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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Court of Appeals Opinion No. 2023-UP-246
(Filed June 21, 2023; Rehearing denied August 17, 2023)

Ironwork Productions, LLC., ... Appellants,

v.

Bobcat of Greenville, LLC and
Bobcat Company, Inc., ... Respondents,
Of Whom,
Bobcat of Greenville, LLC is the ..... Petitioner,
and
Ironwork Productions, LLC, is the ..... Respondent.

BOBCAT OF GREENVILLE, LLC'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that its Petition for Rehearing was filed on June 30, 2023, (Appx. pp. 15-25), and finally ruled on by the Court of Appeals on August 17, 2023. (Appx. pp. 1-2).

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR BY APPLYING AN IMPROPER STANDARD OF REVIEW AND BY REVERSING THE CIRCUIT COURT'S PROPER EXERCISE OF ITS DISCRETIONARY POWER TO GRANT RELIEF UNDER RULE 37(B), SCRCP?

II. DID THE COURT OF APPEALS ERR BY CONSIDERING IRONWORK'S ARGUMENT THAT THE DISMISSAL SHOULD NOT APPLY TO BOBCAT OF GREENVILLE BECAUSE ANY SUCH ARGUMENT WAS WAIVED, IS UNPRESERVED AND SHOULD NOT BEEN CONSIDERED BY THE COURT OF APPEALS?

III. DID THE COURT OF APPEALS ERR BY DISMISSING BOBCAT OF GREENVILLE'S ARGUMENT THAT IRONWORK'S FAILURE TO COMPLY WITH RULE 59(G) RENDERED THE OCTOBER 25, 2019 ORDER FINAL AND NOT SUBJECT TO FURTHER REVIEW?

Pursuant to Rule 242, SCACR, Petitioner Bobcat of Greenville, LLC ("Bobcat of Greenville"), hereby petitions this Court to grant a writ of certiorari and reverse Points One and Three of the Court of Appeals' Opinion in the above-captioned case, Opinion No. 2023-UP-246 (Ct. App. filed June 21, 2023).[1] This case present a novel issue of law and the Court of Appeals' decision, is in conflict with prior decisions of this Court. Rule 242(b)(1)&(3).

STATEMENT OF THE CASE

Respondent Ironwork Productions, LLC, Plaintiff below, filed a Complaint in Greenville County Court of Common Pleas on August 29, 2018 against Petitioner Bobcat

[1] Petitioner Bobcat of Greenville does not take issue with Point Two of Opinion No. 2023-UP-246, other than that the outcome reached as to Bobcat Company Inc. d/b/a Clark Equipment Company ("CEC") should apply equally to Bobcat of Greenville.

of Greenville, LLC and Bobcat Company, Inc. d/b/a Clark Equipment Company (hereinafter "CEC") (jointly "Defendants"), 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).[2]

Bobcat of Greenville filed a timely Answer, raising the error in its name[3] and raising numerous affirmative defenses. (R. pp. 17-20). On that same date, Bobcat of Greenville served Interrogatories and Requests for Production on Plaintiff.[4]

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

Subsequently, on January 25, 2019, CEC served discovery requests on Ironwork. (R. pp. 32-48). Having received no response by March 6, 2019, CEC's counsel emailed Ironwork asking it to provide responses. Ironwork'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). After still having 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 3, 2018; however, at nearly 10:00 p.m. the night before the hearing, Ironwork's

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

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

[4] Respondent incorrectly asserted before the Court of Appeals that Bobcat of Greenville did not serve "discovery requests on [Respondent] at any stage of this case." (Appx. p. 34 n.6). In fact, Bobcat of Greenville served discovery requests to which Respondent provided insufficient and/or deficient responses. (R. pp. 184-185, 422-447).

initial counsel emailed responses to CEC. (R. p. 102). Consequently, the hearing was cancelled.

On May 16, 2019, CEC sent Ironwork a letter advising that its discovery responses were deficient, noting that Ironwork 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 Ironwork a second set of interrogatories and document requests. (R. pp. 147-161).

