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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Robert E. Hood, Circuit Court Judge

Appeal No. 2024-000220

Harland Jones,.....Petitioner,

v.

Karen Robinson, ...Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242(f), SCACR, Respondent, Karen Robinson ("Respondent" or "Defendant"), responds in opposition to the Petition for Writ of Certiorari (the "Petition") filed by Petitioner, Harland Jones ("Petitioner" or "Plaintiff"). Petitioner challenges the unanimous Court of Appeals decision dated November 15, 2023, which affirmed the order of sanctions against Petitioner. Petitioner fails to demonstrate any "special and important reasons" this Court should exercise its discretion and review the decision of the Court of Appeals. The only basis for review argued by the Petitioner is that the Court of Appeals' decision conflicts with a previous decision from this Court. However, Petitioner fails to demonstrate any such conflict.

STATEMENT OF THE CASE

The parties are before this Court due to numerous and repeated discovery abuses by Petitioner and his counsel. However, the underlying case involved a simple accident between an automobile driven by Respondent and a bicycle ridden by Petitioner. Petitioner filed a Complaint in the Richland County Court of Common Pleas on March 16, 2018. (R. pp. 76-80). Therein, Petitioner alleged that on June 7, 2017 Respondent struck him with her car when she was "unlawfully attempt[ing] to pass the vehicle in front of her, crossed over into Plaintiff's lane of travel," which caused her to strike the front of Petitioner's bicycle. (R. p. 76-80 at ¶¶ 8-11, 13).

Respondent answered the complaint, (R. pp. 81-84), and then filed an amended answer and counterclaim. (R. pp. 85-97). In addition to denying Petitioner's claims and raising various affirmative defenses, Respondent alleged that she did not "deviate from her lane of travel," but, instead, that Petitioner "suddenly and without warning turned left directly into the path of Defendant's car." (R. pp. 85-97 at ¶¶ 40-42, 52).

On May 1, 2018, Respondent served Petitioner with the First Set of Interrogatories and Requests for Production (the "Initial Interrogatories"). Among other things, Respondent sought "the names and addresses of persons known to Plaintiff or counsel to be witnesses concerning the facts of the case," along with information relating to what each such person knew or would testify about. (R. pp. 208-221 at ¶¶ 1-2).

On June 5, 2018, instead of timely responding to the Initial Interrogatories, Plaintiff filed a motion seeking dismissal of Petitioner's counterclaim (the "Motion to Dismiss"). (R. pp. 107-112). In his Motion to Dismiss, Petitioner repeated his allegation that "Defendant crossed over into Plaintiff's lane of travel," thereby causing the accident. (R. p. 108). Petitioner asserted that, "[u]pon information and belief, discovery in this case is expected to reveal witnesses to the events giving rise to the subject motor vehicle collision who believe that Defendant was speeding, that Defendant was not paying attention to the roadway at the time of the subject collision, and/or that Defendant unlawfully attempted to unlawfully pass a vehicle immediately in front of her at the time she (Defendant) unlawfully caused Plaintiff to strike Defendant's vehicle." (R. p. 111). There are not and never were any such witnesses.

In a letter dated July 23, 2018, Lane Jeffries, Petitioner's counsel, requested proposed dates for mediation and asserted, "[t]*he rules require that both you and I physically attend the mediation*, as well as our clients and your adjuster. This requires finding a date that at least 5 people are free, plus finding a mediator that is also free on that date." Mr. Jeffries also stated that, "[b]y 'available dates' we mean dates on which you, your client(s), and insurance adjuster(s) with full authority to settle for the policy limits *without having to check with someone else*, are able to be physically present at

mediation beginning at 10 a.m. and continuing as long as necessary." (R. pp. 173-174) (emphases added).

On August 10, 2018, having received no responses to the Initial Interrogatories, Respondent filed a motion to compel (the "Motion to Compel"). (R. pp. 113-114).

A few days later, and in response to Petitioner's assertions in his Motion to Dismiss, Respondent served Petitioner with supplemental interrogatories, seeking the identity of, any statements by, and a detailed summary of anticipated testimony "of the witness and/or witnesses referenced in Paragraph 2, Page 5 of 'Plaintiff's [Motion to Dismiss].'" ("Supplemental Interrogatories") (R. pp. 218-219).

On October 1, 2018, the Honorable DeAndrea G. Benjamin heard arguments regarding the Motion to Dismiss and the Motion to Compel. Although Petitioner provided some discovery responses just prior to the hearing, Respondent explained that "[w]hat we have not yet received in this case is a response to the supplemental interrogatories from August," noting that the Supplemental Interrogatories arose as a result of statements made in the Motion to Dismiss. Petitioner responded "[w]e agree largely with what Mr. Bayne has to say." (R. p. 466:9-466:11 & 468:1-468:4). Judge Benjamin ruled Petitioner would have 20 days to provide the information to which Petitioner's counsel responded "[w]e will provide that, Your Honor, certainly." (R. p. 469:24-470:12). The Court also granted the Motion to Dismiss without prejudice. (R. p. 480:22-481:1). The Form 4 Order was filed on October 3, 2018, stating, in pertinent part, "Motion to compel – granted. Remaining records and all supplemental responses should be received in 20 days." (R. pp. 1-3).

