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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

S. Ct. Appellate Case No. 2026-002089

Richard A. Gorman,.....Respondent,

v.

John C. Monarch,.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

David L. Moore Jr.
S.C. Bar No. 1509
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
dmoore@turnerpadget.com
and
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
6511 Dare Circle
Columbia, South Carolina 29206
(803) 500-0891
drew@radekerlaw.com
Attorneys for Petitioner

Respondent submits this return to the petition for a writ of certiorari in this case. The Petitioner has failed to show the trial judge committed reversible error and has failed to carry his further burden to convince this Court that review by way a writ of certiorari is warranted.

OVERVIEW

The trial court issued sanctions against Petitioner after concluding the evidence showed a pattern of discovery misconduct designed to keep Respondent from finding out the truth with regard to Petitioner's involvement in events of the case. (R. pp. 94-106.) This misconduct included, but was not limited to, Petitioner's violation of four of the trial court's previous orders. (R. pp. 31-35, 51-58, 75-77, 78-84, 94-106).

The underlying action here is about a blackmail shakedown attempt that led to a concerted and vitriolic online campaign defaming Respondent. (R. pp. 157-84.) Discovery of digital data in the Petitioner's custody or control was sought from the outset of this case. After some years of discovery wrangling, the Petitioner entered into a consent order that required him to identify electronic devices and provide them expeditiously for examination by Respondent. (R. pp. 31-35, 96.) Petitioner then refused to do what he had been ordered, with his consent, to do. (R. pp. 32, 52.) The trial court then ordered him to comply and gave him a deadline to do so. (R. pp. 45-58.) He did not meet that deadline. He fought against turning over any electronic devices for about three years after entering into the consent order that directed their production. (R. pp. 75-76, 637-75, 676-77, 1061.) Only when faced with the trial court's ultimatum with built-in consequences did Petitioner provide any device for examination. (R. pp. 78-84, 1144-49.)

The Petitioner's attempts to prevent examination of his electronic devices went well beyond what the law allowed, and, when he finally turned over a laptop for examination, its examination by experts revealed that data had been deleted from the laptop. (R. pp. 1161-64, 1237-39.) Expert examination also revealed evidence that the laptop had most likely been used to access and work on another electronic device that Petitioner had never mentioned when he had responded to discovery that required him to identify that device. (R. pp. 521-22, 1144-49, 1221-43.)

The discovery sought from Petitioner spoke to the central issue in the case: whether the Petitioner's connection to the blackmail-defamation scheme perpetrated against Respondent was a mere coincidence, as Petitioner contended, or whether, as Respondent always deduced, Petitioner was the primary person behind what was done to Respondent. What had been done to the Petitioner's computer made a rather important question unanswerable, at least as a matter of direct evidence: Was the presence on that computer of content from which the defamatory internet postings had been constructed (R. pp. 112-25, 1144-49, 1161-97) a mere coincidence, or was that presence a byproduct of Petitioner's heavy involvement in the defamation of Respondent?

Judge Gravely's decision to strike Petitioner's answer and counterclaim was not an abuse of discretion. It was a decision that took into account Petitioner's dishonest and recalcitrant handling of discovery in this area and the great lengths to which Petitioner went to prevent Respondent from conducting discovery on the most central question posed by the case. (R. pp. 94-106.) It took into account Petitioner's failure to preserve and produce his written communications with a witness about how the witness, a person aligned with Petitioner, would testify at an upcoming deposition.

(R. pp. 94-106, 1334-38, 1344-1345, 1386, 1387-88, 1389-92.) It took into account evidence that indicated the Petitioner most likely destroyed records that most likely connected him directly to the making of the defamatory postings. (R. pp. 521-22, 1144-49, 1161-64, 1221-43.) It took into account that, rather than a set of remarkable coincidences, what most likely happened here is that Petitioner had been lying about his involvement with the internet postings all along. (R. pp. 94-106.) It took into account that it was most likely the Petitioner whose fiddling with his computer made examination of the computer a bust as far as determining whether it held direct evidence of Petitioner's involvement. (R. pp. 94-106, 521-22, 1144-49, 1161-64, 1221-43.) It took into account how that hampered Respondent's preparation of his case, confounding Respondent's ability to prove both this case against Petitioner and his ability to defend Petitioner's defamation claim on a truth basis. (R. pp. 94-106.)

