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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

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2023-001367

Ironwork Productions, LLC, Respondent-Petitioner,

v.

Bobcat of Greenville, LLC, Petitioner-Respondent,

and

Clark Equipment Company d/b/a Bobcat Company, Respondent.

RETURN OF RESPONDENT CLARK EQUIPMENT COMPANY d/b/a BOBCAT COMPANY TO PETITION FOR WRIT OF CERTIORARI BY IRONWORK PRODUCTIONS, LLC

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COUNTER-STATEMENT OF THE CASE

The Petition for Writ of Certiorari arises from the Court of Appeals' unpublished opinion 2023-UP-246, which affirmed in part and reversed in part the Circuit Court Orders dated October 1, 2019, October 25, 2019, and November 19, 2021. The Petition merely challenges the Circuit Court's exercise of discretion in issuing discovery sanctions under the unique facts of this case and the Court of Appeals' finding that the Circuit Court did not abuse its discretion. Nothing in the Petition raises any "special or important reasons" for Supreme Court review as contemplated in Rule 242, SCACR, specifically including none of the Considerations Governing Review in Rule 242(b):

(1) The Petition for Writ of Certiorari merely questions the Circuit Court's discretion in issuing discovery sanctions under the unique facts of this case, and there is no novel question of law;

(2) There was no dissent in the decision of the Court of Appeals;

(3) The decision of the Court of Appeals is not in conflict with any prior decision of the Supreme Court;

(4) No constitutional issue is involved, as the questions presented for review merely challenge the Circuit Court's exercise of its discretion in issuing discovery sanctions under the unique facts of this case; and

(5) No federal question is included, so there is no conflict with a decision of the United States Supreme Court.

The Circuit Court's October 1, 2019 Order granted the motion for sanctions filed by Respondent Clark Equipment Company d/b/a Bobcat Company[1] (hereinafter "CEC"), which was based on a long pattern of discovery abuse by Respondent-Petitioner Ironworx Productions, LLC,[2] culminating in Respondent-Petitioner's failure to appear at the hearing on the motion for sanctions. (R. pp. 1-3). Respondent-Petitioner consented to the language of the October 1, 2019 Order before

[1] Incorrectly named in Respondent-Petitioner's filings as "Bobcat Company, Inc."
[2] Incorrectly named in Respondent-Petitioner's filings as "Ironwork Productions, LLC."

it was filed, including the provision that Respondent-Petitioner's Complaint would be dismissed if Respondent-Petitioner failed to respond to discovery requests as required by the Order. (R. pp. 404-405).

After consenting, Respondent-Petitioner then 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 Respondent-Petitioner's Complaint, just as it warned it would do in the October 1, 2019 Order if Respondent-Petitioner failed to respond to the discovery requests. (R. pp. 4-6).

The November 19, 2021 Order—issued more than two years later because Respondent-Petitioner did not send either of its two motions for reconsideration to the Circuit Court Judge as required by Rule 59(g), SCRCP—denied Respondent-Petitioner'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 Respondent-Petitioner fails to respond.

The Circuit Court's Orders reflect that a pattern of discovery abuse began shortly after Respondent-Petitioner filed this civil action on August 29, 2018. Respondent-Petitioner filed its Complaint alleging breach of implied warranties, breach of express warranties, a violation of the Magnuson-Moss Act, and seeking damages resulting from the sale of a Bobcat T870 Compact Track Loader. (R. pp. 12-15, ¶¶ 4-18). On December 7, 2018, CEC filed a timely answer which denied Respondent-Petitioner'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, Respondent-Petitioner failed to respond to discovery. When Respondent-Petitioner did not respond within thirty days as required by Rule 33, SCRCP, CEC notified Respondent-Petitioner of the failure, and Respondent-Petitioner

stated that it would respond by March 8, 2019. (R. pp. 196-197). However, Respondent-Petitioner 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. Respondent-Petitioner 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, Respondent-Petitioner's counsel sent by email 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 Respondent-Petitioner'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 Respondent-Petitioner a discovery deficiency letter, providing Respondent-Petitioner 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 Respondent-Petitioner. (R. pp. 266-280). Respondent-Petitioner acknowledged receipt of both the discovery deficiency letter and the second set of discovery requests that same day, May 16, 2019. (R. pp. 281-282).