Having received no response by mid-July, CEC reached out to Ironwork advising that, if CEC did not receive responses by July 22, 2019, it would file a Motion to Compel. The response from Ironwork's counsel was, "No problem. It's going in the mail today." (R. p. 162). Again having received no 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 Defendants' counsel attended the hearing, Ironwork'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 Ironwork'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).

Ironwork was sent a proposed Order that stated that its "counsel failed to appear at the duly-noticed hearing," granted CEC's Motion to Compel, and clearly advised Ironwork 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." Ironwork's counsel responded that the proposed Order "is fine with me." (R. p. 663). The Order was filed on October 1, 2019. (R. pp. 1-3).

Ironwork 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 Ironwork's counsel responded, indicating that he had sent his discovery responses "the day after the hearing." (R. p. 668). CEC responded that Ironwork'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 Ironwork'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." (R. pp. 4-6).

On November 4, 2019, Ironwork, 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 Ironwork'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 Ironwork'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 to Alter or Amend was not sent to Judge Miller.

Ironwork's initial counsel, Mr. Rosemond, also moved for reconsideration the very next day, November 5, 2019, 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 he "did not notify the court of the conflict in cases." (R. pp. 172-178) ("Motion for Reconsideration").[5] This Motion for Reconsideration was not sent to Judge Miller either.

CEC filed an opposition to the "two separate and conflicting motions for reconsideration," pointing out that the Motion for Reconsideration, filed by Mr.

[5] On appeal, Ironwork characterized this second Motion for Reconsideration as a "purported, but unauthorized, Motion to Reconsider." (Appx. p. 34, n. 7). Ironwork also acknowledged that the "unauthorized" Motion to Reconsider filed by Mr. Rosemond was also "untimely." (Appx. p. 38).

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).

The parties appeared before Judge Miller on November 16, 2021, over two years after Ironwork's Motions were filed. Present at that hearing were Ironwork's current appellate counsel, as well as counsel for Bobcat of Greenville and for CEC. At the outset of the hearing, Ironwork's current counsel noted that Mr. Rosemond was not present. When asked if Mr. Rosemond was "essential" to the hearing, Ironwork'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). Ironwork's counsel later described Mr. Rosemond as "Plaintiff's previous attorney … or still current but not present attorney …" (R. p. 644, lines 23-24). Ironwork's counsel provided no excuse for failing to send the Motion to Alter or Amend to Judge Miller within ten days. (R. p. 644, lines 3-10). 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). Ironwork'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 Ironwork's repeated failures to respond meaningfully to discovery and failure to comply with the October 1 2019 Order,

as well as Ironwork'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 Ironwork's Motion for Reconsideration. (Form 4 Order, filed Nov. 19, 2021, R. pp. 7-9).

Ironwork timely appealed to the Court of Appeals. Without hearing oral argument, the Court of Appeals agreed with Ironwork in Opinion No. 2023-UP-246 that its failure to provide the Judge with either of its Motions was excused "because the circuit court considered Ironwork's Rule 59(3) motions on the merits." (Appx. p. 5). The Court of Appeals affirmed the dismissal of Ironwork's Complaint as against CEC, observing the Circuit Court's "sound discretion," in addressing Ironwork's failure to comply with discovery and failure to comply with prior orders. (*Id.*). However, the Court of Appeals reversed the dismissal of Ironwork's Complaint as to Bobcat of Greenville, holding that it "lacked 'reasonable factual support'" because "Bobcat belatedly and informally joined CEC's request for dismissal, via email, despite never previously asserting it was owed any outstanding discovery and without articulating how Ironwork had acted in bad faith or with gross indifference to Bobcat's rights." (Appx. p. 6).

Petitioner filed a Petition for Rehearing on June 30, 2023, (Appx. pp. 15-25), which was denied on August 17, 2023. (Appx. pp. 1-2).[6]

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

[6] Ironwork also filed a Petition for Rehearing, (Appx. pp. 7-14), which was denied in the same August 17, 2023 Order.