On October 23, 2018, having not received responses to the Supplemental Interrogatories, Respondent filed a motion for rule to show cause, stating that Petitioner had not complied with the October 3, 2018 Form 4 Order, and seeking to hold Petitioner in contempt, as well as other relief. (R. pp. 115-116). Judge Benjamin granted the motion on October 30, 2018. (R. pp. 8-9).

On November 7, 2018, Petitioner responded to the Supplemental Interrogatories. As to the identity of "the alleged witness and/or witnesses referenced in Paragraph 2, Page 5 of" the Motion to Dismiss by responding to each of them with, "None." (R. pp. 225-226). Therefore, as of November 7, 2018, Petitioner was admitting that there were no witnesses to support his unlawful passing theory.

Petitioner's deposition was scheduled for March 6, 2019. At the deposition, Petitioner testified about how the accident occurred. He said, "[s]o I put my hand out to turn left in front of the car. And then when I put my hand out left to turn in front of the car, letting the car know that I was turning in front of them, I looked over at the car and the lady and let her know that I was turning in front of her, so I put my hand out." (R. p. 1121:10-1121:16). Despite having previously responded that there were no witnesses to the accident, Petitioner identified the "lady in the car" as his wife's cousin, although he could not recall her name. (R. pp. 1122:17-1123:20). Petitioner said his wife told him she had talked to her cousin and "[t]hat she wasn't going to testify because she wasn't going to get in – get involved in that situation." (R. pp. 1125:17-1126:5).

Petitioner acknowledged that he did not see Respondent attempt to pass another vehicle and, in fact, did not see Respondent's vehicle at all prior to the accident. (R. pp. 1190:10-1191:5 & 1193:16-1194:8). When Petitioner was asked why his responses to

discovery described Respondent's car attempting to pass another car, Petitioner's counsel objected, stating that Petitioner "didn't write that answer. We wrote that answer. And anything he would know about it, he knows from talking to his attorneys." (R. p. 1191:6-1191:21).

Petitioner then testified:

Q: Do you know of any witness that saw the defendant cross over the yellow line into the opposite lane of travel?

A: I was told.

Q: Who told you that?

A: Alex.

Q: Where was Alex at the time of the accident?

A: He was looking down the street at me.

Q: So you are saying that Alex witnessed this accident from your house?

A: Yes.

* * *

Q: When did Alex tell you that he witnessed this accident?

A: When I came completely through.

Q: When you were asked about witnesses to this accident, why have you never mentioned Alex?

A: Excuse me?

Q: In discovery, we asked you for a list of all the witnesses to this accident. Alex was not on that list. Do you know why?

A: I couldn't tell you.

* * *

Q: So other than what you say Alex witnessed, what evidence do you have that the defendant ever crossed into your lane of travel?

A: What they told me.

Q: When you say they told you, who are you referring to?

A: From what Alex told me.

Q: Can you tell me precisely what Alex told you about what he saw?

A: He told me that he saw the car when it came across the line when I was turning. That when I was turning, the car came, the car hit me cause it came past the

double line to pass the other cars, speed up to get in front of the other cars. Then he said, when I went to go make my turn, the car had hit me. That's all I can remember him telling me.

* * *

Q: You knew that Alex was a witness to this accident immediately following the accident; right?

A: Yes. He told me after I came through.

Q: And that was a couple of months after the accident?

A: Yeah.

Q: And so you knew a couple of months after the accident that Alex witnessed this; right?

A: That's what he told me.

Q: And he – you say that he told you that the defendant crossed the double yellow line a couple of months after the incident; right?

A: Yes.

(R. pp. 1194:9-1197:13, 1200:9-1200:22 & 1205:2-1206:18).

Petitioner explained that he did not know Alex's last name, current phone number or his address, but that he lived in "a little shack back in the woods," in Winnsboro. (R. pp. 1139:11-1140:25). However, Petitioner stated Alex worked for him, often driving his car because Petitioner did not want to drive. Petitioner testified that he saw Alex "[a]bout every day" following the accident. (R. pp. 1137:18-1138:17 & 1173:25-1175:21).

On March 6, 2019, Respondent moved for summary judgment (the "Motion for Summary Judgment"). (R. pp. 126-127).

On March 7, 2019, Respondent filed another motion to compel arguing that Petitioner admitted he knew of an acquaintance named Alex who had witnessed the accident. Respondent sought dismissal of the Complaint and attorney's fees for "the late disclosure of 'Alex.'" (R. pp. 128-132).

