

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

S.C. SUPREME COURT

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

Ironwork Productions, LLC,.....Petitioner,

v.

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

**PETITION FOR WRIT OF CERTIORARI
OF IRONWORK PRODUCTIONS, LLC**

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CERTIFICATE OF COUNSEL

Counsel for Petitioner Ironwork Productions, LLC certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on August 17, 2023.

QUESTIONS PRESENTED

- 1. DID THE COURT OF APPEALS ERR IN UPHOLDING DISMISSAL WHERE THE FACTS DO NOT SHOW THE REQUISITE WILLFULNESS, BAD FAITH, OR GROSS INDIFFERENCE BY IRONWORK?**
- 2. DID THE COURT OF APPEALS ERR IN UPHOLDING DISMISSAL WHERE THE CIRCUIT COURT FAILED TO CONSIDER THE ACTIONS OF IRONWORK APART FROM MR. ROSEMOND?**
- 3. DID THE COURT OF APPEALS ERR IN UPHOLDING DISMISSAL BECAUSE, AS A SANCTION, IT WAS NEITHER WELL AIMED NOR REASONABLY NECESSARY TO REDRESS THE MISCONDUCT?**

STATEMENT OF THE CASE

On or about November 30, 2017, Ironwork Productions, LLC (“Ironwork”) purchased a Bobcat T870 Compact Track which failed to perform as warranted, resulting in significant damages to Ironwork.¹ (R. p. 12.) Accordingly, Ironwork retained attorney E. Delane Rosemond and, on August 29, 2018, filed a lawsuit to recover its damages against Respondents Bobcat of Greenville, LLC and Bobcat Company, Inc. (R. pp. 10-16.) Both Defendants answered and provided their proper identifications—Respondent Bobcat of Greenville, LLC as Acme Operations, LLC d/b/a Bobcat of Greenville (“Bobcat”) and Respondent Bobcat Company, Inc. as Clark Equipment Company d/b/a Bobcat Company (“CEC”). (R. pp. 17-28.)

On January 25, 2019, CEC served its first set of discovery requests upon Mr. Rosemond. (R. p. 29-48.) On March 6, 2019, CEC’s counsel emailed Mr. Rosemond notifying him that the

¹ Ironwork’s legal name is Ironworx Productions, LLC. Ironwork’s former counsel spelled its name incorrectly in the caption of this case.

responses were due March 1, 2019, and that if he failed to provide the responses in a week, CEC would file a motion to compel. (R. p. 50.) On March 18, 2019, CEC filed the motion to compel, which was set for a hearing on April 3, 2019. (R. p. 139.) On the evening of April 2, 2019, Mr. Rosemond emailed extensive discovery responses to CEC's counsel, who informed the court that the motion to compel had been resolved and a hearing was no longer needed. (R. p. 139.)

Over a month later, on May 16, 2019, CEC sent a deficiency letter to Mr. Rosemond requesting that the April 2, 2019 responses be "clarified or supplemented" and asking, among other things, that the document production be provided in color rather than black and white so that certain color coding could be distinguished. (R. p. 141-46.) With this correspondence CEC also served CEC's second set of discovery requests upon Ironwork. (R. p. 147-61.) That same day, Mr. Rosemond responded, "Thanks for the letter. I will work on this next week." (R. p. 163.) In the same email, Mr. Rosemond instructed his staff to set up a meeting with Ironwork. (R. p. 163.) On July 15, 2019, CEC's counsel emailed Mr. Rosemond requesting a response to the deficiency letter, and on July 16, 2019, Mr. Rosemond responded, "It's going in the mail today." (R. p. 162.) On August 5, 2019, CEC's counsel emailed Mr. Rosemond seeking Ironwork's responses to the second set of discovery requests and threatening a motion to compel. (R. p. 165.)