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 statute 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." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). "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, Ironwork 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

The Court of Appeals erred in: 1) applying an incorrect standard of review and usurping the circuit court's discretion to impose discovery sanctions under Rule 37(b), SCACR; 2) failing to find that Ironwork's argument that the Complaint should not be dismissed as to Bobcat of Greenville was waived and is unpreserved for appellate review;

and, 3) failing to find that Ironwork's Motion to Alter or Amend, (R. pp. 165-171), was ineffective to stay the time to appeal due to Ironwork's failure to timely provide Judge Miller a copy of the Motion as is required by Rule 59(g), SCRCP. All three of these errors are in conflict with prior decisions of this Court. Any one of these errors constitutes reversible error and, accordingly, this Court should grant this Petition, agree to hear Bobcat of Greenville's appeal and, ultimately, reverse the Court of Appeals on Points One and Three.

I. The Court of Appeals erred by applying an improper standard of review and reversing the Circuit Court's proper exercise of its discretionary power to grant relief under Rule 37(b), SCRCP.

The Court of Appeals failed to apply the proper standard for reviewing the Circuit Court's imposition of discovery sanctions. "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Davis*, 409 S.C. at 281, 762 S.E.2d at 543. The Circuit Court properly dismissed Ironwork's Complaint as to Bobcat of Greenville as well as to CEC. Bobcat of Greenville specifically and unambiguously joined in CEC's "request … to dismiss the complaint." (R. p. 659). The burden of proving an abuse of discretion is on the party appealing the sanctions order, here Ironwork. *Barnette*, 355 S.C. at 593, 586 S.E.2d at 575. Instead, the Court of Appeals improperly focused, not on the egregious actions of Ironwork and its initial counsel, but on Bobcat of Greenville's actions, described as "belated" and "via email," when it clearly and timely joined CEC's Motion to Dismiss. (R. p. 659). This was an improper application of the standard of review, and in conflict with this Court's precedent.

Indeed, trial judges "must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal:

achieving success through abuse of the discovery rules rather than by the rules of law." *In re Anonymous Mbr. of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001); *Kershaw County*, 302 S.C. at 395, 396 S.E.2d. at 372 ("[w]hatever sanction is imposed should serve, to protect the rights of discovery provided by the rules"); *see also Downey*, 294 S.C. at 45, 362 S.E.2d at 318 ("the most severe in the spectrum of sanctions provided by statute 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*") (emphasis added). Below, the Circuit Court specifically noted its judicial frustration with Ironwork's Counsel's actions during discovery. (R. p. 649, lines 6-7). The sanction imposed—dismissing Ironwork's Complaint as to both parties with prejudice—is entirely proper and serves to protect the rights of discovery and to deter such conduct in the future by litigants.

The Court of Appeals erred because Ironwork failed to meet its burden of demonstrating "the trial court abused its discretion." *Barnette*, 355 S.C. at 593, 586 S.E.2d at 575. As set out above, there is reasonable factual support to uphold the dismissal as to Bobcat of Greenville as well as to CEC. Ironwork's counsel was provided a copy of the proposed October 1, 2019 Order, which clearly and explicitly stated that, in the event of non-compliance, "Plaintiff's Complaint in this lawsuit shall be dismissed," to which he not only failed to object, but which he wholeheartedly endorsed, saying it was "fine" by him. (R. p. 663). When Bobcat of Greenville stated that it was joining in CEC's motion to dismiss, (R. p. 659), Ironwork failed to make any timely objection. The first time any objection was raised regarding the breadth of the October 1, 2019 Order or to

Bobcat of Greenville joining the motion to dismiss was on rehearing, rendering that argument waived and unpreserved for this Court's review, as is discussed in more detail below.

