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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

Appellate Case No. 2024-000220

Harland Jones ..... Petitioner,

v.

Karen Robinson ..... Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Respondent's Return exemplifies precisely why this Court's review is necessary. Rather than address the actual substance of Mr. Jones' arguments in the Petition, Respondent's return is steeped with pretense and deflection. Contrary to what is contained in the record, Respondent persistently promotes her false version of the events, which resulted in the entry of the Circuit Court's Final Sanctions Order and the decision of the Court of Appeals that are the subjects of this Petition. However, this Court has firmly established that it is reversable error to enter a discretionary order, such as an order awarding sanctions, that lacks sufficient evidentiary support. *See e.g, Patel v. Patel*, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004). The Final Sanctions Order plainly lacks support in the record and, in over twenty instances of material factual errors, is flatly contradicted by the record. Respondent is fully aware of these inconsistencies between the record and the Final Sanctions Order, yet rests on the contrived narrative she used in securing inappropriate sanctions from the Circuit Court without making any effort to refute or explain the numerous inconsistencies between her recitation of events and the actual record in this case.

The sanctions at issue in this case are extreme and unwarranted, particularly considering that the alleged offending conduct amounts to little more than a late disclosure of witnesses and a failure to adhere to a mediation rule that caused no prejudice, and the sanction awarded includes the "death penalty" of dismissal of the client's case with prejudice. These sanctions are shocking given Respondent's previous acknowledgement before the Court of Appeals that it was doubtful the alleged witnesses' actually observed the collision and the Circuit Court's exclusion of these witnesses from testifying. *See* Respondent's Final Brief to the Court of Appeals at 7 ("As will become clear throughout, there are not and never were any such witnesses"); (R. pp. 510-11) (excluding all witnesses not disclosed before June 1st and rejecting Respondent's request of

dismissal as a sanction). Such sanctions are also unduly harsh where Respondent conceded the alleged wrongful mediation conduct had little impact on the parties' inability to resolve the case. (R. p. 888) (showing Respondent's admission that "the case wouldn't have gotten settled" at mediation regardless which attorney attended the mediation on behalf of Respondent). This entire dispute has been blown out of proportion by Respondent's selective, inaccurate – and overly aggressive – characterization of the course of this litigation. Respondent's arguments in opposition attempt to obfuscate the distinction between Mr. Jones's inability to identify witnesses and an alleged refusal to identify witnesses. However, a careful review of the record reveals that this is a stark distinction with a significant difference.

Review of the record reveals that Mr. Jones is a sincere but confused plaintiff who suffered severe injuries when Respondent hit him with her car, including head trauma resulting in long-term deficiencies. He has consistently conveyed the information he could remember about the collision including his belief that he executed a left turn in front of a blue car driven by an African American woman that he could not otherwise describe and his belief that an acquaintance he called "Alex" might have seen the collision. (R. pp. 1116; 1121-26; and 1138-40)

At no time has Mr. Jones ever testified or indicated that he knew the identity of the woman driving the blue car. He only testified that, before she died, his wife told him that she thought the woman might be her cousin and that, sometime before the trial of the case, an amorphous "they" told him the woman his wife referenced might be someone named Lettie Jackson. (R. pp. 688 and 707) Mr. Jones never testified, either at his deposition or at trial, that he ever spoke to this woman or that he was sure that the woman actually saw the accident. Yet, it is undisputed that Mr. Jones and his counsel disclosed the name of Lettie Jackson after Mr. Jones became aware that she might

be the woman his wife had referenced as possibly driving the blue car Mr. Jones recalled from the day of the collision. There is nothing in the record to support Respondent's assertion otherwise.

Mr. Jones also disclosed the information he had about "Alex." At his deposition, Mr. Jones testified that he had known Alex for only six or seven months at the time of the accident, that Alex helped him with odd jobs, that he did not know Alex's real name, and that he did not know Alex's address. (R. pp. 1138-40) He also said that he believed Alex saw the collision and that Alex initially came to see him often following the accident, but he no longer had a current telephone number for Alex. *Id*. However, Mr. Jones' memory regarding Alex was unclear and, at times, inconsistent with other statements Mr. Jones made during his deposition including the timing of his meetings with Alex and his recollection of the information he believed he heard from Alex – all of which is understandable due to Mr. Jones' injuries and the elapse of almost two years between the day of the collision and his deposition. (R. p. 115) (recalling the collision occurring in the evening); (R. p. 1137) (noting that he saw Alex "last week sometime"); (R. p. 1138) (stating that he does not see Alex "no more now").