Two months later, on July 15, 2019, Respondent-Petitioner still had not responded to the discovery deficiency letter or responded to the second set of discovery requests. (R. p. 281). CEC

then emailed Respondent-Petitioner to inquire into its progress responding, and Respondent-Petitioner stated the responses were going into the mail that very day. (*Id.*). Once again, this was false. Respondent-Petitioner continued its persistence in not sending the required and promised discovery responses. On August 5, 2019, CEC emailed Respondent-Petitioner again to inquire into its progress responding to the discovery deficiency letter and the second set of discovery requests. (R. p. 284). Once again, Respondent-Petitioner did not respond to this email or produce any responses.

D. CEC files its second Motion to Compel and a Motion for Sanctions, Respondent-Petitioner fails to appear for the hearing, and the Court grants the motions.

On August 15, 2019, CEC filed both a Motion for Sanctions against Respondent-Petitioner and its second Motion to Compel Discovery Responses from Respondent-Petitioner, pursuant to Rule 37(d) and (a), SCRCP, respectively. (R. pp. 285-400). Respondent-Petitioner 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 Respondent-Petitioner's counsel by telephone to confirm that Respondent-Petitioner would be present for the hearing the following morning. Respondent-Petitioner'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 Respondent-Petitioner'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 Respondent-Petitioner. (R. p. 650). The Circuit Court requested a proposed order granting the motion for sanctions.

Respondent-Petitioner was given an opportunity to review the proposed order, and Respondent-Petitioner consented to the language before it was submitted to the court, including a

provision that Respondent-Petitioner's Complaint would be dismissed if Respondent-Petitioner failed to respond to discovery requests as required by the Order. (R. pp. 404-405). The Circuit Court then entered the order—with Respondent-Petitioner's consent—ordering Respondent-Petitioner 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 Respondent-Petitioner 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 Respondent-Petitioner. (*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. With Respondent-Petitioner's consent and after entry of an Order warning Respondent-Petitioner that failure to fully respond to discovery will result in dismissal of the case, Respondent-Petitioner 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, Respondent-Petitioner 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 Respondent-Petitioner:

1) The first document was merely a photocopy of the same deficient discovery responses originally served by Respondent-Petitioner 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 Respondent-Petitioner 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 Respondent-Petitioner 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 Respondent-Petitioner's document production; however, it was merely another copy of the deficient production that CEC previously received when Respondent-Petitioner 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 Respondent-Petitioner, CEC's second set of discovery requests to Respondent-Petitioner, or the Circuit Court's October 1, 2019 Order—the Order to which Respondent-Petitioner 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). Respondent-Petitioner again failed to file any response. On October 25, 2019—as the October 1, 2019 Order stated would occur, and with Respondent-Petitioner's consent—the court dismissed Respondent-Petitioner'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. Respondent-Petitioner 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 Respondent-Petitioner's behalf. An additional law firm made a new appearance as counsel for Respondent-Petitioner 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 Respondent-Petitioner's "previous counsel," who represented Respondent-Petitioner from the outset of the case and was still representing Respondent-Petitioner as counsel of record. (*Id.*).

The second "Motion for Reconsideration" was signed by the counsel who represented Respondent-Petitioner 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), SCRCP. No substitution or withdrawal of counsel was requested; both law firms remained as counsel of record for Respondent-Petitioner.

Almost two years later, on October 5, 2021, the new counsel who made an appearance for Respondent-Petitioner 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 Respondent-Petitioner. 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 Respondent-Petitioner 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. Respondent-Petitioner's original counsel remained counsel of record at all times while this case was pending with the Circuit Court.

