

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Oct 06 2023

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Court of Appeals Opinion No. 2023-UP-246
(Filed June 21, 2023; Rehearing denied August 17, 2023)
Appeal No. 2023-001367

Ironwork Productions, LLC, Appellants,

v.

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

Of Whom,

Bobcat of Greenville, LLC is the Petitioner,
and

Ironwork Productions, LLC, is the Respondent.

**BOBCAT OF GREENVILLE, LLC'S
OPPOSITION TO IRONWORK PRODUCTIONS, LLC'S
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS PROPERLY AFFIRM THE DISMISSAL OF IRONWORK'S COMPLAINT AS A DISCOVERY SANCTION, WHERE THERE IS SUFFICIENT EVIDENCE OF BAD FAITH, WILLFUL DISOBEDIENCE AND/OR GROSS INDIFFERENCE TO THE RIGHTS OF DEFENDANTS BELOW TO JUSTIFY DISMISSAL?
- II. DID THE COURT OF APPEALS AND CIRCUIT COURT PROPERLY ATTRIBUTE THE ACTIONS AND INACTIONS OF IRONWORK'S COUNSEL TO IRONWORK?

Pursuant to Rule 242, SCACR, Bobcat of Greenville, LLC ("Bobcat of Greenville"), hereby opposes Ironwork Production, LLC's ("Ironwork") Petition for Writ of Certiorari regarding Point Two of the Court of Appeals' Opinion in the above-captioned case, Opinion No. 2023-UP-246 (Ct. App. filed June 21, 2023). Ironwork's Petition does not present any special or important reason for this Court's review. Ironwork does not assert any novel issue of law, or a substantial constitutional issue. There was no dissent to Point Two of the Court of Appeals' Opinion, which is not in conflict with any prior decision of this Court. Rule 242(b), SCACR. In other words, Ironwork disputes the outcome reached by the Court of Appeals in Point 2 of its Opinion, but has not made out a case for this Court's review. Consequently, its Petition should be denied.

STATEMENT OF THE CASE

Bobcat of Greenville adopts and incorporates by reference its statement of the Case in its Petition for Writ of Certiorari, filed August 29, 2023. (Appx. pp. 55-60).

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." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997).

ARGUMENTS

Ironwork repeats the two arguments it made to the Court of Appeals in support of its position that the circuit court should not have dismissed its Complaint: 1) there is insufficient evidence of bad faith, willful disobedience or gross indifference to the rights of the Defendants below; and, 2) Ironwork should not be sanctioned for the actions or inactions of its initial counsel, who Ironwork asserts abandoned it. Neither argument is supported by the evidence and neither demonstrates any abuse of discretion on the part of the circuit court.

I. The Court of Appeals properly affirmed the dismissal of Ironwork’s Complaint as a discovery sanction, as there is sufficient evidence of bad faith, willful disobedience and/or gross indifference to the rights of Defendants below to justify dismissal.

Ironwork bears the burden of demonstrating that the circuit court abused its discretion in dismissing its Complaint. *See Kershaw County*, 302 S.C. at 395, 396 S.E.2d at 372 (the burden is on the appellant “to show that the trial court abused its discretion”); *Davis*, 409 S.C. at 282, 762 S.E.2d at 543 (appellant must show “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”). This it has not and cannot do,¹ and the Court of Appeals properly affirmed the dismissal.

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), SCRPC. 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), SCRPC (emphasis added). Ironwork attempts to overcome its burden of proof by comparing the facts of this case to the facts of other cases, suggesting that the dismissal was excessive. In fact, the circuit court properly dismissed Ironwork’s Complaint as to both Defendants based on Ironwork’s bad faith

¹ Bobcat of Greenville incorporates by reference the arguments made in Section I of its Brief to the Court of Appeals. (Appx. pp. 64-72).

discovery practices, willful disobedience of the October 1 Order, and/or gross indifference to the rights of the other parties to this case.