After Mr. Jones' counsel was unsuccessful in identifying and locating Alex or the woman driving the blue car, he provided a late response to Respondent's supplemental discovery seeking those witness identifications. (R. p. 224-26) There is nothing in the record to suggest that either Mr. Jones or his counsel had sufficient information at the time of that response to disclose the alleged witnesses. However, the record does reflect that in the days before trial, Mr. Jones and his counsel were able to supplement the discovery responses to include Lettie Jackson's name. (R. p. 634) The record also reflects that Mr. Jones testified at trial that he had located Alex but that Alex said he didn't know anything about the accident. (R. pp. 720-21) Respondent latches on to this

testimony as some admission of subterfuge. Yet, Mr. Jones' testimony did not include anything about the timing or circumstances of when this occurred.

It is undisputed that these alleged witnesses were the only hope Mr. Jones had to corroborate his version of the collision. Therefore, Mr. Jones and his counsel had every incentive to positively identify and disclose them in a timely manner. Unfortunately, they were unable to do so. Consequently, the trial court excluded not just those two witnesses but also the damages witness Mr. Jones identified to replace his deceased wife's testimony about the impact of the collision on Mr. Jones' life. (R. pp. 10-14; 679)

Nothing in the record supports a finding that Mr. Jones and his counsel had the witness information and purposefully withheld it from disclosure. Notwithstanding the absence of any evidence of nefarious intent, Respondent's counsel presumed the worst. To support this presumption, Respondent's counsel elected to take Mr. Jones' testimony out of context and exaggerated Mr. Jefferies' statements to convince Judge Hood to adopt Respondent's view of the circumstances of the discovery dispute. Unfortunately, this tactic was also successful before the Court of Appeals.

Petitioner does not mean to suggest that Respondent or her counsel has tried to trick any judge. Nevertheless, the record does show defense counsel's use of a "satellite litigation" strategy focused on the conduct of Mr. Jefferies rather than the merits of the case or the actual impact of the alleged wrongful conduct on the litigation itself. By doing so, Respondent has repeatedly presented a misleading and one-sided portrait of the proceedings. Despite Respondent's continuing reliance on this contrived narrative, the law established by this Court requires review and consideration of the entire record in determining whether the trial court's decision to impose the severest of sanctions is supported by the record. This case is simply not one where the record

supports the brutal sanctions imposed by Judge Hood. When the Court of Appeals declined to review the record to determine whether there was adequate evidentiary support for the sanctions issued by Judge Hood under the guise of the doctrine of law of the case, it modified the standard of review firmly established and clearly applied by this Court.

The sanctions imposed in this case are the harshest sanctions available and will unjustly foreclose Mr. Jones' opportunity to seek recompence for the damages Respondent caused him by her admitted failure to follow the law. This is an extraordinarily punitive outcome. For punishment of this magnitude to be just and proper, there must be a clear record of intentional wrongdoing and of prejudice. Such a record does not exist here, and this Court should grant this Petition to fully review the issues on appeal and reverse the Final Sanctions Order.

I. The Court of Appeals erred in not reviewing the underlying circumstances of the Final Sanctions Order.

Respondent contends that the Court of Appeals correctly applied *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), when it found that Mr. Jones was forever bound, not just by the rulings requiring that discovery be had, but also by various preliminary factual findings in the orders containing those rulings. This line of argument is directly contrary to the law and ignores the well-establish scope of review for sanctions orders in South Carolina.

The appellate standard of review for sanctions orders expressly includes review of "such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County*, 379 S.C. 462, 467, 665 S.E.2d 830, 832 (Ct. App. 2008). The appellate court must also examine the record to determine whether the lower court's imposition of sanctions rests on "reasonable factual support" and to ensure that the sanctions do not result "in prejudice to the rights" of the sanctioned party. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). Furthermore, where the

Circuit Court's sanctions include an award of attorneys' fees, the appellate court is specifically allowed to take its own view of the record. *See Ex parte Gregory*, 378 S.C. 430, 437-38, 663 S.E.2d 46, 50 (2008).

