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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Hon. G.D. Morgan, Jr.

Case No. 2026-000110

IN THE MATTER OF Mary Sloan "Polly" Shoemaker ..... Decedent,

James Marshall Shoemaker, III ..... Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, and Edward Sloan Shoemaker and Jonathan Evans Shoemaker as Beneficiaries and as Individuals ..... Respondents.

FINAL REPLY BRIEF OF APPELLANT

Respectfully submitted,

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INTRODUCTION

Respondents' Brief attempts to portray this case as one involving complete noncompliance with discovery obligations. The record reflects something very different. First, the record contains documentary evidence that discovery responses existed in November 2021 and were discussed by counsel at the time. (R. at pp. 124-143; pp. 100-102). Second, regardless of any dispute concerning November 2021 production, Respondents indisputably received the March 23, 2023 production, which Appellant represented was complete and responsive, and which contained full interrogatory responses and responsive documents. (R. at p. 161; pp. 165-205; p. 55, lns. 15-25; p. 56, lns. 1-8). Third, Respondents cannot convert actual production into nonproduction by refusing to review the materials provided and then claiming discovery was never produced. Fourth, Respondents failed to establish actual prejudice resulting from the alleged deficiencies. (R. at pp. 165-205; pp. 206-212). Fifth, the harshest sanction in existence was imposed without any prior sanctions nor any Order warning of the same, and if any sanction were warranted (which is disputed), far less drastic sanctions were available for the necessities of the actual posture and facts of the case. Finally, the authorities relied upon by Respondents to support the sanctions imposed in this case involve parties who actually deprived their opponents of discovery, concealed evidence, or engaged in exceptionally egregious conduct, whereas nothing remotely comparable occurred in the present case.

ARGUMENT

I. RESPONDENTS' DISCOVERY HISTORY IS CONTRADICTED BY THE RECORD.

Respondents' Brief repeatedly presents this matter as though Appellant simply ignored discovery requests for years and failed to provide any meaningful responses until immediately

before the sanctions hearing. That narrative is not supported by the record. The record contains a November 29, 2021 cover letter from Appellant's then-counsel expressly stating that Petitioner's discovery responses were enclosed for service. (R. at p. 124). The record contains Petitioner's signed Answers to Interrogatories bearing the same date. (R. at pp. 125-141). The record further contains a Certificate of Service certifying service of those responses upon Respondents' counsel. (R. at p. 143). The record also contains contemporaneous email communications demonstrating that counsel were actively discussing the preparation and transmission of discovery responses during the same period. (R. at pp. 100-102).

These documents matter because they directly contradict the premise upon which Respondents build much of their argument. Respondents repeatedly assert that Appellant failed to provide interrogatory responses until 2024. Yet the record contains actual interrogatory responses prepared and signed in 2021. The record also indisputably proves Appellant produced the same full interrogatory responses and document production in March 2023, in response to a single Motion to Compel. Respondents may dispute whether those responses were received. They may dispute whether those responses were complete. They may dispute whether supplementation later became necessary. However, none of those arguments support the proposition that no responses existed. The distinction is critical because South Carolina appellate courts have consistently distinguished between total noncompliance and imperfect compliance, intentional acts of bad faith versus mere inadvertence. The record before this Court reflects the latter, not the former.

The significance of the November 2021 responses becomes even more apparent when considered alongside the procedural history of the case. The Motion to Compel was filed

only days after the date reflected on the interrogatory responses and Certificate of Service. (R. at pp. 103-123; pp. 124-143). Thus, from the very outset, this case involved a dispute concerning the adequacy and receipt of discovery rather than a complete refusal to participate in discovery. The Probate Court and Respondents have repeatedly blurred that distinction. The record demonstrates that the distinction is real and substantial.

Appellant consistently maintained throughout the proceedings that discovery responses had been prepared and served by prior counsel. Appellant did not first invent this position on appeal. The same position was presented during the sanctions proceedings, in the Motion for Reconsideration, and before Judge Morgan in the Circuit Court appeal. (R. at pp. 165-205; pp. 213-229; p. 60, lns. 12-25; p. 61, lns. 1-25). Thus, Respondents' effort to portray the November 2021 responses as an after-the-fact creation is inconsistent with the procedural history reflected in the record itself.

