On January 25, 2019, Clark served Appellant's former attorney Mr. Rosemond with Clark's First Set of Interrogatories and Requests for Production to Plaintiff. (R. pp. 31-48).

[3] Appellant notes this timeline is derived exclusively from filings in this matter prior to undersigned counsel's appearance on behalf of Appellant, which occurred days after the circuit court entered its October 25, 2019 Order. The bulk of this timeline is based on Clark's motions, attachments, and supporting documents filed in this case. Appellant is unable to discern what portions of these filings—or what other documents or correspondence related to them—may exist in Mr. Rosemond's files as he has not provided any documents to Appellant since his termination.

- On March 6, 2019, counsel for Clark emailed Mr. Rosemond inquiring about the status of Appellant's responses to Clark's first set of discovery requests and informed Mr. Rosemond of Clark's intention to file a motion to compel within a week if the responses were not received. (R. pp. 49-51).

- Via email response on the same day, March 6, 2019, Mr. Rosemond advised he "will look at them and get back to you before Friday" of that week, March 8, 2019. (*Id.*).

- On March 18, 2019, Clark filed a Motion to Compel Discovery Responses from Appellant. (*See* R. pp. 29-51). According to this motion, Clark had not received any discovery responses from Mr. Rosemond as of March 18, 2019.

- According to Clark:

  - A hearing on Clark's March 18, 2019 motion to compel was set for April 3, 2019. (*See* R. p. 53*;* R. pp. 101–140).

  - At 9:55pm on April 2, 2019, Mr. Rosemond emailed Clark's counsel responses to Clark's first set of discovery responses. (*Id*.).

  - Clark's counsel "cancelled the hearing on its Motion to Compel" because Mr. Rosemond "had produced at least minimal responses."[4] (*Id.*).

- On May 16, 2019, according to Clark:

  - Clark sent Mr. Rosemond a letter regarding the sufficiency of Appellant's discovery responses and outlined Clark's position that "some of the responses need to be clarified or supplemented." (*See* R. pp. 53 – 54*;* R. pp. 141 – 146).

  - In addition, Clark served its Second Set of Interrogatories and Requests for Production. (*See* R. p. 54*; see also* R. pp. 147 – 161).

  - The same day, Mr. Rosemond responded to the letter and second set of discovery requests advising Clark that Mr. Rosemond would "work on this next week."[5]

[4] These purported "minimal responses" were actually thirty-six (36) pages of written responses to Clark's first interrogatories; it is unclear if any document production was served at this time. (*See* R. pp. 103 – 138). However, Clark appears to acknowledge documents were originally served by Appellant in response to Clark's first set of discovery requests. (*See* R. pp. 422 – 613).

(*See* R. p. 54*; see also* R. pp. 162 – 163).

- Two months later, according to Clark:

    - Counsel for Clark emailed Mr. Rosemond on July 15, 2019 regarding the status of Mr. Rosemond's responses to Clark's May 16, 2019 deficiency letter regarding Appellant's responses to Clark's first set of discovery requests and advising of Clark's intention to file a motion to compel the same if responses were not received by July 22, 2019. (*See* R. p. 54*; see also* R. p. 162).

    - On July 16, 2019, Mr. Rosemond replied to Clark's counsel that "It's going in the mail today." (*See* R. p. 54*; see also* R. p. 162).

    - On August 15, 2019, one month after Mr. Rosemond advised that Appellant's supplemental responses to Clark's first set of discovery requests were going to be put in the mail to Clark, Clark asserts it "never received any such responses." (*See* R. p. 54).

    - On August 5, 2019, Clark's counsel emailed Mr. Rosemond inquiring about the status of Mr. Rosemond's responses to Clark's second set of interrogatories and requests for production to Appellant served on or about May 16, 2019 and advising of Clark's intention to file a motion to compel if responses were not received within five days (by August 10, 2019). (*See* R. pp. 54-55*; see also* R. p. 165).