Respondent recognizes that review of the record in this matter will reveal the manner in which she has exploited a routine discovery dispute to her unfair advantage. Therefore, she seeks to avoid any holistic review of the facts by incorrectly asserting that the Court's review is limited because Mr. Jones did not directly appeal the discovery orders issued in this case. However, Mr. Jones was not required to appeal each of the discovery orders issued in this case. *See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right").

The various discovery orders issued in this case did not involve the merits of the case or impair a substantial right, so they were not directly appealable. Neither is Mr. Jones required to list each of those prior orders as separate issues in this appeal because they are part and parcel of the Final Sanctions Order. However, Mr. Jones sufficiently detailed objections to Respondent's mischaracterization of the facts related to the discovery orders within his briefing to allow the Court of Appeals to fully review the providence of the Final Sanctions Order. *See* J. TOAL, ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 208 (3d ed. 2016) (explaining that an issue is ripe for appellate court review if it is "reasonably clear" from the appellant's arguments) (citations omitted); *see also Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (noting that the appellate court may consider issues that are "reasonably clear from an appellant's arguments."); and *Davis v. Parkview Apartments*, 409 S.C. 266, 281 n. 15, 762 S.E.2d 535, 543 n.

15 (2014) (finding that a discovery ruling is unreviewable "[w]ithout specific objections to each item of discovery deemed discoverable").

In issuing the Final Sanctions Order, Judge Hood did not merely accept prior findings that Mr. Jones was ordered to provide certain discovery and render sanctions based on the alleged failure to comply with those orders. As he explicitly stated in his Final Sanctions Order, Judge Hood independently re-examined the factual underpinnings of the prior orders as well as Mr. Jones' and his counsel's conduct since inception of this case to conclude, with clear error, that they actively hid their knowledge of the alleged witnesses. Given Judge Hood's express reliance on Respondent's summation of Mr. Jones' and his counsel's discovery conduct – also reflected in the discovery orders – and the severity of the sanctions issued against Mr. Jones, it was incumbent on the Court of Appeals to conduct a comprehensive review of the record regarding the circumstances of the discovery issues in this case to determine whether or not the sanctions should stand.

Respondent misleadingly argues that Mr. Jones failed to timely raise any concerns about the veracity of the factual history of the discovery dispute. However, Mr. Jones has refuted Respondent's version of the events contributing to the dispute about witness disclosures consistently throughout this litigation. (R. pp. 496-505) (discussing Mr. Jones' deposition testimony about turning before a car other than Respondent's but acknowledging that there are no witnesses to corroborate his version of the collision); (R. pp. 541-46) (refuting Respondent's arguments and explaining that counsel had not been able to identify and locate the potential witnesses despite a desire to do so). Although Mr. Jones' counsel did not detail each and every misstatement of fact made by Respondent's counsel during the hearing before Judge Hood, he did indicate disagreement with Respondent's recitation and, more specifically, called out Respondent for contending that Mr. Jones continuously relied on the existence of witnesses that had not been

identified. (R. pp. 889-99) After Judge Hood entered the Initial Sanctions Order adopting Respondent's incorrect statements of fact, Mr. Jones moved to alter or amend it and more explicitly detailed the factual errors underlying the court's award of sanctions to Respondent. (R. pp. 353-410) Contrary to Respondent's supposition, Mr. Jones did not simply accept Respondent's counsel's factual arguments but lodged objections within the framework and context of the relevant hearings.

The Court of Appeals' decision substantively changes the standard of review in sanctions cases. Instead of waiting until a final decision on the merits, the Court of Appeals has now said that a litigant must suffer contempt and immediately appeal every discovery order where he disagrees with the trial court's factual recitation, even if the litigant is willing to abide by the discovery ordered, or else the litigant is forever bound by those facts as the law of the case. That is not what *Davis* holds, and allowing the Court of Appeals' decision to stand will open the floodgates for needless interlocutory appeals.