Respondent-Petitioner subsequently submitted a Notice of Appeal to the Court of Appeals on December 14, 2021. (R. pp. 680-683). On June 21, 2023, the South Carolina Court of Appeals issued its unpublished Opinion No. 2023-UP-246, affirming the dismissal of Respondent-Petitioner's Complaint as to CEC but reversing the dismissal of the Complaint as to Petitioner-Respondent Bobcat of Greenville, LLC. On July 5, 2023, Respondent-Petitioner filed a petition for rehearing, and on August 17, 2023, the Court of Appeals denied the petition. The Petition for Writ of Certiorari followed.

STANDARD OF REVIEW

"Under Rule 37, SCRCP, 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), SCRCP). 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).

Respondent-Petitioner 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 SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE IT DOES NOT RAISE ANY SPECIAL OR IMPORTANT REASONS FOR SUPREME COURT REVIEW, INCLUDING NO CONSIDERATIONS GOVERNING REVIEW AS SET FORTH IN RULE 242(B), SCACR.

The Petition for Writ of Certiorari merely challenges the Circuit Court's exercise of discretion in issuing discovery sanctions and the Court of Appeals' finding that the Circuit Court did not abuse its discretion. Nothing in the Petition raises any "special or important reasons" for Supreme Court review as contemplated in Rule 242, SCACR, specifically including none of the Considerations Governing Review in Rule 242(b):

(1) The Petition for Writ of Certiorari merely questions the Circuit Court's discretion in issuing discovery sanctions under the unique facts of this case, and there is no novel question of law;

(2) There was no dissent in the decision of the Court of Appeals;

(3) The decision of the Court of Appeals is not in conflict with any prior decision of the Supreme Court;

(4) No constitutional issue is involved, as the questions presented for review merely challenge the Circuit Court's exercise of its discretion in issuing discovery sanctions; and

(5) No federal question is included, so there is no conflict with a decision of the United States Supreme Court.

The Record shows that the Circuit Court Order dismissing Respondent-Petitioner's Complaint was an exercise of discretion based on Respondent-Petitioner's noncompliance with

discovery obligations, noncompliance with the Circuit Court's October 1, 2019 Order, and failure to appear at the October 1, 2019 hearing. The Court Circuit's discretion also considered that Respondent-Petitioner consented to a proposed order stating its Complaint would be dismissed if it failed to respond to discovery requests as required by the Order and then failed to respond to those exact discovery requests as ordered by the Court. Rather than raising any special or important reason for Supreme Court review, the Petition for Writ of Certiorari merely challenges the Circuit Court's exercise of discretion in issuing discovery sanctions under the unique facts of this case.

B. RESPONDENT-PETITIONER'S DISPUTED CONTENTION THAT THE FACTS DO NOT SHOW THE REQUISITE WILLFULNESS, BAD FAITH, OR GROSS INDIFFERENCE BY RESPONDENT-PETITIONER IS MERELY A CHALLENGE TO THE CIRCUIT COURT'S EXERCISE OF DISCRETION AND IS NOT A SPECIAL OR IMPORTANT REASON FOR SUPREME COURT REVIEW.

Respondent-Petitioner's first argument in the Petition for Writ of Certiorari is merely a challenge to the Circuit Court's exercise of discretion in issuing discovery sanctions under the unique facts of this case and is not a special or important reason for Supreme Court review. The Record shows that the Circuit Court exercised its discretion in ordering discovery sanctions based on a pattern of bad faith, willfulness, and gross indifference to CEC's rights. Rule 37, SCRCP expressly grants a circuit court power to order dismissal for either the violation of a court order or for a party's failure to respond to certain discovery requests. Rule 37(b)(2)(C) & Rule 37(d), SCRCP. "Under Rule 37(b)(2)(C), SCRCP, 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. . . .

Rule 37(d), SCRCP.

Rule 37(b), SCRCP further provides that the court may enter:

> 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)(C), SCRCP.

