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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Ironwork Productions, LLC., ...Respondent-Petitioner,
v.
Bobcat of Greenville, LLC .....Petitioner-Respondent,
and
Ironwork Productions, LLC .....Respondent.

BOBCAT OF GREENVILLE, LLC'S REPLY TO IRONWORK PRODUCTIONS, LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

MCANGUS GOUDELOCK & COURIE
Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Robert L. Mebane, Jr.
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000
robert.mebane@mgclaw.com
Attorneys for Respondent Bobcat of Greenville, LLC

Other Counsel of Record:
Adam C. Bach, Esq.
TONNSEN BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
abach@tonnsenbach.com
Attorneys for Ironwork Productions, LLC

Jay T. Thompson
MURPHY & GRANTLAND, PA
P.O. Box 11070
Columbia, South Carolina 29201
Jay.thompson@murphygrantland.com
Attorneys for Clark Equipment Company d/b/a Bobcat Company, Inc.

Pursuant to Rule 242(g), SCACR, Bobcat of Greenville, LLC ("Bobcat of Greenville"), hereby replies to Ironwork Production, LLC's ("Ironwork") Return to the Petition for Writ of Certiorari ("Return") regarding Points One and Three of the Court of Appeals' Opinion in the above-captioned case, Opinion No. 2023-UP-246 (Ct. App. filed June 21, 2023). Bobcat of Greenville has raised important issues that need to be addressed by this Court.

ARGUMENTS

I. The Court of Appeals applied an improper standard of review in reversing the Circuit Court's dismissal as to both Defendants.

Ironwork's Return completely ignores the over-arching purpose of discovery sanctions. In addition to penalizing the offending party, discovery sanctions serve to protect the rights of discovery and to deter other parties from engaging in similar behavior. Trial judges "must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rules of law." *In re Anonymous Mbr. Of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001). It goes without saying that, "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 v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987); *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").

Like the Court of Appeals, Ironwork chooses to focus on what Bobcat of Greenville purportedly did or did not do, as opposed to Ironwork's own egregious actions and failures below. Bobcat of Greenville is not the party being sanctioned; instead, it properly and affirmatively moved to join in CEC's motion to dismiss in light of Ironwork's bad faith actions toward the trial court and the other litigants.

Contrary to Ironwork's main criticism of its Petition, Bobcat of Greenville specifically addressed the Court of Appeals' error in holding that there was not reasonable factual support for dismissing Ironwork's Complaint as to both Defendants. As noted in its Petition at pages 11-12, that evidence consists of the facts that Ironwork's counsel fully endorsed the proposed October 1, 2019 Order stating that "Plaintiff's Complaint in this lawsuit shall be dismissed," without limiting that dismissal to CEC or in any other way; and, that, when Bobcat of Greenville properly and timely joined in the motion to dismiss, Ironwork failed to raise any objection. Bobcat of Greenville should not suffer the consequence for Ironwork's failure to act and/or to protect its rights.

Much of Ironwork's opposition to Bobcat of Greenville's Petition centers on an unsuccessful attempt to compare the facts of this case to those in *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). While *Karppi* involved a dispute between a purchaser, Karppi, on one side, and the merchant who sold an allegedly defective product, Terrazzo, and the manufacturer of that product, Ogden Teck, on the other, that is where the factual similarities between that case and this one end. There, in response to Karppi's complaint, Ogden Teck filed cross-claims against the co-

defendant, Terrazzo. No cross-claims have been filed in the instant case. There, Karppi, the plaintiff, served discovery on Ogden Teck, which that defendant failed to answer properly. Here, it is the plaintiff, Ironwork who, after initiating claims against both Defendants, repeatedly failed to respond to discovery and to attend hearings. There, Terrazzo plainly did not move or join in any motion to strike Ogden Teck's initial pleadings. Here, it is undisputed that Bobcat of Greenville timely and affirmatively moved to join the dismissal. These factual differences are sufficient to distinguish this case from *Karppi*.

