THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Maité D. Murphy, Circuit Court Judge

Case No. 2011-CP-07-04999

Appellate Case No. 2013-002569

Steffani Walther and Michael Walther, ... Appellants,

v.

Eddie Maple and Kate Maple, individually
And d/b/a Equine Management, LLC, ... Respondents.

INITIAL BRIEF OF THE APPELLANTS

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October 20, 2014.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial Court err in imposing sanctions pursuant to Rule 37, which dismissed the Plaintiffs' case where there was no evidence of a willful or intentional refusal to comply with discovery and the Defendants were not prejudiced.

II. Did the Trial Court err in imposing sanctions pursuant to Rule 37, which precluded a decision on the merits, where the court intended to dismiss the case without prejudice, but the order was entered after the running of the statute of limitations.

III. Did the Trail Court err in awarding attorney's fees based on an *ex parte* affidavit, which included costs unrelated to the allegedly sanctionable conduct of the Plaintiffs.

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STATEMENT OF THE CASE

This is an appeal from the Order of the Honorable Maité D. Murphy dismissing the Plaintiffs' defamation action, pursuant to Rule 37, SCRCP, and the Order denying Plaintiff's Motions under Rules 52(b), (59)(e) and 60(b), SCRCP.

On November 30, 2011, the Plaintiffs, Steffani and Michael Walther filed this action for defamation against Eddie Maple and Kate Maple, individually, and d/b/a Equine Management, LLC. [Complaint dated November 30, 2011]. The action was based on statements made by the Defendants on or around November 4, 2011. Id. Depositions noticed in 2012 were postponed due to settlement negotiations, between the parties. [Tr. of Hearing, October 28, 2013, p. 5].

Plaintiffs retained Robert V. Mathison, Jr., in January of 2013 to take over the representation. Defense counsel sent Notices of Depositions to Plaintiffs in March and April of 2013, both of which had to be rescheduled due to Plaintiffs' counsel having prior obligations before the court. [Defendants' Exhibits to Motion for Sanctions dated September 23, 2013]. Defense Counsel agreed to the continuances, but also filed a Motion to Compel on April 16, 2013. Id. Before the motion was heard, the Plaintiffs agreed to hold the depositions on July 2nd or 3rd, however, Defense counsel was unavailable on July 3, and Plaintiff's counsel fell ill the day before the depositions were to be taken on July, 2nd. [Order of Marvin H. Dukes dated July 24, 2013, p. 1, ¶ 3].

At the hearing on the motion to compel, the Walthers agreed to submit to depositions before August 28, 2013. [Trans. of Hearing, October 28, 2013, p. 7, l. 17-25]. Judge Dukes issued an order to that effect dated July 24, 2013.

On August 7, 2013, without prior consultation, Defense counsel issued a notice to take Plaintiffs' depositions on August 28, 2013. On August 7, Plaintiff's counsel notified Defense counsel that Michael Walther would not be available on that date and that Plaintiff's counsel had a hearing before the Securities Commissioner in Columbia that would be scheduled during that week. Plaintiffs' counsel further advised that both the Walthers and Plaintiffs' counsel would all be available on September 3rd, 4th and 5th. [Email Corresp. dated August 7, 2013].

On August 25, 2013, Steffani Walther's son was the victim of a severe assault in California that left him hospitalized and in need of surgery. Upon learning of the attack on August 26, Ms. Walther immediately purchased a plane ticket and traveled to California to attend to her son. She did not return to South Carolina until August 31st, after her son's surgeries were completed and his condition stabilized. [Aff. of S. Walther dated October 29, 2013].

On August 19th, and again on August 27th, Plaintiffs' counsel again notified Defense counsel that the depositions could not take place and that there would be nobody present at his office on August 28th. [See Aff. of P. Florence, Exhibit A, Invoice No. 11, p. 2; Email Corresp., August 7, 2013 and August 27, 2013]. Nevertheless, the next day, Defense counsel and a court reporter went to the Plaintiffs' counsel's office, where—as they were told—nobody was present. Defense counsel then made a record at the court reporter's office.

Defense counsel filed a motion for sanctions pursuant to Rule 37, SCRCP, on September 23, 2013. The motion was scheduled for October 28, at 1:00 p.m. Due to an error in calendaring the event, Plaintiffs' counsel was running late and called the Chief

Administrative Judge's clerk at 1:35 p.m., in an effort to notify the court. The motion was heard in his absence. [Aff. of R. V. Mathison, Jr., November 29, 2013].