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[5] In Mr. Rosemond's May 16, 2019 email to Clark's counsel (which was not fully quoted in Clark's August 15, 2019 Motion for Sanctions and Motion to Compel), he appears to expressly invite Clark's counsel to discuss a plan for additional discovery matters—like scheduling depositions—given Mr. Rosemond's availability from June to August of 2019; Mr. Rosemond also appears to actively plan to meet with Appellant to work on additional written discovery matters propounded by Clark in its May 16, 2019 correspondence and its second set of requests:

> [Counsel] – Thanks for the letter. I will work on this next week. Also if you want to look at dates for depositions let (sic) start talking now because I'm gone a lot in June, July and first part of August.
>
> Delane
>
> Denise – Please get in touch with [Appellant] and have him make an appointment to see me.

(*See* R. pp. 162 – 163).

    - In Clark's August 15, 2019 motion, Clark states that Mr. Rosemond "completely failed to respond to this email or produce any responses whatsoever" to Clark's second set of discovery requests. (*See* R. pp. 54 –55).

- On August 15, 2019, Clark filed a "Motion for Sanctions and to Compel Discovery Responses." Motion to Compel Discovery Responses from Appellant. (*See id.*).

In sum, Clark filed two (2) motions to compel discovery responses from Appellant.[6] The first of these motions was "resolved" per email from Clark's counsel because Appellant propounded lengthy responses. (*See* R. p. 139). Clark's second motion to compel, which also sought sanctions, is the only discovery motion that was heard by the circuit court and the only motion that resulted in a discovery order. (*See* R. pp. 52-165; R. pp. 1-3). Clark's motion sought sanctions because of Appellant's purported three-month delay in responding to a deficiency letter sent to Appellant, as well as Appellant's purported failure to respond to Clark's second set of discovery requests. (*Id.*).

On October 1, 2019, a hearing was held on Clark's Motion for Sanctions and Motion to Compel. Mr. Rosemond did not appear at the hearing.[7] After the hearing, counsel for Clark emailed a proposed order to the court and copied all counsel. Mr. Rosemond responded to that email a few hours later at 2:25pm: "The proposal is fine with me." The circuit court entered an "Order Granting Clark Equipment Company, Inc.'s Motion for Sanctions and To Compel Discovery" the same day. (*See* R. pp. 1-3). The order ordered Appellant:

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[6] Acme filed none, and does not appear to have served discovery requests on Appellant at any stage of this case.

[7] Mr. Rosemond later filed an explanation for his non-appearance at the October 1, 2019 hearing in his purported, but unauthorized, Motion to Reconsider filed on behalf of Appellant on November 5, 2019. (*See* R. pp. 172-178). It appears Mr. Rosemond had a conversation with counsel for Clark the night before the hearing, had his courthouses confused, and was in Oconee County that day. (*Id.*)

> . . . to provide full and complete responses to all outstanding requests set forth in [Clark's] May 16, 2019 deficiency letter and May 16, 2019, second set of discovery requests with (sic) ten (10) days of receipt of entry of this order. If [Appellant] fails to respond as ordered herein, Plaintiff's Complaint in this lawsuit shall be dismissed.

(*Id.*). Approximately one hour after the Court entered its order, Mr. Rosemond's office filed a certificate of service at 4:07 pm on October 1, 2019 certifying it had served its discovery responses on all parties that day via mail. According to Mr. Rosemond, he believed he had complied with the circuit court's October 1, 2019 order and never heard to the contrary until Clark filed notice with the court of Mr. Rosemond's "noncompliance" with the order. (*See* R. pp. 172-178).

On October 18, 2019, Clark filed a "Notice of Plaintiff's Noncompliance with the Court's 10/1/19 Order and Request for Dismissal" in which it stated Appellant "completely failed to comply" with the circuit court's October 1, 2019 order. It acknowledged, however, that one day after the October 1, 2019 order was entered, Clark's counsel "Received by FedEx a packet of documents containing only photocopies of the same documents previously produced on April 2, 2019." Clark concluded that Appellant "has not produced a single document in response to CEC's May 16, 2019 deficiency letter, CEC's May 16, 2019 second set of discovery requests, or the Court's October 1, 2019 order." In response to Clark's filed notice of purported noncompliance, the circuit court entered its Order Dismissing Plaintiff's Complaint with Prejudice as to Clark as well as Acme—without a hearing, argument, or requiring any supporting documentation, testimony, or evidence to support, inform, or verify Clark's representations. (*See* R. pp. 661-664; R. pp. 1-3; R. pp. 4-6). In the Order, the circuit court explained:

> On October 18, 2019, [Clark's] counsel filed a Notice of Noncompliance with the October 1, 2019 Order, asserting that Plaintiff had not produced a single document in response to [Clark's] May 16, 2019 deficiency letter, [Clark's] May 16, 2019 second set of discovery requests, or the Court's October 1, 2019 Order.
>
> The Court finds 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.