In other words, Judge Gravely made a reasoned evaluation of the evidence before him, including what to believe about contested factual matters, and correctly applied the law to reach his decision on this discovery sanctions matter. The Court of Appeals committed no error in affirming his ruling. Certiorari by this Court is neither needed nor warranted.

STATEMENT OF THE CASE

The underlying appeal was made by the Petitioner from an order issued by Judge Perry Gravely striking Petitioner's answer due to his bad faith failure to comply with discovery, despite prior orders requiring him to do so. (R. pp. 94-106.) Judge Gravely found that Petitioner violated discovery orders over a period of several years and found Petitioner's discovery misconduct included failing to identify and produce for examination all the electronic devices Petitioner had agreed in a consent order to

identify and produce, failing to maintain the integrity of the data on his electronic devices after knowing the data was sought by Respondent, failing to take any steps to preserve evidence of Petitioner's written communications with a material witness shortly before the witness' deposition, causing Respondent to go to extraordinary lengths to try to obtain data about Petitioner's digital actions, and deliberately altering or removing data from a computer in an attempt to stymie Respondent's case against him. (R. pp. 94-106.)

The parties have been involved since 2014 in litigation regarding a blackmail scheme against Respondent which, when Respondent did not pay, blossomed into a campaign of defamatory statements about Respondent. (R. pp. 157-84.) In 2013, emails sent anonymously demanded Respondent pay millions of dollars in Bitcoin cryptocurrency or face ruin. (R. p. 160.) Respondent did not pay the money demanded, and highly derogatory and misleading internet postings followed that contained false information about Respondent, including that Respondent was a child molester and that he had raped a certain adult woman. (R. pp. 160-64.) Because the issues arose out of electronic transmissions over the internet with direct evidence of the author being concealed, it became important to obtain documentation through discovery of evidence of those electronic transmissions.

Respondent had reason to believe Petitioner was behind the attempted blackmail and the internet postings. (R. p. 94.) Petitioner, who had recently launched a business that competed with one of Respondent's, had come to Respondent's attention by making an unanticipated and unsolicited hostile statement toward him on Twitter. (R. pp. 159-60.) Once the defamatory postings got underway, Respondent, suspicious of Petitioner's probable involvement, forwarded a preservation letter to

Petitioner on December 20, 2013, before this suit was brought. (R. pp. 96, 510-14.) The letter notified Petitioner that he should preserve all of his electronic data. (R. pp. 96, 510-14.)

In 2014, after this suit was brought, Respondent served discovery requests, including requests regarding electronic devices, laptop computers, and cellular phones. (R. pp. 316-82.) This case was placed on hold on December 1, 2015, by a stay to allow the resolution of litigation in Federal Court in Pennsylvania between the parties. (R. p. 1.) After the Pennsylvania action was dismissed for lack of sufficient contacts between Petitioner and the state of Pennsylvania, that stay was lifted on August 16, 2016. (R. pp. 4-6.)

On March 15, 2018, Respondent filed a motion to compel due to incomplete discovery responses by Petitioner. (R. pp. 285-384.) Believing that motion to be resolved by agreement, Respondent's counsel withdrew the motion shortly before it was scheduled to be heard. (R. pp. 96, 442-44.) The issue was apparently not resolved, as the discovery was not forthcoming, and Respondent again moved to compel. (R. pp. 96, 487-89.) On August 21, 2020, the parties entered into a consent discovery order pursuant to which Petitioner was to identify electronic devices for inspection and expeditiously provide to Respondent any identified devices chosen by Respondent for examination. (R. pp. 31-35, 96.)

Petitioner identified a MacBook Pro laptop and an iPhone 5. (R. pp. 569-73, 577, 581-83.) Petitioner asserted he did not have possession of either device. (R. pp. 569-73, 577, 581-83.) Petitioner claimed that some devices were gone, stating that he had allowed them to be taken from him or had turned them over to others when he bought new devices. (R. pp. 566, 581-83.) Respondent filed motions to compel

production of the electronic devices and a motion for sanctions based on Petitioner's destruction of or failure to preserve the materials sought in discovery. (R. pp. 501-49.)