On May 5, 2019, Petitioner opposed the Motion for Summary Judgment, arguing that there was conflicting evidence as to "***how*** and ***why*** Defendant struck Plaintiff." ("Response in Opposition"). (R. pp. 152-160) (emphasis in original). Petitioner's version of events involved a car being driven by his "wife's cousin" that had slowed down to let him know it was "ok" for him to turn in front of her. Then, according to Petitioner, "Defendant became impatient and pulled into the oncoming (eastbound) lane to pass. As Defendant passed the blue car, she saw the black car coming directly towards her. To avoid a head-on collision with the oncoming black car, Defendant whipped back into the westbound lane as soon as she was past the blue car, thus striking Plaintiff in the midge of his turn across the westbound lane." (R. pp. 155-157).

Respondent's Motion for Summary Judgment and most recent motion to compel were heard by the Honorable Roger Couch on May 7, 2019. As Petitioner had argued the existence of a factual dispute based upon a version of events allegedly supported only by witnesses that had not been identified, (R. pp. 499:2-501:18), Judge Couch concluded, "there's enough that's going to get you past a motion for summary judgment," which was denied. (R. p. 505:11-505:21).

As to the motion to compel, Respondent pointed out that neither Alex nor the wife's cousin – both allegedly witnesses to the accident or, at a minimum, the moments leading up to the accident – had been revealed in response to Respondent's discovery requests despite the show cause order. (R. pp. 507:1-508:16). Judge Couch ruled:

THE COURT:	I'm going to require that you get them pretty quickly, I think, because this case has been going on a long time.
MR. JEFFERIES:	I agree, Your Honor, and we're perfectly comfortable with that. We understand we can't find Alex …
THE COURT:	I believe in full discovery, and I also believe in not trying cases by ambush.

MR. JEFFERIES: We agree.

THE COURT: When are we going to have this witness's name?

MR. JEFFERIES: Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that.

* * *

THE COURT: Well, I mean, what I would do is I would bar them from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time.

MR. BAYNE: Certainly, Judge.

MR. JEFFERIES: And we agree with that, Your Honor. We're perfectly comfortable not being able to use that witness.

* * *

THE COURT: Okay. If they don't have it by June 1st if they don't have it, that witness will be prevented from testifying.

(R. p. 509:14-511:5).

On May 10, 2019, Respondent sent a proposed order, to which Petitioner objected. (R. p. 228). The proposed order was sent to Judge Couch on May 14, 2019 and followed up on May 28, 2019. (R. pp. 230 & 232). On June 21, 2019, Respondent reached out to Judge Couch again. (R. p. 343). Three days later, Judge Couch responded stating, "I will be happy to sign the proposed Order, please file it in the clerk's que for my electronic signature." (R. p. 1237).

On June 21, 2019, the parties attempted unsuccessfully to mediate this claim. (R. p. 189). The mediation lasted less than an hour. Immediately following the unsuccessful mediation, Respondent's counsel emailed Petitioner's counsel setting out the problems with the failure to have counsel of record participate in the mediation:

> You sent a six month associate who has never worked on this case, never appeared on this case, and who had precisely zero information about the case or any real knowledge of the facts – embarrassingly so. Many of the things he asserted were just factually incorrect even within the constructs of the allegations you have made in the Complaint. He asserted medical damages that were inaccurate (and have never been produced) and asserted

> that there were 'several eyewitnesses to the accident who would be called to testify' – which have never been identified and are now barred from trial by Judge Couch's ruling.
>
> After all of that, he made a demand of $500,000 on a case he openly and readily admitted you have a 1 in 10 chance of winning (although he then changed that to 1 in 6 and described this case as a game of Russian Roulette while explaining to all of us and the clients how Russian Roulette works).
>
> Rule 6(b)(3) requires the "party's counsel of record" to appear at the mediation. Gus [Anastopoulo] is not a counsel of record and does not appear on a single pleading, filing, or any other material in this case. He is not on any emails that I can find relating to this case. He clearly lacked any competent understanding of the file, the issues, or the nature of resolution to this claim. To make matters worse, it appeared your client was also unaware of a majority of the issues that were raised. Therefore, you failed to properly appear and conduct mediation in accordance with Rule 6.

Respondent requested that Petitioner pay the entire mediation cost, associated legal fees, and compensate Respondent for the day of work she missed. (R. p. 188). Petitioner's counsel failed to respond.

Consequently, on June 27, 2019, Respondent filed a motion for sanctions (the "Motion for Sanctions"). Respondent noted that in addition to Petitioner's "stonewall[ing] discovery and provid[ing] contradictory statements both in discovery and to this court," that "Plaintiff failed to participate in mediation as required by Rule 6." Respondent sought "sanctions pursuant to ADR Rules 6, 8 and 10," as well as "SCRCP Rules 11 and 37." Respondent concluded that, "[a]t this point, given the repeated discovery abuses and violations as found by Judge Benjamin and Judge Couch, and now given the mediation abuses set out herein, the only proper remedy this court can fashion is to strike the Complaint, with prejudice, pursuant to SCADR Rule 10(b) and 37(b)(2)(C)." Respondent also sought an award of attorneys' fees and costs, and compensation to Respondent for the cost of missing work. (R. pp. 161-188).