Ironwork relies on *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996) for its argument that dismissal was too harsh of a sanction. However, *Orlando* is both substantively and procedurally distinguishable in that, there, the trial judge imposed a sanction on the plaintiffs that amounted to dismissing their medical malpractice claim, based solely on a single failure to follow a scheduling order. 320 S.C. at 511, 466 S.E.2d at 355. Here, in contrast, there were repeated failures by Ironwork to timely and completely respond to discovery and to attend hearings of which it had proper and adequate notice. Moreover, in *Orlando*, the trial judge made contradictory statements, finding, on one hand, that the acts were not intentional but, on the other, holding that they were nonetheless willful. 320 S.C. at 511-512, 466 S.E.2d at 355. There are no such contradictory findings here.²

Kershaw County, on which Ironwork also relies, is similarly distinguishable in that, there, the circuit court found that neither the plaintiff *nor* its attorney was guilty of intentional misconduct. 302 S.C. at 395, 396 S.E.2d at 372. Here, on the other hand, Ironwork's attorney committed repeated and willful violations of the discovery rules, the October 1 Order, and failed to attend or provide a plausible explanation for his failure to attend two hearings below. What this case does bear in common with *Kershaw County* is that, in both cases, the appealing party failed to show the trial court abused its discretion.

² Ironwork's reliance on Mr. Rosemond's assertion in his late-filed (and therefore ineffective) Rule 59(e) motion, that he "believed" he had complied with prior orders and/or that it had provided everything it had in its possession is misplaced. Clearly, the circuit court, after conducting two hearings that Mr. Rosemond failed to attend despite proper notice, did not assign much credence to these statements and certainly made no finding that Ironwork's conduct was not intentional.

302 S.C. at 395, 396 S.E.2d at 372. It is notable that, although the earlier discovery order in *Kershaw County* did not mention sanctions, let alone dismissal or dismissal with prejudice, “as a discovery order, it [was] subject to those measures contained in SCRCP Rule 37,” which include “striking out pleadings or parts thereof, ... or dismissing the action or proceeding or any part thereof ...” 302 S.C. at 395, 396 S.E.2d at 372. Thus, Ironwork’s protestations that dismissal was unwarranted because the October 1 Order did not say its Complaint would be dismissed “with prejudice” are unpersuasive.

Ironwork appears to be fixated on the word “willful” or “willfulness,” asserting that CEC did not claim it acted willfully and that the circuit court did not make a specific finding of “willfulness.” However, in the October 1, 2019 Order, with which Ironwork’s counsel agreed, (R. p. 663), the Court noted CEC had alleged in its Motion for Sanctions and to Compel Discovery Responses that Ironwork “demonstrated both bad faith and a gross indifference” in responding to discovery. (R. p. 1; *see also* R. p. 57). The October 25, 2019 Order also notes that the background of the discovery issues leading to the October 1 Order was set forth in CEC’s Motion for Sanctions. (R. p. 4). That Motion for Sanctions sets forth Ironwork’s willful abuse of the discovery process. (R. pp. 52-164).

Ironwork complains that it had no opportunity to respond to the Notice of Noncompliance before its Complaint was dismissed, suggesting CDC acted as “judge[]” and rendered a “verdict” that the circuit court simply accepted. However, CEC filed its Notice of Noncompliance on October 18, 2019, copying Ironwork’s counsel, (R. p. 657), who raised no objection whatsoever in the seven days between the Notice of Noncompliance and the October 25 Order. Ironwork had an opportunity to respond or object during those seven days, but failed to do so.

In addition, Judge Miller expressed frustration at the November 16, 2021 hearing with Ironwork’s dilatory discovery practices. (R. pp. 649-652, 654). Clearly, even though the written Orders do not contain specific, formulaic language, they acknowledge and are supported by the record of noncompliance, non-responsiveness, failure to attend hearings, amounting to bad faith, willful disobedience and/or gross indifference to the Defendants’ discovery rights in this case.

The cases cited on pages 11-13 of Ironwork’s Petition do not support a different outcome.³ Unlike the instant case, in *Rickerson v. Karl*, a medical malpractice lawsuit, the plaintiff’s notice of intent to file was dismissed for failure to comply with the 120-day deadline in which to hold a mediation conference. 412 S.C. 215, 770 S.E.2d 767 (Ct. App. 2015). Here, in contrast, Ironwork’s Complaint was not dismissed for failing to meet a single deadline but for its repeated failures—despite ongoing promises—to comply with discovery requests, to comply with the October 1 Order, and to attend