(*See* R. pp. 4-6).

According to Mr. Rosemond, however, he endeavored to and believed he had provided all information in his possession as of October 1, 2019; he also alluded to some sort of clerical error that may have occurred in his office regarding the documents mailed to Clark's counsel on October 1, 2019, but also noted the Appellant's complete supplemental responses were emailed to Clark's counsel once Mr. Rosemond was aware of a purported issue after the October 18, 2019 notice was filed by Clark. (*See* R. pp. 172-178).

Notably, none of the above discovery motions, issues, hearings, orders, or otherwise were ever conveyed to Appellant, and all of this occurred without Appellant's knowledge. As set forth in Appellant's affidavit, Appellant's President Brandon McAlister explained that:

- He originally hired Mr. Rosemond in 2018 to file this lawsuit;
- He provided Mr. Rosemond responsive information and documents to the Respondent's discovery requests whenever asked to do so by Mr. Rosemond;
- He was not informed by Mr. Rosemond:
    - about any discovery issues or lack of responses from Mr. Rosemond's office;
    - that Respondent(s) filed a motion to compel Appellant's discovery responses;
    - that a hearing was held on October 1, 2019 on the issue;

- that an order was issued by the circuit court requiring any additional responses within ten (10) days of the hearing.
- that an order was issued dismissing this lawsuit with prejudice.

(*See* R. pp. 169-171).

Moreover, in his affidavit, Mr. McAlister also explained the timeline and circumstances of his seeking and hiring new counsel at Eller Tonnsen Bach to represent Appellant once he became aware of the circuit court's orders. (*Id.*). After growing "frustrated with the lack of communication from Mr. Rosemond about [the] case in general," Mr. McAlister contacted Eller Tonnsen Bach "on Thursday October 31, 2019 by telephone to seek representation" in this case. (*Id.*). When office staff at Eller Tonnsen Bach looked up this matter while on the phone with Mr. McAlister, they informed him that the public index showed the case was dismissed with prejudice six (6) days earlier (on October 25, 2019). This was the first time Appellant was made aware of the apparent discovery issues, motions, hearing, orders, and dismissal of his case. (*Id.*). In light of this revelation, Mr. McAlister immediately retained Eller Tonnsen Bach over the phone, drove from his home in Seneca to downtown Greenville to meet with Eller Tonnsen Bach, paid a retainer, signed an engagement letter, and agreed that a motion for reconsideration be filed on Appellant's behalf regarding the October 25, 2019 order. (*Id.*).

On November 4, 2019, pursuant to Rules 59 and 60, SCRCP, undersigned counsel appeared for Appellant in the suit and filed a Motion to Reconsider, Amend, or Alter Judgment on behalf of Appellant. (*See* R. pp.165-171). Attached to this motion was the affidavit of Brandon McAlister. (*See* R. pp. 168-171). In this motion, Appellant explained any failure to respond to discovery, court order, or otherwise was no fault of the Appellant, that Appellant's former counsel had failed to

communicate and essentially abandoned Appellant, and sought timely relief from the circuit court's October 25, 2019 order dismissing the complaint with prejudice in light of the change in representation and apparent actions of Appellant's former attorney. (*See* R. pp. 165-171).

On November 5, 2019, Appellant's former attorney Mr. Rosemond filed an unauthorized and untimely "Motion for Reconsideration" purportedly on behalf of Appellant, despite Mr. McAlister terminating Mr. Rosemond's representation and engaging the services of Eller Tonnsen Bach. (*See* R. pp. 172-178). Mr. Rosemond explained in his motion the certain circumstances that led to his absence at the October 1, 2019 hearing. Regarding compliance with the October 1, 2019 order, he stated: "On October 1, 2019, Plaintiff sent Answers to CEC's First Set of Interrogatories and Request (sic) for Production in the United States Mail, accompanied by a Certificate of Service. . . . [Mr.

