THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No: 2011-CP-26-9457

Horry County, A body politic,..... .....Respondent.

v.

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

Of whom,

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

APPELLANTS' PETITION FOR REHEARING

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The Appellants, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed on April 2, 2104. The basis of this Petition for Rehearing is the attached Memorandum.

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Dated: April 11, 2014

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Memorandum in Support of Petition for Rehearing

The Appellants move the Court for a rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules. The basis of this Petition for Rehearing is as follows:

1. **The Court of Appeals erred by not considering the factual record and not determining the lower court abused its discretion in striking Appellants' Answer when there was no showing that Appellants willfully disobeyed the court's order.**

The Court of Appeals failed to consider the factual record which showed Appellants did not act with bad faith, willful disobedience or gross indifference. The record shows Appellants consented to Respondent having full access to their books and records. Appellants made no attempt to prevent the Respondent from reviewing its books and records. It was the Respondent that failed to make any efforts to do so. The Court of Appeals failed to consider these factual circumstances and erred by not determining the lower court abused its discretion.

The record also shows Appellants were obedient to the Orders of the lower court. For example, after the July 23, 2012 hearing, the Appellants immediately began making payment of the disputed surcharge monies to the Respondent - from July 23, 2012 through November 25, 2012 those monies totaled $226,933.00. Furthermore, the record shows Appellants fully cooperated with the court appointed receiver. The facts of this case simply do not support the finding that Appellants willfully disobeyed the court.

In his separately concurring opinion in Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App.1997), Judge Anderson cited 23 Am.Jur.2d Deposition and Discovery §390 and §391 (1983) for the following:

> The sanction of striking pleadings should not be lightly used, since it can amount to judgment against the delinquent party without an opportunity to be heard on the merits. A default judgment is clearly a drastic remedy and should be resorted to only in extreme situations, as where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders or persists in an outright refusal to comply with discovery obligations, or where there is a series of episodes of nonfeasance on the part of counsel amounting to a near total dereliction of professional responsibility and going well beyond ordinary negligence.

In Barnette v. Adams Brothers Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003), the Supreme Court upheld the trial court's dismissal of Barnette's complaint given her "persistent refusal to comply with the trial court's orders." The record showed three separate hearings were held in which the trial court ordered Barnette to produce records. During the third hearing on the matter, the trial court warned that Barnette's failure to comply with its orders could result in the imposition of sanctions which may result in dismissing the action. Because Barnette failed to obey the trial court's orders, even after being warned, her complaint was dismissed. The trial court had no other choice given the fact that Barnette was intentionally trying to conceal evidence.

In McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct.App.2008), the Court of Appeals upheld the trial court's decision to strike Fairfield County's pleading. The record showed the County completely ignored and failed to comply with the court's order even after numerous hearings on the matter were held. The court warned the County that it was inclined to strike the County's Answer but would instead give the parties forty-five days to reach an agreement and to submit proposed scheduling orders. When the County once again ignored the court and failed to submit a proposed scheduling order, the trial court

issued an order striking the County's Answer.

In the present case, there is no showing of bad faith, willful disobedience or gross indifference on the part of the Appellants. As such the lower court abused its discretion by striking Appellants' Answer. The Court of Appeals erred in not determining this issue.

2. **The Court of Appeals erred by not considering the factual record and not determining the lower court abused its discretion in striking Appellants' Answer when there was no showing that Appellants acted with gross indifference to the Respondent.**

The Court of Appeals failed to consider the factual record which showed Appellants did not act with gross indifference to the Respondent. The Court of Appeals also failed to consider the fact that Respondents were not prejudiced in any way. As such, the Court of Appeals erred in not determining the lower court abused its discretion.

In QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct.App.2004), the Court determined the trial court did not abuse its discretion in striking Moyer's Answer because the facts showed Moyer intentionally and willfully violated the trial court's discovery order. The trial court ordered Moyer to produce a computer in which evidence was thought to be stored. Before turning over the computer, Moyer caused the hard-drive of the computer to be re-formatted which effectively erased any information contained therein. The Court determined Moyer's actions in willfully destroying evidence clearly showed gross indifference to QZO's rights.

In Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), Mitchell failed to disclose the existence of a videotape in a personal injury case which the Court determined was relevant to the issue of damages. Mitchell had the videotape for over two years before disclosing its existence just days before trial. The Court discussed:

> 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." State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (*quoting* Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when 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). Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required. Id. at 46, 362 S.E.2d at 319.

In the present case, the record shows Appellants invited Respondent to come review all their records. Furthermore, in the lower court's Order filed on July 30, 2012,[1] the court set forth Appellants' consent and specifically provided:

> The Plaintiff and Defendants have further consented and agreed that during the pendency of this action, employees, agents and officials of the Plaintiff shall have full access to and the unlimited right to inspect all of the books and records pertaining to the business, assets and property of the Defendants, wherever located and however stored, whether manually, on a hard drive or by portable data storage (CD, DVD, or Flash Drives), as the Plaintiff deems necessary in this action. Provided, however that the information contained in these books and records shall be confidential and not for public dissemination, except to the extent necessary for any proceedings or actions the parties to this action deem necessary to prosecute or defend this action.

The record in this case shows no attempt was made by the Respondent to access Appellants' documentation or electronically stored information as provided in the July 30, 2012 Order. As such, there is no showing that Appellants made any attempt to hide discoverable materials from the Respondent or acted in gross indifference to the Respondent's rights.

Additionally, the affidavits of Robert Weisberg and Spiro Naos reveal Appellants were not aware that they were in violation of a court order. Once their new counsel, the undersigned, informed them of the order compelling discovery, Appellants worked

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1 Order, July 30, 2012, R.p. 14

quickly to provide discovery responses. Those responses were hand-delivered to Respondent's counsel prior to the contempt hearing. Appellants were extremely frustrated, scared, and angry to learn they were not in compliance with the lower court's order as a result of their prior counselor's actions.

Furthermore, this case was not on the trial roster. The record shows that the parties had just filed amended pleadings a few weeks prior to the lower court's order holding Appellants in contempt. No witness depositions had been taken or noticed. Unlike the situation in Samples v. Mitchell, there was no danger of Respondent being ambushed at trial. There was no showing that Appellants were trying to hide information or destroy evidence. Respondent was not prejudiced in any manner.

3. The Court of Appeals erred by not considering the factual record and not determining the lower court's Order striking Appellants' Answer was unduly harsh and disproportional to Appellants' alleged disobedience.

The Court of Appeals failed to consider the factual record which showed the striking of the Appellants' pleadings was not proportional to Appellants' alleged disobedience. As such, the Court of Appeals erred in not determining the lower court abused its discretion. Appellants In Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App.1997), the Court determined the trial court abused its discretion in striking Ogden Teck's pleadings because the sanction was unduly harsh under the circumstances. The trial court struck Ogden Teck's pleading because it failed to respond to a discovery orders issued by way of a written order and a verbal order during a status conference. In reversing the trial court's order, the Court emphasized that it did not condone Ogden Teck's violation of the discovery orders, but, "[u]nder the circumstances...the harsh

sanction imposed was not commensurate with Ogden Teck's disobedience, and any number of lesser, more narrowly tailored sanctions would have sufficed to protect Karppi's rights while adequately punishing the wrongdoing of Ogden Teck. Id. at 545, 683. The Court further provided in a footnote the following:

> While we agree that the trial court was well within its power to penalize Ogden Teck for what the court found to be willful disobedience, under these circumstances it seems from the record as though the attorney for Ogden Teck was at least as much to blame as the party itself, for its indiscretions. To penalize Ogden Teck so severely for apparently relying on the advice of its attorney, under these circumstances, is clearly unjust, and would not properly serve the purposes for sanctions. Cf. Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989). Id. at 545, 683.