On July 3, 2019, Judge Couch filed his order memorializing his May 7, 2019 decision compelling (again) discovery responses from Petitioner. Judge Couch recited Petitioner's on-going discovery abuses, concluding that, "[i]t is apparent that Plaintiff has failed to fully comply with the discovery requests of Defendant. Specifically, Plaintiff has failed to identify in full persons sought by Defendant in discovery while simultaneously seeking to introduce these unidentified witnesses' statements about the accident." Judge Couch ordered Petitioner to reveal the identity of these purported factual witnesses by June 1, 2019 and ruled that the failure "to comply with this Order shall result in Plaintiff's inability to use the aforementioned witnesses or any other unidentified witness at trial." Judge Couch also warned that continued failure to comply may result in Plaintiff being sanctioned in accordance with Rule 37. (R. pp. 10-14).

Petitioner immediately filed a motion to alter or amend the order (the "Motion to Amend"). (R. pp. 190-195). Despite the order reflecting the timeline Judge Crouch stated on the record, and to which Petitioner's counsel agreed, Petitioner mainly argued the order "purports to require the impossible, i.e. that Plaintiff comply with the Order 'on or by June 1, 2019', which is over a month before the Order was entered."

Late in the afternoon on July 5, 2019, the Friday before the week trial was to commence, Respondent received a supplemental discovery response from Petitioner identifying two new witnesses, Treacy Robinson, Petitioner's step-daughter who would testify to the effect of Petitioner's injuries on his daily life, and Lettie Jackson, who would testify to "facts and circumstances." No other information was provided regarding either of these two newly-identified witnesses. (R. p. 454 & 419). Respondent's counsel sent Petitioner's counsel an email asking "who is Lettie Jackson? What is her address?

Where is the response to Rogg 2 asking for a summary of facts for the two new witnesses?" (R. p. 456). No response was provided over the weekend. Respondent's counsel explained to Judge Lee that, "[a]fter we conducted the – the roster meeting, I asked Mr. Jeffries [sic], 'are you going to supplement with who Leddy [sic] Jackson is and what she's going to testify to,' and his response was, 'You already know the answer.'" (R. pp. 536:15-538:1).

The parties appeared before Judge Lee on July 8, 2019 to resolve preliminary issues prior to trial. Judge Lee heard argument on the Motion to Amend and the Motion for Sanctions. At that hearing, Petitioner's counsel stated to the Court that he had objected to Judge Couch's ruling from the bench at the time of the May 7, 2019 hearing, claiming, "at the hearing, I said, 'Your Honor, I disagree with this, but I understand the Court's holding.'" (R. p. 544:5-544:6). Judge Lee asked counsel about the oral ruling Judge Couch made from the bench:

THE COURT: And I wasn't at the hearing. I don't know how certain, how forceful, how convinced Judge Couch was that this was what his ruling was and that's what he wanted it to be. What part – what portion of that oral argument or oral ruling did you disagree with? I mean … I'm just trying to understand that.

MR. JEFFERIES: Several portions, Your Honor, and – and this was, of course, laid out in our Rule 59 memo …. No. 1, I didn't think barring was proper at all. I didn't think 30 days was a sufficient time frame or to the June 1 deadline was a sufficient time frame."

(R. pp. 545:15-546:17). Ultimately, Judge Lee ruled that Judge Couch should decide the Motion to Amend. (R. p. 548:6-548:24).

Judge Couch denied Plaintiff's Motion to Amend in its entirety, stating, correctly, that, at the hearing, "Plaintiff agreed with both the June 1, 2019 deadline and to the exclusion of unnamed witnesses as a penalty for failure to meet the deadline." Judge Couch noted that this was the second time Respondent was forced to file a motion to

compel over this same witness issue. Judge Couch reconfirmed that Petitioner's failure to comply with discovery orders "results in Plaintiff's inability to use any witness that was unidentified as of June 1, 2019 at trial," and that "Plaintiff may be sanctioned in any manner [in] accordance with South Carolina Rules of Civil Procedure 37." (R. pp. 510:16-510:23 & 12-13 & 21).

The trial was reset for the week of August 12, 2019. On August 13, 2019, when Respondent raised Petitioner's failure to comply with multiple discovery orders, Petitioner's counsel asserted that, "[w]e attempted to find Alex. We would love to have a witness. We did not find Alex. No Alex. We found some shacks in the woods, but we did not find Alex." (R. p. 569:12-569:19). Judge Manning then asked Mr. Jefferies:

THE COURT:	I'm going to ask you this, did you comply with the terms of Judge Couch's order?
MR. JEFFERIES:	Yes, Your Honor –
THE COURT:	Did you fail to comply? Look, I can read this myself. I'm asking for a straight answer on the record, did you – did you comply or not? "Yes" or "no"?
MR. JEFFERIES:	Yes, Your Honor.
THE COURT:	Okay. Fine. If I find out at the end, then that's additional sanctions. If you're wrong – do you understand that? I will take this matter up later, not pre-trial. At the conclusion of this case, I'll make a decision on this argument.

(R. pp. 569:21-570:7).