On August 15, 2019, CEC filed a "Motion for Sanctions and to Compel Discovery Responses." (R. p. 52.) The hearing for this motion took place on October 1, 2019 before the Honorable Edward W. Miller. (R. p. 634.) Mr. Rosemond did not appear, and CEC's counsel argued that the case should be dismissed because the "case has been pending for thirteen months . . . [, and] every time we've served discovery we get nothing." (R. p. 634-36.) In explaining why CEC cancelled the hearing regarding the first motion to compel, CEC's counsel admitted that

Ironwork had provided responses to CEC’s first set of discovery but claimed that they were “not even close to what we asked for.” (R. p. 638.) The Court granted the motion to compel and instructed CEC’s counsel to draft an order providing that unless Ironwork fully complied with CEC’s discovery requests, the Complaint would be dismissed. (R. p. 638.) The Court did not indicate that a dismissal would be with prejudice. (R. p. 638.)

Later that day, counsel for CEC emailed a proposed order to Judge Miller’s chambers and copied counsel of record. (R. p. 419.) The order stated that CEC “asserted in its Motion that Plaintiff has exercised bad faith and a gross indifference to the rights of CEC” and commanded Ironwork to fully respond to “all outstanding requests set forth in CEC’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 Plaintiff fails to respond as ordered herein, Plaintiff’s Complaint in this lawsuit shall be dismissed.” (R. pp. 1, 417.) Mr. Rosemond replied all to this email with the proposed order, saying, “The proposal is fine with me.” (R. p. 419.)

That same day, Mr. Rosemond’s office filed a certificate of service showing that Ironwork’s “Answers to Interrogatories and Response to Request for Production” were served upon defense counsel that day. (R. p. 656.) As CEC’s counsel later admitted, on October 2, 2019, CEC received by Federal Express delivery Ironwork’s discovery responses, including color copies of Ironwork’s document production, as requested. (R. p. 184-86.) However, Mr. Rosemond failed to provide separate responses to CEC’s second set of discovery requests or a letter responding to CEC’s deficiency letter.

On October 18, 2019, CEC filed a Notice of Noncompliance purporting to show that Ironwork failed to comply with the October 1, 2019 order and requesting—for the first time—that

Ironwork’s “Complaint be dismissed with prejudice.” (R. pp. 661-62.) CEC also emailed the Notice of Noncompliance to Judge Miller’s chambers, copying opposing counsel. (R. p. 657.) Counsel for Bobcat replied all to the email and, for the first time, “join[ed] in the request . . . to dismiss the complaint.” (R. p. 659.) On October 21, 2019, the Court requested that CEC’s counsel draft an order of dismissal. (R. p. 665.) On October 24, 2019, Mr. Rosemond replied all to the email chain and addressed CEC’s counsel: “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.) CEC’s counsel responded that the documents received were photocopies of prior production from Ironwork. (R. p. 672.)

The following day, on October 25, 2019, the Court issued an order dismissing Ironwork’s Complaint with prejudice—even though the October 1, 2019 order did not provide for dismissal with prejudice. (R. pp. 4-5.) The Court did not conduct a hearing, request supplemental briefing, or offer an opportunity for Ironwork to defend against the dismissal or explain its position.

Meanwhile, Ironwork’s owner had become frustrated because Mr. Rosemond would not respond to his multiple attempts to communicate with him. (R. p. 169.) Ironwork’s owner had not heard from Mr. Rosemond for several months. (R. p. 645, lines 13-25.) He did not know that there was any ongoing discovery dispute or that Ironwork had failed to provide documents or responses requested by CEC. (R. p. 169-70.) In late October 2019, Ironwork contacted its present counsel, Tonnsen Bach, LLC, about taking over its case. (R. pp. 169-70; R. p. 645, lines 13-16.) During this telephone call, Tonnsen Bach’s office staff searched the case on the public index, discovered the October 25, 2019 order dismissing the case with prejudice, and informed Ironwork of the order of dismissal. (R. p. 170.)

