THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin ..... Appellant,

v.

Bridget D. Inman, Muriel C. Kennedy, and Patricia Clarkin Smith ..... Respondents.

and Bruce A. Berlinksy, Intervenor. _____

FINAL BRIEF OF RESPONDENT, BRIDGET D. INMAN

June 8, 2021

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ISSUE IV. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS WHEN APPELLANT CLEARLY ESTABLISHED IT HAS SUFFERED PREJUDICE.

The only issues which concern Respondent Bridget Inman (hereafter Inman) are Issues II and IV. Inman does not dispute the manner in which Appellant framed the issues.

STANDARD OF REVIEW AND STATEMENT OF THE CASE AS TO ISSUE II

Factual and Procedural History

Inman does not object to Appellant's Statement of the Case insofar as it relates to Issue II or that the Standard of Review is whether the Circuit Judge abused his discretion.

Argument

1. **Issue II is moot.** This issue is moot because after the ruling which struck paragraphs 90 and 91 of the Amended Complaint, Inman answered both paragraphs. (R. p. 285, ¶s 49 and 50). Inman submits, however, that evidence of

the allegations in these two paragraphs are inadmissible at trial under Rule 408, SCRE because they were offers to compromise and they were statements made during settlement negotiations. Whether they are admissible for any purpose is not before this Court, however. This Court should remand this issue to the Circuit Court with instructions that the admissibility of the evidence of these allegations shall be decided by the trial judge.

2. **Appellant's complaint and amended complaint violate Rule 8(a), SCRCP.**

Inman also asks this Court to affirm based on a ground not argued in the Circuit Court based on Rules 208(b)(2) and 220(c) SCACR which allow Inman to argue for an affirmance based on any ground appearing in the record on appeal.

In this case Appellant's amended complaint grossly violated Rule 8(a), SCRCP which states in relevant part:

> A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.

Plaintiff's Amended Complaint (R. pp. 263-280) 132 paragraphs many of which go well beyond Rule 8's requirement that the complaint contain "a short and plain

statement of the facts showing that the pleader is entitled to relief." Appellant treated its complaint, and in particular paragraphs 90 and 91, not just as what he needed to prove but also how it he was going to prove it which is not the purpose of a complaint. In its discussion in its brief of ISSUE II in the Section entitled **Argument,** Appellant in relevant part states:

> Appellant asserted four grounds for why the court should deny Inman's motion to strike: 1) Appellant did not allege the allegations for the purpose of proving the amount claimed owed. Appellant asserted the allegations in the Amended Complaint for the purpose of proving prior to this action Inman did not dispute the evidence of her obligation to repay Clarkin, but after the action was initiated Inman asserts the Disputed Funds were a gift. The statements impeach Inman's subsequent statements in this action and go towards her credibility as a witness. Inman cannot on the one hand say she never believed an obligation existed because the disputed funds were a gift and at the same time claim her pre-litigation statements acknowledging the existence of the obligation should be excluded because they were settlement negotiations as to an obligation Inman now claims she never believed existed. At the time of the statement there was no dispute as to the existence of the obligation that required resolution or settlement. Statements plead *(sic)* do not address an amount owed, but do impeach Inman's post litigation testimony. The pleadings are not settlement negotiations they are evidence of statements as to business negotiations over a lump sum payment versus monthly payments; 2) the statement was an admission against interest of Inman which is also admissible for impeachment purposes.....

There are numerous other paragraphs in the Amended Complaint that go well beyond the mandate of Rule 8 that a complaint contain only "a short and

plain statement of the facts showing that the pleader is entitled to relief" but Inman objected in particular to paragraphs 90 and 91 because they alleged settlement negotiations.

ISSUE IV.

Standard of Review

ISSUE IV. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR SANCTIONS WHEN APPELLANT CLEARLY ESTABLISHED IT HAS SUFFERED PREJUDICE.

Inman agrees that the standard of review is whether the Circuit Judge abused his discretion when he denied Appellant's motion.