The Court of Appeals dismissed the fact that Bobcat of Greenville properly joined in the motion to dismiss, describing it as belated and informal, and without explanation. However, there is no rule or requirement that a party explain its reasons for joining a motion to dismiss. Nor is there a timeframe in which a party must join a motion to dismiss.[7]

In ruling that the circuit court's order lacked "reasonable factual support" for dismissing Ironwork's claims against Bobcat of Greenville, the Court of Appeals relied on *Rickerson v. Karl*, 412 S.C. 215, 770 S.E.2d 767 (Ct. App. 2015) and *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999). (Appx. p. 6). However, the *Rickerson* decision cited this Court's opinion in *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) for the point that an abuse of discretion occurs when a ruling is "grounded in factual conclusions [which are] without evidentiary support." *Rickerson*, 412 S.C. at 219-220, 770 S.E.2d at 770, citing *Clark*. That passage in *Clark* dealt with a trial judge's refusal to give a jury charge that would have dismissed the relevance of defendant's excessive speed in causing a fatal accident, and not a discovery order. Significantly, in *Clark*, there were no facts that would have supported the conclusion that speed did not contribute to the conclusion. 339 S.C. at 389-391, 529

[7] Ironically, the Court of Appeals took issue with the timing of Bobcat of Greenville's joining the motion to dismiss, but gave Respondent a complete pass on the mandatory requirement to provide the presiding judge with a copy of its Rule 59(e) motion, discussed in Section III below. The procedural rules of this Court should apply evenly between plaintiffs and defendants, and not in favor of one over the other.

S.E.2d at 539-540. Here, in contrast, there are abundant facts supporting Ironwork and its initial counsel's egregious discovery abuse, failure to attend hearings, and failure to obey orders of the court. Concomitantly, there is reasonable support for finding Bobcat of Greenville properly and timely joined CEC's Motion to Dismiss and, critically, absolutely no evidence to the contrary.

Griffin, in turn, relied on this Court's opinion in *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989), where this Court agreed with the sanctioned party that her refusal to continue her deposition until a relevant order was received was reasonable, leaving the sanctions order without factual support. Critically, the key focus was on the actions of the sanctioned party and whether they deserved punishment, and not on the actions or inactions of other parties. *Dunn*, 298 S.C. at 502, 381 S.E.2d at 735. In Point Three of its Opinion, the Court of Appeals improperly focused on Bobcat of Greenville's actions instead of those of Ironwork and its initial counsel. And, as noted above, there is reasonable support for finding Bobcat of Greenville joined the Motion to Dismiss, which joinder was unopposed.

Critically, the *Griffin* decision distinguished the case before it from *Karppi* by noting that, there, "the only party punished for the discovery abuses is … the party who clearly and willfully committed the abuses." 334 S.C. at 200, 511 S.E.2d at 719. In *Karppi*, in contrast to both *Griffin* and the instant case, it was one of the two defendants, Ogden Tech, manufacturer of the allegedly defective floor materials, who committed egregious discovery offenses. The trial court struck Ogden Tech's answer, including its cross-claims against the other defendant, Terrazzo, who had sold the flooring to the plaintiff. The Court of Appeals properly noted that striking Ogden Tech's answer would

both serve as a windfall, by eliminating its cross-claims against Terrazzo, and create unwarranted prejudice to Terrazzo by removing any defense that the flooring materials were not defective. 327 S.C. at 543-544, 489 S.E.2d at 682-683. This case does not present a similar conundrum. Focusing on the actions of the sanctioned party—Ironwork—as the reviewing court must, the sanction dismissing its Complaint in its entirety is supported by the record, is entirely warranted and serves "to protect the rights of discovery provided by the Rules," *Kershaw County*, 302 S.C. at 395, 396 S.E.2d. at 372, and to "deter those who might be tempted to such conduct in the absence of such a deterrent." *Downey*, 294 S.C. at 45, 362 S.E.2d at 318.

To the extent the Court of Appeals reversed the dismissal as to Bobcat of Greenville because it believed the dismissal somehow created a windfall to Bobcat of Greenville and/or that limiting the dismissal to only CEC did not create a hardship on Bobcat of Greenville, it simply is wrong. Both Defendants copied each other on the discovery served on Ironwork. (*e.g.*, R. pp. 39, 48, 60, 68, 76, 141-146, 184-185, 236, 422-447). Both Defendants were free to use the discovery produced by any other party to the litigation in defending against Ironwork's claims. As a result, Ironwork's failure to properly respond to the discovery served on it in this litigation by both CEC and Bobcat of Greenville—litigation which Ironwork initiated—harmed both CEC and Bobcat of Greenville.

