

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Court of Appeals Opinion No. 2021-001461
(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.

APPENDIX

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The South Carolina Court of Appeals

Ironwork Productions, LLC, Appellant,

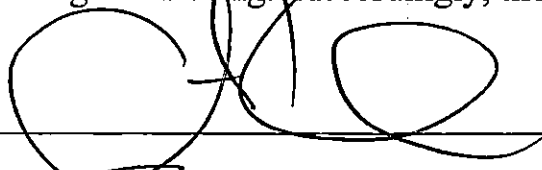
v.

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

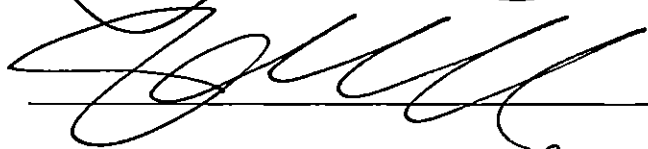
Appellate Case No. 2021-001461

ORDER

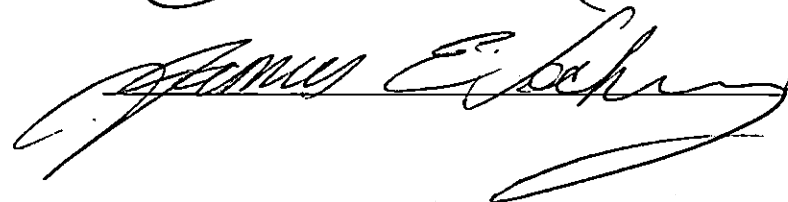
After careful consideration of the petitions for rehearing filed by Ironwork Productions, LLC and Bobcat of Greenville, LLC, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

Adam Crittenden Bach, Esquire
Jay T. Thompson, Esquire
Robert L. Mebane, Jr., Esquire

FILED
Aug 17 2023

Helen F Hiser, Esquire
John Patrick Bradley, Esquire
The Honorable Edward W. Miller

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ironwork Productions, LLC, Appellant,

v.

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

Appellate Case No. 2021-001461

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2023-UP-246
Submitted June 6, 2023 – Filed June 21, 2023

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

John Patrick Bradley, of Haynsworth Sinkler Boyd, PA,
and Adam Crittenden Bach, of Tonnsen Bach, LLC, both
of Greenville, for Appellant.

Helen F. Hiser, of McAngus Goudelock & Courie, LLC,
of Mount Pleasant, and Robert L. Mebane, Jr., of
McAngus Goudelock & Courie, of Greenville, both for
Respondent Bobcat of Greenville.

Jay T. Thompson, of Murphy & Grantland, PA, of
Columbia, for Respondent Bobcat Company, Inc.

PER CURIAM: Ironwork Productions, LLC, (Ironwork) appeals an order of the circuit court dismissing its complaint for failure to comply with the circuit court's discovery order. On appeal, Ironwork argues (1) the circuit court erred in dismissing its complaint as a discovery sanction when there was no evidence it willfully or repeatedly failed to comply with discovery orders or that it acted in bad faith or engaged in misconduct, willful disobedience, or callous disregard for the rights of Bobcat of Greenville (Bobcat) and Bobcat, Inc., (CEC)¹; and (2) the circuit court erred in dismissing its complaint as to Bobcat because Bobcat had not served discovery requests, filed a motion to compel, or sought a discovery sanction against it. We affirm in part, reverse in part, and remand.