Rosemond] believed he had complied with the said Order. [Mr. Rosemond] heard nothing from either defendant that it considered the responses deficient until October 18, 2019." (R. pp. 173 – 174). Mr. Rosemond also stated that he "objected to the Court issuing its Order" and that the "parties even exchanged emails that day, attached with what each sent and/or received," and that he "sent [Clark] an email, with an attachment that contained answers thereto of 55 pages. [Clark] ***has everything that the Plaintiff has in its possession***."[8] (R. p. 174) (emphasis added). It appears that Mr. Rosemond's position is that he believed he had complied with the October 1, 2019 order, that he sent Respondents' counsel "everything" he had and not received any notification or

[8] Appellant notes that it has been unsuccessful in obtaining any information, documents, emails, or communication from Mr. Rosemond to date and is unsure what documents, emails, or otherwise Mr. Rosemond is referring to in his motion.

alleged deficiency after October 1, 2019. (*Id.*). The Certificate of Service filed by Mr. Rosemond on October 1, 2019 appears to corroborate this. (*See* R. p. 656).

On November 16, 2021, a hearing was held on Appellant's motion to reconsider. (*See* R. 641-655). At this hearing, undersigned counsel appeared on behalf of Appellant and argued the motion to reconsider; Mr. Rosemond—though no longer Appellant's attorney—still had his purported motion to reconsider pending, but he did not appear at the hearing. The circuit court denied Appellant's motion for reconsideration. (*Id.*; *see also* R. pp. 7-9). Appellant filed the instant appeal on December 14, 2021. (*See* R. pp. 680-683).

STANDARD OF REVIEW

The circuit court's order dismissing Appellant's complaint for purported discovery infractions is subject to an abuse of discretion standard:

> "The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "A [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Id.* "The burden is upon the party appealing from the order to demonstrate the [circuit] court abused its discretion." *Id.* "An abuse of discretion may be found whe[n] the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id.*

Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 456-57, 814 S.E.2d 643, 656 (Ct. App. 2018). Regarding the circuit court's dismissal of Appellant's complaint, "[a] dismissal under Rule 37(b)(2)(C)[, SCRCP] is not a 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 Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990).

"When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). "A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of *bad faith, willful disobedience, or gross indifference to the rights of the adverse party*." *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770-71 (Ct. App. 2015) (emphasis in original); *see also Griffin Grading*, 334 S.C. at 198- 99, 511 S.E.2d at 718-19 ("Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience, or gross indifference to its rights to justify the sanction."). A sanction imposed under Rule 37, SCRCP "should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

ARGUMENT

I. DISMISSAL OF APPELLANT'S COMPLAINT WAS NOT WARRANTED BECAUSE THERE WAS NO EVIDENCE OF A WILLFUL AND REPEATED FAILURE TO COMPLY WITH DISCOVERY ORDERS AND NO EVIDENCE OF BAD FAITH, MISCONDUCT, WILLFUL DISOBEDIENCE, OR A CALLOUS DISREGARD FOR THE RIGHTS OF OTHER LITIGANTS.

Dismissal of Ironwork's complaint was not warranted because Appellant was not in violation of multiple prior discovery orders, Appellant's prior attorney appears to have believed he complied with the sole discovery order issued in this case, and there is no evidence of bad faith, willful disobedience, or gross indifference to the rights of Respondents to justify such a severe remedy.

"In those cases in which South Carolina appellate courts have reviewed dismissals of actions under Rule 37(b)(2)(C), the courts have generally upheld the trial court's decision to use dismissal as a sanction only when necessary to protect the rules of discovery or when there was evidence of bad faith, misconduct, willful disobedience, or a callous disregard for the rights of other litigants." *Rickerson,* 412 S.C. at 221, 770 S.E.2d at 771; *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762, S.E.2d 535, 544 (2014) (upholding dismissal as a discovery sanction in light of appellants' willful and repeated failure to comply with "numerous discovery rulings" and orders of the court, which resulted in delay and prejudice to opposing parties); *Griffin Grading*, 334 S.C. at 119, 411 S.E.2d at 719 (finding the striking of a defendant's answer as a discovery sanction was warranted based on the defendant's failure to comply meaningfully with **four** prior court orders compelling discovery, even after being warned of the consequences of such failure and after being assessed attorney's fees).