During the next portion of the litigation, Petitioner took inconsistent positions about what devices he had kept and what he had gotten rid of. (R. pp. 51-52.) Once faced with the evidence-destruction sanctions motions, Petitioner stated that he did, in fact, have the laptop he had identified. (R. pp. 566, 581-83.) After inquiry by Respondent's counsel about providing the laptop for examination, Petitioner refused. (R. p. 52.) Petitioner, who had agreed earlier "to cooperate concerning the expeditious provision of such devices from the list as the Plaintiff may select for examination by the Plaintiff or such persons as he may choose[,]" with no restrictions on access by Respondent or his examiners, refused to turn any devices over for any examination without significant privilege and privacy safeguards. (R. pp. 32, 52.)

In September of 2021, Judge Alex Kinlaw heard the motions to compel and for sanctions, and he issued Form 4 orders that, respectively, continued the sanctions issue pending the compelled production and directed Respondent's counsel to prepare an order granting the motion to compel. (R. pp. 45-50.) That prompted communications between counsel and status conferences with Judge Kinlaw in which the court and counsel attempted to assuage Petitioner's concerns about privacy and privilege. These communications and attempts to satisfy Petitioner's demands continued into the spring, Judge Kinlaw issued a formal order commanding Petitioner to turn over the devices for examination. (R. pp. 51-58.) His order put in place significant safeguards to address Petitioner's concerns, such as having an independent expert examine the devices first to weed out likely privileged or irrelevant material. (R. pp. 51-58.) Petitioner was to

produce the laptop to a neutral expert. (R. pp. 53.) Sanctions were held in abeyance. (R. pp. 51.)

Petitioner declined to comply with the order and turned nothing over for examination. Instead, he moved to reconsider Judge Kinlaw's order and, before the court took any action on the motion to reconsider, appealed the order. (R. pp. 75-76, 637-75, 676-77, 1061.) This court dismissed the appeal, finding it to be interlocutory. (R. pp. 71.)

After issuance of the remittitur, the trial court heard and denied Petitioner's motion to reconsider and reaffirmed its previous order on January 12, 2023. (R. pp. 75-76.) On February 10, 2023, Respondent filed a motion for sanctions in light of Petitioner's refusal to comply with the court's order. (R. pp. 696-703.) On April 28, 2023, the court reaffirmed its previous decision and noted that Petitioner had refused to permit digital imaging of the laptop, possibly in bad faith. (R. pp. 78-84.) The court directed that Petitioner comply with the prior consent order or have his answer stricken and be fined \$7,500. (R. pp. 82-83.)

Petitioner then supplied a laptop to the neutral expert, Steve Abrams. (R. pp. 1144-49.) Abrams noted there were discrepancies in the metadata of the laptop, indicating that the information had been manipulated. (R. pp. 1161-64.) Among the files that were left on the laptop were items of text and images that were components of defamatory internet postings about Respondent. (R. pp. 112-25, 1144-49, 1161-97.)

After segregating out information deemed privileged, irrelevant, or inappropriately private, the neutral expert then provided Respondent's retained expert with an electronic image (in layman's terms, a copy) of the remaining data on the laptop for that expert's review and investigation. (R. pp. 1164-97, 1228-34, 1236-39, 1240-

42.) Respondent's retained expert also found evidence indicating that the information on the laptop had been manipulated, including the user-directed destruction of .bash data that showed what websites Petitioner had used. (R. pp. 1237-39.) Both these experts also noted that the laptop had been used to access a "virtual machine," using the laptop to work on another computer device through remote connection. (R. pp. 1144-49, 1221-43.) That other computing device was never identified, in discovery or otherwise, by Petitioner, though Respondent's discovery requests asked him to name the electronic devices he used during the relevant time period. (R. pp. 521-22.)

Petitioner also retained an expert, Ian Finch, to examine the laptop, and Petitioner's expert issued an opinion generally indicating that no data replacement had occurred and that the laptop turned over was the laptop Petitioner had used. (R. pp. 1329-1333.)

Respondent took the deposition of Illya Shpetrik, who acknowledged in that testimony and in an affidavit that he did some internet posting defaming Respondent after being encouraged by Petitioner to do so. (R. pp. 1334-38.) In his deposition, Shpetrik testified that he had communicated with Petitioner shortly before the deposition through the digital platform Telegram, which had been set to automatically delete the messages between them and did so. (R. pp. 1344-1345.)

Respondent took Petitioner's deposition. (R. pp. 1355–1396.) Petitioner admitted to communicating with Shpetrik via Telegram and acknowledged he did nothing to preserve those communications for discovery, even though he knew how to do so. (R. pp. 1386, 1387-88, 1389-92.)