The Court of Appeals appears to have imposed a requirement that Bobcat of Greenville join in the Motion to Dismiss in a formal pleading, and that it have done so earlier. There simply is no requirement in Rule 37(b) that each defendant against whom a complaint is dismissed file a written motion. Instead, Rule 37(b) provides, in pertinent

part, that "if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just," and include "[a]n order striking out pleadings or parts thereof … or dismissing the action or proceeding or any part thereof." Rule 37(b), SCRCP. Again, the proper focus in on the actions of the offending party, not the other parties to the proceeding.

Had the drafters of Rule 37(b) intended to include requirements such as filing a written motion within a certain amount of time, they easily could have done so. However, they did not and the Court of Appeals erred in imposing such a requirement *sua sponte*. *See Kosciusko v. Parham*, 428 S.C. 481, 496, 836 S.E.2d 362, 370 (Ct. App. 2019) ("[i]n interpreting the meaning of [procedural rules], the [c]ourt applies the same rules of construction used to interpret statutes"); *see also Seels v. Smalls*, 437 S.C. 167, 181, 877 S.E.2d 351, 348 (2022) (explaining that if the General Assembly had intended a certain result, it could have included language in the statute so indicating, "and principles of statutory interpretation do not favor implying such a result in the absence of any indicia that this was, in fact, the General Assembly's intent"). Here, there is no indicia that the drafters of Rule 37(b) intended to constrict a circuit court's ability to formulate discovery relief or sanctions to reach only the parties who file a formal motion. The Court of Appeals' Opinion erred by adding such a requirement, contrary to the *South Carolina Rules of Civil Procedure* and this Court's precedent.

Plainly, the focus under Rule 37(b) is on the actions of the offending party, not the actions or inactions of the other parties. Here, Ironwork, the Plaintiff below, clearly failed to obey an order entered under Rule 26(f), failed to attend hearings, was aware that its Complaint would be dismissed for such failure, and the dismissal was properly based

on the egregious actions of Ironwork and/or its counsel. There is no requirement that each defendant file a separate motion in order to be included in the dismissal.

This Court should grant this Petition and hold that the Court of Appeals applied an incorrect standard of review and that Ironwork failed to meet its burden of proving the Complaint should not have been dismissed as against Bobcat of Greenville.

II. The Court of Appeals erred by considering Ironwork's argument that the dismissal should not apply to Bobcat of Greenville because any such argument was waived, is unpreserved and should not been considered by the Court of Appeals.

The Court of Appeals erred by substantively considering Ironwork's argument that the dismissal should apply only to CEC, and not to Bobcat of Greenville. Ironwork's argument is unpreserved for appellate review in at least two respects: 1) Ironwork failed to object to the breadth of the October 1, 2019 Order or to Bobcat of Greenville's request to join in CEC's motion to dismiss, and 2) the first time Ironwork raised this argument was on reconsideration. *See, e.g.*, *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010) (noting both that "a contemporaneous objection is required to preserve an issue for appellate review," and an issue cannot be "raised for the first time in a motion for reconsideration"); *State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (an objection "must be timely made, which usually requires it be made at the earliest possible opportunity" or else it is waived); *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); *see also 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).

A. Ironwork failed to make timely objections.

Ironwork had two clear opportunities to object to the Complaint being dismissed as to both Defendants, but either failed or strategically declined to do so. First, Ironwork's counsel was provided with a copy of the proposed October 1, 2019 Order before it was submitted to Judge Miller. Ironwork's counsel did not object to any of the wording, including the fact that the entire "Complaint in this lawsuit shall be dismissed" if Ironwork failed to meet the deadline set therein. Instead, Ironwork's counsel stated that the proposed Order was "fine" with him. (R. p. 663). Indeed, in its October 25, 2019 Order Dismissing Plaintiff's Complaint with Prejudice, the Circuit Court noted that Ironwork's counsel had "consented to the language of the [October 1] Order before it was filed." (R. pp. 4-6).