Inman's Statement of the Case as it Relates to ISSUE IV

Inman submits that Appellant's Statement of the Case went well beyond the limitations set out in Rule 208(b)(1)(C), SCACR. Specifically as it relates to ISSUE IV and as will be set out more fully below, Inman objects to Appellant's Statement of the Case because it omits that at the November 13, 2019 hearing on Appellant's Motion for Sanctions before Judge Jennifer McCoy, Appellant's counsel agreed with Judge McCoy that Inman was not responsible for the discovery problems Appellant alleged in his Motion for Sanctions (R. p. 336, line 19 – p. 339, line 9) and that he was only seeking sanctions against her then

attorney, Bruce Berlinsky who was not present at the November 13, 2019 hearing because he no longer represented Inman.

Factual History for Issue IV

Inman retained Attorney Bruce Berlinsky shortly after she was served with the Summons and Complaint in October 2017. (R. p. 478, ¶2). He continuously represented her until October 14, 2019 when a consent order was entered relieving him as her counsel and substituting the undersigned. (R. p. 8).

As set out in the Appellant's Statement of the Case, Appellant claims that Inman borrowed approximately $137,000.00 in 2008 from her grandmother Muriel Clarkin (hereafter Clarkin) for whom the Appellant is the court appointed conservator. Appellant is suing Inman for non-payment of this alleged debt. Inman claims it was not a loan but was a gift which she used to purchase a house on Elrod St. in Goose Creek, SC (hereafter Elrod). Clarkin borrowed the funds she gave to Inman to buy Elrod on a line of credit from Wells Fargo which encumbered a house Clarkin owned on Atlantic St in Mt. Pleasant, SC. On February 6, 2017, Inman sold Elrod and realized $99,317.71 from the sale. From these funds, on September 2, 2017, Inman gave her mother Muriel Kennedy (hereafter Kennedy) who is Clarkin's daughter a check for $85,000.00 to invest for

her. Kennedy used approximately $67,000.00 of funds she received from Inman to purchase stock in Apple, Inc. (See Appellant's Statement of the Case).

In its Motion for Sanctions (R. pp. 161-170), Appellant sets out in detail the failings by Inman' former lawyer in responding to Appellant's discovery requests. The main issue raised in the motion was the repeated failure by Berlinsky to supply documents or information in response to Appellant's discovery requests that would show who possessed the proceeds Inman received from the sale of Elrod. Appellant also complained in the Motion for Sanctions that Inman had not timely and fully complied with an order compelling her to comply with certain discovery requests including but not limited to ordering her to identify the current location and form of the proceeds of sale of Elrod.[1] (R. p. 161, ¶1 – p. 162, ¶3). At her April 8, 2019 deposition, Inman was asked by Appellant's counsel if she was aware that there was an order that required her to provide documents which would show what happened to the funds Inman realized from the sale of Elrod. She testified that she did not know about the order which is significant because the only way she would know is if lawyer Berlinsky told her which he clearly had not.

Q. Okay. When did you give your mother the

[1] In Appellant's Motion for Sanctions filed on April 15, 2019, he incorrectly states the order compelling proper responses to discovery requests was filed on June 19, 2019. ¶ 3, Appellant's Motion for Sanctions.

$85,000?
A. I'd have to look at the date of the check.
Q. There's a check?
A. Yes.
Q. Okay. Have you provided me that check in discovery?
A. Pretty sure I did.
Q. I have not received it.
A. Okay.
Q. Are you aware there's an order asking you to provide documents evidencing where that money went?
A. (Witness moves head side to side).
Q. Can you provide me a copy of that check?
A. Yes.

(R. p. 307, line 22 of p. 25 of Depo. – line 11 of p. 26 of Depo.)