Ironwork did not know about the dismissal or about the events leading to the dismissal, including:

- 1) CEC's deficiency letter;
- 2) CEC's August 15, 2019 Motion to Compel and for Sanctions;
- 3) The October 1, 2019 hearing or Mr. Rosemond's failure to appear at the hearing;
- 4) The October 1, 2019 order requiring further discovery responses in ten days;
- 5) Mr. Rosemond's consent to the October 1, 2019 order;
- 6) The October 18, 2019 Notice of Noncompliance; or
- 7) The October 25, 2019 order dismissing Ironwork's case with prejudice.

(R. p. 169-70.)

The same day that Ironwork learned of the dismissal, it retained Tonnsen Bach. (R. p. 170.) On November 4, 2019, Ironwork's new counsel timely filed a motion to reconsider, informing the Court of Ironwork's ignorance of the prior discovery deficiencies and prior orders and promising that "if permitted to proceed with its case, [Ironwork] will promptly and diligently comply with the court's order compelling discovery responses." (R. pp. 166-67.) Ironwork also offered to pay CEC's counsel's attorney's fees and costs. (R. p. 648, line 2-3.)

On November 5, 2019, Mr. Rosemond—without communicating with Ironwork—also filed a motion for reconsideration. (R. p. 172.) In this motion, Mr. Rosemond expressed his surprise at the dismissal with prejudice: "The [October 1, 2019] Order did not say anything regarding dismissal *with prejudice*." (R. p. 173 (emphasis in original).) He pointed out that over one year remained in the statute of limitations period, ending on approximately November 30, 2020, so that if the complaint were dismissed without prejudice, Ironwork could "seek new counsel, file a new

lawsuit, or allow [Mr. Rosemond] to continue in this lawsuit.” (R. pp. 174, 177.) In addition, he explained that “[he] believed he had complied with the said Order. Plaintiff heard nothing from either defendant that it considered the response deficient until October 18, 2019.” (R. p. 174.) He informed the Court that, when responding to the October 1, 2019 order compelling production, his staff made a mistake in re-sending the old discovery answers; however, he supplemented these responses so that “CEC has everything that the Plaintiff has in its possession.” (R. pp. 174-77.)²

The Court heard the motions to reconsider on November 16, 2021. (R. p. 641.) The Court denied the motions by order on November 19, 2021. (R. p. 7, 654.) On December 14, 2021, Ironwork filed and served its Notice of Appeal, appealing the October 25, 2019 order dismissing the Complaint with prejudice and the November 19, 2021 order denying the motions to reconsider. (R. pp. 680-83.)

On June 21, 2023, the South Carolina Court of Appeals filed its Opinion, affirming the dismissal of Ironwork’s Complaint as to CEC but reversing the dismissal of the Complaint as to Bobcat. (Opinion No. 2021-001461.) In finding that the lower court did not abuse its discretion in dismissing Ironwork’s Complaint with prejudice as to CEC, the Court of Appeals appears to conclude that dismissal with prejudice was appropriate because Ironwork’s attorney allegedly agreed to such a sanction. (*Id.*) The Court of Appeals appeared to reason as follows: (A) “Ironwork’s attorney agreed that dismissal was the appropriate sanction if it failed to comply with the October 1 order”; (B) Ironwork later “conceded” that it did not fully comply with the October 1 order; therefore, (C) Ironwork got the outcome to which it agreed. (*Id.* at ¶ 2.) The Opinion does

² On March 10, 2022, this Court suspended Mr. Rosemond from the practice of law in this state indefinitely. *In re Edward Delane Rosemond*, 438 S.C. 23, 881 S.E.2d 765 (2022). This suspension was unrelated to this lawsuit.

not address the fact that Ironwork’s attorney did not agree to dismissal *with prejudice*. Likewise, the Opinion does not analyze the willfulness of either Mr. Rosemond or Ironwork in determining whether dismissal with prejudice is an appropriate, reasonably necessary sanction under these circumstances.

