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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Dale E. Van Slambrook, Circuit Court Judge

Appellate Case No. 2025-001683

Kanisha Nash……..……...…….……..…Respondent,

v.

Montgomery Construction, LLC, Patrick Montgomery, and Sabrina Montgomery, individually, and as owner/registered agent for Montgomery Construction, LLC, ……Defendants,

of which Patrick Montgomery and Sabrina Montgomery are, ……..…...Appellants.

FINAL BRIEF OF RESPONDENT KANISHA NASH (APPELLANT SABRINA MONTGOMERY)

BRINGARDNER INJURY LAW FIRM, LLC
Mark J. Bringardner
mark@bringardner.com
Mary K. Linton
mlinton@bringardner.com
41 Broad Street
P.O. Box 100 (29402)
Charleston, SC 29401
Office: 843-400-0550
Facsimile: 843-350-8290

Attorneys for Respondent Kanisha Nash

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in striking Appellant's Answer and awarding costs and fees for intentionally destroying evidence that was ordered to be produced?

STATEMENT OF THE CASE

On June 16, 2023, Respondent Kanish Nash brought this action alleging various causes of action for negligence against Appellant Sabrina Montgomery, Patrick Montgomery, and Montgomery Construction, LLC. (R. pp. 53-66). All parties filed timely Answers. (R. pp. 67-73).

On June 23, 2023, Respondent served Appellant with Interrogatories and Requests for Production. (R. pp. 75-101). On September 11, 2023, after receiving no responses, Respondent filed a Motion to Compel. (R. p. 74). On September 8, 2023, Appellant served Respondent with incomplete and deficient responses. On December 14, 2023, Appellant served Supplemental Responses to Interrogatories and Requests for Production. Prior to the hearing, pursuant to Rule 11, SCRCP, Respondent made numerous attempts to informally resolve the discovery dispute. On December 15, 2023, the parties appeared before the Honorable Diane S. Goodstein regarding Respondent's Motion to Compel. Appellant did not file a memorandum in relation to the Motion. The Court made certain oral rulings from the bench and advised that a written order would be forthcoming.

On January 25, 2024, Appellant served supplemental discovery responses. The responses were still incomplete and contained deficiencies. On February 2, 2024, Judge Goodstein entered a formal Order Granting Plaintiff's Motion to Compel. (R. pp. 1-9).

On May 7, 2024, Respondent served a letter on counsel for Appellant advising of their failures to comply with the Order and requesting prompt compliance with the same. (R. p. 337). By June 19, 2024, Appellant still had not complied with Judge Goodstein's Order. Consequently, Respondent did not have the documents necessary to take informed depositions and was forced to cancel a previously scheduled deposition. Counsel for Respondent proposed that all counsel use the scheduled time to discuss the outstanding discovery issues related to non-compliance with the

Order. On June 20, 2024, all counsel held an informal discovery status conference. Counsel for Respondent advised, again, of the remaining deficiencies and failures to comply with the Order. Counsel for Appellant gave assurance to Respondent that they would meet with their client to resolve the issues. On September 9, 2024, Appellant served third supplemental responses to Interrogatories and Requests for Production. (R. pp. 341-364). However, those responses were still demonstrably incomplete and contained deficiencies. The parties agreed to reschedule the deposition to September 12, 2024, but again had to postpone the deposition because discovery issues remained unresolved.

On October 24, 2024, Respondent filed a Motion for a Rule to Show Cause against Appellant, which was eight (8) months after Judge Goodstein's Order was entered, and after a significant grace period to comply was permitted by Respondent. (R. pp. 250-261). Appellant did not file a memorandum in relation to the Motion. On January 6, 2025, Respondent's Motion was heard and orally granted by Judge Van Slambrook, who ordered the production of Appellant's cell phone for forensic inspection. (R. p. 637: 17-18). Appellant failed to comply with the Court's Order, and instead, destroyed evidence on her cell phone that had been directly ordered for production by Judge Van Slambrook. Appellant does not contest that she knowingly and intentionally destroyed this evidence despite the Court's instruction that it be produced in discovery.

On April 17, 2025, counsel for Appellant produced Appellant's phone. On April 21, 2025, the forensic examiner, John Akerman of Rosen Technology, performed the forensic inspection which revealed that the cellular device was manually reset on April 16, 2025 at 5:15PM. (R. pp. 468-471). This reset wiped the entire phone of all Court ordered data rendering the forensic inspection useless. Per the affidavit of John Akerman of Rosen Technology, the reset occurred on

April 16, 2025, just one (1) day before the phone was to be turned over for the forensic inspection. (R. pp. 468-471). While Appellant feigned compliance with the Court's Order and produced her phone for forensic inspection, Appellant's actions demonstrated an utter disregard for the judicial system. The destruction of evidence is particularly egregious in light of the Court Order commanding its production.