The Circuit Court's October 1, 2019 Order stated broadly and unambiguously that if Ironwork 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." (R. pp. 1-3) (emphasis added). The October 1, 2019 Order did not say the Complaint *might* be dismissed, nor did it say the Complaint would be dismissed *only as to CEC*. Instead, the October 1, 2019 Order stated clearly and unequivocally that, if Ironwork failed to comply with the discovery order, his Complaint would be dismissed, period. As noted above, there was no objection from Ironwork, who found Order "fine."

Second, when CEC filed its Notice of Plaintiff's Noncompliance with the Court's 10/1/19 Order and Request for Dismissal, (R. pp. 661-662), Counsel for Bobcat of Greenville responded by emailing 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). Critically, again, Ironwork did not object or oppose in any way Bobcat of Greenville's request to join the motion to dismiss the complaint. And, while the Court of Appeals improperly criticized the timing and the alleged "informality" of Bobcat of Greenville's request to the Circuit Court to join the motion to dismiss—discussed above—there was no timely objection or response of any kind from Ironwork.

Accordingly, Ironwork waived review of this issue by failing to make any timely objection, despite having had at least two clear opportunities in which to do so. *See*, *e.g.*, *Sea Cove*, 387 S.C. at 108 n.5, 691 S.E.2d at 165 n.5 (noting both that "a contemporaneous objection is required to preserve an issue for appellate review," and an issue cannot be "raised for the first time in a motion for reconsideration"); *King*, 334 S.C. at 510, 514 S.E.2d at 581 (an objection "must be timely made, which usually requires it be made at the earliest possible opportunity" or else it is waived). The Court of Appeals' Opinion is in direct conflict with this line of cases.

While the result reached in this case could be seen as harsh under different facts, here, Ironwork had a clear opportunity to object to the breadth of the proposed sanctions Order. It also had an opportunity to object to Bobcat of Greenville joining the motion to dismiss. However, Ironwork failed to raise any objection, whether due to inadvertence or for strategic reasons. It should not be allowed to benefit from its failures to raise timely objections.

B. Ironwork failed to object to the dismissal as to Bobcat of Greenville until arguing its Motion to Alter or Amend.

The only Motion to Alter or Amend that was timely filed did not raise any argument that the Complaint should not be dismissed as to Bobcat of Greenville. Instead,

that Motion only set forth reasons for Ironwork's failure to respond to discovery and asking for leniency. (R. pp. 166-171). And, while Ironwork's current counsel did argue that the Complaint should not be dismissed as to Bobcat of Greenville at the November 17, 2021 hearing on the Motion to Alter or Amend, conducted nearly two years after the Motion was filed, (R. p. 649), that clearly does not cure the fact that this argument was made for the first time on reconsideration. Plainly, an issue cannot be raised for the first time in a motion for reconsideration. *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 (an issue cannot be raised for the first time in a motion for reconsideration); *Kiawah Prop. Owners*, 359 S.C. at 113, 597 S.E.2d at 149 (issue first raised in motion for reconsideration is not preserved for appellate review). The Court of Appeals' substantive consideration of this unpreserved argument is in conflict with this Court's precedent.

Accordingly, this Court should grant the Petition and hold that the Court of Appeals erred in considering Ironwork's arguments regarding the Complaint being dismissed against Bobcat of Greenville, as those arguments are waived and/or unpreserved for appellate review.

III. The Court of Appeals erred by dismissing Bobcat of Greenville's argument that Ironwork's failure to comply with Rule 59(g) rendered the October 25, 2019 Order final and not subject to further review.

As noted below, Ironwork's appeal is untimely due to its failure to comply with Rule 59(g), SCRCP. It is undisputed that neither the Motion to Alter or Amend, (R. pp. 165-171), nor the Motion for Reconsideration, (R. pp. 172-178), was sent to Judge Miller within ten days of filing as is required by Rule 59(g).[8] It is also uncontested that the

[8] As the Court of Appeals correctly pointed out, accepting Defendants' argument that Respondent's Motion to Alter or Amend was ineffective due to Respondent's failure to comply with Rule 59(g), SCRCP, is dispositive of this appeal. (Appx. p. 5 n.2).