On July 5, 2023, Ironwork filed a petition for rehearing, and on August 17, 2023, the Court of Appeals denied the petition. This petition for writ of certiorari follows.

STANDARD OF REVIEW

Upon finding that a circuit court abused its discretion in imposing sanctions, the appellate court should alter or reverse the circuit court’s order. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 327 S.E.2d 679, 681 (Ct. App. 1997) (citations omitted). “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) (citing *Karppi*, 327 S.C. at 542, 489 S.E.2d at 681)).

ARGUMENT

“In determining the appropriateness of sanctions, 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. *Griffin Grading & Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). South Carolina’s precedent provides specific considerations that a court should analyze when weighing these factors. Here, the trial court erred by failing to make these required considerations.

I. THE COURT OF APPEALS ERRED IN UPHOLDING DISMISSAL WHERE THE FACTS DO NOT SHOW THE REQUISITE WILLFULNESS, BAD FAITH, OR GROSS INDIFFERENCE BY IRONWORK

According to this Court's precedent, dismissal as a sanction is only appropriate where a party commits willful misconduct. In *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996), this Court reversed dismissal as a sanction where the sanctioned party did not act willfully. The *Orlando* plaintiffs failed to comply with a scheduling order's provision that their expert be made available for deposition by a certain date. *Orlando*, 320 S.C. at 510, 466 S.E.2d at 354. The lower court sanctioned the plaintiffs by ruling that they could not use their expert witness and, because the plaintiffs could not establish a standard of care without the expert witness, granted summary judgment against them. *Id.* at 510-11, 466 S.E.2d at 354. The Court of Appeals remanded for the trial judge to make findings of willful disobedience or gross indifference to the defendants' rights, and on remand, the trial judge found that the plaintiffs "were willfully disobedient to the order and grossly indifferent to the [defendants'] rights." *Id.* at 511, 466 S.E.2d at 354. Another appeal followed.

This Court found that the trial court abused its discretion. It began its analysis by referencing a prior case holding that when preclusion of a witness amounts to dismissal, there must be a showing of willful disobedience or gross indifference. *Id.* at 511, 4766 S.E.2d at 355 (citation omitted). It then set forth the following standard for dismissal as a sanction: "**A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.**" *Id.* at 11, 466 S.E.2d at 355 (emphasis added) (citations omitted). This Court noted that on remand, the trial court admitted that the failure to comply with the order was not intentional: "[T]hese lax efforts indicate willingness, *certainly not anything intentionally done*, but the lax efforts indicated willfulness to

me.’ ” *Id.* at. 511-12, 466 S.E.2d at 355 (emphasis in opinion). Finding that there was no evidence of intentional misconduct or prejudice to the defendant for failing to comply with the order, this Court reversed the lower court.

This Court’s holding in *Kershaw County Board of Education v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) is also instructive. The lower court issued an order requiring Plaintiff Kershaw County Board of Education (“Kershaw”) to notify the defendants prior to removing asbestos from schools. *Kershaw*, 302 S.C. at 394, 396 S.E.2d at 371. Despite this order, asbestos was removed from Camden High School before notifying the defendants and giving them an opportunity to inspect the building. *Id.* Counsel for Kershaw maintained that he did not willfully violate the court’s order, that he did not know that the removal had occurred, and that he did not willfully conceal any information regarding the removal of asbestos. *Id.* When a defendant moved for judgment in its favor relating to the claims at Camden High School as a sanction for Kershaw’s failure to comply with the court’s order, the court denied the motion but allowed a jury instruction regarding destruction of evidence. *Id.* at 394, 396 S.E.2d at 372.

When the defendant appealed this ruling, this Court held that the trial court acted properly. Specifically, this Court held that dismissing Kershaw’s claim “would have been too severe under the facts of this case.” *Id.* at 395, 396 S.E.2d at 372. This Court specifically noted that dismissing the claim would have been improper considering Kershaw’s lack of willfulness: “We believe this is particularly true in light of the fact that there was **no evidence of any intentional misconduct on the part of Kershaw or its counsel.**” *Id.* (emphasis added).