II. The Final Sanctions Order is not reasonably supported by the record.

In arguing that the Final Sanctions Order is overwhelmingly supported by the record, Respondent attempts to invalidate Mr. Jones' unlawful passing theory by arguing that it hinged entirely on third-party witnesses. Yet, as was the case throughout, Respondent and the courts have disregarded Mr. Jones' own first-hand account of the incident. Mr. Jones has been steadfast in his testimony that he personally recalled executing his turn in front of a car that was not driven by Respondent; this testimony was independent of any testimony regarding what he believed Alex might have seen. (R. pp. 1121-25; pp. 1138-40) In an effort to reconcile these claims with the fact that Respondent was the person who collided with Mr. Jones, Mr. Jones' counsel pled a theory that was plausible to explain how the accident occurred with hopes that witnesses would be located

to corroborate Mr. Jones' recollection of events. (R. 74-80; 1263-64) However, those witnesses did not materialize during the course of discovery. Still, even without the alleged witnesses, Mr. Jones was entitled to testify based on his own memory regarding the circumstances of the collision. This is why two different Circuit Court Judges ruled on four separate occasions that Respondent was not entitled to judgment as a matter of law.

Unfortunately, Mr. Jones' recollection of the collision and surrounding events may not be as clear as he would like it to be.

Instead of recognizing that Mr. Jones' testimony was likely impacted by his significant memory issues caused by the injuries he sustained when Respondent hit him, Respondent opted to manipulate the narrative by cherry-picking isolated statements and presenting them as the full and true reflection of how the dispute unfolded. Without any support, Respondent ascribes ill motives to Mr. Jones and his counsel regarding Alex despite evidence in the record that Mr. Jones had not provided sufficient information about Alex to allow his own counsel to locate him.

Respondent also misconstrues multiple statements from Mr. Jones' Petition. First, Mr. Jones has always maintained that he had no witnesses responsive to the discovery requests. While Mr. Jefferies acknowledged this in the hearing before Judge Couch, he further acknowledged that Mr. Jones had hoped to identify witnesses but was unable to recall sufficient information to enable his counsel to identify them with any particularity, that his wife died shortly before his deposition (without having disclosed the name of her alleged cousin), and he had not been able to find out the information despite diligent effort. (R. pp. 508-09)

Although phrased differently, Mr. Jones' arguments in the briefing before the Court of Appeals is substantially similar to the arguments made to Judge Couch – that he had no additional witnesses to name because Mr. Jones did not know the name of the woman in the blue car that

might have been the cousin of his now deceased wife and Mr. Jones only knew his acquaintance by the alias of Alex. *Id*. With respect to naming the alleged witnesses, Mr. Jones' counsel explained to Judge Couch that "we can't find Alex who lives . . . in the woods" and, when pressed on when he would disclose the witness, he responded "I don't know that we can find it." (R. p. 510, ll. 2-3) So, the statements in Mr. Jones' opening brief about the response to the supplemental discovery do not advance a new argument in as much as it merely explains why there were no witnesses to name in the response.

Respondent further contends that the findings set forth in the Final Sanctions Order regarding Mr. Jefferies' alleged misrepresentations to Judge Lee are supported by the record. Yet, those findings are reflective of only Respondent's account of those hearings and not what actually occurred in the hearings. While Judge Lee did inquire about the nature of Mr. Jefferies's objections to Judge Couch's oral ruling requiring witness identifications by June 1st, her question was in the context of understanding Mr. Jones' Rule 59 motion. In response, Mr. Jefferies explained his objections with respect to the way the oral ruling was reflected in the written order. He specifically took issue with the accuracy of the factual recitation included in the written order and that the written order excluded <u>all</u> witnesses rather than just the alleged witnesses – Alex and the woman in the blue car – discussed during the hearing. *See* (R. p. 545, l. 8-p. 646, l. 17) (relaying the substance of the objections raised in the Rule 59 motion). Finally, it bears mentioning that the only late-named witness Mr. Jones attempted to call at trial was the person who cared for him after his wife's death and not either of the witnesses at issue in the discovery dispute, and this witness was called for issue preservation purposes, though Respondent implies otherwise. The inconsistency between Respondent's description of actions by Mr. Jones and his counsel on one hand and the

actual transcript on the other serves as a further illustration of Respondent's strategy throughout this litigation.