What is clear from *Karppi* is that the failure to comply with only one discovery order can be deemed sufficiently intentional and willful to justify the sanction of dismissing a party's initial pleading. There, given Ogden Teck's egregious actions, the Court of Appeals only reluctantly reversed the sanctions order, due to its effect on the co-defendant in the case who, as noted above, did not move to join in any dismissal. In fact, the Court of Appeals found that the sanction imposed in *Karppi* was unduly harsh specifically because of the unintended consequences it would have on the co-defendant, providing both a windfall to Terrazzo, by relieving it of the cross-claims against it, as well as undue prejudice to Terrazzo by removing a potential defense. Here, there is no unanticipated windfall to Bobcat of Greenville, which affirmatively moved to join the dismissal based on Ironwork's egregious conduct. And, contrary to Ironwork's protestations otherwise, the imposition of a severe sanction in this case protects both Defendants' rights as well as serves as a deterrence to "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; *Kershaw County*, 302 S.C. at 395, 396 S.E.2d at 372 ("[w]hatever sanction is

imposed should serve to protect the rights of discovery provided by the Rules"). Here, the sanction properly addressed Ironwork's wrongdoing, serves as an example to other litigants who might consider engaging in such conduct, and properly was extended to both Defendants who moved for dismissal.

And, while Ironwork cherry-picks select language out of the *Karppi* opinion that purportedly supports its position, the opinion as a whole supports the circuit court's decision in this case to dismiss Ironwork's Complaint with prejudice against both Defendants. For example, in *Karppi*, the Court of Appeals cited *National Hockey League v. Metropolitan Hockey Club Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778 (1976), for the proposition that discovery sanctions are intended to "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." 327 S.C. at 545, 489 S.E.2d at 683. The circuit court's sanction in this case fulfills that goal.

In addition, Ironwork's failure to respond timely and fully to discovery affected both Defendants below, regardless of which Defendant propounded the discovery and moved for sanctions. While Ironwork suggests that only the party whose discovery requests were the focus of motions and hearings, and that moves for sanctions should ever be dismissed, it notably cites no case law or authority for such a position. That is because there is none. Ironwork suggests that "the cross-claim defendant in *Karppi could* have asserted the same argument, but the Court of Appeals still found dismissal of the cross-claim erroneous." (Return p. 14) (emphasis added). What is clear is that the cross-claim defendant in *Karppi* did *not* move to join any dismissal and did *not* raise this argument to the Court of Appeals, which completely defeats Ironwork's argument.

Ironwork clearly is attempting to salvage part of its case despite its egregious behavior during discovery, failure to attend hearings, and failure to protect its interests before the trial court. This Court should not reward Ironwork by preserving its claims against Bobcat of Greenville when Ironwork itself created this situation by failing to take proper steps to respond timely and completely to discovery, agreeing to orders and then violating them, and failing to raise timely objections. Consequently, this Court should grant Bobcat of Greenville's Petition and reverse the Court of Appeals Opinion on Points One and Three.

II. Ironwork's argument that the dismissal should not extend to Bobcat of Greenville was waived and is unpreserved.

Ironwork's argument that its Complaint should not have been dismissed as to Bobcat of Greenville is both unpreserved and waived. While it is true that Ironwork argued generally that dismissal was too harsh a sanction,[1] it did not argue separately—until the November 16, 2021 hearing on its Motion to Alter or Amend—that any dismissal should be solely as to CEC.

Ironwork repeats the argument made in its Petition that it had no opportunity to respond to either the Notice of Non-Compliance, or to Bobcat of Greenville's joining in the motion to dismiss. However, Ironwork had a full week to respond to both the Notice of Non-Compliance, as well as Bobcat of Greenville's email joining the motion to dismiss, both emailed to Ironwork's counsel on October 18, 2019, (R. pp. 659-662), and the October 25, 2019 Order, but failed to take any steps to protect its interests. Having

[1] In its Opposition to Ironwork Productions, LLC's Petition for Writ of Certiorari, filed October 6, 2023 ("Opposition"), Bobcat of Greenville addresses Ironwork's arguments that any dismissal of its Complaint was unwarranted, and incorporates those arguments herein.

failed to raise a timely objection below, it is barred from arguing on appeal that its Complaint should have been dismissed only as to CEC.