On February 26, 2025, the court issued the appealed order, which found that the court had given Petitioner numerous opportunities to rectify his discovery deficiencies.

(R. pp. 94-106.) The lack of appropriate responses was found to demonstrate a pattern of deceit and destruction of material evidence. (R. p. 102.) The court found these actions by Petitioner undermined the entire discovery process and found that Petitioner had flouted court orders. (R. p. 104.) The court went on to state there had been no meaningful discovery compliance by Petitioner and that this non-compliance was in bad faith, willfully disobedient, or at least grossly indifferent to Respondent's discovery rights. (R. pp. 104.) As a result, Petitioner was found in contempt, had his answer stricken, and was fined \$7,500. (R. p. 105.)

Petitioner did not move under Rule 59, SCRCP, with regard to the sanctions order but, instead, brought a direct appeal to the Court of Appeals. The Court of Appeals affirmed on the briefs without oral argument.

ARGUMENT

I. There was no abuse of discretion here.

This is an appeal of a discovery sanctions order, and the Court of Appeals was tasked with reviewing the record to determine if Judge Gravely's decision was an abuse of discretion. A trial court's determination that there has been an abuse of the discovery process, and that the appropriate sanction for that abuse is to strike that party's pleadings, is within the trial court's discretion and should not be overturned unless there has been an abuse of discretion. Clark v. Ross, 284 S.C. 543, 328 S.E. 2d 91 (Ct. App 1985). When the trial court's "thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion[.]" Morris v. BB&T Corp., 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023).

When a trial court's "thought process of applying sound principles of law to the court's view of the facts and circumstances is evident[,]" what has occurred is a use of discretion, not an abuse of it, and an appellate court is not at liberty to alter the trial court's application of its discretion. Id.

In the context of a discovery sanctions appeal, an abuse of discretion may be found only where the sanctioned party is able to show the trial court's conclusion was without any reasonable factual support and resulted to prejudice to the rights of that party or was grounded in an erroneous perception of the law that prejudicially changed the outcome. Dunn v. Dunn, 298 S.C. 499, 381 S.E. 2d 734 (1989). Trial courts are permitted to, and often must, make credibility assessments in determining whether to issue discovery sanctions. QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004).

An appellant who claims the facts do not justify a discovery sanction bears the burden of demonstrating the absence of evidentiary support for the trial court's decision, rather than that there is a factual dispute within the evidence that was before the court. Id. On appeal, an argument that the trial judge made an improper reckoning of what evidence was believable is an argument that necessarily fails to meet that burden unless no reasonable mind could believe the evidence the judge did. See id.

Rule 37 of the South Carolina Rules of Civil Procedure controls the sanctions available should a party fail to comply with properly submitted discovery requests. In particular, Rule 37(b)(2)(c) provides that a court may strike a party's pleadings should that party not comply with discovery obligations. If there is a showing of bad faith, willful disobedience, or gross indifference to the rights of the party harmed by the misconduct, a sanction of striking the offending party's pleading is justified.

Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E. 2d 537 (1991).

a. The record contains substantial support for Judge Gravely's finding that Petitioner violated discovery orders.

Petitioner asks this Court to believe there is no support for the trial court's determination that Petitioner had violated discovery orders. An examination of the record belies that notion. As discussed in the statement of the case above, Petitioner violated the consent order that first required him to produce his electronic devices for inspection and violated the order that commanded him to comply with the consent order, creating years of discovery delay.

To adopt Petitioner's premise, that he was not in violation of a court order, this Court would have to put blinders on. Petitioner refused to comply with the consent order. Petitioner then refused to comply with Judge Kinlaw's order that, in an effort to get Petitioner to comply with his obligations under the consent order, made accommodations Petitioner demanded. Petitioner continued to refuse compliance, keeping up his disobedience after the dismissal of his appeal of Judge Kinlaw's order and after the denial of his motion to reconsider Judge Kinlaw's order. Petitioner kept on refusing to comply, which resulted in Judge Gravely's order that provided that further noncompliance after 45 days would result in automatic sanctions. *That* – the last in this three-year series of orders – is the order with which Petitioner now says he complied. But what did that very late, ostensible compliance reveal? It revealed that, more than likely, Petitioner had removed data from his computer after that data's discovery was sought by Respondent in this case.

