

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No: 2011-CP-26-9457

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SEP 12 2013

SC Court of Appeals

Horry County, A body politic,.....Respondents.

v.

Aquasino Partners of South Carolina LLC, Suncruz Casino Cruises, LLC,
Ventures South Carolina, LLC, Suncruz Casinos, LLC and Highland Park
Real Estate Development Corporation,.....Defendants.

Of whom,

Aquasino Partners of South Carolina, LLC, Suncruz Casinos Cruises, LLC
and Highland Park Real Estate Development CorporationAppellants.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities	iii
I. ARGUMENT:.....	1
II. CONCLUSION	3

TABLE OF AUTHORITIES

Cases:

<u>Baughman v. American Tel. & Tel. Co.</u> , 306 S.C. 101, 401 S.E. 2d 537 (1991).....	1
<u>Griffin Grading and Clearing, Inc.</u> , 334 S.C.193, 198-199, 511 S.E.2d 716, 718 (Ct.App. 1999)	1
<u>Samples v. Mitchell</u> , 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997).....	1

I. ARGUMENT:

Respondent's arguments are not based upon the proper standard of review and improperly shift the burden of proof. This Court has previously held "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc., 334 S.C. 193, 198-199, 511 S.E.2d 716, 719 (Ct.App.1999)(citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)). As argued more fully in Appellants' Brief, Respondent failed to meet this burden.

Furthermore, there is no showing the lower court actually weighed the nature of the discovery requests, the posture of the case, Appellants' alleged willfulness, or the degree of prejudice to Respondent. "In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion. Id.

The Record on Appeal reveals there is no reasonable factual support for the lower's court's decision to strike Appellants' pleading. The undisputed facts show:

- Appellants' discovery responses were provided to Respondent prior to the rule to show cause hearing.¹

¹ Transcript of October 15, 2012 Hearing, page 11, line 22 – page 12, line 7.

- Appellants offered several times to provide Respondent with full access to all records and documents *prior to* Respondent's filing of its motion to compel.²
- Appellants presented affidavits to the lower court showing they were not aware they had not complied with the court's order and would not knowingly violate the court's order.³
- According to the Initial Report of Escrow Agent filed on August 30, 2012,⁴ Appellants were in compliance of the lower court's Order and no further action was mandated of the Escrow Agent at that time.
- The lower court's Order filed July 30, 2012 granted Respondent "full access to and the unlimited right to inspect all of the books and records pertaining to the business, assets and property of the Appellants, wherever located and however stored, whether manually, on a hard drive or by portable data storage (CD, DVD, or Flash Drives), as the Respondent deems necessary in this action."⁵
- Respondent made no effort to review Appellants' books and records even though the lower court granted Respondent complete authority to do so.
- The case was not on a trial roster. Respondent was not in danger of being "ambushed at trial."
- Respondent made no showing to the lower court that it had been prejudiced in any way.

2 Transcript of July 23, 2012 Hearing, page 11, lines 20-22; page 17, lines 10-17.

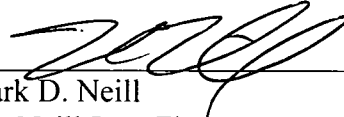
3 Affidavit of Spiro Naos, R.p. ; Affidavit of Robert Weisberg. R.p.

4 Initial Report of Escrow Agent, August 30, 2012, R.p.

5 Order, July 30, 2012 R.p.

II. CONCLUSION:

As argued above and in Appellants' Brief, the lower court's Order finding Appellants in contempt and striking their pleading must be reversed.



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September 10, 2013

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PROOF OF SERVICE

I certify that I have served a copy of Appellants' Reply Brief, by depositing a copy of it in the United States Mail, postage prepaid, on September 10, 2013, addressed to counsel for Respondent, Philip C. Thompson, Thompson & Henry, 1300 Second Avenue, 3rd Floor, Conway, SC 29526, Arrigo P. Carrotti, 1301 Second Avenue, #2D45, Conway, SC 29526, Blake A. Hewitt, P.O. Box 7965, Columbia, SC 29202, counsel for Defendants/Respondents and J. Todd Kincannon, P.O. Box 7901, Columbia, SC 29202.



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