Ironwork posits that its argument is preserved because Rule 60, SCRCP, allows relief "in circumstances where the grounds were unknown prior to entry of a final order." To the extent Ironwork is arguing that it was somehow "surprised" by Bobcat of Greenville joining the motion to dismiss, as noted above, Ironwork was aware of this fact a full week before its Complaint was dismissed. Finally, Bobcat of Greenville did not waive any argument by not asserting below that the dismissal properly included it. The only timely-filed Motion to Reconsider, Amend or Alter Judgment did not contend that the Complaint should be dismissed only as to CEC. (R. pp. 166-167).[2]

This Court should grant Bobcat of Greenville's Petition and hold that any argument that Ironwork's Complaint should have been dismissed only as to CEC is unpreserved and/or waived.

III. Ironwork's failure to comply with Rule 59(g), SCRCP, renders the October 25, 2019 Order final and no longer subject to review.

Ironwork suggests that Bobcat of Greenville's argument regarding Rule 59(g), SCRCP, is governed by precedent and should simply be dismissed. However, none of the precedent cited by Ironwork that holds that a failure to comply with the mandatory language in Rule 59(g) may be waived or excused by the trial judge is from this Court,[3] meaning that issue requires this Court's attention. *Jones v. State*, 382 S.C. 589, 677

[2] And, while Mr. Rosemond did object to the inclusion of Bobcat of Greenville in his late-filed Motion for Reconsideration, Ironwork has conceded that that Motion was filed too late and, consequently, ineffective. (Appx. p. 34, n. 7; p. 38).

[3] *Lee v. Lee*, 2014 S.C. App. Unpub. LEXIS 411, 2014 WL 3943772 (Ct. App. Aug. 13, 2014), is unpublished as well. *See* Rule 268(d)(2), SCACR ("[U]npublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved").

S.E.2d 20 (2009), the only Supreme Court case cited by Ironwork, contains a passing reference to Rule 59(g), but only to note with approval that the lower tribunal "dismissed the State's motion for reconsideration on the ground the State failed to comply with the ten-day service requirement of Rule 59(g) of the South Carolina Rules of Civil procedure." 382 S.C. at 594, 677 S.E.2d at 23. Far from supporting Ironwork's position, *Jones* affirms that the failure to comply with Rule 59(g) should result in a lower tribunal dismissing the motion for reconsideration.

While completely ignoring the mandatory "shall" contained in Rule 59(g), and the traditional rules of statutory interpretation, Ironwork looks solely to the comments to Rule 59(g), which do nothing to detract from the mandatory nature of the Rule. *See*, *e.g.*, *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") *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"); *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," which uses the same mandatory shall, "is an absolute deadline"). Comments to our Rules of Civil Procedure are intended to provide guidance but, clearly, the language of the Rule itself prevails.

Rule 203(b)(1) does not change that analysis. That Rule provides, in pertinent part, that "[w]hen 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." Rule 203(b)(1), SCACR (emphasis added). The use of the phrase "has been made" means that all the steps

required to perfect the motion have been made, including that it has been timely filed, served, *and* provided to the judge. Note that Rule 203(b)(1) does not state simply that the motion has been timely *filed*, but that a Rule 59 motion has been timely *made*. Rule 203(b)(1) clearly includes serving the other parties and providing a copy of it to the judge within ten days.

This Court should grant Bobcat of Greenville's Petition and rule that the October 25, 2019 Order was final and no longer subject to review based on Ironwork's failure to comply with Rule 59(g), SCRCP.

CONCLUSION

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

Respectfully submitted,

McAngus Goudelock & Courie

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s/Helen F. Hiser

Helen F. Hiser, S.C. Bar No. 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Robert L. Mebane, Jr., S.C. Bar No. 78043
55 East Camperdown way, Suite 300 (29601)
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000
robert.mebane@mgclaw.com

Attorneys for Petitioner Bobcat of Greenville, LLC