Ironwork commenced this action in August 2018, asserting claims regarding equipment it purchased from Bobcat and CEC, and the parties began discovery. CEC made its first request for the production of documents and responses to interrogatories in January 2019; Ironwork answered that request on April 2, 2019. On May 16, 2019, CEC sent a second request for production of documents, a second set of interrogatories, and a letter outlining what it believed were deficiencies in Ironwork's first response and requesting clarification and further responses. After Ironwork failed to respond to these additional requests, CEC filed a motion for sanctions and to compel discovery on August 15, 2019, and the circuit court held a hearing on October 1, 2019. Neither Ironwork nor Bobcat attended the hearing. However, later that day, Ironwork's attorney agreed via email to an order stating that if it failed to respond to CEC's outstanding discovery requests within ten days, the complaint would be dismissed. Ironwork responded by mailing to CEC documents it had already produced to the parties. On October 18, 2019, CEC filed a "Notice of Plaintiff's Noncompliance" with the October 1 order, asserting Ironwork had not produced any further documents or materials responsive to the May 16 letter or its second set of discovery requests; CEC also asked for dismissal of the complaint. Without holding a hearing, the circuit court dismissed the action as to both CEC and Bobcat by order dated October 25, 2019. Ironwork filed timely motions to reconsider pursuant to Rule 59(e), SCRCP; however, it failed to send copies to the judge as required by Rule 59(g), SCRCP.

¹ Bobcat, Inc., asserts it has been improperly named in the underlying action and the appeal, and it does business as Clark Equipment Company.

Consequently, the circuit court did not hold a motions hearing until November 2021, after which it upheld the dismissal.

1. We hold that because the circuit court considered Ironwork's Rule 59(e), motions on the merits, despite Ironwork's failure to comply with Rule 59(g), this appeal is properly before this court.² See Rule 59(e), SCRCP ("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(g), SCRCP ("A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten . . . days after the filing of the motion."); Rule 203(b)(1), SCACR ("A notice of appeal [from the Court of Common Pleas] shall be served on all respondents within thirty . . . days after receipt of written notice of entry of the order or judgment."); *id.* ("When a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) ("Because the circuit court found it appropriate to hear the matter, we find no error in the circuit court's decision to decide the motion despite Gallagher's failure to comply with Rule 59(g), SCRCP."); *id.* ("There is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR.").

2. We affirm the circuit court's dismissal of Ironwork's complaint as to CEC. See *Rickerson v. Karl*, 412 S.C. 215, 219, 770 S.E.2d 767, 770 (Ct. App. 2015) ("The decision of whether to impose sanctions is generally entrusted to the sound discretion of the trial court."); *id.* ("This court will not interfere with a trial court's exercise of its discretion with respect to the imposition of sanctions unless an abuse of discretion has occurred."). Ironwork's attorney agreed that dismissal was the appropriate sanction if it failed to comply with the October 1 order. Although the circuit court initially relied solely on the assertions of CEC in its "Notice of Plaintiff's Noncompliance" to find Ironwork failed to comply, it held a hearing on Ironwork's motions to reconsider, at which time Ironwork conceded the documents mailed to CEC after the October 1 order did not address the deficiencies or the second set of requests. We therefore affirm the dismissal as to CEC. See *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 200, 511

² We begin with preservation because the argument would be dispositive if this court accepted CEC's argument.

S.E.2d 716, 719 (Ct. App. 1999) ("[T]he acts of an attorney are directly attributable to and binding on the client.").

3. However, we find the circuit court erred in dismissing the complaint as to Bobcat because the circuit court's order lacked "reasonable factual support" for dismissal of those claims. *See Rickerson*, 412 S.C. at 219, 770 S.E.2d at 770 (Ct. App. 2015) ("The decision of whether to impose sanctions is generally entrusted to the sound discretion of the trial court."); *id.* ("This court will not interfere with a trial court's exercise of its discretion with respect to the imposition of sanctions unless an abuse of discretion has occurred."); *Griffin*, 334 S.C. at 198, 511 S.E.2d at 718 ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law."). The October 1 order resulted from a motion for sanctions and to compel discovery filed by CEC, not Bobcat. Bobcat did not join that motion or attend the October 1 hearing, and the resulting order stating the complaint would be dismissed if Ironwork failed to comply references only CEC's discovery requests and Ironwork's dilatory conduct toward CEC. 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. *See Griffin*, 334 S.C. at 198-99, 511 S.E.2d at 719 ("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."); *id.* at 198, 511 S.E.2d at 718 ("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."); *id.* at 198, 511 S.E.2d at 719 (stating any sanction imposed must "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 a case"). We therefore reverse the dismissal of the complaint as to Bobcat and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.³

KONDUROS and VINSON, JJ., and LOCKEMY, A.J., concur.