II. THE MARCH 23, 2023 PRODUCTION CONSTITUTED ACTUAL COMPLIANCE WITH THE ORDER COMPELLING DISCOVERY.

Even if this Court were to disregard the November 2021 discovery materials entirely, dismissal still cannot be justified. The March 23, 2023 production independently demonstrates actual compliance with the Probate Court's order compelling discovery.

The March 23 production letter states that all documents relating to both the Mary Shoemaker litigation and the James Marshall Shoemaker litigation were enclosed. (R. at p. 161). The letter further states that the documents were being produced exactly as maintained in the ordinary course of business and that the production constituted the complete non-privileged file inherited from prior counsel. (R. at p. 161). Thus, the production was not partial, conditional, or limited. Counsel expressly represented that the entire non-privileged file was being turned over.

Respondents repeatedly describe this production as a "mixed-up giant box of files." That phrase has rhetorical force, but it does not answer the dispositive question before this Court. The question is not whether Respondents liked the manner in which the documents were organized. The question is whether documents were produced. The record conclusively demonstrates that they were, but that the Respondents refused to review them as if it were their right to do so and then somehow successfully argued noncompliance at the sanctions hearing without actually having a smattering of knowledge about Appellant's full production that Respondents possessed for over a year.

Indeed, one of the most striking aspects of the record is what Respondents never identified. Respondents never identified a specific responsive document that remained unavailable after March 23, 2023. Respondents never identified a category of documents that was withheld from production. Respondents never identified evidence that was destroyed. Respondents never identified spoliation. Respondents never identified a responsive document later discovered that should have been included in the production but was not. (R. at pp. 165-205; pp. 329-349). This is because Respondents failed and refused to review the production.

Instead, Respondents' objections focused primarily upon the organization of the production and the absence of separate written responses that corresponded to individual document requests. (R. at pp. 165-205). Those complaints may be relevant to the adequacy of discovery. They do not transform actual production into nonproduction. The supplemental responses reinforce this point. In those responses, Appellant expressly stated that all documents responsive to the Requests for Production that were in Petitioner's possession had already been delivered to Respondents on March 23, 2023. (R. at pp. 162-164). Appellant further stated his belief that prior counsel had already provided written responses in

November 2021. (R. at pp. 162-164). Thus, Appellant's position remained consistent throughout the litigation: discovery had been produced, and any alleged deficiencies concerned form, organization, or supplementation rather than outright refusal, willful disobedience, bad faith, or gross indifference to the Respondents.

III. RESPONDENTS FAILED TO ESTABLISH ACTUAL PREJUDICE.

The record contains remarkably little evidence of actual prejudice. Respondents filed their Motion to Compel in December 2021, prior to Appellant's current counsel appearing in the case months later. (R. at pp. 103-123). However, the hearing on that motion did not occur until January 2023, due to Respondents never seeking to schedule their motion. (R. at pp. 150-151). Appellant repeatedly emphasized this chronology in both the Motion for Reconsideration and the Circuit Court appeal. (R. at pp. 213-229; p. 64, lns. 1-25; p. 65, lns. 1-25). If discovery was truly essential to Respondents' preparation of the case and time was of the essence, it is difficult to reconcile that claim with the decision to wait approximately thirteen months before obtaining a hearing and then try to blame Appellant for such scheduling and claim to suffer prejudice.

The chronology becomes even more significant after March 23, 2023. Upon this date, Respondents had all interrogatory responses and complete document production, as hand delivered by Appellant's counsel. Respondents possessed the production for approximately one year before the sanctions hearing, which is not disputed. Nor is it disputed that Respondents blatantly stated their refusal to review it in the 13 months it was in their possession, prior to a sanctions hearing Respondents didn't seek to schedule (thus Respondents again creating their own delay of over a year by not only possessing responsive discovery but also in seemingly disregarding their motion for sanctions by not seeking to

schedule it for over a year. (R. at p. 161; pp. 165-205; p. 55, lns. 15-25; p. 56, lns. 1-8; p. 142). During that period, Respondents never provided any deficiency letter; never identified concealment or destruction; never identified a deposition that could not be taken because of the alleged deficiencies; never identified a trial date jeopardized by the alleged deficiencies.