³ Ironwork improperly relies on three unpublished opinions, *see* Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved”), none of which advance its case in any event. In *Innovative Waste Mgmt. v. Crest Energy Ptrns. GP*, 2023 S.C. App. Unpub. LEXIS 153, 2023 WL 2671712 (Ct. App. March 29, 2023), the record fully supported the dismissal, which is the case here as well. In *Green v. Hoover*, 2007 S.C. App. Unpub. LEXIS 139, 2007 WL 8326696 (Ct. App. 2007), the Court of Appeals upheld the dismissal of a medical malpractice action on the basis that, although the plaintiff had identified an expert and provided the expert’s affidavit in response to summary judgment, the plaintiff failed to also move to expand the scheduling order. That result was found to not be “unduly harsh.” 2007 S.C. App. Unpub. LEXIS 139 *9. If anything, *Green* supports the sanction imposed here. Finally, in *Channel Group, LLC v. Abbott*, 2012 S.C. Unpub. LEXIS 15, 2012 WL 10906589 (S.C. March 21, 2012), the complaint was dismissed for failure to prosecute, which this Court found to be too harsh, give that the record on appeal (which was comprised of the complaint, the motion for summary judgment and an order of dismissal) did not reveal such failure. Here, in contrast, the Record is replete with Ironwork’s bad faith and willful failure to comply with discovery rules and deadlines, and its callous disregard of the rights of the other litigants.

properly noticed hearings. This is more than sufficient evidence of bad faith, wilfulness, and/or gross indifference to the rights of not only the court but also the other litigants. *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682.

More analogous to the instant case, the defendant in *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008), was warned that its Answer would be stricken if it failed to comply with a prior discovery order—which result was upheld on appeal. In *McNair*, as is the case here, there were multiple failures to comply with discovery rules and an order compelling discovery. There, as should be the case here, the sanction of striking the offending party’s initial pleading and dismissing the condemnation action was upheld based on the County’s repeated failures to comply with discovery and a verbal warning that its pleading would be stricken. Ironwork’s reliance on *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004) and *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), is misplaced. The fact that the sanctioned behavior in those cases may be viewed as somewhat more egregious than the behavior sanctioned in this case does not mean that the sanction imposed here was unduly harsh.

Ironwork argues, as it did below that dismissal was not warranted because it was not in violation of *multiple* discovery orders. However, there is no authority for the position that, before a party’s pleading can be dismissed, it must have been found to have violated multiple discovery orders. 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 full range of sanctions being available for a single and inexcusable failure to comply with a discovery order.

Ironwork asserts that the circuit court failed to consider the requisite factors for imposing a severe discovery sanction. Despite Ironwork's attempts to soft-pedal and obscure its inexcusable discovery failures, delays, continual empty promises to respond, and failures to attend hearings, all of which led to the sanction, the facts here are fairly straightforward and are supported by the Record on Appeal. For the sake of brevity, Bobcat of Greenville refers the Court to Appx. pp. 55-60 and 62-68, which chronicle Ironwork's failure to participate in good faith in discovery, failure to comply with the October 1 Order, and failure to attend duly noticed hearings. This clearly is sanctionable behavior, and the sanction of dismissing Ironwork's Complaint was not unduly harsh under the circumstances.

Moreover, although Ironwork asserts that its repeated failure to respond to discovery or to attend duly noticed hearings 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—can justify a harsh sanction. Second, as noted above, Ironwork repeatedly failed to respond to discovery requests, even after being reminded they were overdue and after repeatedly—but falsely—assuring a response was forthcoming. Ironwork's counsel failed to show up for properly noticed hearings and agreed that the failure to comply with the October 1 Order would result in dismissal. This agreement, like any other concession by counsel, is binding and is not subject to appellate review. *Ex parte McMillan*, 319 S.C.

331, 335, 461 S.E.2d 43, 45 (1995) (a matter conceded by counsel “is procedurally barred” from appellate review); *see also TNS Mills, Inc. v. S.C. Dep’t of Rev.*, 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”).

The Court of Appeals properly upheld the dismissal of Ironwork’s Complaint, and Ironwork has not presented any argument or issue that warrants this Court’s review. Accordingly, its Petition should be denied.

II. The Court of Appeals and circuit court properly attributed the actions and inactions of Ironwork’s counsel to Ironwork.