That is a lot like the facts of QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E. 2d 541 (Ct. App. 2004). There, the appellant had possession of a computer belonging to his

former employer, which was soon to be his business competitor. After the appellant in that case delayed turning the computer over for inspection, the court ordered production, and an expert was allowed to examine it. The expert determined that the hard drive for the computer had been reformatted a day before the computer was turned over, effectively erasing the information contained on the computer. The court found the violation of the prior court order to provide the computer in discovery was willful, justifying the striking of the violator's pleadings.

Petitioner argues that he delivered his laptop in compliance with the order of March 28, 2022, and therefore should not have been sanctioned by having his pleadings stricken. This argument disregards the fact that the data on the delivered laptop had been deleted to the extent that Respondent would not have been able to obtain evidence from it necessary to establish his case against the petitioner – or even evidence that would exonerate Petitioner. Petitioner's acts in removing data made the computer useless from an evidentiary standpoint, though it should have been one of the most important evidentiary items in the case. It would have been if it had not been altered. Petitioner appears to argue that by merely and finally delivering the sought-after laptop, his failure to protect its data and his actions in deleting data from it should have been of no consequence to the trial court. Petitioner's position ignores that the point of this discovery was to examine the data preserved on the laptop, not to effect a change in the physical custody of a laptop that at one point had contained relevant data already removed by Petitioner.

b. The Petitioner takes an unlawfully narrow view of what conduct could subject him to sanctions.

The Petitioner further argues that the only activity which could be sanctioned was that which occurred between the issuance of the order of March 28, 2022, and the order of April 28, 2023. A review of the order of April 28, 2023, reveals that the trial court was concerned with the course of conduct undertaken by the Petitioner to avoid compliance with the discovery process. (R. pp. 78-84.) That makes sense, since any specific acts of deleting or losing data were, as a result of Petitioner's efforts to prevent the computer's examination, unknowable by the court at that time. The fact that the Petitioner supplied his laptop only after the sought-after data had been deleted or lost was just more evidence of Petitioner's willful or grossly negligent acts in failing to comply with the discovery process, all of which were to the detriment of the Respondent's ability to go forward with his case.

The Petitioner appears to argue that sanctions are not warranted unless each specific act or omission on which the court based sanctions was contrary to the language of a specific order. This is not the standard. Rule 37(b)(2)(c), SCRCP; Baughman, 306 S.C. at 101; QZO, 358 S.C. at 246. Where it is determined that a party's acts in failing to allow discovery are in bad faith, are the product of willful disobedience, or demonstrate indifference to the rights of the party harmed, a sanction to strike the offending party's pleading is justified. Baughman, 306 S.C. at 101. The evidence upon which the trial court relied demonstrated at a minimum a gross indifference to the rights of the Respondent. (R. pp. 94-106.) Indeed, this evidence illustrates Petitioner's willful disobedience of both discovery rules and court orders and his acts in bad faith, like hiding his *sub rosa* communications with a witness about how the witness should testify in his deposition, concealing the computer device he remotely

accessed from his laptop, and deleting data from his laptop that would have shown his internet activity at the times in question. (R. pp. 94-106.) The standard for a trial court to strike a pleading for discovery abuse does not require the party at fault to be given endless chances to comply, especially when trial is imminent, as it was here. Rule 37(b)(2)(c), SCRPC; Baughman, 306 S.C. at 101; QZO, 358 S.C. at 246.

c. Judge Gravely was in a position to make credibility assessments, and those he made are supported by the evidence.

Petitioner now attempts to introduce into this appeal the idea, never mentioned before, that Judge Gravely could not make credibility determinations without live testimony instead of affidavits. Petitioner cites no case that requires that; he just argues that it is impossible to make credibility determinations without the court observing live testimony. Petitioner ignores that trial courts can, do, and should be able to make credibility determinations in discovery disputes without a mini-trial of live witness examination. Physical demeanor is only one attribute a factfinder may use to assess credibility. Others include, but are not limited to, consistency with older statements or lack thereof, consistency or inconsistency with other evidence or events in the case, motive and bias, and the plausibility of an offered explanation.