On the contrary, it's undisputed that discovery was responded to, and it's further undisputed that Respondents refused to review the production. Had they not refused, they would have discovered full discovery responses. The lower court completely disregarded that critical fact, nor did it inquire as to why Respondents refused to review responses and documents maintained in the ordinary course of business as produced by Appellant.

The absence of prejudice becomes particularly important when viewed against the substantial mitigating circumstances reflected in the record. The record reflects the suspension of prior counsel, the transfer of files, and honest confusion regarding the status of discovery previously prepared by prior counsel and presumptively served in November 2021. (R. at pp. 213-229; pp. 165-205). Those circumstances may not excuse every delay. They do, however, undermine any suggestion that Appellant engaged in a deliberate scheme to deprive Respondents of discovery.

Accordingly, even if this Court concludes that Appellant's discovery compliance was imperfect, the record does not support the conclusion that Respondents suffered the type of actual prejudice necessary to justify the harshest sanction available under Rule 37.

IV. THE AUTHORITIES RELIED UPON BY RESPONDENTS ARE SO MATERIALLY FACTUALLY DISTINGUISHABLE FROM THE FACTS OF THE PRESENT CASE THAT EXTINGUISHING THE APPELLANT'S CASE WAS AN ABUSE OF DISCRETION.

Respondents' Brief relies heavily upon South Carolina cases upholding discretionary decisions to strike a party's pleading in cases involving egregious willful discovery abuse.

Appellant does not dispute the legal principles articulated in those cases. Rather, Appellant submits that the actual factual record of this case illustrates with crystal clarity the vast delta between the egregiousness of discovery abuse in the cited authorities versus the facts in the present case. This delta makes patently clear the types of cases where proper discretion may lead to striking of pleadings. As to the present case, the same vast delta indicates where discretion is abused in the striking of pleadings.

Most fundamentally, the authorities cited by Respondents involve situations in which a party's conduct deprived the opposing party of discovery through outright refusal, destruction or concealment of discoverable material, or the intentional disregard of multiple court orders and after previous sanctions had already been imposed. *National Hockey League v. Metropolitan Hockey Club, Inc*. 427 U.S. 639 (1976); *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999); *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004).

In contrast, the record in the present case contains documentary evidence of full interrogatory responses, documentary evidence of complete document production, and documentary evidence of supplemental responses, all provided either in November of 2021, or 3 days beyond the single Motion to Compel 10-day response deadline. (R. at pp. 124-143; p. 161; pp. 162-164; pp. 206-212). Respondents repeatedly characterize this case as one involving complete noncompliance, but the actual record reflects a dispute concerning the sufficiency, organization, and timing of full discovery responses that had already been produced in response to a single Order compelling production, over a year prior the sanctions hearing. It also reflects Respondents admission that discovery responses were

produced in March 2023 in response to the one and only Order issued in the case prior to the Order dismissing Mr. Shoemaker's case entirely. The sanctioning Court in this case summarily dismissed or ignored the factual record, ignored the stark contrast between this case of minor technical error versus all precedential cases noted above, each presenting a factual landscape of vast and egregious purposeful conduct.

Respondents place substantial reliance upon *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), yet the facts of that case ultimately undermine Respondents' position rather than supporting it. *Karppi* emphasizes that dismissal is "harsh medicine" and should be reserved for circumstances involving bad faith, willfulness, gross indifference, or comparable misconduct. *327* S.C. at 543. *Karppi* further recognizes that sanctions should not exceed the necessities of the situation and that courts should remain mindful of the strong preference for resolving cases on their merits. *Id*.