On May 1, 2025, Respondent filed a Supplemental Memorandum for Rule to Show Cause against Appellant for her failure to comply with the Order Granting Plaintiff's Motion for Rule to Show Cause and for the willful destruction of Court ordered evidence. (R. pp. 423-450). Appellant did not file a memorandum in relation to the Motion. On June 18, 2025, Judge Van Slambrook – for a second time – heard oral argument on Plaintiff's Motion for Rule to Show Cause. This hearing was the third before the Court on the exact same issue – discovery noncompliance. On June 20, 2025, Judge Van Slambrook issued a Form 4 granting Plaintiff's Motion for Rule to Show Cause, for a second time, and relayed that sanctions would be issued in a more detailed Order to be issued at a later date. (R. pp. 26-29).

On July 1, 2025, Judge Van Slambrook issued a Supplemental Order Granting Plaintiff's Motion for Rule to Show Cause and struck Appellant's Answer, awarded attorney's costs and fees in the amount of $10,914.32, and ordered Appellant to pay for the costs and fees associated with the forensic inspection totaling $2,375.00. (R. pp. 30-44). On July 11, 2025, Appellant filed a Motion for Reconsideration under Rule 59(e), SCRCP. (R. pp. 524-525). On July 24, 2025, Respondent filed a reply to the Motion for Reconsideration. (R. pp. 618-620). On July 25, 2025, the Motion was denied with a clarification that Appellant's counsel would not be responsible for the attorney's costs and fees, without objection from Respondent. (R. pp. 48-50). Appellant filed the present Notice of Appeal on August 22, 2025. (R. pp. 621-622).

STATEMENT OF THE FACTS

On April 14, 2023, Patrick Montgomery, while driving drunk, crossed the center line and caused a nearly head-on collision with a vehicle driven by Respondent. (R. pp. 380 ¶¶ 11, 41). Respondent suffered severe, life-threatening injuries and was hospitalized for weeks. Her past medical bills total over $400,000. (R. p. 134). Tragically, Respondent's three-year-old son, who was a passenger in her vehicle, was killed as a result of the injuries he sustained in crash. (R. p. 134).

At the time of the collision, Patrick Montgomery was driving a pick-up truck, owned by his wife, Appellant Sabrina Montgomery, and hauling a trailer, believed to be owned and/or used by Montgomery Construction, LLC, ("Montgomery Construction"). (R. pp. 380 ¶¶ 13,16). Sabrina Montgomery is the sole owner of Montgomery Construction. (R. pp. 379 ¶ 6). Evidence shows that Sabrina Montgomery and Patrick Montgomery co-mingled the LLC's assets and used them for work and personal purposes. Montgomery Construction owned and/or used the trailer to haul materials.

At the time of the crash, the trailer held a large blue barrel containing off road diesel fuel and other materials/equipment believed to be owned by Montgomery Construction. (R. pp. 383 ¶¶ 28-29). Direct negligence, negligent entrustment, vicarious liability, alter-ego, and piercing the corporate veil have been alleged in the Amended Complaint.

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Nevertheless, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules. *See* (addressing the comparable Federal Rule) *Diaz v. Southern Drilling Corp.,* 427 F.2d 1118, 1126 (5th Cir.), *cert. denied,* 400 U.S. 878, 91 S. Ct. 118, 27 L.Ed.2d 115 (1970) ("[O]verleniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery."); *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dictum) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.").

Under Rule 37(b)(3)(C) of the South Carolina Rules of Civil Procedure, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action. *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008); *see also*, *Barnette v. Adams Bros. Logging, Inc.,* 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred. *Id.*

In order to overturn the trial court's decision, the reviewing court must find that an abuse of discretion occurred to justify reversal of a trial court's order to impose discovery sanctions. *See*

Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); *see also Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018); *see also S.C. Dep't of Health & Envtl Control v. FedServ Indus. Inc.*, 294 S.C. 33 at 39, 325 S.E.2d 311 at 314-15 (Ct. App. 1987).

ARGUMENTS

I. The Trial Court Did Not Abuse its Discretion in the Issuance of Sanctions Because Judge Van Slambrook's Decision was Based on Reasonable Factual Support.

Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and the party appealing the order of the sanction carries the burden of proving an abuse of discretion occurred. *Barnette v. Adams Bros. Logging, Inc.,* 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). An abuse of discretion may be found when the appellant shows that the conclusion reached by the circuit court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law. *Karppi v. Greenville Terrazzo Co.,* 327 S.C. 538, 542, 489 S.E.2d 672, 681 (Ct. App. 1997). *See also, Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

"In determining the appropriateness of a sanction, the court should consider 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, 832-33 (Ct. App. 2008); *quoting Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). "Whe[n] 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*, at 198-199, 511 S.E.2d at 719.