Although this Court has never modified its willfulness standard, the Court of Appeals articulates a slightly different standard, stating that dismissal is a proper sanction when a party acts

with “bad faith, willfulness, or gross indifference to the rights of other litigants.” *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (citations omitted). In practice, however, the Court of Appeals requires evidence of willfulness before upholding dismissal as a sanction. *See e.g., Innovative Waste management, Inc. v. Crest Energy Partners GP, LLC*, Appellate Case No. 2019-001719, 2023 WL 2671712, at *5 (Ct. App. Mar. 29, 2023) (unpublished) (finding “harsh sanction of dismissing Appellants’ pleadings was not unreasonable” where record supported findings of “deliberate pattern of discovery abuse” and “willful” non-compliance with orders”); *Rickerson v. Karl*, 412 S.C. 215, 222, 770 S.E.2d 767, 771 (Ct. App. 2015) (reversing dismissal as sanction and noting “a sanction amounting to a judgment of default or dismissal has been deemed ‘too severe’ without a showing of intentional misconduct or willful disobedience.” (quoting *Kershaw*, 302 S.C. at 395, 396 S.E.2d at 372)); *McNair v. Fairfield County*, 379 S.C. 462, 466-67, 665 S.E.2d 830, 832-33 (Ct. App. 2008) (finding that dismissal was appropriate sanction where trial court found defendant was willfully disobedient in failing to comply with order over seven months after issuance and after several warnings); *Green v. Hoover*, No. 2007-UP-116, 2007 WL 8326696, at *4 (Ct. App. Mar. 7, 2007) (unpublished) (upholding dismissal because, unlike appellants in *Orlando v. Boyd*, plaintiff repeatedly and willfully violated multiple court orders whereas *Orlando* “appellants’ efforts to comply with the scheduling order did not constitute willful disobedience of the order.” (citing *Orlando*, 320 S.C. at 510-12, 466 S.E.2d at 354-55)); *QZO, Inc. v. Moyer*, 358 S.C. 246, 256-57, 594 S.E.2d 541, 547 (Ct. App. 2004) (citing standard and finding striking defendant’s answer and entering default judgment appropriate where defendant intentionally defied court’s order and willfully destroyed evidence); *Griffin Grading & Clearing, Inc. v. Tire Service Equipment Mfg.*

Co., Inc., 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App. 1999) (noting “[i]f there was ever a case where striking a party’s pleading was an appropriate sanction, it is this case” where defendant willfully disobeyed four prior orders, court had first issued lesser sanction of attorney’s fees, and defendant’s continued withholding of relevant evidence showed pattern of bad faith and willful, intentional disobedience).

Here, CEC did not claim that Ironwork acted willfully; the circuit court made no finding that Ironwork acted willfully; and the Court of Appeals affirmed the dismissal of Ironwork’s Complaint against CEC without any consideration of whether Ironwork acted willfully. The facts establish that, like the parties in *Orlando* and *Kershaw*, Ironwork did not act willfully in failing to comply with the October 1, 2019 order and, as in those cases, dismissal was improper. Also like counsel in *Kershaw*, Mr. Rosemond informed the circuit court that he did not intentionally fail to comply with the October 1 order and “believed he had complied with the said Order.” (R. p. 174.) He only discovered after the filing of the Notice of Noncompliance that his staff had inadvertently sent the wrong responses, and he supplemented the responses so that “CEC has everything that the Plaintiff has in its possession.” (R. p. 174-77.)