Karppi involved conduct that actually prevented the opposing from obtaining discovery. Defendant Ogden Teck provided discovery responses to Karppi that Karppi was dissatisfied with, and Karppi was also upset because Ogden Teck refused to produce a key witness for deposition. Karppi moved to compel the deposition. An Order issued from the court compelling full discovery responses and the deposition of Mr. Ogden. Ogden Teck still did not provide responses nor did they provide the deponent. Yet another Order issued from the Court compelling the same, and only a week before trial. Ogden Teck did not comply, and Karppi filed another motion to compel only 3 days before trial. The egregious conduct led to the lower court striking pleadings. *Karppi,* 327 S.C. at 541.

The present case is not remotely comparable. There is no allegation of destruction or concealment, nor refusal to respond (R. at pp. 165-205; pp. 329-349) whereas in *Karppi*, the

alleged discovery abuse consisted of multiple overt refusals to provide a witness for deposition and completely deliberate refusal to comply with 3 separate orders compelling the same, and did so as near as 3 days before trial. *Id*. The offending party fully and overtly refused to provide critical discovery all the way to trial. The present case provides a clear evidentiary basis of fully produced discovery in November 2021, March 2023, or both, and no factual basis exists on the record beyond an inadvertent 3-day delay in fulfilling the single Order compelling production issued in this case (it should be noted that no trial date for the case had even been discussed).

Respondents similarly rely upon *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), which involved circumstances where the party seeking sanctions was intentionally deprived or denied information necessary to litigate the case. Again, such facts are not present here. In *Griffin Grading*, a deposition witness was not provided by the opponent Tire Service, but most importantly, Griffin Grading filed 6 motions to compel and there were 4 court orders compelling compliance. 334 S.C. at 198. In the Court's 4th Order, it indicated that defendant Tire Service had "engaged in a pattern of non-compliance with the South Carolina Rules of Civil Procedure and with the Orders of [the] Court." 334 S.C. At 197. Further, after Tire Services' failure to comply with two different Orders of the Court, the Court issued a very clear warning of the possibility of a striking of pleadings in its next Order, as required by South Carolina law.

The present case is patently distinct. Respondents did not argue that no documents existed, nor that responses were not produced. Respondents suggest only that the documents were mixed together, not Bates-stamped, not separately identified by request number, or otherwise claimed them difficult to review. (R. at pp. 165-205). Those arguments admit the

existence of discovery responses and simply argue poor organization; there was no deprivation, denial, refusal, or any other deliberate or intentional act. Further, it is questionable indeed how Respondents could make such an argument while also indisputably refusing to review the provided responses.

To that point, Respondents admittedly refused to review the production for over a year of being in their possession; thus, it is impossible for Respondents to even make any valid claim that Appellant's discovery responses were incomplete or insufficient, and Respondents certainly could not claim complete noncompliance with discovery with absolutely zero review of the production. 100% of responsive documents and answers were produced, arguably in November 2021, and definitely in March 2023 – Respondents just refused to review them. How can a court have sufficient factual support to make a ruling of complete noncompliance, bad faith, willfulness, or the like when the Respondents 1) merely claimed without proof that they didn't receive the responses in 2021, and 2) admittedly refused reviewed the full production for over a year of possessing them in 2023? The evidence absolutely establishes the discovery production, yet that fact was completely overlooked.

Similarly, *QZO* is substantially distinguishable from the present case. The hallmark of cases like *QZO* is deliberate obstruction of the discovery process and resulting prejudice to the opposing party; in this case, the offending party literally erased a hard drive on a computer after receiving a TRO ordering the hard drive's production, intentionally destroying discoverable evidence. *QZO*, 358 S.C. at 257. In the present case, there is absolutely no claim of destruction of evidence, concealment of evidence, nor was there any finding that Appellant intentionally prevented Respondents from obtaining their discovery requests. (R. at pp. 206-212). The record contains no finding that Appellant concealed evidence. (R. at pp. 206-212). Instead, as referenced throughout this appeal, the record

reflects a dispute concerning what had been produced, whether Appellant's prior counsel had served discovery responses in 2021, whether the production in 2023 was responsive, which the Respondents would have discovered to be fully responsive had they not refused to review them. (R. at pp. 165-205; pp. 213-229; p. 60, lns. 12-25; p. 61, lns. 1-25).