In the record to date, including the written materials produced by the parties to Judge Van Slambrook, the record from the multiple hearings regarding the same discovery noncompliance, and the statement of counsel at the hearings, there is overwhelming factual evidence to support Judge Van Slambrook's determination that the Appellant did not comply with either Judge Goodstein's Order or his own and that the sanction of striking her Answer and awarding costs and fees was appropriate. Most notably because Appellant knowingly and willfully destroyed evidence

despite the Court ordering its production.

A. Appellant's On-Going Failure to Comply with Multiple Discovery Orders Provides Reasonable Factual Support.

Not only was the awarded relief appropriate, but it was necessary in the wake of such willful disobedience to two prior Court Orders and the intentional destruction of evidence. This is not a situation wherein Appellant was only given one opportunity to comply with judicial instruction:

i. Appellant Failed to Comply with Judge Goodstein's Order Granting Respondent's Motion to Compel.

On February 2, 2024, Judge Goodstein issued an Order Granting Plaintiff's Motion to Compel as Appellant's discovery responses were replete with evasive answers or otherwise nonresponsive. (R. pp. 1-9). Judge Goodstein's Order was straightforward, fair, and ordered compliance by March 3, 2024. (R. p. 8). On September 9, 2024, Appellant served discovery responses which were noncompliant with Judge Goodstein's Order and contained numerous deficiencies. From February 20, 2024 until the filing of Respondent's Rule to Show Cause, on October 24, 2024, Respondent advised counsel for Appellant, on numerous occasions, of the remaining discovery deficiencies and failures to comply with Judge Goodstein's Order. Despite this, Appellant failed to supplement her discovery to come into complete compliance with the outstanding Order.

ii. Appellant Failed to Comply with Judge Van Slambrook's Order Granting Respondent's Rule to Show Cause by Intentionally Destroying Evidence.

On October 24, 2024, Respondent filed a Motion for Rule to Show Cause against Appellant. (R. pp. 250-261). Respondent's Motion came before the Court on January 6, 2025, and was scheduled for an in-person hearing. Appellant failed to show. The Court ordered Appellant to supplement discovery and produce her cell phone for forensic inspection. (R. p. 637: 17-18). The

day before the forensic inspection, Appellant intentionally reset her phone thereby wiping all evidence from the phone and rendering the inspection useless. The clear factual evidence of the Appellant's gross indifference to the rights of Respondent is overwhelming and has severely prejudiced Respondent in the pursuit of her case. There can be no more egregious an action than that of defying a Court Order by intentionally and willfully destroying evidence which was ordered for production.

II. Prejudice to the Respondent Resulted from the Appellant's Delay and Intentional Destruction of Evidence.

The discovery process enables parties to know before the trial begins what evidence may be presented. "The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of South Carolina Bar,* 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001). "The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." *Samples v. Mitchell,* 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997) (internal quotations omitted). The discovery process is designed to prevent guessing games. *See, e.g. U.S.* v. *Proctor & Gamble Co.,* 356 U.S. 677, 682 (1958). "The rights of discovery provided by the Rules gives the trial lawyer the means to be prepared for trial. Where these rights are not accorded, *prejudice must be presumed.*" *Downey v. Dixon,* 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App 1987) *(emphasis added).*

This action has been filed since 2023. As of the filing of this Brief, Respondent is still without information necessary to adjudicate these claims and now is unable to obtain key evidence because it was intentionally destroyed. The extended delay in the advancement of the case from 2023 to the present is highly prejudicial and emotionally draining to the Respondent, whose minor child

perished as a result of this collision. Despite the fact that three (3) years have passed, the case still remains in the very early stages of discovery.

III. Appellant's Arguments in Support of Her Appeal Were Not Preserved for Appellate Review and are Therefore Considered Waived.

Appellant's Rule 59(e), SCRCP Motion requested that the Court reconsider the monetary amount of sanctions against her and also requested the Court revise its Order to remove counsel from being held responsible for the sanctions, which was unopposed by Respondent. (R. pp. 524-525). The Motion did not address the striking of her Answer or identify any material fact or principle of law that was either overlooked or disregarded by the Court, nor did it identify any error of law or fact not appropriately considered.

In its Initial Brief, Appellant appears to argue that the trial court failed to consider whether lesser sanctions could achieve justice. This issue is unpreserved because Appellant never raised this argument; instead, Appellant only requested the Court reconvene to hear from Appellant and that the Court lower the monetary amount of sanctions against her. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (stating "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). This issue was also directly contemplated by Judge Van Slambrook and overruled given the intentional destruction of evidence.