Motion for Reconsideration, filed on November 5, 2019, was untimely and, therefore, of no effect. This is because Rule 59(e) 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." Rule 59(e), SCRCP (emphasis added); *Van Ness v. Eckerd Corp.*, 350 S.C. 399, 402-403, 566 S.E.2d 193, 195 (Ct. App. 2002) (a trial court loses jurisdiction to alter or amend unless a Rule 50(e) motion is filed within ten days of a judgment); *Garrison v. Target Corp.*, 435 S.C. 566, 581-582, 869 S.E.2d 797, 806 (2022) (the use of the term "shall" indicates "that the action is mandatory"). Thus, the ten-day window in which to seek reconsideration under Rule 59(e) is mandatory and cannot be expanded by the trial court. *See, e.g.*, *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018) ("the ten-day limit for serving a Rule 59(e) motion is an absolute deadline"), *citing Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000).

Similarly, Rule 59(g) provides "[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." Rule 59(g), SCRCP (emphasis added). Applying traditional rules of statutory interpretation, *Kosciusko*, 428 S.C. at 496, 836 S.E.2d at 370 ("[i]n interpreting the meaning of [procedural rules], the [c]ourt applies the same rules of construction used to interpret statutes"), the use of "shall" in Rule 59(g), makes it mandatory as well. *Garrison*, 435 S.C. at 581-582, 869 S.E.2d at 806. Consequently, Ironwork's failure to provide a copy of its Motion to Judge Miller within ten days of filing rendered the October 25, 2019 Order final and no longer subject to review. (*See* R. p. 651, line 22 – p. 652, line 8; p. 653, lines 3-9) (Appx. pp. 73, 74; 89-90). The Court of Appeals' failure to

apply this rule to this case is in conflict with this Court's well-established precedent, and warrants reversal.

Ironwork's failure to provide a copy of its Motion to Alter or Amend to Judge Miller within ten days provides an additional, substantive—in fact dispositive[9]—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 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").

The Court of Appeals cited *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) for the proposition that, because the Circuit Court heard arguments to alter or amend despite Ironwork's failure to comply with Rule 59(g), its arguments were preserved and the time for appeal did not start to run until the order on rehearing was filed. However, as explained above, Rule 59(g) uses the same mandatory "shall" as does Rule 59(e), which "means that the action is mandatory." *Garrison*, 435 S.C. at 581-582, 869 S.E.2d at 806; *see also Kosciusko*, 428 S.C. at 496, 836 S.E.2d at 370. Our courts consistently and unequivocally have held that the 10-day deadline under Rule 59(e) is absolute and cannot be expanded. *Overland*, 423 S.C. at 256, 815 S.E.2d at 433. The basis for this bright-line rule is that, while trial courts have limited authority under Rule 6(b), SCRCP, to extend deadlines, Rule 6(b) specifically provides that "[t]he time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Like Rule 59(e), Rule 59(g) "does

[9] Appx. p. 5 n.2.

not have any 'conditions stated' which would allow such an extension." By ruling that the trial court can "excuse" the failure of a party to provide the judge with a copy of its Rule 59(e) within ten days of filing by simply hearing the motion, essentially allows the judge discretion to grant an extension of time—despite the fact that Rule 6(b) specifically prohibits such discretion. The Court of Appeals Opinion is in conflict with this Court's precedent establishing that the deadlines under Rule 59, SCRCP, are absolute deadlines. *E.g.*, *Overland*, 423 S.C. at 256, 815 S.E.2d at 433.

This Court should grant this Petition and rule that Ironwork's failure to provide Judge Miller with a copy of its Motion to Alter or Amend within ten days of filing rendered the October 25, 2019 Order final and no longer subject to review. Ironwork's failure also rendered its appeal of the October 25, 2019 Order untimely. Rule 203, SCACR.

CONCLUSION

For the reasons stated herein, Petitioner Bobcat of Greenville respectfully requests that this Court grant its Petition for Writ of Certiorari, and overturn Points One and Three of Opinion No. 2023-UP-246.

Respectfully submitted,

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