³ We decide this case without oral argument pursuant to Rule 215, SCACR.

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.

APPELLANT'S PETITION FOR REHEARING

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ARGUMENT

Appellant Ironwork Productions, LLC (“Ironwork”) respectfully submits this petition for rehearing regarding this Court’s June 21, 2023 Opinion in which it held that the lower court did not abuse its discretion in sanctioning Ironwork by dismissing its Complaint against Bobcat Company, Inc. (“CEC”) with prejudice. “An abuse of discretion may be found when 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.” *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 456-57, 814 S.E.2d 643, 656 (Ct. App. 2018). In its Opinion finding no abuse of discretion, this Court notes that Ironwork’s attorney apparently agreed that dismissal would be a proper sanction for failing to comply with the October 1 order:

Ironwork’s attorney agreed that dismissal was the appropriate sanction if it failed to comply with the October 1 order[,] . . . [and at the] hearing on Ironwork’s motions to reconsider, . . . Ironwork conceded the documents mailed to CEC after the October 1 order did not address the deficiencies or the second set of requests.

(Opinion 3.) In affirming the lower court’s dismissal with prejudice, this Court overlooks three important facts.

I. IRONWORK DID NOT WILLFULLY VIOLATE ANY ORDER AND WRONGFULLY BEARS THE PUNISHMENT FOR AN ATTORNEY WHO ABANDONED IT

Ironwork knew nothing of any discovery dispute, the October 1 order, or the potential that its case could be dismissed. (R. pp. 169-71.) Historically, this Court has considered the willfulness of the party itself apart from its attorney in determining the appropriateness of sanctions. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 545 n.6, 489 S.E.2d 679, 683 n.6 (Ct. App. 1997) (“While we agree that the trial court was well within its power to penalize [appellant] for what the court found to be willful disobedience, under these circumstances it seems from the record as

though the attorney for [appellant] was at least as much to blame as the party itself, for its indiscretions. To penalize [appellant] so severely for apparently relying on the advice of its attorney, under these circumstances, is clearly unjust, and would not properly serve the purposes for sanctions.”); *see also Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 200, 511 S.E.2d 716, 719 (Ct. App. 1999) (affirming sanctions but noting “that there is no evidence in the record to support [appellant’s] assertion that it was unaware of the acts of its counsel”). Here, Ironwork’s president affirmed in his affidavit that Ironwork’s attorney at the time, Delane Rosemond, never informed him of any discovery issues or potential dismissal. (R. pp. 169-71.) Mr. Rosemond never told Ironwork that

- CEC sent a deficiency letter;
- CEC sought supplemental discovery responses;
- CEC filed a motion to compel those responses;
- A hearing was scheduled regarding CEC’s motion to compel;
- Mr. Rosemond failed to appear at the motion hearing;
- Mr. Rosemond consented to an order compelling Ironwork to provide supplemental responses within ten days or risk dismissal; and
- The court entered the October 1 order providing for dismissal of Ironwork’s case if it failed to provide timely supplemental responses.

(R. pp. 169-71.) Nor did Mr. Rosemond tell Ironwork that he “inadvertently” sent incorrect supplemental responses to CEC, violating the order to which he had apparently consented. (*Id.*; R. p. 645, lines 4-8.) Rather, Ironwork learned that its case had been dismissed only after seeking other counsel to represent it.

A discovery sanction “should be aimed at the specific misconduct of the party sanctioned” and “should not go beyond the necessities of the situation.” *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682 (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990)). Ironwork is severely sanctioned because of the actions of an attorney it was seeking to replace—an attorney who has now been suspended from the practice of law in this state. The bad actor here is no longer in the case; a “well-aimed” sanction should not severely punish Ironwork, which was acting reasonably and promptly in seeking other counsel.