In a motion in limine, Respondent argued that the two witnesses Petitioner had identified for the first time on July 5, 2019 were barred from testifying per Judge Couch's prior orders. Petitioner argued Judge Manning could "undo" Judge Couch's order.

THE COURT:	Well, did Judge Couch exclude any additional witnesses after a certain date? Yes or no?
MR. JEFFERIES:	Yes, he did.
THE COURT:	Well, they're excluded then, aren't they?

MR. JEFFERIES: He –

THE COURT: Wait. Let me finish. He said they were to be provided – they were not disclosed prior to – prior to judge Couch's order; is that true?

MR. JEFFERIES: If I may correct what Mr. Bayne said. First off, we did not refuse to identify them. We identified them on July –

THE COURT: Did you meet the deadline imposed by Judge Couch? Yes or no?

MR. JEFFERIES: Yes, Your Honor. Can I explain how? Because that's important.

(R. p. 631:4-631:18). Judge Manning ruled that the late-identified witnesses were barred. (R. pp. 634:1-634:6).

Nonetheless, following opening statements, the first witness Petitioner called to the witness stand, in front of the jury, was Treacy Robinson – one of the two late-identified fact witnesses who had been excluded. After the jury was excused, Judge Manning admonished Petitioner's counsel for calling the witness in front of the jury. "You're missing the whole point. You don't call a witness that's been excluded. You proffer that testimony in the absence of the jury, not in their presence. There's no other way to do that." (R. pp. 659:2-662:15). At the end of the proffered testimony of Treacy Robinson, Judge Manning advised, "My ruling remains the same in accordance with Judge Couch's order and Judge Benjamin's order. They're excluded. They weren't revealed before June 1st." (R. p. 679:4-679:6).

At trial, Plaintiff again testified that, as he was riding down Old Bluff Road on June 7, 2016, he signaled to a car that he was going to turn left and cross the highway. However, for the first time, he positively identified Lettie Jackson as the wife's cousin, testifying that "this lady in a car, they said was a cousin …. They say she was my wife's cousin …. Lettie Jackson" and that the car this woman was driving, "[t]hey said it was a blue car. I'm not quite sure what color it was." (R. pp. 687:17-688:18).

Plaintiff admitted that he did not see Defendant cross the double yellow line, "I never saw it [Defendant's car] …. I didn't see anything happen" and, in fact, did not see anything prior to the accident, other than the woman "they" told him was his wife's cousin, who "they" said was driving a blue car. (R. p. 711:19-713:5).

Plaintiff was asked about the allegations in his Complaint:

Q: One of those is that the Defendant – that's Ms. Robinson – unlawfully attempted to pass a vehicle immediately in front of her. Do you remember that?

A: That's what I was told.

Q: Okay. That's what you were told?

A: Yes. I don't – I don't know anything.

Q: And I – and this is the last time I'll ask this. But you didn't, actually, see that happen; is that right?

A: I didn't see anything happen …. I don't know anything. And I didn't see anything.

(R. p. 715:12-715:20).

On re-direct examination, in response to questions from his own attorney, Petitioner testified:

Q: You mentioned that day that your buddy that you worked with had come over to the house and might have seen the wreck. Is that the guy named Alex, the guy you worked with?

A: Yes, yes. He told me that he didn't see –

* * *

Q: Okay. Did you try to find Alex after that so he could come testify?

A: Yes. But he said –

Q: Did you find him?

A: Yeah, yeah. But he said he didn't see anything.

Q: Okay. So it was no good for him to come here and testify if he didn't see anything?

A: Yes.

(R. p. 720:4-721:15).

The trial ended in a mistrial. (R. p. 858:9).

On September 27, 2019, the Motion for Sanctions was heard by Judge Hood. Petitioner's counsel admitted that Mr. Anastopoulo had never appeared on any filing and had not appeared at any hearing in this case prior to the mediation. (R. p. 900:11-900:17). Further, Petitioner's counsel was asked about his statements to Judge Manning regarding compliance with prior discovery orders:

THE COURT: Why did you tell Judge Manning that you had complied with Judge Couch's order?

MR. JEFFERIES: Here is why, Your Honor. And Judge Manning asked for further argument at the end of the case to explain. Judge Couch issued his order orally, not the final order, nothing that you could file or Rule 59 to ask him to reconsider. You have to wait for the final order to come out. So the date for performance was before the final order came out. So before there was any ability of ours to say that's not enough time or this isn't right, that date for performance would have gone by …. Judge Couch ultimately denied our Rule 59, and as soon as he did, as soon as his order became effective, we answered the question. The answer, unfortunately, was, we don't know who these witnesses are, so we can't find them. We did it immediately after that order became effective. So that's why I gave Judge Manning the answer, yes. He asked me to explain later. He didn't want to get into that before trial, but that's why the answer was there. As soon as that order took effect, we complied with it.

THE COURT: I suggest you not take that position in the future.

MR. JEFFERIES: I understand, Your Honor.