The cases cited in the Petition for Writ of Certiorari both are distinguishable and do not create or indicate a special or important reason for Supreme Court review. For example, *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996), involved a circuit court order that barred an expert witness from testifying because the plaintiff failed to produce the expert for deposition by the date stated in a scheduling order. In the absence of expert testimony from the plaintiff to establish the standard of care, the circuit court then granted summary judgment in favor of the defendant. *Id.* at 510-11, 466 S.E.2d at 354. Unlike this case, where the record reflects Respondent-Petitioner's long pattern of discovery abuse including repeated failure to respond to discovery, failure to respond to motions to compel discovery and for sanctions, falsely representing it had responded to discovery, filing a false certificate of service, and failure to appear for a sanctions hearing, the singular discovery issue identified in *Orlando* was one failure to produce a witness for deposition by the deadline. *Id.* at 510, 466 S.E.2d at 354. The defendants filed a motion to dismiss for failure to prosecute four days after the missed deadline for the expert witness's deposition. *Id.* The Supreme Court reversed the order excluding the expert witness and granting summary judgment, finding under the facts of that case that the singular failure to present an expert witness by the stated deadline did not rise to a level of willful disobedience sufficient to merit dismissal of the plaintiff's

entire case. *Id.* at 511-12, 466 S.E.2d at 355. The Court's ruling turned on its observations that the only shortcoming was missing one deadline, which the circuit court believed was unintentional. *Id.* at 511-12, 466 S.E.2d at 355. The *Orlando* facts stand in striking contrast to the extensive pattern of bad faith, willfulness, and gross indifference to CEC's rights in this case. Therefore, *Orlando* is distinguishable from the facts of this case, does not present any reason to question the Circuit Court's exercise of its discretion, and does not indicate a special or important reason for Supreme Court review.

Similarly, *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990), does not create or indicate a special or important reason for Supreme Court review. *Kershaw* was an evidence spoliation case where the plaintiff sought restitution and damages based on asbestos-containing products the defendant installed in school buildings. In violation of a court order requiring evidence preservation, the plaintiff removed the asbestos from one of the schools before the defendant could inspect it. *Id.* at 394, 396 S.E.2d at 371. The defendant sought dismissal of the case as a sanction for spoliation of evidence, but the court declined to dismiss it because the only error was the plaintiff's singular failure to preserve evidence in one building. *Id.* at 394, 396 S.E.2d at 371-72. Again, unlike this case where the record reflects Respondent-Petitioner's long pattern of discovery abuse, the only pertinent allegation in *Kershaw* was spoliation of evidence by removing asbestos before it could be inspected. There was no long and systemic pattern of failure to respond to discovery, failure to respond to motions to compel discovery and for sanctions, and false representations to the opposing party and the court. Therefore, *Kershaw* is also distinguishable from the facts of this case, does not present any reason to question the Circuit Court's exercise of its discretion, and does not indicate a special or important reason for Supreme Court review.

For similar reasons, the other cases string-cited in the Petition for Writ of Certiorari also do not present any reason to question the Circuit Court's exercise of its discretion and do not indicate a special or important reason for Supreme Court review.

Unlike those cases, this is merely a case challenging the Circuit Court's exercise of discretion in issuing discovery sanctions. While the Circuit Court's order may not have used the word "willful," the Court of Appeals affirmed the Circuit Court's exercise of discretion because the Record shows that Respondent-Petitioner'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. As reflected in the Record and set forth above, the Circuit Court's Order was issued after consideration of Respondent-Petitioner's bad faith, willfulness, and gross indifference in all of the following particulars:

1. Repeatedly failing to respond to written discovery properly and completely failing to respond at all despite repeated notices;
2. Repeatedly stringing CEC along by affirming that Respondent-Petitioner would comply with discovery obligations but then repeatedly failing to do so;
3. Ignoring CEC's motion for sanctions and failing to file any response;
4. Failing to appear at the hearing on CEC's motions;
5. Failing to comply with the Court's October 1, 2019 Order;
6. Failing to respond to the Notice of Non-Compliance; and
7. Filing 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.