Perhaps trial counsel could have handled some things differently during this litigation. This is always the case in any litigation. However, there is nothing in the record to support a finding that they had the witness information when responding to the supplemental discovery requests and purposefully withheld it from disclosure. Moreover, none of this caused any prejudice to Respondent in the litigation. At worst, Mr. Jones' counsel should have received a reprimand or modest sanction, but there is absolutely no basis for imposing the "death penalty" of dismissal when the client did nothing wrong and there was no prejudice to Respondent.

III. The penalties imposed by the Final Sanctions Order are excessive.

The record in this case does not support a finding that either Mr. Jones or his counsel acted with bad faith, willful disobedience, or gross indifference. Certainly, Mr. Jones and his counsel believed that there were alleged witnesses that would support Mr. Jones' case but, since the commencement of this dispute, the only reason Mr. Jones and his counsel did not make a timely witness disclosure is that they did not know who to disclose or where to find them. Respondent wants there to be some grand scheme between Mr. Jones and his counsel. However, there is no evidence of any scheme to hide witnesses in this record.

This Court has consistently found that brutal sanctions like the ones handed down in this case are unjustified. *See, e.g. Kershaw Co. Bd. of Educ. v. United States Gypsum Co*., 302 S.C. 390, 396 S.E.2d 369 (1990) (affirming the trial court's refusal to dismiss claim where there was no evidence of intentional violation of the discovery order and the lesser sanction of a jury instruction would have been sufficient); *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996) (reversing the trial court's grant of summary judgment because the sanction effectively resulting

in dismissal was too severe where there was no evidence of any intentional misconduct). Even the cases relied on by Respondent only find sanctions as severe as those imposed by the Final Sanctions Order appropriate where it is indisputable that the sanctioned party engaged in intentional discovery violations or bad faith violations of court orders in a manner that prejudiced the other party. *See McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008); *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004); and *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 528, 489 S.E.2d 679 (Ct. App. 1997).

Here, Mr. Jones and his counsel were sanctioned for failing to disclose possible witnesses to the collision and violating mediation rules. Respondent portrays this as multiple discovery violations and open contempt for court rules. However, this alleged wrongful conduct centered on Respondent's repeated attempts to have Mr. Jones and his counsel sanctioned for their inability to identify the same two alleged witnesses, which did not prejudice Respondent in any way. The record demonstrates that Mr. Jones and his counsel did not name the alleged witnesses because they could not do so. Even when they finally named Lettie Jackson, Mr. Jones did not have her address and was still unsure if she truly was a witness to the accident. Additionally, while Mr. Jones testified at trial that he located Alex, there is nothing in the record indicating whether this occurred before or after his deposition testimony such that there is any evidence of efforts to avoid disclosing him as a witness. Neither Alex nor Lettie Jackson were at trial to testify and, even if they had been there, the court had already excluded them as witnesses at trial as a sanction for any untimely disclosure. Likewise, the complaints regarding the mediation violation are merely pretextual as Respondent has conceded that there was no expectation that mediation would be fruitful. Therefore, imposing the sanction of dismissal in this matter was unreasonable and went

far "beyond the necessities of the situation." *The Balloon Plantation, Inc. vs. Head Balloons, Inc., et al.,* 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990).

Respondent also makes no legitimate effort to refute Mr. Jones' argument regarding the excessiveness of the attorney's fee award. If any monetary sanctions were appropriate at all, the amount of those sanctions should have been limited to the fees and costs related to the alleged misconduct. *See* Rule 11(a), SCRCP (allowing "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee"); Rule 37(b), SCRCP (authorizing "reasonable expenses, including attorney's fees, caused by the failure") Likewise, our mediation rules limit monetary recovery to "the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference." Rule 10(b), SCRADR.

While the motions to compel, mediation, and the hearing before Judge Hood could be related to the conduct complained of in the Motion for Sanctions, it was overreach to include the fees and costs incurred in participating and preparing for trial. Respondent was required to do that work notwithstanding the alleged discovery and mediation misconduct. Notably, more than half of the amount imposed upon Mr. Jones and his counsel as sanctions is attributable to those required activities. (R. pp. 259-71) Therefore, it is disingenuous for Respondent to contend that she did not reap a windfall in the award of monetary sanctions and none of those fees should be awarded to her as part of the sanctions.

CONCLUSION

For these reasons and those set forth in Mr. Jones' Petition, this Court should grant certiorari.

Respectfully Submitted,

s/ *Meliah Bowers Jefferson*

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