Last, Respondents' reliance upon *National Hockey League v. Metropolitan Hockey Club, Inc. et al.*, 427 U.S. 639 (1976) is particularly misplaced. *National Hockey League* involved repeated failures to comply with discovery obligations and Orders, and when responses were ultimately provided, they were found to be grossly inadequate. *National Hockey League* at 427 U.S. 643. The record before this Court presents a dramatically different picture. Again, the record contains evidence of full responses to discovery in 2021 and 2023, the existence of only a single Motion and Order to Compel, and Respondents' possession of the full responsive documents for over a year while refusing to review it.

V. REVERSAL IS MANDATED UNDER AN ABUSE OF DISCRETION STANDARD OF REVIEW BECAUSE THE SANCTIONS IMPOSED BY THE LOWER COURT RELIED UPON INACCURATE FACTUAL CONCLUSIONS AND THE ABSENCE OF ANY WARNING OF THE MOST SEVERE SANCTIONS IN ITS SINGLE ORDER COMPELLING DISCOVERY PRODUCTION.

Respondents rely upon *Downey v. Dixon* for the proposition that sanctions decisions are reviewed under an abuse-of-discretion standard. 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). Appellant does not dispute that principle. However, a discretionary ruling must still be supported by the record, based upon accurate factual premises. It must still reflect consideration of the relevant circumstances. It must still be proportionate to the conduct at issue. *See Karppi, Griffin Grading, QZO, supra*.

This factual record could not possibly support the lower court's sanctions, and discretion was abused by concluding that Appellant was guilty of complete noncompliance

despite the factual record revealing substantial production. The ruling of noncompliance was based solely upon the assertion of Respondents (who refused to review the discovery production) and without having any knowledge whatsoever of the contents of the interrogatory responses and document production provided by Appellant. (R. at pp. 165-205; p. 55, lns. 15-25; p. 56, lns. 1-8). In fact, a simple review of the production, had the Court been so willing, would have clearly demonstrated full, or at least substantial compliance with all discovery requests. Appellant was not afforded that opportunity.

The central factual premise underlying the sanctions order in this case is that Appellant failed to provide meaningful discovery (R. at pp. 206-212), yet the record belies that conclusion, again because discovery was produced in full, at the latest, over a year prior to Respondents docketing a sanctions hearing. Further, discretion was also abused by the lower court failing to apply the required law, that an Order warn a party of the potential striking of pleadings, and it is undisputed that no such Order exists.

Appellant does not ask this Court to reweigh evidence. Appellant asks this Court to recognize that the lower court's sanctions were based upon critical false conclusions of fact and application of laaw. Appellant did provide meaningful discovery responses/production; Respondents merely claimed to have either not received it at all or refused to review it for responsiveness. The record supports the conclusion that Appellant provided discovery responses repeatedly. The record does not support complete noncompliance, lack of meaningful discovery production, and certainly no intentional acts of discovery defiance or abuse. This distinction is critical in concluding that an abuse of discretion occurred in the striking of Appellant's pleadings and resulting dismissal.

When the actual facts of this case are compared to the authorities relied upon by

Respondents, one conclusion is unavoidable: dismissal exceeded the necessities of the situation. The record reflects disputes regarding the adequacy and organization of discovery. The record does not reflect destruction of evidence. It does not reflect concealment of evidence. It does not reflect actual deprivation of discovery. It does not contain any evidence of deliberate disobedience or bad faith or gross indifference – because the record reveals full production 13 days after an Order compelling discovery, and the record reveals compelling evidence that responses were provided in November 2021. Furthermore, it does not reflect demonstrated prejudice sufficient to justify permanently extinguishing Appellant's claims. The record reflects delayed discovery, but a legitimate dispute about the sufficiency of production existed; Respondents caused a majority of delay in not seeking hearings on two motions for almost two years in aggregate.

Even if some sanction was appropriate, the Probate Court possessed numerous alternatives short of dismissal. Instead, the court selected the harshest sanction available despite the absolute documentary evidence showing discovery responses, document production, and subsequent supplementation, and despite Appellant's position and reasonable evidence that the same production had previously been made in November 2021. (R. at pp. 206-212; pp. 213-229).