Ironwork appears to argue that severe sanctions are never appropriate unless both the attorney *and* the represented party acted willfully. However, there is no rule that the party must be “at least as much to blame as” its attorney, as Ironwork suggests. In fact, in *Karppi*, the reason the Court of Appeals reversed the sanction of striking Ogden Teck’s answer, which placed it in default was the effect that sanction would have on the co-defendant, Terrazzo, who sold the floor tiles. Striking Ogden Teck’s answer in its entirety would have served both as a windfall to Terrazzo, because it struck Ogden Teck’s cross-claims against Terrazzo, and “created undue and unwarranted prejudice,” because it would strip Terrazzo of certain defenses. 327 S.C. at 544, 489 S.E.2d at 682-683. And, while the Court of Appeals noted in a footnote that “it seems from the record as though the attorney for Ogden Teck was at least as much to blame as the party itself,” and that “[t]o penalize Ogden Teck so severely for apparently relying on the advice of its attorney, under these circumstances, is clearly unjust,” 327 S.C. at 545 n.6, 489 S.E.2d at 683 n.6, that is a far cry from establishing the rule that Ironwork appears to be proposing, *i.e.*, that unless the client actively joined in the bad faith litigation tactics, it should not

suffer any severe consequences for its attorney's egregious behavior.⁴ That rule would completely abrogate the well-accepted rule that a client is bound by the actions of its counsel. *Graham v. Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978).⁵

Ironwork incorrectly suggests that, because Mr. Rosemond has been suspended from the practice of law, dismissing its Complaint will have no deterrent effect. The deterrence effect of a sanction is not limited to the case in which the discovery abuses were committed. Instead, sanctions are imposed “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. In other words, the sanction imposed in this case will have a deterrent effect beyond just this litigation, and will serve the interests of discovery beyond this case.

Next, Ironwork argues that it should not be penalized for Mr. Rosemond's failures because he “abandoned” Ironwork. The main problem with this argument is that Mr. Rosemond did not abandon Ironwork during the litigation, nor did he move to be relieved as counsel. While Ironwork 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.

⁴ Moreover, there is no evidence here that Ironwork actually took any particular position or action based on advice of Mr. Rosemond.

⁵ *Griffin* does not hold differently. There, the Court of Appeals first noted that there was no evidence the represented party “was unaware of the acts of its counsel,” but then stated, “[f]urthermore, the acts of an attorney are directly attributable to and binding on the client.” 334 S.C. at 200, 511 S.E.2d at 719 (emphasis added).

As Ironwork concedes, “[t]he general rule in [South Carolina] is that the neglect of the attorney is attributable to the client.” *Graham*, 272 S.C. at 451, 248 S.E.2d at 598. 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. Ironwork argues that Mr. Rosemond’s actions in discovery, which it described below as good faith efforts to respond and, therefore, understandable,⁶ somehow *also* constitute his unilateral abandonment of representation of Ironwork. 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. 272 S.C. at 451, 248 S.E.2d at 598 (emphasis added).

Here in contrast, Ironwork vacillates between attempting to justify Mr. Rosemond’s conduct of discovery while, at the same time, asserting he unilaterally abandoned Ironwork. However, at the hearing on its Motions to Alter or Amend and for Reconsideration, Ironwork’s current appellate counsel acknowledged that Mr. Rosemond “filed a motion to reconsider. I mean, he’s still technically counsel of record for the

⁶ See Appx. pp. 35, 38 (Mr. Rosemond “believed he had complied with the circuit court’s October 1, 2019 order”); p. 36 (Mr. Rosemond “endeavored to and believed he had provided all information in his possession”); Appx. pp. 42-43 (asserting that Ironwork, 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]”).

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 Ironwork'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 Ironwork, Mr. Rosemond remained counsel of record and continued to file pleadings on Ironwork's behalf, even as he also continued his pattern of failing to attend hearings.

In *Mitchell Supply Co. v. Gaffney*, the Court of Appeals 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 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 Ironwork.

Ironwork 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, Ironwork failed to meet that burden.

The actions and inactions of its counsel are attributable to Ironwork, and Ironwork has failed to show that Mr. Rosemond abandoned it during proceedings before the circuit court. Ironwork has raised no issue warranting this Court’s review and its Petition should be denied.

CONCLUSION

For the reasons stated herein, Petitioner Bobcat of Greenville respectfully requests that this Court deny Ironwork's Petition for Writ of Certiorari, and affirm Point Two of Opinion No. 2023-UP-246 as to both Defendants below.

Respectfully submitted,

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October 6, 2023

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