Moreover, this Court’s Opinion does not address Mr. Rosemond’s abandonment of Ironwork. Ironwork perceived that its counsel had apparently abandoned it—so much so that it sought other counsel. (R. pp. 169-71.) Ironwork should not be punished because of an attorney who abandoned Ironwork by failing to appear on its behalf, willfully ignoring its communications, and refusing to inform Ironwork of the discovery dispute and the potential dismissal of Ironwork’s case. *Graham v. Town of Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598-99 (1978).

II. IRONWORK’S ATTORNEY DID NOT CONSENT TO DISMISSAL WITH PREJUDICE

Mr. Rosemond’s apparent agreement, referenced in this Court’s June 21, 2023 Opinion, did not include dismissal with prejudice. The proposed October 1 order merely stated that if Ironwork failed to comply, its “Complaint in this lawsuit shall be dismissed.” (R. p. 2.) Rule 37(b) does not specify that the sanction of dismissal is with prejudice, and Ironwork’s attorney had no reason to assume that the dismissal would be with prejudice, especially considering our jurisprudence’s deference for protecting a litigant’s right to be heard on the merits. *Balloon Plantation, Inc.*, 303 S.C. at 154, 399 S.E.2d at 440 (“However, the sanction imposed 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.”); *see also Karppi*, 327 S.C. at 546-50, 489 S.E.2d at 683-86 (Anderson, J., concurring) (concurring with reversal of lower court “because a sanction which precludes a decision on the merits should be lightly invoked,” listing cases, and noting that “[d]enying a party the opportunity to be heard should be carefully invoked and reserved for the most egregious cases.”) Indeed, Ironwork’s attorney’s motion to reconsider shows his surprise that the dismissal was with prejudice: “The [October 1] Order did not say anything regarding dismissal *with prejudice*.” (R. pp. 172-73 (emphasis in original).) By dismissing the case with prejudice, the lower court prejudiced the rights of Ironwork to reassert its claims against CEC within the approximately one year remaining of the statute of limitations period. (R. pp. 174-75.) Accordingly, dismissal with prejudice was an abuse of discretion.

III. IRONWORK’S ATTORNEY DID NOT WILLFULLY DISREGARD THE OCTOBER 1 ORDER

Ironwork’s attorney thought he had complied with the October 1 order. On October 24, 2019, in response to CEC’s counsel’s email to the Court inquiring about the status of the order dismissing the case, Ironwork’s attorney replied all, saying: “Jay – I sent you the plaintiff’s answer to interrogatories and request for production the day after the hearing. Have you not received anything from my office since the hearing?” (R. p. 668.) Only later did he realize that “he inadvertently sent the same other materials.” (R. p. 645, lines 4-8.) The failure to comply with the October 1 order was “inadvertent” and evidently done in confusion—not “bad faith, willfulness, or gross indifference to the rights of other litigants” as required to dismiss the case. *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682. Despite the apparent confusion expressed on October 24, 2019, on October 25, 2019, the court dismissed the case with prejudice, never providing Ironwork’s attorney

an opportunity to appear, argue, explain, or otherwise defend against the dismissal with prejudice.
(R. pp. 4-6.)

Dismissal as a discovery sanction is already “harsh medicine that should not be administered lightly.” *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682. Where, as here, neither Ironwork nor its attorney acted willfully to tout the court’s order, dismissal of Ironwork’s case with prejudice was inappropriate.

CONCLUSION

For the reasons stated herein, Appellant Ironwork Productions, LLC respectfully requests that the Court grant its petition for rehearing.

Respectfully submitted,

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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.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on the Respondents, Bobcat of Greenville, LLC and Bobcat Company Inc., by electronic mail, on July 5, 2023, addressed to their attorneys of record:

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July 5, 2023

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Jun 30 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Appeal No. 2021-001461

Ironwork Productions, LLC, ... Appellants,

v.

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

**BOBCAT OF GREENVILLE, LLC'S
PETITION FOR REHEARING**

Pursuant to Rules 221(a) and 240, SCACR, Petitioner Bobcat of Greenville, LLC (“Bobcat of Greenville”), hereby petitions this Court to rehear Points One and Three of its Opinion in the above-captioned case, Opinion No. 2023-UP-246 (Ct. App. filed June 21, 2023).¹ Petitioners received this Court’s Opinion No. 2023-UP-246 on June 21, 2023.