A hearing was held for the Motion for Sanctions before Judge Jennifer McCoy on November 13, 2019. Before the hearing, Inman filed an affidavit in which she stated she retained Berlinsky after she got served with the summons and complaint. Inman stated she met with Berlinsky every time he asked her to come in, answered all of his questions and, every time he her asked for documents, she provided them to him as soon as possible. (R. p. 478, ¶s 2 and 3). Inman stated she had never seen the responses to interrogatories and requests to produce Berlinsky sent to Appellant's counsel and did not know she was supposed to have signed the responses to interrogatories under oath. (R. p. 480, ¶9).

Also in her affidavit filed for the Motion for Sanctions, Inman stated that she brought a copy of the $85,000.00 check written to Kennedy to Berlinsky when she first met with him or shortly after she first met with him. She stated that well after she had given Berlinsky a copy of the check, he asked her for it again. She gave him another copy. Inman stated that "Apparently, Mr. Berlinsky never gave it to [Appellant's] lawyer (R. p. 481, ¶14).

At the hearing before Judge McCoy on November 13, 2019, Appellant's counsel immediately started complaining about Berlinsky. Appellant's counsel noted that the Motion for Sanctions was filed during April 2019. "However, unfortunately due to continuous delays of previous counsel of defendant, Mr. Berlinsky, we are here before you now seven months later." (R. p. 329, lines 10-16). Appellant's counsel then went into detail about Berlinsky's failures in complying with discovery requests and his failure to comply with an order filed on June 19, 2018 compelling him to respond to certain discovery requests within fifteen (15) days of the order. He clearly blamed Berlinsky and not Inman.

And that brings us to the motion for sanctions. We would before you, Your Honor, on June 19th, 2018 on a motion to compel. At this point in time, Mr. Berlinsky, previous counsel for defendant, was representing defendant. And you ordered him to supplement responses to request for admissions, to provide proof of the years she declared the mortgage interest paid on her grandmother's heloc on her taxes, to provide proof of all payment she made on the heloc, and proof of where the proceeds of the sale went, including bank statements.

On July 19th, months later, I sent Mr. Berlinsky a certified letter, with a notice of deposition attached to it with a cover letter. I also requested that he provide the outstanding discovery that had been ordered on June 19th.

That came back return to sender. However, on July 24th, a couple of days later, Mr. Berlinsky provided me the first part of the ordered discovery, which was the proof of mortgage interest.

Thereafter, I sent numerous e-mails over a period of months saying, I need this outstanding discovery, can we please get depositions scheduled, as well as mediation.

Finally on February 6th Mr. Berlinsky responded -- this is 2019 -- with an e-mail stating he thought the documents had been sent.

On March 3rd Mr. Berlinsky sent me an e-mail stating that $76,000 of that $99,000 from the proceeds of the sale were used to purchase Apple stock. He gave me a stock statement. However, the account number and the account holder's names were redacted. I asked him to provide me with an unredacting copy. I received that on April 5th.

This is the first time -- this is a year and a half after you had ordered this discovery be provided, that we find out that the stock is titled in the name in the defendant's mother, who is the third party being added on the motion to amend.

Further, on April 5th I called Mr. Berlinsky and said, if you will provide me the proof of all payments made on the heloc, that would probably really shorten our deposition, which is scheduled to be held on April 8th.

He immediately provided them in e-mail. It was an account created by the defendant two years prior. And, apparently, it had been in his possession, but he had yet to provide it a year and a half after ordered to do so.

April 8th we had her deposition wherein she stated that she provided a check to her mother for $85,000, a majority of the proceeds from the sale. I asked if provided a copy of it. And she said, yeah, I believe I have. And I said, I have not received a copy of that, can you get me a copy? She said sure. She also said she provided a copy of the HUD 1 statements from the original purchase of the Elrod property.

At this point in time, I would direct you to the transcript from the hearing, which I filed, as well, with the Court. Page nine, beginning on line 13, it says, the only other thing is discovering where the money is right now. I need to know the location of the money. Because if I have to make motions to protect it in the future, I need to know its whereabouts.

That's exactly what I had to do with the motion to add a third party. Because eventually we have learned, years later, that the money was in her mother's possession.