VI. RESPONDENTS' PRESERVATION ARGUMENT FAILS BECAUSE THE SANCTIONS ORDER RESTS UPON A FACTUAL PREMISE THAT IS CONTRADICTED BY THE RECORD.

Respondents devote substantial portions of their Brief to arguing that Appellant's reliance upon the November 2021 interrogatory responses is unpreserved. The argument is incorrect but also misses the central issue in this appeal. Even if an assumption is made that Respondents never received the November 2021 interrogatory responses (as they claim), the

dismissal sanction still cannot stand because the record establishes that discovery responses and responsive documents were indisputably produced on March 23, 2023, in response to the one and only Order compelling responses. Appellant consistently maintained before the Probate Court and the Circuit Court that the produced box of documents contained the interrogatory responses, the Certificate of Service from November of 2021, and the responsive document production. (R. at pp. 165-205; p. 55, lns. 15-25; p. 56, lns. 1-8). Most importantly, Respondents physically possessed that production for a year while refusing to review it.

Thus, even under Respondents' version of events, the case is not about whether discovery was produced. The case is not even about whether interrogatory responses existed. By March 23, 2023, at the latest, Respondents possessed all discovery responses and production but simply refused to review it. May then Respondents refuse to review discovery that has been produced and claim ignorance of production to obtain dismissal on the factually incorrect theory that discovery was never produced. The answer must be no.

The sanctions order repeatedly proceeds from the premise that Petitioner failed to provide discovery responses and failed to comply with discovery obligations. (R. at pp. 206-212). Yet the order never reconciles that conclusion with the undisputed fact that full production occurred at least a year prior to such hearing. Nor does the order identify a single responsive document that remained unavailable after that production. (R. at pp. 206-212).

Respondents repeatedly characterize the March 23 production as a "mixed-up giant box of files." But that characterization is not only inaccurate, it is absolute evidence of production. At most, it is a complaint about the manner in which the production was organized. But nothing about the manner of production or a dispute as to its sufficiency

transforms actual production into nonproduction. Further, Respondents also should not be able to invent prejudice by refusing to examine materials that were provided to them and possessed by them for a year.

Even if Respondents did not receive the November 2021 discovery responses, the central premise of the sanctions order remains unsustainable – all discovery responses were in fact provided. That is not a preservation issue. That is the central merits issue in the appeal. Accordingly, Respondents' argument should be rejected, as should the discretion exercised by the lower court. The question before the Court is whether a striking of pleadings sanction should be affirmed where discovery responses were produced, opposing counsel refused to review them, no specific missing documents were identified, and no actual discovery deprivation was shown. The record does not support such a result.

CONCLUSION

Appellants have replied to Respondents arguments and demonstrated that the harshest sanction, a death sentence to litigation on the merits, was imposed upon Appellant based upon numerous factual inaccuracies, a complete ignorance on the part of Respondents and the issuing court as to what was in fact produced to Respondents, despite Respondents possessing all responses arguably in November 2021 and certainly in March 2023. Assumptions were made that production was insufficient despite the fact that Respondents admittedly refused to review the production, and neither did the lower court. Further, any failure on the part of Appellant would be limited to a dispute as to organization or manner of production, and reliance upon a single technical and inadvertent delay of 3 days beyond the Order compelling discovery production. Last, Appellant received no Order from the Court warning of the striking of pleadings in the absence of strict compliance as required. And all caselaw guiding this determination illustrates egregious abuse and total disregard for

discovery rules, with every case relied upon by the Court and Respondents including purposeful destruction of evidence, purposeful ignoring of 4 and even 6 orders as to discovery production, intentional refusal to provide a deponent, and clear warnings from Court Orders that noncompliance would or could result in striking of pleadings. Appellants therefore conclude that the lower court's failure to adhere to or recognize the actual factual record, infer and/or determine facts not supported by the record, failure to consider any review of the actual production provided to Respondents, and legal failures to warn of the severest sanction in an Order – all of these amount to a conclusion that the lower court abused its discretion, and this matter should be remanded to the trial court for further proceedings.

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