This Court overlooked and/or misconstrued the facts that: 1) Plaintiff’s Motion to Alter or Amend, (R. pp. 165-171), was ineffective to stay the time to appeal due to Plaintiff’s failure to timely provide Judge Miller a copy of the Motion as is required by Rule 59(g), SCRCP; 2) Plaintiff’s argument that the Complaint should not be dismissed

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./Clark Equipment Company (“CEC”) should apply equally to Bobcat of Greenville.

as to Bobcat of Greenville was waived and is unpreserved for appellate review; and 3) the Circuit Court properly dismissed the Complaint as to both Defendants.

I. This Court overlooked and/or misconstrued Defendants’ argument that Plaintiff’s failure to comply with Rule 59(g) rendered the October 25, 2019 Order final and not subject to further review.

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), SCRCF.² It is also uncontested that the 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), SCRCF (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).

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.”

² As this Court correctly pointed out, accepting Defendants’ argument that Plaintiff’s Motion to Alter or Amend was ineffective due to Plaintiff’s failure to comply with Rule 59(g), SCRCF, is dispositive of this appeal.

Rule 59(g), SCRCP (emphasis added). Applying traditional rules of statutory interpretation, *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”), the use of the mandatory shall in Rule 59(g), makes it mandatory. *Garrison*, 435 S.C. at 581-582, 869 S.E.2d at 806. Consequently, Plaintiff’s failure to provide a copy of his 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; Brief of Bobcat of Greenville pp. 19-20; Brief of CEC pp. 9-10).

As a result, Plaintiff’s failure to provide a copy of its Motion to Alter or Amend to Judge Miller within ten days provides an additional substantial 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”).

This Court cites *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 Plaintiff’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 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 an extension.

This Court should grant rehearing and rule that Plaintiff’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.

II. This Court overlooked and/or misconstrued the fact that Plaintiff’s argument that the dismissal should not apply to Bobcat of Greenville was waived, is unpreserved and should not be considered by this Court.

Even if this Court were to address the substance of this appeal, Plaintiff’s argument that the dismissal should apply only to CEC, and not to Bobcat of Greenville, is unpreserved for appellate review. Plaintiff’s argument on this point is unpreserved in two respects: 1) Plaintiff 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 Plaintiff raised this argument was on reconsideration.

A. Plaintiff failed to make timely objections.

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

The Circuit Court's October 1, 2019 Order stated broadly and definitely that if Plaintiff did not "provide full and complete responses to all outstanding requests ... with[in] ten (10) days of receipt of" the Order, "Plaintiff's Complaint in this lawsuit *shall* be dismissed." (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 Plaintiff failed to comply with the discovery order, his Complaint would be dismissed, period.

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, Plaintiff did not object or oppose in any way Bobcat of Greenville’s request to join the motion to dismiss the complaint. And, while this Court criticized the timing and the alleged “informality” of Bobcat of Greenville’s request to the Circuit Court to join the motion to dismiss—discussed below—there was no timely objection by Plaintiff to Bobcat of Greenville’s joining the request for dismissal, or response of any kind from Plaintiff.

Accordingly, Plaintiff waived review of this issue by failing to make any timely objection, despite having had at least two opportunities in which to do so. *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).

While the result reached in this case could be seen as harsh under different facts, here, Plaintiff 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, Plaintiff failed to raise any objection, whether due to inadvertence or for strategic reasons. This Court should grant rehearing and hold that Plaintiff waived any argument it might have had that the Complaint should not have been dismissed as against Bobcat of Greenville.

B. Plaintiff 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 Plaintiff's failure to respond to discovery and asking for leniency. (R. pp. 166-171). And, while Plaintiff'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 still 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 v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *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).