And Mr. Berlinsky originally states, well, at this point it's her money, they have to prove they're entitled to it. And Your Honor said, do you have a problem with this? He said, I'll certainly let them know where the money is.

Ms. Inman has just filed an affidavit. It states that shortly after meeting with Mr. Berlinsky in 2017, before I ever sent discovery, she provided him a copy of the check for $85,000. This is very important to this case.

It's a majority of the money that's in dispute. I asked for it in discovery in January of '18. Your Honor ordered that it be provided in June of '18. He never provided a copy of that check to me, even after I filed this motion for sanctions in April.

Mr. O'Connell has now provided it to me. And he noted that it was actually in Mr. Berlinsky's file when he received the file. And, again, Ms. Inman's affidavit states she provided it to him in 2017. I would say –

(R. p. 332, line 24 – p. 336, line 18).

Judge McCoy's reaction to this argument is important because she clearly observed Appellant's counsel was blaming Berlinsky and that Appellant's counsel was really seeking sanctions from Berlinsky, not Inman.

THE COURT: I mean, I understand -- it would be one thing if Mr. Berlinsky was in here today representing the defendant, but he's not. You're not asserting that the defendant, herself, has withheld information that she's --

MR. KEYS: I would assert to the Court there's just been a continued history of failure to

comply with the discovery work, to delay in taking depositions, mediation, has continued these hearings. **This is now the third time they've been set with Mr. Berlinsky's continued continuances.**

THE COURT: Is he on the case any more? Are you taking his place?

MR. O'CONNELL: I'm now representing the defendant in this case. I inherited this case. He was let go and I was retained.

MR. KEYS: And, Your Honor, I would say that this has truly caused a delay in plaintiff's ability to prosecute this case. It has been very prejudicial to them. And the rules do provide that this Court may sanction a defendant or their attorney.

THE COURT: **Right. But here's the problem, you just stated yourself that you believe the defendant did her due diligence and turned this $85,000 copy of a check over two years ago, as she was instructed to. So I don't know that I can punish her if she's done what she was supposed to do.** And if I were to punish Mr. Berlinsky that would be a little bit silly at this point, as he's no longer an attorney on this case. So I'm not sure exactly what you're asking me to do.

MR. KEYS: At this point, I would --

THE COURT: I'm sympathetic for your situation. But, I mean, in terms of sanctions my hands are tied.

MR. KEYS: If I may approach.

THE COURT: Sure.

MR. KEYS: This is an affidavit. The rule provides that the Court could sanction when it felt to provide for attorney's fees. I would be honest, this has been very frustrating to me. **But I was shocked when I looked at the time spent, at the hours that I honestly believe are attributable**

to him failing to comply with discovery and delay.

THE COURT: Okay. You're asking this and you're alleging that Mr. Berlinsky is the reason that these fees are drummed up? Don't you think that he has the right to be present at the hearing?

MR. KEYS: In which case, I would request a continuance.

THE COURT: Well, that would be proper if you want to notice him. If you're seeking fees from him, then certainly he needs to be present. Don't you agree? I'm going to give this back to you.

MR. KEYS: Yes. May I move to continue this motion?

THE COURT: You can.

MR. KEYS: Thank you, Your Honor.

THE COURT: I'll grant a continuance on that motion. He needs to be here if you're going to seek fees against him.

(R. p. 336, line 19 – p. 339, line 9) (emphasis added).

The Motion for sanctions was reconvened on June 24, 2020 before Judge Bentley Price. The hearing was not finished on June 24th so it was reconvened again on June 30, 2020 before Judge Price. Appellant's counsel made the rather amazing statement to Judge Price that "[t]he motion for sanctions which was heard at 11/13. But because Mr. Berlinsky was not present it was continued." (R. p. 375, lines 9-11). Appellant's counsel made no mention to Judge Price that Judge McCoy found during the 11/13/19 hearing that Appellant's counsel was seeking sanctions against Berlinsky instead of Inman because, as Appellant's

counsel agreed, Inman had done her due diligence. Appellant's counsel also did not reveal Judge McCoy said she could not proceed against Berlinsky because he had been relieved as Inman's counsel and was not present.