The common thread in the cases upholding the sanction of dismissal is repetitive disobedience in the face of clear instructions from the court and no good faith excuse for a litigant's conduct. None of these circumstances are present in this matter. It is uncontested that:
(1) only one discovery motion was not resolved between the parties and had to be heard by the circuit court; (2) only one order was issued by the circuit court regarding the discovery; and (3) that Appellant had provided over fifty pages of written responses and document production seeking to comply with the Court's instructions.

South Carolina courts have expressed a clear preference for cases to be decided on the merits, and that a discovery "sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case." *Griffin Grading*, 334 S.C. at 198, 511 S.E.2d at 719. Here, the Order dismissing the

claims against both Clark and Acme with prejudice clearly is not a sanction "aimed at the specific conduct" of Appellant—which, apparently, was the conduct of not providing the exact information Clark deemed to be sufficient in response to its discovery requests. As suggested at the November 16, 2021 hearing by Appellant, more appropriate sanctions for the conduct complained of by Clark were available such as an order requiring Appellant to pay Clark's attorneys' fees and costs for bringing the motion. (*See* R. pp. 647-648).

Moreover, the Order does not demonstrate that the court considered the requisite factors in crafting its sanction in this case, and Clark has not demonstrated that these factors are present. *See Griffin Grading*, 334 S.C. at 199, 511 S.E.2d at 719 ("In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice."). As to the discovery posture, this case was less than 12 months old and the motion considered responses propounded but deemed deficient by an adverse party. This was not a case where a litigant refused to respond, and even if those responses were deficient, Appellant offered to make itself available for a deposition. As to willfulness, Appellant did not refuse to respond to discovery altogether or willfully ignore a court's order. Instead, the record shows Appellant propounded responses and communicated with Clark as recently as three weeks prior to the Order striking its complaint about the status of discovery and its responses. Additionally, although Mr. Rosemond's did not appear at the October 1, 2019 hearing on Clark's motion to compel and motion for sanctions, it does appear that Mr. Rosemond and counsel for Clark discussed the hearing the night before, that Mr. Rosemond had his schedule mixed up and went to the wrong courthouse, but Mr. Rosemond immediately agreed to Clark's proposed order via email after the hearing and Mr. Rosemond filed an certificate of service later that same day indicating he had served the

supplemental discovery in his possession on Clark per the circuit court's October 1, 2019 order. At most, this shows neglectful, but not willful, conduct.

The final factor—degree of prejudice—likewise does not favor wholesale dismissal of the Appellant's complaint as to either Clark or Acme. The Order makes no finding of what prejudice was caused by Appellant's delay and Clark would struggle to articulate that prejudice. Appellant had produced over 160 pages of documents, provided dozens of pages of written responses to Clark's interrogatories and requests for production, and offered to make Appellant available for a deposition months before Clark filed its motion to compel. Appellant's failure to provided responses Clark deemed sufficient caused no prejudice at that early stage of the case.

Clearly much of the underlying issues in this appeal could have been resolved with clearer communication between the attorney for Clark and the former attorney for Appellant. It would be inappropriate, however, to attribute the acts of Mr. Rosemond during discovery in this case to Appellant given Mr. Rosemond's abandonment of Appellant during the litigation. This abandonment is further illustrated by Mr. Rosemond's continued failure to communicate with Appellant's current attorneys and failure to provide information or documents to assist in Appellant's legal representation in this matter.

"The general rule in [South Carolina] is 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, 598-99 (1978). "[A] willful and unilateral abandonment of the client by counsel," however, is an exception to the general rule. *Id.* at 452, 248 S.E.2d at 599 (citing 46 Am. Jur. 2d Judgments § 737 (1969) ("The rule that an attorney's negligence may be imputed to his client and prevent the later from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case.")). "To overcome the general rule that the

neglect of the attorney is attributable to the client, the client must establish that its former attorney willfully and unilaterally abandoned it." *Stearns Bank Nat. Ass'n v. Glenwood Falls*, LP, 373 S.C. 331, 342, 644 S.E.2d 793, 798-99 (Ct. App. 2007).