This sequence of events and actions demonstrates Respondent-Petitioner'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. Respondent-Petitioner's counsel assured—in writing—on multiple occasions that Respondent-Petitioner 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, Respondent-Petitioner 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, Respondent-Petitioner'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.

Ultimately, Respondent-Petitioner 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. Taken together, these facts from the Record are all examples of the considerations underlying the Circuit Court's Order and exercise of discretion under the unique facts of this case. However, nothing about Respondent-Petitioner's Petition for Writ of Certiorari raises any special or important reason for Supreme Court review under Rule 242.

C. RESPONDENT-PETITIONER'S DISPUTED CONTENTION THAT THE CIRCUIT COURT FAILED TO CONSIDER THE ACTIONS OF IRONWORK APART FROM MR. ROSEMOND IS MERELY A CHALLENGE TO THE CIRCUIT COURT'S EXERCISE OF DISCRETION AND IS NOT A SPECIAL OR IMPORTANT REASON FOR SUPREME COURT REVIEW.

Respondent-Petitioner's second argument in the Petition for Writ of Certiorari also is merely a challenge to the Circuit Court's exercise of discretion in issuing discovery sanctions and is not a special or important reason for Supreme Court review. 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 explained:

> 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)). *See also, e.g., Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 200, 511 S.E.2d 716, 719 (Ct. App. 1999) ("[T]he acts of an attorney are directly attributable to and binding on the client.") (citing *Greenville Income Partners v. Holman*, 308 S.C. 105, 417 S.E.2d 107 (Ct. App. 1992)).

Respondent-Petitioner's citation to *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 327 S.E.2d 679, 681 (Ct. App. 1997), both is misplaced and does not raise any special or important reason for Supreme Court review under Rule 242. In *Karppi*, the Court of Appeals "reluctantly" found an abuse of discretion in the lower court's decision to strike not only the defendant's answer as a discovery sanction, but also its crossclaim against a codefendant that was not involved in the discovery dispute. *Id.* at 543, 489 S.E.2d at 682. The defendant, Ogden Teck, refused to bring a Pennsylvania corporate officer to South Carolina for a deposition noticed by the plaintiff, even after being ordered to do so. The co-defendant, Terrazzo, was not involved in the dispute over the deposition. Importantly, the crux of the *Karppi* ruling was <u>not</u> that the sanction against the defendant was improper as it pertained to the aggrieved plaintiff. Rather, the Court of Appeals held that the sanction was "unduly harsh under the circumstances" and "was not limited in scope with regard to the violation" because it struck Ogden Teck's crossclaim against Terrazzo in addition to striking Ogden Teck's answer to the plaintiff's complaint. *Id.* at 543, 489 S.E.2d at 682. The abuse of discretion was that an uninvolved party (Terrazzo) was able to benefit from the sanction against Ogden Teck. The Court of Appeals explained:

> Where, as here, multiple parties are involved, the trial court must closely scrutinize the dynamics of the litigation and be extremely cautious before striking the pleadings of a transgressing party because of the effects such action is likely to have on the other parties. Although the trial court made the requisite finding that Ogden Teck "intentionally and willfully violated the Orders of this Court," *the court failed to properly tailor its sanction to address the specific violation committed by Ogden Teck vis-a-vis Karppi.*

Id. (emphasis added).

> Terrazzo's discovery rights are simply not the discovery rights that the trial court was properly protecting by imposing the sanction in this case, and it was an abuse of the court's discretion to attempt to do so in this instance.
>
> In essence, Terrazzo received a windfall due to the overbreadth of the trial court's sanction, because Terrazzo was wholly removed from the instant discovery dispute.

Id. at 544, 489 S.E.2d at 682.