Prior to the reconvening of the hearing before Judge Price on Appellant's Motion for Sanctions on June 24, 2020, the undersigned filed a Memorandum in Opposition to Plaintiff's Motion for Sanctions. (R. p. 611 – p. 615). Attached as exhibits to that memorandum were the transcript of the November 13, 2019 hearing before Judge McCoy and Inman's affidavit which was provided to Judge McCoy before the same hearing. Judge Price, therefore, had the benefit of the arguments and documents presented to Judge McCoy and Judge McCoy's view that Appellant was seeking sanctions against Berlinsky and not Inman.

The undersigned argued before Judge Price on June 24th and again on June 30th Inman's position:

> MR. O'CONNELL: The hearing in front of Judge McCoy back in November, I filed my client's affidavit. I filed a brief. You've got it. Mr. Keys, essentially, waived his -- any claim against my client having any fault in the discovery issues that he raises. In fact, he agreed with me when he said to Judge -- this is further from the brief I submitted -- when he said to Judge McCoy, Judge, I was shocked when I looked at the time spent, hours we honestly believe are attributable to him to comply with discovery and delay. And then Judge McCoy said, well, you are accusing Mr. Berlinsky of

drumming up these fees, so he needs to be here. So that's why we didn't finish the motion, because it was all directed at Mr. Berlinsky. And that's -- and she said he's got to be here and be given notice. That's what happened. Now it's in front of you. I don't think my client ought to be charged with any sanctions at all because it wasn't her fault. She didn't know what was going on. And I think Mr. Keys has, essentially, waived any right to go after my client for sanctions. And that's explained in the brief that I filed with you previously.

(R. p. 401, line 21 – p. 402, line 17)

Berlinsky participated in both hearings and argued that the delays in providing discovery was inadvertent and not intentional.

> **MR. BERLINSKY**: Your Honor, I -- this case had just mountains of documents. I thought I had sent everything to Mr. Conor [sic]. But even if I didn't we discussed all of this. And the three items that he claims were missing, which was a copy of a check, a redacted stock statement of Ms. Inman's mother that he did receive.
>
> The only thing I redacted was her home address and her account number and her personal stocks because she used these monies on her daughter's behalf to purchase Apple stocks. And then there was one other document.
>
> But, we talked about them. And in fact when Ms. Inman's deposition was taken Mr. Conor [sic] certainly questioned her about all of those things as if he had the documents because we were open and forthcoming that those were the dollar amounts. The documents were later produced by Mr. -- by Michael O'Connell.
>
> And it certainly supported everything that we had told Mr. Keys so that he didn't suffer any prejudice. It didn't delay anything. This case has kept on moving whether it was me or subsequent counsel. And there has been no prejudice or harm.

(R. p. 371, line 22 – p. 372, line 17).

When the hearing reconvened on June 30, 2020, Berlinsky stated:

> **MR. BERLINSKY**: Thank you, Your Honor. Only thing I would just add, Your Honor, is I've been doing this 37 years. This is the first time I've ever even had a motion for sanctions. As I said earlier, you know, you've got my brief, it was inadvertent and not intentional. And I just point that out to the Court.

(R. p. 393, lines 18-23).

It was clear by the end of the hearing on June 30, 2020 that Judge Price was not going to assess sanctions against Inman. He asked Appellant's counsel how much money he was seeking **against Berlinsky**.

> THE COURT: **What amount of money are you asking for, Mr. Keys, just as an aside, so Mr. Berlinsky knows?**
> MR. KEYS: I sent you an affidavit of over $6,000 that I can equate to the delay, Your Honor. But I would like to leave it to the Court's discretion.

(R. p. 393, lines 9-13). In the wake of these questions from Judge Price, Appellant's counsel did not say anything about seeking money from Inman because Rule 37(b)(2), SCRCP allows for the same.