Mr. McAlister's affidavit and the documented actions of Mr. Rosemond in discovery demonstrate Mr. Rosemond's unilateral abandonment of Appellant in this case. *See Griffin Grading,* 334 S.C. at 200, 511 S.E.2d at 719. The troubling circumstances of Mr. Rosemond's representation of Appellant are similar to those in *Graham*, which have been a guide for finding abandonment in this state. In *Graham*, the moving party established that its attorney withdrew from representation "on the eve of a summary judgment hearing ***leaving the client unaware of the imminent and dispositive motion hearing***. Our supreme court upheld the trial court's decision to grant relief from judgment based on the fact that the attorney willfully abandoned his representation by resigning right before the summary judgment hearing." *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 345, 644 S.E.2d 793, 800 (Ct. App. 2007) (citing *Graham,* 272 S.C. at 453, 248 S.E.2d at 599) (emphasis added).

Much like the abandonment in *Graham*, Mr. Rosemond's actions here left Appellant completely unaware of: (1) any alleged issues or deficiencies in Appellant's responses to Clark's discovery requests or opportunities to address the same; (2) Clark's motion for sanctions and motion to compel; (3) the court's hearing on Clark's motion for sanctions and motion to compel; (4) the court's October 1, 2019 order requiring supplemental responses to Clark's discovery requests; and (5) the court's dismissal with prejudice as to all claims against both Clark and Acme. Mr. McAlister's affidavit makes it clear that he was unaware of the imminent nature of: the discovery issues, motion, and hearing on the same; and unaware of the imminent and dispositive nature of the failure to comply with or address the circuit court's October 1, 2019

discovery order. (*See* R. pp. 169-171). As shown by his immediate actions in retaining new counsel once he learned of Mr. Rosemond's failure, Appellant was ready and willing to act at speed to address any issues with his discovery responses or take any other action to comply with the Court's orders.

Further, by entering its Order without reviewing the production by Appellant or holding a hearing to determine the sufficiency of that production, the circuit court made Clark judge and jury over Appellant's compliance. At a minimum, the court should have reviewed the responses provided by Appellant and given Appellant an opportunity to be heard before summarily dismissing its case. A party who has made an effort to comply with the court's instructions should not have their case dismissed based on an unverified notice.

II. THE CIRCUIT COURT IMPERMISSIBLY REACHED BEYOND THE SCOPE OF THE MOTION AND THE EVIDENCE IN DISMISSING APPELLANT'S COMPLAINT AS TO ACME

The Order reaches beyond the scope of Clark's motion and the evidence. As Appellant noted during the hearing on its motion for reconsideration, (*see* R. p. 649), only Clark served discovery requests on Appellant and only Clark filed a motion to compel and a motion for sanctions on Appellant. The Order, however, not only dismissed Appellant's claims against Clark, it also dismissed all claims against Acme with no explanation for why the court reached those claims based on a discovery motion filed by Clark regarding Clark's discovery requests. (*See* R. pp. 4-6).

Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefore, and shall set forth the relief or order sought." As explained by the South Carolina Supreme Court in *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010), "[b]y requiring notice to the court and the opposing party of the basis for the motion, [R]ule 7(b)(1) advances the policies of reducing prejudice to either party and assuring the court can

comprehend the basis of the motion and deal with it fairly." *Id.* (internal citations and quotations omitted). Further, due process requires at a minimum that Appellant be given notice that its claims against Acme were also at peril and an opportunity to be heard. *See, e.g., Kurschner v. City of Camden Planning Comm.,* 3376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (explaining the "fundamental requirements of due process" include notice and an opportunity to be heard). Sanctioning Appellant and dismissing its claims against a non-moving defendant who had not served any discovery on Appellant or filed any motion does not comport with the *South Carolina Rules of Civil Procedure* or due process.

CONCLUSION

For these reasons and those explained above, the Order dismissing Appellant's complaint against Clark and Acme should be reversed.

Respectfully submitted,

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August 22, 2022

Greenville, 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.

RULE 211(b) CERTIFICATION

The undersigned certifies that our Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

August 22, 2022

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PROOF OF SERVICE

I certify that I have served Final Brief of Appellant on the Respondents, Bobcat of Greenville, LLC and Bobcat Company Inc., by electronic mail on August 23, 2022, as follows:

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