In this case, not only did Petitioner fail to take even simple measures to preserve relevant data and devices, he also undertook a campaign of slowly and consistently refusing to respond to proper discovery requests. (R. pp. 103-104.) When the court intervened, Petitioner kept up his refusal, disobeying court orders for about three years until, at the point of the sanctions sword, he produced his laptop to a neutral expert. (R. pp. 31-35, 51-58, 59-66, 94-106.) This review provided proof of Petitioner's efforts to hide and destroy data. (R. pp. 94-106, 1144-56, 1161-97, 1329-33.) Petitioner's choices to engage in these actions hamstrung Respondent's opportunity to prove his

case – as Petitioner knew. (R. pp. 94-106.) Petitioner acted to block access to this data and information on an ongoing basis. The trial court observed all this. Judge Gravely was the judge assigned to the case, and he was familiar with the facts of the ongoing discovery struggle and familiar with the Petitioner. He had reviewed the several and detailed affidavits of the neutral expert and Respondent’s expert and had reviewed Petitioner’s expert’s affidavit and report. The trial court was equipped with what it needed to evaluate credibility here, and its credibility determinations against the Petitioner are well supported with evidence. The Petitioner has not shown an abuse of discretion in the trial court’s credibility assessment. See, e.g., QZO, 358 S.C. at 246.

d. The Petitioner argues the trial court should have determined what was in data that the Petitioner had made unreviewable through destruction. This is not the law and does not make sense.

Petitioner argues that the trial court failed to specify what evidence was no longer available, as though the Respondent or the trial court were in a position to know what was in the data Petitioner had deleted. This is, of course, an attempt to shift the burden by putting the onus on the Respondent to prove what was in the evidence after Petitioner’s deletion had made Respondent unable to review the evidence. Perhaps moreover, though, Petitioner’s argument ignores what is readily apparent from the record: that he destroyed evidence that had a strong likelihood of determining whether Petitioner had or had not used his laptop to work on the internet postings that defamed Respondent. (R. pp. 94-106, 1144-56, 1161-97, 1329-33.)

e. Judge Gravely did not abuse his discretion. He appropriately used it.

In light of Petitioner’s concerted efforts to avoid electronic discovery, his failure to truthfully respond to submitted discovery requests, and the signs of his

modification and deletion of data on the laptop, the trial court had more than sufficient facts to determine Petitioner had willfully defied his discovery obligations and the court orders of August 21, 2020, March 28, 2022, January 12, 2023, and April 28, 2023. (R. pp. 31-35, 51-58, 75-77, 78-84.)

This activity by Petitioner warranted the sanction of striking Petitioner's answer and counterclaim. QZO, 358 S.C. at 246. Here there was a showing of bad faith, willful disobedience, and gross indifference to the rights of the party harmed by the misconduct, and this Court's precedent provides that the issued sanction of striking the offending party's pleading is justified and not subject to reversal under the standard of review that applies here. E.g., Baughman, 306 S.C. at 101. The trial court considered and rejected other potential remedies such as a fine or a jury instruction on an adverse inference. It rejected those lesser sanctions as being ineffective, particularly in light of Petitioner's longstanding and recurrent attempts to hide or destroy evidence adverse to his position. (R. pp. 94-106.) As noted by the trial court, Petitioner's pattern of delay and deception resulted in "no meaningful compliance" with discovery obligations and with the court's several orders, which did not just prejudice Respondent's ability to investigate the facts of the case but also undermined the court's authority. (R. p. 105.)

A trial court's decision on the appropriate sanction will not be reversed absent an abuse of discretion. Unless the decision was controlled by an error of law, which, as discussed above, did not occur here, an abuse of discretion exists only when the trial court's decision lacks reasonable factual support and results in prejudice to the rights of the sanctioned party. Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E. 2d 679 (Ct. App. 1997). That did not occur here, either.

Judge Gravely's decision is supported by evidence that was before the court. (R. pp. 94-106.) It is supported by the rules of civil procedure and by existing precedent. Rule 37(b)(2)(c), SCRCP; Baughman, 306 S.C. at 101; QZO, 358 S.C. at 246. Judge Gravely's "thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record[.]" Morris, 438 S.C. at 587. No abuse of discretion occurred here; rather, a use of discretion did. Id.

The Court of Appeals was right to affirm.

II. The Petitioner asks that this Court assign error on grounds the Petitioner never asked the trial court to consider.

Petitioner contends the Court of Appeals erred by not ruling for him. To the Court of Appeals, Petitioner made the following arguments:

- 1) Petitioner did not violate discovery orders because, among other things, he falls within the protection of Rule 37(f), SCRCP, which protects a party from sanctions for "failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."¹
- 2) Petitioner's conduct in refusing to comply with court orders was justified because of fears of misuse of the electronic data by Respondent.
- 3) Petitioner's conduct did not prejudice Respondent because Respondent did not seek a forensic examination of the electronic devices earlier in the case.