In his brief, Appellant stated that on July 9, 2020, Judge Price filed a form order denying the motion. Appellant does not mention that Judge McCoy made findings on the record at the conclusion of the June 30, 2020 hearing that showed why he denied the Motion for Sanctions against Berlinsky.

> **THE COURT**: Well, I got it. We made these arguments last time. They are all in my notes. You are chronologically going right down what I wrote down. For the purposes of this, what I'm going to do is, because Julie is going to want to do a Form 4, because this is our last day of hearings, which is nice, for the next two days, but, regardless, **as to the motion for sanctions, I'm going to deny those. They said they were inadvertent, and I believe them. They are officers of the court. And I believe that it was.**

(R. p. 405, lines 1-12) (emphasis added).

Argument

Waiver by Appellant to Seek Sanctions against Inman: The exchange between Appellant's counsel and Judge McCoy at the November 13, 2019 hearing could not be clearer that Appellant was not seeking sanctions against Inman but was seeking them against Berlinsky. Appellant's counsel never mentioned that Inman was at fault. Moreover, Judge McCoy found that she could not punish Inman because, as Appellant's counsel admitted, Inman had done her due diligence in the discovery process. After Judge McCoy said she could not impose sanctions against Berlinsky because he was not present, Appellant's counsel did not argue the acts and omissions by Berlinsky in the discovery process were attributable to Inman and, therefore, she should be sanctioned. He merely asked

for a continuance so Berlinsky could be present to defend himself; that was the waiver of his right to seek sanctions against Inman.

Inman was not responsible for the discovery problems created by Berlinsky, was not aware of them and, therefore, should not be sanctioned. It is clear that Inman was not responsible for any of the actions or inactions of Berlinsky and did not know about them. She did not know about the Order Granting [Appellant's] Motion to Compel (R. p. 307, line 22 of p. 25 of Depo. – p. 26 of Depo., line 11), did not know Berlinsky failed to give Appellant's counsel a copy of the $85,000.00 check she gave Kennedy, never saw the answers to interrogatories or requests to produce and never knew she was supposed to sign them under oath. (R. p. 480, ¶9 and p. 481, ¶14).

The last paragraph of Rule 37(b)(2), SCRCP is as follows:

> In lieu of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney obeying him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds the failure was substantially justified or that other circumstances make an award unjust.

The case law cited by Appellant is clear that the "acts of an attorney are directly attributable to and binding on the client," *Griffin Grading v. Tire Service Equipment*, 334 S.C. 193,199-200, 511 S.E.2d 716 (Ct. App.1999). Rule 37(b)(2)

makes it clear, however, that sanctions can be targeted at the lawyer or her client or both. In the *Griffin Grading* opinion, this Court suggested that if a litigant is unaware of the acts or omissions by its lawyer, the litigant should not be sanctioned. At the oral argument before this Court," the defendant's new lawyer[2] conceded that the failure to comply with certain discovery in this case was 'indefensible' but asserted that Tire Service should not be punished for acts committed by its previous counsel." In response, this Court stated **"[f]irst, we note that there is no evidence in the record to support Tire Service's assertion that it was unaware of the acts of its counsel.** Furthermore, the acts of an attorney are directly attributable to and binding on the client." *Id at* 334 S.C. 200. (emphasis added). In this case, there is plenty of evidence that Inman was completely unaware of the acts and omissions by Berlinsky.

CONCLUSION

This Court should find ISSUE II is moot and remand it to the Circuit Court with instructions that Judge Price's order granting the motion to strike was not an evidentiary ruling and that whether the allegations in paragraphs 90 and 91 of the Amended Complaint are admissible evidence shall be decided by the trial judge.

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[2] The defendant's previous lawyer had been suspended from the practice of law for 90 days.

As to ISSUE IV, this Court should affirm Judge Price's order that denied the motion for sanctions.

June 8, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 8, 2021

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