Even if a finding of willfulness were not required by precedent, the circuit court lacked sufficient factual basis to dismiss for bad faith and gross indifference and offered no analysis as to how the facts warranted dismissal, instead merely stating that CEC “asserted in its Motion that Plaintiff has exercised bad faith and a gross indifference.” (R. p. 1.) Ironwork was given no opportunity to respond to this assertion before dismissal. Effectively, CEC’s counsel judged Ironwork’s actions, and CEC’s counsel’s verdict was accepted by the court. There is no South Carolina precedent upholding dismissal for unintentional failure to abide by one court order or any

precedent supporting dismissal without some opportunity for the party opposing dismissal to appear and contest.

Instead of analyzing whether the trial court erred in failing to determine that Ironwork had the requisite willfulness, bad faith, or gross indifference, the Court of Appeals focused on an apparent agreement by Mr. Rosemond that failure to comply with the October 1 order would result in dismissal. This is not the proper standard. Even if Mr. Rosemond agreed to dismissal with prejudice as a sanction, the trial court should have considered his willfulness—or lack thereof—in failing to abide by this agreement. At a minimum, this would require giving Ironwork an opportunity to explain its actions before dismissal. The Court of Appeals’s failure to reverse and remand was error.

II. THE COURT OF APPEALS ERRED IN UPHOLDING DISMISSAL WHERE THE CIRCUIT COURT FAILED TO CONSIDER THE ACTIONS OF IRONWORK APART FROM MR. ROSEMOND

In addition, the Court of Appeals should have reversed the lower court for failing to consider the willfulness of Ironwork apart from Mr. Rosemond. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 327 S.E.2d 679, 681 (Ct. App. 1997). In *Karppi*, the plaintiff filed a motion to compel Defendant Ogden Teck, Inc. (“Ogden Teck”) to adequately respond to discovery requests and allow one of its officers to be deposed. *Id.* at 540-41, 489 S.E.2d at 680-81. Following a hearing, Ogden Teck consented to a June 29 order compelling discovery. *Id.* at 541, 489 S.E.2d at 681. At a July 11 status conference, the court ordered Ogden Teck to comply with the June 29 order by July 31 and set the case for trial during the week of August 12. *Id.* Ogden Teck again failed to comply with the order, and on August 9, the plaintiff filed a second motion to compel. *Id.* The court found that Ogden Teck “willfully and intentionally failed to comply with the discovery

order” and, therefore, struck its answer, counterclaim, and cross-claim and ordered that default be entered against it. *Id.* at 542, 489 S.E.2d at 681.

The Court of Appeals reversed, finding the order unduly harsh and not reasonably necessary. *Id.* at 543, 489 S.E.2d at 682. The Court of Appeals noted that the purpose for sanctions is to penalize the wrongdoer and deter others from engaging in similar conduct. *Id.* at 545, 489 S.E.2d at 683 (citations omitted). Accordingly, sanctions should be aimed at the specific misconduct of the sanctioned party and not go beyond what is reasonably necessary to redress the wrong committed.” *Id.* at 543, 489 S.E.2d at 682 (citations omitted). In finding that the sanctions imposed by the court exceeded these bounds, the Court of Appeals noted that **“the attorney for Ogden Teck was at least as much to blame as the party itself. . . . To penalize Ogden Teck 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.”** *Id.* at 545 n.6, 489 S.E.2d at 683 n.6 (emphasis added); *see also Griffin Grading & Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (upholding sanction where party’s noncompliance continued *after* party changed counsel and “there [was] no evidence in the record to support [defendant’s] assertion that it was unaware of the acts of its counsel.”)

The Court of Appeals failed to consider that, as in *Karppi*, penalizing Ironwork for the actions of Mr. Rosemond in this case “is clearly unjust, and would not properly serve the purposes for sanctions.” *Karppi*, 327 S.C. at 545 n.6, 489 S.E.2d at 683 n.6. If the “purposes for sanctions” are to penalize the wrongdoer and deter others while taking aim at “the specific misconduct of the party sanctioned,” then the Court of Appeals would have found that dismissal of Ironwork’s case was improper. *Karppi*, 327 S.C. 543, 545, 489 S.E.2d at 682-83.