¹ The Court of Appeals correctly rejected this argument. It was not preserved for review but, regardless of that, failed on its merits. No evidence here indicated that the data deletion was "a result of the routine, good faith operation of an electronic information system." Rule 37(f), SCRCP. Instead, it was the product of purposeful, deliberate deletion undertaken outside the ordinary use of a laptop computer. (R. pp. 1237-39.)

- 4) Petitioner's resistance to producing the devices for examination did not cause material delay in this case because the majority of delay is attributable to Respondent.
- 5) The record does not show Petitioner's discovery conduct prejudiced Respondent with regard to the counterclaim.
- 6) Respondent could not win this case on its merits.

Neither of the two appealed trial court orders here addressed those arguments. Petitioner did not move to reconsider either of those orders. Further, his Rule 37(f) argument was not raised at all until he argued it to the Court of Appeals.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). "Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). An appellant's unpreserved arguments cannot prevail on appeal. E.g., Hatfield v. Hatfield, 327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997).

To the extent he made them below, Petitioner failed to preserve these arguments for review. As they were the bedrock of his appeal, Petitioner placed himself in a position from which the arguments in his brief could not have won him a victory before the Court of Appeals. With regard to those arguments, he would be in the same position before this Court were certiorari to be granted. That is regardless of those arguments' merits, which, as discussed above, are lacking. Regardless of the merits, the lack of

issue preservation makes the Petitioner's arguments unwinnable before they get out of the gate. See, e.g., id.

III. The Petitioner asks that this Court take the Court of Appeals to task for failing to rule in his favor on points he never asked that court to consider.

As shown by a review of the petition to this Court and Petitioner's brief to the Court of Appeals, he now makes argument to this court that differs even from what he argued to the Court of Appeals and bears little resemblance to what he argued to the trial court. Never before the filing of this petition has Petitioner argued that live witness testimony is required for a court to make a credibility determination. Similarly new is his argument that his discovery misconduct did not impair Respondent's defense of Petitioner's counterclaim.²

This case is not a "good vehicle," as Petitioner claims, for this Court to issue an opinion on issues that have never been properly put before any court in this case. The Petitioner was the appellant to the Court of Appeals, and an appellant's unpreserved arguments cannot prevail on appeal. E.g., Hatfield, 327 S.C. at 367. The Court of Appeals made no error in rejecting Petitioner's unpreserved arguments at that appellate level, and review by this Court is not proper with regard to questions Petitioner never presented to the Court of Appeals. See id. Even in theory, how could this Court determine the Court of Appeals erred by failing to rule for Petitioner on questions he had never asked that court to answer?

² The counterclaim was about whether statements Respondent had made about Petitioner's involvement in the blackmail scheme were defamatory, so it is easy to see how Petitioner's computer malfeasance hampered the defense of the counterclaim. The destroyed data had high potential to be relevant to Respondent's truth defense to the defamation counterclaim.

The purpose of an appeal is for the appellate court “to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). The petition here asks this Court to go far afield of that.

CONCLUSION

Rather than the fascinating potential misapplication of discovery sanctions law pitched by Petitioner, what this case presents is a reasoned application of discovery sanctions law to a litigant who repeatedly thumbed his nose at his discovery obligations and the authority of the court. The trial judge’s “thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record[.]” Morris, 438 S.C. at 587. Judge Gravely observed that, before he concluded Petitioner’s longstanding discovery misconduct on a central issue was finally going to result in a serious sanction, Petitioner had already been given chances to comply and avoid sanctions, chances the Petitioner did not deserve. (R. pp. 94-106.) The trial court gave Petitioner plenty of slack in the rope. He decided to hang himself with it. Petitioner cannot flout his rules-based and court-ordered discovery obligations and think our court system will save him from the consequences of his choices. That is what he asks this Court to do.

WHEREFORE Respondent prays for an order denying the petition for a writ of certiorari.

Respectfully submitted,

/s/ Andrew S. Radeker

David L. Moore Jr.
S.C. Bar No. 1509
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
dmoore@turnerpadget.com

and

Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
6511 Dare Circle
Columbia, South Carolina 29206
(803) 500-0891
drew@radekerlaw.com
Attorneys for Petitioner

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