This Court should grant rehearing and hold that any argument that Plaintiff's arguments regarding the Complaint being dismissed against Bobcat of Greenville are waived and/or unpreserved for this Court's review.

III. This Court overlooked and/or misconstrued that the Circuit Court properly dismissed Plaintiff's Complaint as against all parties.

The Circuit Court properly dismissed Plaintiff's Complaint as to Bobcat of Greenville as well as to CEC. Arguments to the contrary fail for a number of reasons. As noted above, Plaintiff's appeal is untimely due to its failure to comply with Rule 59(g). In addition, this issue was waived and is not preserved for appellate review because Plaintiff failed to make any timely objections and did not raise it until rehearing. *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); *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).

Even though this Court addressed the substance of this issue, which it should not have done, it lacks merit. “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). 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.” *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. Indeed, the Circuit Court noted its judicial frustration with Plaintiff’s Counsel’s actions during discovery. (R. p. 649, lines 6-7).

Here, Plaintiff failed to meet its burden “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). As set out above, there is reasonable factual support to uphold the dismissal as to Bobcat of Greenville. Plaintiff’s counsel was provided a copy of the proposed October 1, 2019 Order, to which he not only failed to object, but which he wholeheartedly endorsed, saying it was “fine” by him. When Bobcat of Greenville stated that it was joining in CEC’s motion to dismiss, Plaintiff 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.

Here, Bobcat of Greenville specifically and unambiguously joined in CEC's "request ... to dismiss the complaint." (R. p. 659). Although Plaintiff stated in a footnote in its November 5 Motion for Reconsideration that its Complaint should not have been dismissed as to Bobcat of Greenville, (R. p. 173 n.2), that Motion was untimely. While Plaintiff's counsel raised the same argument at the November 17, 2021 hearing, over two years after the Complaint was dismissed, that belated argument is both waived and unpreserved. While this Court dismissed the fact that Bobcat of Greenville properly joined in the motion to dismiss, describing it as belated and informal, and without explanation, 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. Ironically, this Court takes issue with the timing of Bobcat of Greenville's joining the motion to dismiss but gives Plaintiff a complete pass on the mandatory requirement to provide the presiding judge with a copy of its Rule 59(e) motion. The procedural rules of this Court should apply evenly between plaintiffs and defendants, and not in favor of one over the other.

This Court should grant rehearing and affirm the dismissal of Plaintiff's Complaint as to both Respondents.

CONCLUSION

For the reasons stated herein, Petitioner Bobcat of Greenville respectfully requests that this Court grant its Petition and rehear that portion of the Opinion No. 2023-UP-246 that reverses the Circuit Court's dismissal of the Complaint as to Bobcat of Greenville.

Respectfully submitted,

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June 30, 2023

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RECEIVED

Jun 30 2023

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

Appeal No. 2021-001461

Ironwork Productions, LLC, ...Appellant,

v.

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

PROOF OF SERVICE

I certify that on the 30th day of June 2023, I served **Bobcat of Greenville, LLC's Petition for Rehearing** on Ironwork Productions, LLC and on other counsel of record by emailing a copy of it to counsel as follows:

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Aug 23 2022

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 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, LLC¹ (“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).

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:

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:
 - o about any discovery issues or lack of responses from Mr. Rosemond's office;
 - o that Respondent(s) filed a motion to compel Appellant's discovery responses;
 - o 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, SCRCF, 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)[, SCRC] 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, SCRPC “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 a 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 provide 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), SCRCF 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

RECEIVED

Aug 23 2022

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.

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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Ironwork Productions, LLC, Appellant,

v.

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

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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RICHLAND COUNTY

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v.

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

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court properly dismissed Plaintiff's Complaint for willful repeated failures to respond to discovery requests?
- II. Whether the Circuit Court properly dismissed Plaintiff's Complaint as against all parties?

STATEMENT OF THE CASE

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

Respondent Bobcat of Greenville, LLC filed a timely Answer, raising the error in its name² and raising numerous affirmative defenses. (R. pp. 17-20). On that same date, Bobcat of Greenville served Interrogatories and Requests for Production on Plaintiff.³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff timely appealed to this Court.