First, Ironwork is punished for actions it did not know about. It was not the wrongdoer and knew nothing about the events leading to dismissal. (R. p. 169-70.) In fact, immediately upon learning of the dismissal, Ironwork acted quickly and reasonably by retaining new counsel.

Second, there is no deterrent value for punishing Ironwork for the actions of its attorney—who has now been suspended from the practice of law in this state. According to the precedent set from Ironwork’s experience, even attempting to repeatedly contact one’s attorney, being ignored, and then immediately seeking new counsel once a party learns it has been prejudiced by its counsel are not enough to prevent dismissal of one’s case where an attorney has gone silent. South Carolina precedent teaches that intermediate sanctions short of dismissal are appropriate in these circumstances.

Third, Ironwork offered to correct “the specific misconduct” leading to the sanction. *Karppi*, 327 S.C. 543, 489 S.E.2d at 682. Once Ironwork retained different counsel—and learned of the discovery issues and sanction—it offered not only to pay CEC’s attorney’s fees and costs but also to provide the requested discovery responses. Had the Court of Appeals considered that the lower court failed to assess Ironwork’s actions apart from Mr. Rosemond’s, it would have found that dismissal was improper because it did not further the proper purposes of sanctions.

Also, in upholding the lower court’s failure to consider Ironwork’s actions separately from Mr. Rosemond’s, the Court of Appeals ignored Mr. Rosemond’s abandonment of Ironwork, neglecting to even address abandonment in its Opinion. In *Graham v. Town of Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598-99 (1978), the attorney for the Town of Loris (“Town”) resigned without providing the Town notice, refused to communicate with the Town, and left the Town unaware of an imminent hearing regarding a motion for summary judgment. *Id.* at 452-53, 248 S.E.2d 594, at

599. Summary judgment was entered against the Town. *Id.* at 446, 248 S.E.2d at 596. The Town nevertheless acted diligently in retaining other counsel, who moved to have the summary judgment set aside for excusable neglect. *Id.* The court granted the Town’s motion, and an appeal followed. *Id.* at 447, 248 S.E.2d at 597.

This Court found that the attorney abandoned the Town and that the Town should not be punished for the attorney’s actions. This Court noted that the Town acted diligently upon learning of its counsel’s resignation and stated, “Conscience requires this Court to charge the attorney alone with his gross dereliction of duty and not to visit its consequences upon an innocent client.” *Id.* at 452-53, 248 S.E.2d at 599. Accordingly, it upheld the lower court’s decision to set aside the entry of summary judgment against the Town. *Id.* at 452-54, 248 S.E.2d at 599-600.

Here, Mr. Rosemond’s actions were akin to those of the Town’s attorney: he failed to appear at hearings on Ironwork’s behalf, willfully ignored Ironwork’s attempts to communicate, and failed to notify Ironwork of the discovery dispute or the potential dismissal of Ironwork’s case. Nevertheless, like the Town, Ironwork worked diligently to cure the failures of its counsel. It promptly retained new counsel, filed a motion to set aside the dismissal, and offered to provide the requested discovery materials and pay CEC’s attorney’s fees and costs. Had the Court of Appeals considered Mr. Rosemond’s abandonment of Ironwork, it would not have condoned dismissing Ironwork’s case for Mr. Rosemond’s actions.