IV. Judge Van Slambrook Gave the Matter Serious Consideration and Did Not Abuse His Discretion in Striking the Answer of Appellant and Awarding Costs and Fees.

The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.

Morgan v. Jones, 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984). The selection of a sanction for discovery violations is within the trial court's discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). In order to overturn the trial court's decision, the reviewing court must find that an abuse of discretion occurred to justify reversal of a trial court's order to impose discovery sanctions. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); *see also Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018); *see also S.C. Dep't of Health & Envtl. Control v. FedServ Indus. Inc.,* 294 S.C. 33, 325 S.E.2d 311 (Ct. App. 1987).

Judge Van Slambrook reviewed the evidence presented at both Rule to Show Cause hearings, listened to arguments of counsel, reviewed Respondent's briefs (to date, Appellant has never filed a responsive brief in this matter), reviewed Judge Goodstein's prior Order, and thoughtfully questioned counsel for both parties related to the relevant facts. At the first Rule to Show Cause hearing, Judge Van Slambrook did not order sanctions against Appellant. Only after she disobeyed the Court's instruction and intentionally destroyed key evidence did Judge Van Slambrook order the relief at issue.

Following the second Rule to Show Cause hearing, Judge Van Slambrook took the matter under advisement for nearly one (1) month before issuing a determination of sanctions. His consideration was thorough and reflective of the facts. He clearly used sound discretion based on the facts presented by both sides and made a determination that striking the Answer and issuing attorney's fees and costs as well as costs associated with the forensic inspection was the proper sanction for the extreme and flagrant disregard of the Court and intentional destruction of evidence. There is no evidence whatsoever that Judge Van Slambrook abused his discretion in any way. Thus, his decision must be upheld.

V. Judge Van Slambrook's Order Should be Affirmed Because Appellant Failed to Comply with Judicial Order and Intentionally Destroyed Evidence That the Court Ordered for Production.

Appellant failed to comply with judicial instruction and intentionally destroyed evidence that the Court ordered be produced. As such, Judge Van Slambrook was required to use his discretion to determine the appropriate sanction. Based on the extent and severity of the disregard for the judiciary, he was well within his discretion to strike the Appellant's Answer and award monetary relief. As Judge Van Slambrook thoughtfully noted in his Order, he could not discern a more egregious discovery abuse than the intentional destruction of evidence that was ordered to be produced in discovery.

If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to obey any orders. . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both

> to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(b)(2), SCRCP. Judge Van Slambrook was within his discretion to not only strike Appellant's Answer and award monetary sanctions, but it was also within his discretion to hold Appellant in contempt. He did not impose the harshest sanction at his disposal as Appellant was not held in contempt. Instead, he chose the sanction compatible with open admissions from Appellant that she did not comply with prior Court Orders and intentionally destroyed evidence. It is clear that the relief was warranted.

The judiciary expects lawyers to police themselves and to participate fairly in the discovery process, but when that ideal is not met, the responsibility for preventing discovery abuse rests on the shoulders of the trial judges. *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 193, 552 8.E.2d 10,18 (2001). It is Judge Van Slambrook's duty and responsibility to prevent blatant discovery abuse, as was seen in the conduct of the Appellant. It was within Judge Van Slambrook's sound discretion to issue the sanction of striking the Appellant's Answer and awarding costs and fees.

CONCLUSION

The Appellant has acted with willful disobedience and gross indifference to the rights of the Respondent. Her callous disregard for judicial order warrants a severe sanction. Striking the Answer of the Appellant and awarding costs and fees was the appropriate sanction for her egregious conduct and bad faith toward the Respondent and the tribunal. Our courts have held that the dismissal of an action is warranted in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996).

The failure of the Appellant to obey the judiciary, is evidence of bad faith, willful disobedience, and gross indifference to the rights of the Respondent and to the authority of the Court. The sanction of striking the Appellant's answer and awarding costs and fees is clearly warranted in this case and Judge Van Slambrook acted within his discretion to order the same.

For the reasons stated herein, this Court should affirm Judge Van Slambrook's Order Striking the Answer of Appellant and awarding attorney's fees and costs.

Respectfully Submitted,

BRINGARDNER INJURY LAW FIRM, LLC

s/Mary K. Linton
Mark J. Bringardner (SC Bar No.: 102465)
mark@bringardner.com
Mary K. Linton (SC Bar No.: 102815)
mlinton@bringardner.com
41 Broad Street
P.O. Box 100 (29402)
Charleston, SC 29401
Office: 843-400-0550
Facsimile: 843-350-8290

Attorneys for Respondent Kanisha Nash

May 5, 2026
Charleston, South Carolina