THE COURT: That's a bad decision. If a judge gives you a deadline, whether or not there is a written order, I suggest you comply with it or file a motion.

MR. JEFFERIES: Understood, Your Honor.

(R. p. 916:6-917:14).

Petitioner's counsel then argued that, because the trial had been reset for the end of October, Respondent could no longer show prejudice with respect to the late disclosure of witnesses such that they should be allowed to testify. Judge Hood was not impressed with this argument, "[y]ou're taking the position that regardless of the fact that the

plaintiff repeatedly abused and disregarded circuit court judge's orders, the defense isn't on prejudice any more?" (R. pp. 919:18-920:10).

On October 31, 2019, Judge Hood issued his Order granting the Motion for Sanctions. Judge Hood based his decision on the "repeated discovery violations, mediation violations, and disobedience of court orders." After reciting and chronicling on-going discovery violations committed by Petitioner, Judge Hood concluded that, "based on the totality of the circumstances," sanctions were warranted. Judge Hood dismissed the complaint with prejudice, while allowing Respondent's counterclaims to proceed to trial, and awarding Respondent attorneys' fees and costs. (R. pp. 23-45).

Petitioner filed a motion to reconsider (the "Motion to Reconsider"). (R. pp. 353-409). Despite Petitioner having testified that he had located Alex and spoken with Alex, and that the "lady in the car," was named Lettie Jackson, Petitioner argued that "[d]espite diligent efforts, nobody has been able to positively identify or locate either of these eyewitnesses. To this date, neither Plaintiff nor his counsel have any information regarding their whereabouts." (R. pp. 359-360).

The parties were heard on December 5, 2019 by Judge Hood on the Motion to Reconsider. Judge Hood observed that, "[n]ot one single lawyer in the room can tell me why out of the three to four attorneys that are listed on every single filing that they filed none of them could be [at the mediation]." (R. p. 993:10-993:19). Judge Hood pointed out that Petitioner had revealed the fact that he had located Alex in response to a direct question from his counsel, "[a]bout Alex and thank God Mr. Jones decided to tell the truth …. But for Mr. Jones telling the truth, on the witness stand in the trial nobody in this room right now would know what the truth is. You know why, because its been

hidden. Its been intentionally, strategically and willfully hidden from the other side. Just like the wife's cousin, intentionally, willfully and strategically hidden from the other side. And we would never know right now that Alex was found and that Alex didn't see anything but for Mr. Jones telling the truth on the witness stand." (R. p. 995:3-995:17).

On March 2, 2020, Judge Hood entered an amended order granting the Motion for Sanctions. (R, pp. 46-70). The Court granted the Motion for Sanctions in full "based on the totality of the circumstances," including Petitioner's "repeated discovery violations and disobedience of court orders," as well as the ADR violations. The Court specifically found "that Plaintiff's counsel acted with bad faith, willful disobedience, and gross negligence during this case." The Court dismissed the complaint with prejudice and awarded updated attorneys' fees and costs. (R. pp. 46, 68).

Petitioner only appealed Judge Hood's orders.

ARGUMENT

Petitioner fails to meet the standards set forth in Rule 242, SCACR, for review of the unanimous decision of the Court of Appeals affirming the sanctions imposed on Petitioner. Despite his arguments to the contrary, the decision of the Court of Appeals does not conflict with a previous decision from this Court and there is no other basis under which this Court should grant the Petition.

I. The Court of Appeals Did Not Err in Relying on the Doctrine of the Law of the Case to Affirm the Sanctions Imposed by the Circuit Court.

Petitioner makes two arguments. First, Judge Hood was not bound by the findings of previous circuit court judges who had found numerous discovery abuses. Second, sanctions are not supported by the record. Neither argument is compelling.

In *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), the respondents served interrogatories. *See id*. at 274, 762 S.E.2d at 539. The appellants provided limited responses. *See id*. A motion to compel was granted requiring more complete responses. *See id*. at 274-275, 762 S.E.2d at 539-540. However, the appellants failed to comply within the time required. *See id*. at 275, 762 S.E.2d at 540. Additionally, a dispute arose concerning claims of privilege. *See id*. at 275-276, 762 S.E.2d at 540. After review by a special master, the court ordered the appellants to disclose 96 documents that had been withheld. *See id*. at 276, 762 S.E.2d at 540. The appellants failed to comply. *See id*. at 276, 762 S.E.2d at 541. Ultimately, the court dismissed the appellant's cases and awarded attorneys' fees and costs. *See id*. at 279, 762 S.E.2d at 542.

On appeal, the Supreme Court noted that the appellants, like Petitioner, only appealed the order awarding sanctions, and thus, the underlying orders were not before the Court for consideration. *See id*. at 280, 762 S.E.2d at 542-543. The Court noted that "to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." *See id*. at 280, 762 S.E.2d at 543 *citing Ex. Parte Whetstone*, 289 S.C. 589, 347 S.E.2d 881, 882 (1986). Thus, as the appellants "continued along in the litigation" and "continued to accept the circuit court's formulation of discovery," the underlying decisions "form the law of the case and [the appellants] are bound by them now." *See id*. at 281, 762 S.E.2d at 543 *citing ML-Lee Acquisition Fund L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). The Court noted that because the appellants waited to only appeal the sanctions order dismissing the case, "the merits of the underlying discovery

orders are not before this Court on appeal. Thus,…the only reviewable question before this Court is whether the sanctions were properly awarded." *See id*.