In addition to showing that *Karppi* does not reflect any special or important reason for Supreme Court review in this case under Rule 242, these explanations demonstrate why *Karppi* does not support Respondent-Petitioner's arguments on the merits of the case. Subsequent rulings of this Court have also distinguished *Karppi* on exactly this basis. *See, e.g., QZO, Inc. v. Moyer*, 358 S.C. 246, 258, 594 S.E.2d 541, 548 (Ct. App. 2004) (". . . *Karppi* is factually distinguishable from the present case. In *Karppi*, this Court held that the trial court's sanction of striking the answer of a defendant was unduly harsh under the circumstances, especially because of the profound effect it had on the co-defendant to the litigation. Here, the only party punished is the Appellant, the party who clearly and willfully committed the misconduct.").

Respondent-Petitioner's claim that the sanctionable conduct was conducted only by its attorney (in Respondent-Petitioner's name) also does not present any special or important reason for Supreme Court review. To the contrary, the neglect of the attorney is attributable to the client, and the Order of dismissal was a proper exercise of the court's discretion under *Graham v. Town*

of Loris. Respondent-Petitioner's contention that it should not bear the consequences of the discovery abuse perpetrated in Respondent-Petitioner's name because it was allegedly "abandoned" by its attorney is not supported by the Record, and Respondent-Petitioner's disagreement with the Circuit Court's exercise of discretion on this point is not a reason for Supreme Court review under Rule 242.

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 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

[3] Section 15-27-130 was the predecessor to Rule 60(b), SCRCP.

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, Respondent-Petitioner's original counsel in this case did not abandon Respondent-Petitioner and did not withdraw from his representation at any time. To the contrary, the original counsel remained involved in the case at all times. The day before the hearing on CEC's motion for sanctions, (September 30, 2019), CEC's counsel spoke to Respondent-Petitioner's counsel by telephone to confirm that Respondent-Petitioner would be present for the hearing the following morning. (R. pp. 650-651). Respondent-Petitioner's counsel expressly stated that he would be present for the hearing the following day. (*Id.*). Rather than withdrawing, Respondent-Petitioner'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, Respondent-Petitioner'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, Respondent-Petitioner’s original counsel continued appearing on Respondent-Petitioner’s behalf when he filed a motion for reconsideration on November 5, 2019. (R. pp. 612-618). Still further, Respondent-Petitioner’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. Respondent-Petitioner’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). Respondent-Petitioner’s original counsel continued to be listed as counsel of record at all times while this case was pending with the Circuit Court.

Therefore, Respondent-Petitioner’s claim that its original counsel “abandoned” Respondent-Petitioner and that this alleged abandonment rendered the Circuit Court’s sanctions order overly harsh is incorrect. Respondent-Petitioner’s original counsel remained involved in the case at all times. Any failures of Respondent-Petitioner’s chosen counsel are attributed to Respondent-Petitioner, and there is no special or important reason for Supreme Court review in this case.

D. RESPONDENT-PETITIONER’S DISPUTED CONTENTION THAT DISMISSAL, AS A SANCTION, WAS NEITHER WELL AIMED NOR REASONABLY NECESSARY TO REDRESS THE MISCONDUCT IS MERELY A CHALLENGE TO THE CIRCUIT COURT’S EXERCISE OF DISCRETION AND IS NOT A SPECIAL OR IMPORTANT REASON FOR SUPREME COURT REVIEW.

Respondent-Petitioner’s third argument in the Petition for Writ of Certiorari also is merely a challenge to the Circuit Court’s exercise of discretion in issuing discovery sanctions and is not a special or important reason for Supreme Court review. The crux of Respondent-Petitioner’s argument is that the extent of the discretionary sanction was excessive under the unique facts of

this case. However, there is no standard against which this can be measured (hence discretion), and it does not present any reason for Supreme Court review under Rule 242.