In a separately concurring opinion, Id. at 547, 684, Judge Anderson stated the trial judge's order holding Ogden Teck in default for failure to comply with a discovery order was an abuse of discretion. Judge Anderson cited the U.S. Supreme Court's holding in Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct.1087, 2 L.E.2d 1255 (1958) for the holding "the sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Judge Anderson went on to state "the sanction should be a rifle-shot, not a shotgun blast. In the instant case, the sanction was a hydrogen bomb. The Appellants were denied the opportunity to present a defense."

Judge Anderson further cited Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36 (4th Cir.1995) in which the Court held "[w]hile the imposition of sanctions under Rule 37(b) lies within the trial court's discretion, it is not a discretion without bounds or limits. In the case of ordering default judgment, the 'range of discretion is more narrow' than when a court imposes less severe sanctions."

In the present case, striking the Appellants' pleadings was not proportional to their alleged disobedience. The record shows Appellants provided full access so the Respondent could review any records it wanted. The record also shows that prior to the contempt hearing, Appellants provided written discovery responses along with requested documentation. The record further shows Appellants complied with all other provisions of the lower court's July 30, 2012 Order. As such, the Court of Appeals erred by not determining the lower court abused its discretion.

4. The Court of Appeals erred by not considering the factual record and not determining the lower court abused its discretion in striking Appellants' Answer when Appellants were not warned that a failure to fully obey a court order could result in the striking of their Answer.

The Court of Appeals failed to consider the factual record which showed the lower court did not warn Appellants that it may strike their pleadings. As such, the Court of Appeals erred in not determining the lower court abused its discretion. In determining whether or not a lesser sanction would be effective and more proportional to a party's disobedience, courts usually determine whether the sanctioned party was previously warned. *See* Barnette v. Adams Brothers Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003) and McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct.App.2008) discussed above. Additionally, in Griffin Grading and Clearing, Inc., 334 S.C.193, 199, 511 S.E.2d 716, 719 (Ct.App. 1999), the Court considered the trial court's order striking the defendant's answer in which the trial court noted:

> Although striking the defendant's Answer is a harsh sanction, I find that no less drastic sanction would be effective in this case. Four prior Orders have been issued, without meaningful compliance by the defendant. A lesser sanction of the assessment of attorney's fees was imposed [in an earlier order], yet that did not result in meaningful compliance by the defendant. In

> [an earlier order], the defendant received a clear and explicit warning of the consequences if the defendant failed to comply with the Order of the Court, yet the defendant has done just that.

In Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36 (4th Cir.1995), the case discussed by Judge Anderson in Karppi, the Court provided:

> In particular, this court has emphasized the significance of warning a defendant about the possibility of default before entering such a harsh sanction. As we recently noted in a slightly different context, a party "is entitled to be made aware of th[e] drastic consequence[s] of failing to meet the court's conditions at the time the conditions are imposed, when he still has the opportunity to satisfy the conditions and avoid" the sanction. Choice Hotels Int'l v. Goodwin & Boone, 11 F.3d 469, 473 (4th Cir.1993). In Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir.1987), reversing a default sanction as an abuse of discretion, a panel of this court considered the failure to warn a "salient fact" which distinguished that case from those in which default was appropriate. Id. at 954 n. 2. According to the Lolatchy court, if a warning had been given, "another case would be presented." Id. Because the court had issued only general scheduling orders in the case at bar, the lack of any advance notice is especially problematic.