STANDARD OF REVIEW

“The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), *citing Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). “A dismissal under Rule 37(B)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court’s discretion.” *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). “[W]hatever sanction is imposed should serve to protect the rights of discovery provided by the Rules.” *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. Indeed, “the most severe in the spectrum of sanctions provided by 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.” *Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997). “The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). Thus, Plaintiff bears the burden of demonstrating “that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.” *Davis*, 409 S.C. at 282, 762 S.E.2d at 543.

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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August 22, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Aug 22 2022
SC Court of Appeals

GREENVILLE COUNTY
APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Appeal No. 2021-001461

Ironwork Productions, LLC., ... Appellants,

v.

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

CERTIFICATE OF COUNSEL

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

August 22, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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 Company¹ (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), SCRCF—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), SCRCR, 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), SCRCPP. 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, SCRCF, 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), SCRCF). 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), SCRPC. 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), SCRPC

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), SCRPC. 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), SCRPC, 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), SCRPC. “Under Rule 37(b)(2)(C), SCRPC, 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), SCRPC.

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), SCRPC.

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 they 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), SCRCPP.

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), SCRCPP, 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

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Aug 24 2022

SC 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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Ironwork Productions, LLC, Appellant,

v.

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

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ARGUMENT

Appellants submit this brief reply to address two points raised by Respondents. First, Respondents argue that because neither the first nor second motions to amend were sent to the trial judge, “the matters raised in this appeal are not properly preserved for appellate review.” Clark Initial Brief at p. 10-11; Bobcat Initial Brief at p. 20-21. In support of this position, Respondents cite to a Court of Appeals case that upheld a trial court’s decision to deny a Rule 59 motion based on non-compliance with Rule 59(g). *Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017).

A Rule 59 motion can be denied on the basis that it was not sent to the trial judge, but the trial judge is not required to deny the motion on that basis. Instead, whether to deny a motion on that basis is within the sound discretion of the trial court. *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) (“we find no error with the trial court’s decision to decide the motion despite [the appellant’s] failure to comply with Rule 59(g), SCRC.P.”). Respondents raised their Rule 59(g) arguments at the hearing on Appellant’s motion to reconsider. The court was aware of those arguments and could have chosen to deny the motion on Rule 59(g) grounds. He did not and the issues raised by the motion to reconsider are properly preserved. (R. pp. 7-9); (R. p. 643, line 23-p. 644, line 13).

Second, Respondent Bobcat accuses Appellant of “vacillat[ing]” between attempting to justify Appellant’s prior counsel’s conduct and arguing that Appellant’s prior counsel abandoned Appellant. Bobcat Initial Brief at p. 17. Bobcat’s argument misunderstands Appellant’s position. Appellant’s position is not that its prior counsel’s conduct is justified. Appellant’s position is that his prior counsel’s conduct does not rise to the level of meriting the “harsh medicine” of dismissal

or default. *Griffing Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). Said differently, an attorney can “willfully and unilaterally abandon” his client without engaging in “bad faith, willful disobedience, or gross indifference to the rights of the adverse party” in discovery practice sufficient to support the “severe punishment” of default of dismissal. Although Mr. Rosemond abandoned his client, his conduct was not sufficiently egregious to merit dismissal as a discovery sanction.

CONCLUSION

For these reasons, and for the reasons stated in Appellant’s initial brief, the order dismissing Appellant’s complaint against Respondents should be reversed.

Respectfully submitted,

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SC Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
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The Honorable Edward W. Miller, Circuit Court Judge

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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 Appellant's Final Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

August 23, 2022

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

PROOF OF SERVICE

I certify that I have served Appellant's Final Reply Brief on the Respondents, Bobcat of Greenville, LLC and Bobcat Company Inc., by electronic mail, on August 23, 2022, addressed to their attorneys of record:

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Court of Appeals Opinion No. 2021-001461
(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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Appendix** complies with Rule 242(e), SCACR. The undersigned also certifies that this **Appendix** complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

August 29, 2023

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