Respondent-Petitioner relies on *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990), for the argument that South Carolina law requires a sanction to be well aimed and reasonably necessary. However, *Balloon Plantation* is distinguishable from this case and does not provide any special or important reason for Supreme Court review. In *Balloon Plantation*, the Court of Appeals found an abuse of discretion when the Circuit Court held the defendant in default and struck its counterclaim for nothing more than relying upon Express Mail of the U.S. Postal Service to deliver discovery responses by a court-ordered 12:00 noon deadline, but the mail arrived a few hours late. This occurred in 1988, before the ability to transmit documents by email or similar means, and the defendant was conscientious to send the documents by Express Mail with the expectation that they were timely. Unlike this case, the Court of Appeals recognized that the sanctioned party's actions in *Balloon Plantation* showed good faith effort, were the first time an issue had arisen in this case, and amounted more to a misunderstanding rather than disobedience. The court stated that "it appears that, at worst, the defendants were guilty of being no more than a few hours late." *Id.* at 152, 399 S.E.2d at 440. The Court of Appeals also recognized that the unduly harsh sanctions order resulted from one circuit judge misreading another circuit judge's order and incorrectly understanding his authority in exercising discretion in issuing sanctions. *Id.* at 155, 399 S.E.2d at 440-41.

Unlike *Balloon Plantation*, the Circuit Court in this case exercised its discretion to impose sanctions after a long pattern of repeated failure by Respondent-Petitioner to respond to discovery, failure to respond to motions to compel discovery and for sanctions, falsely representing it had responded to discovery, filing a false certificate of service, and failure to appear for a sanctions

hearing. This all culminated with Respondent-Petitioner consenting to a proposed order stating that Respondent-Petitioner's Complaint would be dismissed if failed to respond to discovery requests as required by the Order and then failed to respond to the discovery requests as ordered by the Court. (R. pp. 404-405). Therefore, the argument that dismissal was neither well aimed nor reasonably necessary to redress the misconduct is merely a challenge to the Circuit Court's exercise of discretion in issuing discovery sanctions and is not a special or important reason for Supreme Court review.

In addition, the fact that the October 25, 2019 dismissal was ordered with prejudice even though the words "with prejudice" were not used in the October 1, 2019 sanctions Order is of no consequence. A discovery sanction is both a penalty and a deterrent—the "reasons for the imposition of sanctions under Rule 37 [are] '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.'" *Karppi*, 327 S.C. at 545, 489 S.E.2d at 683 (quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). The October 1, 2019 Order required Respondent-Petitioner 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 and stated that "[i]f Plaintiff fails to respond as ordered herein, Plaintiff's Complaint in this lawsuit shall be dismissed." (R. p. 402). Respondent-Petitioner consented to this provision. When a court identifies in advance that dismissal will be the sanction and consequence for extensive failure to comply with discovery obligations, a party is on notice that the potential sanction will end the case—*i.e.*, that the dismissal is likely to be with prejudice. The alternative would be counterintuitive, as dismissal without prejudice is merely an opportunity for a penalty-free second chance and is not a penalty or deterrent at all. In fact, if Respondent-Petitioner takes the position that it consented to

the order and acted as it did because it believed the only "consequence" would be a dismissal without prejudice (a penalty-free second chance), this is tantamount to an admission that Respondent-Petitioner led on the Circuit Court and CEC with no actual intention of complying in the first place. Such a position, which cannot be Respondent-Petitioner's intention, would be an assertion that Respondent-Petitioner intended to manipulate its discovery obligations and the court's orders by knowingly failing to comply, allowing the case to be dismissed as a consequence, but then simply refiling the case, with no actual penalty at all. Such a non-penalty and non-deterrent result was not contemplated by the parties or the court and would not have been a reasonable outcome.

It is implicit that the Circuit Court and Court of Appeals considered the dismissal with prejudice as well aimed and reasonably necessary, because the alternative would not be a sanction or consequence of any significance. It is not reasonable to assume that a court would respond to a party's bad faith, willfulness, and gross indifference to an opposing party's rights only by imposing a non-consequence. This assertion, again, is merely a challenge to the Circuit Court's exercise of discretion in issuing discovery sanctions and is not a special or important reason for Supreme Court review.

CONCLUSION

For all the reasons stated herein, Respondent Clark Equipment Company respectfully requests that the Court deny Respondent-Petitioner's Petition for Writ of Certiorari.

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Respectfully submitted,

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