More recently, in Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 652736 (February 21, 2013), the United States Magistrate Judge Thomas E. Rogers, III stated a court must consider "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective." *citing* Belk v. Charlotte–Mecklenburg Bd. of Educ., 269 F.3d 305, 348 (4th Cir.2001). In denying the appellants' Motion to strike the complaint and order the case dismissed due to the respondent's failure to produce discovery responses, Judge Rogers held:

> At this juncture, dismissal is too harsh a sanction as Respondent has not previously been warned that a failure to participate in discovery or to obey court orders could result in dismissal. Therefore, Respondent is hereby directed to fully respond to Appellants' First Set of Interrogatories and First

> Set of Request for Production of Documents, both dated May 17, 2011, within fifteen (15) days of the date of this Order. Appellants may file a second motion for sanctions should Respondent fail to comply with this Order. Failure by Respondent to respond to Appellants' discovery requests may result in a recommendation that this case be dismissed pursuant to Rule 37, Fed.R.Civ.P.

A month later, in Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 1901073 (April 16, 2013), Judge Rogers held dismissal of the action was appropriate at that time because: (1) Respondent acted in bad faith by failing to cooperate with her counsel prior to him being relieved; (2) Plaintiff's actions prevented Appellants from discovering relevant facts of the case and preparing a defense; (3) Less drastic sanctions would not be effective. "Respondent was specifically warned in the Court's most recent Order that her failure to serve responses to Appellants' discovery could result in a recommendation that the case be dismissed. Nevertheless, Respondent continues to ignore the orders of this Court as well as the Federal Rules of Civil Procedure." In Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 1901015 (May 7, 2013), Judge R. Bryan Harwell approved Judge Rogers' recommendation and dismissed the plaintiff's complaint without prejudice.

The Court of Appeals erred by not determining the lower court abused its discretion by striking Appellants' Answer without first issuing a warning.

5. CONCLUSION:

In the present case, while the record could support the determination that Appellants failed to timely produce discovery responses, that failure does not warrant the imposition of the harshest sanction available. The Court of Appeals erred by not determining the lower court abused its discretion in light of the following factual circumstances: (1) Appellants made all their books and records available to Respondent, (2) Appellants were not aware they

were in violation of an order and there was no showing that they intended to cause prejudice to the Respondent, (3) Respondent was not prejudiced, (4) Appellants provided responses to discovery requests prior to the contempt hearing, (3) Appellants' prior counsel, not the Appellants, was the source of the disobedience, (4) Appellants cooperated and fully complied with all other provisions of the lower court's Order, and (5) the lower court did not warn Appellants of the possibility of having their Answer stricken and being held in default. Accordingly, Appellants' Petition for Rehearing should be granted.

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Dated: April 11, 2014

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Of whom,

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

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Petition for Rehearing, by depositing a copy of it in the United States Mail, postage prepaid, on April 14th, 2014, addressed to counsel for Respondent, Blake A. Hewitt, P.O. Box 7965, Columbia, SC 29202, Phillip C. Thompson, 1300 Second Ave., 3rd Floor, Conway, SC 29526, Arrigo P. Carotti, Esq., P.O. Box 1235, Conway, SC 29526.

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April 14, 2014

The Honorable Jenny Abbott Kitchings
Court of Appeals Clerk of Court
1015 Sumter Street
Columbia, SC 29201

Re: Horry County, vs. Aquasino Partners of South Carolina, LLC, et al.
Case No: 2011-CP-26-9457
Appellate Case No: 2013-000757

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of Appellants' Petition for Rehearing and Proof of Service regarding the above captioned matter. Please file the originals and return a time-stamped copy back in the enclosed self addressed stamped envelope at your convenience. I am also enclosing the filing fee of $25.00.

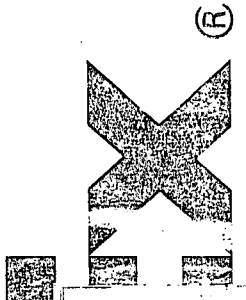
Please do not hesitate to contact me should you have any questions.

With kindest regards, I am,

Sincerely,

Mark D. Neill

MDN/lah
Enclosures ($25.00)
Cc: All Counsel of Record (w enclosures)



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