Ultimately, the Court disagreed with the argument that dismissal and the awarding of fees was "unduly harsh." *See id*. at 283, 762 S.E.2d at 544. The Court pointed out that the appellants refused to comply with discovery orders because they would harm the appellants' case and that the appellants were given multiple opportunities to amend their discovery responses, but they failed to comply. *See id.*

Thus, under *Davis*, the law of the case and Petitioner's choice to only appeal the orders of Judge Hood limits appellate review to the question of whether Judge Hood abused his discretion in awarded the sanctions he did against Petitioner. This is what the Court of Appeals did. As this case is squarely on point with *Davis*, the Court of Appeals did not err and their decisions does not conflict with *Davis*.

Moreover, even if review of the underlying orders were appropriate, those determinations were correct. As noted herein, the record provides more than sufficient evidence to support each of the underlying orders. Petitioner was given multiple opportunities to identify the witnesses he relied upon as required in multiple discovery orders. Petitioner failed to do so until shortly before trial. Additionally, Petitioner's version of what Alex knew changed from his deposition testimony to his trial testimony. Even more egregiously, Petitioner's counsel repeatedly mislead the Court about decisions by prior judges and positions he previously took. Finally, Petitioner's counsel admittedly violated South Carolina rules on mediation attendance.

Put simply, the Court of Appeals was correct to apply the Law of the Case Doctrine and to affirm the sanctions awarded against Petitioner. Accordingly, there is no basis to grant the Petition and review this question.

II. The Court of Appeals' Affirmation of the Sanctions Imposed by the Circuit Court Was Not Based on a Misapprehension of the Record.

Despite arguing that this Court should grant its Petition because the Court of Appeals decision "departs from this Court's prior rulings" the only citation to any case on this question is to *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C.254, 578 S.E.2d 11 (2003) for the generic proposition of the appellate court's role in reviewing an award of sanctions. Accordingly, Petitioner has failed to demonstrate the "special and important reasons" this Court should exercise its discretion and review the decision of the Court of Appeals on this question.

Moreover, Petitioner's fundamental argument – there was an insufficient factual basis for the Final Sanctions Order – is inaccurate. Petitioner attempts to rewrite history to suggest that "it was largely Respondent's choice to focus nearly exclusively on [Petitioner's] unlawful passing theory" and that Petitioner had abandoned his "unlawful passing theory" by the time he responded there were no witnesses on November 7, 2018. Petitioner's position is belied by the clear record in this case.

On March 6, 2019, at Petitioner's deposition, he testified that Alex told him Respondent had crossed the center line to pass another car before striking Petitioner.

On April 4, 2019, Petitioner answered Respondent's second set of requests for admission and stated "it was Defendant's illegal passing maneuver, in which she unlawfully travelled in the lane of oncoming traffic, which caused her to strike Plaintiff immediately after she returned to the westbound lane of travel." (R. pp. 1263-1264).

On May 5, 2019, in Petitioner's Response in Opposition to the Motion for Summary Judgment, Petitioner described his "version of events" involving Respondent crossing the center line to pass a car before striking the Petitioner.

Even as late as Petitioner's opening statement at trial, he was relying on the narrative that Respondent became impatient, crossed the center line and pulled around the vehicle in front of her. (R. pp. 648:23-649:10).

As detailed above, Petitioner and his counsel's discovery and mediation violations were calculated, pervasive and repeated. Petitioner used the illusion of unidentified witnesses to support his unlawful passing theory, which was then used to support the Motion to Dismiss and to defeat the Motion for Summary Judgment, while Petitioner consistently testified that he did not see Respondent's car before the accident.

Despite, stating in writing that there were no witnesses, at his deposition Petitioner identified a "lady in the car" who was his wife's cousin and "Alex," who he could not locate. Yet, the Friday before trial was set to start, Petitioner identified two new witnesses, one of whom, Lettie Jackson, was revealed, for the first time during Plaintiff's trial testimony, to be the "lady in a car," who was his wife's cousin. Further, at trial, shortly after Petitioner's counsel told the Court that they had attempted to find "Alex" but failed, Petitioner testified, in response to his own counsel's questions, that he had recently spoken with "Alex" about what he knew of the case.