III. THE COURT OF APPEALS ERRED IN UPHOLDING DISMISSAL BECAUSE, AS A SANCTION, IT WAS NEITHER WELL AIMED NOR REASONABLY NECESSARY TO REDRESS THE MISCONDUCT

South Carolina law requires a sanction to be well aimed and reasonably necessary, yet neither requirement was met here. *Balloon Plantation, Inc. v. Head Balloons, Inc.* 303 S.C. 152,

399 S.E.2d 439 (Ct. App. 1990), provides guidelines for imposing appropriate sanctions. There, the defendant failed to comply with an order compelling discovery by serving its compelled responses after the ordered deadline. *Balloon Plantation, Inc.*, at 303 S.C. 153, 399 S.E.2d at 440. As a sanction, the trial court held the defendant in default and struck its counterclaim. *Id.* at 154, 399 S.E.2d at 440. On appeal, the Court of Appeals held that a sanction “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.” *Id.* (citation omitted). Likewise, the Court instructed that a sanction “should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast.” *Id.* The Court of Appeals reversed the lower court, finding that the sanction was “unduly harsh under the circumstances.” *Id.*

The Court of Appeals repeated and applied these requirements in *Karppi v. Greenville Terrazzo Co., Inc.*, holding that striking the defendant’s pleadings and holding it in default was “unduly harsh,” not “reasonably necessary,” and “not commensurate with Ogden Teck’s disobedience [where] any number of lesser, more narrowly tailored sanctions would have sufficed to protect [the plaintiff’s] rights while adequately punishing the wrongdoing of Ogden Teck.” *Karppi*, 327 S.C. at 543-45, 489 S.E.2d 679, at 682-83.

Judge Anderson, in his concurring opinion in *Karppi*, further explained that the trial court abused its discretion by “imposing the ‘ultimate sanction’ of striking [Ogden Teck’s] answer and holding it in default.” *Id.* at 549, 489 S.E.2d at 685 (Anderson, J., concurring). Judge Anderson noted, “Denying a party the opportunity to be heard should be carefully invoked and reserved for the most egregious cases.” *Id.* Although Ogden Teck had willfully violated the order, dismissal was “a ‘Scud missile’ when a ‘rifle shot’ would have been efficacious.” *Id.* at 548, 489 S.E.2d at

685. Judge Anderson opined that one of the alternatives listed in Rule 37, such as assessing costs for delay or holding Ogden Teck in contempt would have been more appropriate and had been used in situations involving similar misconduct. *Id.* at 548-49, 489 S.E.2d at 685. In sum, Ogden Teck’s actions simply did not rise to the level of “the most egregious cases.” *Id.* at 549, 489 S.E.2d at 685.

Here, the circuit court failed to make any analysis showing why dismissal of the Complaint as to CEC with prejudice was well aimed or reasonably necessary, and the Court of Appeals failed to consider these requirements as to CEC in its Opinion. Again, the Court of Appeals refers to Mr. Rosemond’s consent to the language of the October 1 order rather than engaging in any analysis. But the language in the October 1 order did not provide for dismissal with prejudice, as Mr. Rosemond pointed out with surprise: “The [October 1] Order did not say anything regarding dismissal *with prejudice*.” (R. pp. 172-73 (emphasis in original).) Nor did Mr. Rosemond have 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 (“[T]he Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.”); *see also Channel Group, LLC v. Abbott*, No. 2012–MO–004, 2012 WL 10906589, at *1 (Mar. 21, 2012) (unpublished) (“This Court views the dismissal of a case with prejudice as an especially harsh sanction.” (citations omitted).)

Finally, neither the circuit court nor the Court of Appeals considered the prejudice to Ironwork by dismissing the case against CEC with prejudice. At the time of dismissal, Ironwork still had approximately one year remaining of the statute of limitations period to reassert its claims

against CEC. (R. pp. 174-75.) Preventing Ironwork from reasserting its claims with different counsel was an abuse of discretion that the Court of Appeals overlooked.

Accordingly, because the sanction was neither well aimed nor reasonably necessary, the Court of Appeals erred in finding that the lower court did not abuse its discretion in dismissing Ironwork's case against CEC with prejudice.

CONCLUSION

For the reasons stated herein, Petitioner Ironwork Productions, LLC respectfully requests that this Court grant its Petition for Writ of Certiorari and overturn Point Two of Opinion No. 2023-UP-246.

Respectfully submitted,

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