The sanctionable conduct extends to Petitioner's counsel. Petitioner's counsel has admitted that despite there being four attorneys of record, an attorney who was not of record was sent to the mediation in violation of South Carolina rules. Moreover, Petitioner's counsel failed to timely respond to the Initial Interrogatories, the

Supplemental Interrogatories or the first order to compel. Further, on May 7, 2019, Petitioner's counsel agreed that any witnesses not disclosed by June 1, 2019 would be barred. Despite so agreeing, Petitioner's counsel told Judge Lee, he had not agreed. Additionally, on August 13, 2019, Petitioner's counsel told Judge Manning that he had complied with Judge Couch's order, when he had not. Then, the very first witness he called at trial was a barred witness. Finally, even after Petitioner's complaint was dismissed for discovery and mediation violations, in Petitioner's Motion to Reconsider he claimed "nobody has been able to positively identify or locate" Alex or Lettie Jackson, which is contradicted by the trial testimony of Petitioner.

Put simply, there was more than enough of a factual basis for the Court of Appeals to affirm the sanctions against Petitioner. Accordingly, there is no basis to grant the Petition and review this question.

III. The Court of Appeals Did Not Err in Determining the Sanctions Imposed by the Circuit Court Were Proportionate to the Conduct of Petitioner and His Counsel.

Dismissal of Petitioner's complaint is proportionate to the documented conduct. Petitioner was warned at least four times, including twice by the Court, that his failure to comply with the multiple discovery orders would result in any of the sanctions available under Rule 37, which includes dismissal of a complaint. (R. pp. 131, 170, 13 & 21).

Plaintiff failed to timely respond to two sets of written discovery, failed to timely comply with an order to compel, had a show cause order entered against him, inaccurately stated there were no witnesses only to disclose the identities of witnesses the Friday before the start of trial, misled opposing counsel and the Court about compliance with various orders and an inability to contact one witness, "Alex" and identify a second,

Lettie Jackson, called a barred witness at trial, repeatedly advanced a theory of negligence for which there was no supporting witness testimony, and admittedly violated South Carolina rules concerning mediation.

As the Court of Appeals noted, dismissal is an appropriate sanction when a party engages in multiple discovery abuses, fails to comply with discovery orders and court orders, and conceals integral information about a case. *See Rogers v. Rogers*, 432 S.C. 168, 178, 182-183, 851 S.E.2d 447, 452, 455 (Ct. App. 2020); *Davis*, 409 S.C. at 283,, 762 S.E.2d at 544; *McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-833 (Ct. App. 2008); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004); *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 594-596, 586 S.E.2d 572, 575-576 (2003); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip Mfg. Co*., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999); *Halverson v. Yawn*, 328 S.C. 618, 620-621, 493 S.E.2d 883, 884-885 (Ct. App. 1997).

Petitioner argues that the above cases are not analogous and *Baugham v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 378 S.E.2d 599 (1989) is. In *Baugham*, 271 plaintiffs instituted a lawsuit and eight appealed after their claims were involuntarily dismissed due to their failure to respond to written discovery despite warnings. *See id*. at 130, 378 S.E.2d at 601. The Court reasoned that all eight were subjected to lengthy depositions about their claims, which eliminated any prejudice to the defendant. *See id*. However, the Court made clear that dismissal would be appropriate if the eight continued to fail to provide answers to the written discovery. *See id*.

Petitioner argues *Baugham* is more analogous than the cases cited by the Court of Appeals because "[t]he record in this appeal contains no evidence that [Petitioner]

undertook any intentional or willful actions to prevent Respondent from obtaining the information she sought through written discovery." Petitioner is simply wrong. Unlike in *Baugham* where the lack of responses to written discovery were cured by the appellants' depositions, here, Petitioner's deposition created more uncertainty. Prior to Petitioner's deposition, Petitioner has said there were no witnesses. However, at Petitioner's deposition Alex and the "lady in the car" were identified. Respondent, understandably, sought information about these witnesses. Yet, Petitioner provided no information about those witnesses until shortly before trial only to reveal at trial that Petitioner had been in contact with at least one of these witnesses and knew the identity of the other.

Put simply, the only conclusion one can reach is that Petitioner did far more than fail to timely respond to written discovery. Petitioner mislead opposing counsel and the Court about the existence of, and contact with, witnesses to a theory of the case that Petitioner repeatedly relied upon, up to, and including, the opening statement of trial. Thus, Petitioner's conduct of active concealment of witness identities and contact as well as the prejudice suffered by Respondent of learning about them at trial elevates Petitioner's sanctionable conduct in this case.

Finally, Petitioner fails to identify any decision of this Court that is in conflict with the decision by the Court of Appeals to award attorneys' fees as a sanction. Regardless, Petitioner objects to the award of attorneys' fees because "more than half of the amount of the fee award consists of the time to prepare for and participate in trial," and therefore, the award is not "limited to reasonable expenses incurred because of the offending conduct." Even ignoring that that Petitioner survived Respondent's Motion for

Summary Judgement advancing the unlawful passing theory, for which he had no witnesses, at trial Petitioner called an undisclosed witness in violation of a Court order, identified for the first time that Lettie Jackson was the "lady in a car" and revealed that Petitioner had recent contact with Alex. Thus, the time spent preparing for and attending trial was incurred because of Petitioner's repeated and pervasive sanctionable conduct.

Accordingly, there is no basis to grant the petition and review this question.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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