At the hearing, the court granted the Defendants' motion for sanctions, dismissing the case without prejudice and awarding costs. The court declined to grant Defendants' request for a dismissal with prejudice, stating "I'm dismissing the case but I'm not doing it with prejudice. I don't think that it's equitable to hold his clients to that burden if it's no fault of their own. I'm not sure whose it is." [Tr. of Hearing, October 28, 2012, p. 12.]. The court stated it would "fill in the blank" regarding the amount of sanctions based on the number of times Defense counsel attempted to schedule the depositions. Id. Defense counsel presented no evidence of attorney's fees or costs, but agreed to submit an affidavit showing costs incurred. Id.

On the following day, without serving copies to the Plaintiff, Defense counsel submitted a proposed order to the court which included findings that "Plaintiffs have willfully and intentionally failed to appear for their properly noticed depositions on multiple occasions" and awarding attorney's fees of $9,691.18. [Defendants' Reply to Plaintiffs' Motion for Relief, December 10, 2013, p. 2]. The proposed order, submitted *ex parte* together with Defense counsel's Affdivit of Attorney's fees, was signed on October 29, 2013. [Order of Maité D. Murphy, dated October 29, 2013]. On October 30, 2013, Plaintiff's counsel submitted the Affidavit of Steffani Walther detailing her son's attack and her trip to California to both Defense counsel and the court. Defense Counsel's Affidavit of Attorney's fees was formally received by the Clerk of Court and Plaintiff's counsel on October 31, 2013.

On November 18, 2013, three weeks after the order was initially submitted and signed, Defense counsel emailed a copy to Plaintiffs' counsel. [Aff. of R. V. Mathison, Jr., p. 3]. This was the first time Plaintiffs' counsel had seen the order dismissing the case. Judgment was entered on November 15, 2013, and on November 29th, Defense Counsel sent an email to Plaintiffs' counsel with the entry of Judgment and a copy of the Order showing a revised entry date of November 18, 2014. [Defendants Reply to Plaintiffs' Motions for Relief, p 2].

On November 29, 2013, Plaintiffs filed Motions pursuant to Rules 52(b), 59(e), and 60(b), SCRCP, as well as a notice of appeal. By letter dated December 9, 2013, Plaintiff's counsel forwarded the motions to Judge Murphy, and noted the potential jurisdictional issues with respect to the Rule 60 motion in light of the Notice of Appeal. The trail court denied Plaintiffs' motions on January 23, 2014.

OUTLINE OF THE ARGUMENT

I. The Order of the Circuit Court Dismissing the Case should be reversed because the Sanctions resulted in a total preclusion of Appellant's claim, without evidence of willful misconduct and Steffani Walther had a meritorious defense that entitled her to relief.

A. Steffani Walther's conduct did not warrant a dismissal because she agreed to cooperate in discovery, her failure to comply was justified by a genuine family emergency and Defendants were not sufficiently prejudiced by any alleged misconduct.

II. A. The trial court abused its Discretion by failing to consider the statute of limitations, because the unintended consequence of the dismissal without prejudice was tantamount to a dismissal with prejudice, precluding an adjudication on the merits.

B. Defense Counsel's misconduct in submitting a proposed order for signature *ex parte*, and delaying any service of the order materially altered the nature of relief granted by the court, and prejudiced the Plaintiff beyond the trial court's intended sanctions.

III. The court improperly awarded attorney's fees and costs that were not supported by the evidence and without sufficient notice to Plaintiffs.

ARGUMENT

I. The Order of the Circuit Court Dismissing the Case should be reversed because the Sanctions resulted in a total preclusion of Appellant's claim, without a finding of willful misconduct and Steffani Walther had a meritorious defense that entitled her to relief.

This court should reverse the Orders dated October 29, 2013, and January 23, 2014, because there was no evidence showing a willful or intentional failure to comply with discovery, which the court recognized in declining to dismiss the case with prejudice. Additionally, contrary to the court's intent, the imposition of sanctions ordered by the court effectively time-barred her action, preventing a decision on the merits. The sanctions were unduly harsh in light of the circumstances and the availability of less severe penalties. The court's failure to consider the impact of the statute of limitations on the relief granted, amounted to an abuse of discretion.

Standard of Review

The trial court has discretion to impose sanctions on a party for violations of the courts discovery rules or court orders pursuant to Rule 37, SCRCP. The rule empowers the court to impose a variety of sanctions, including dismissal. An abuse of discretion occurs "where appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of the appellant, thereby amounting to an error of law." Karppi v. Greenville Gerrazzo, Inc., 327 S.C. 538, 542, 489 S.E.2d 697, 681 (Ct. App. 1997). "When a court orders a sanction that results in dismissal, 'the end result is harsh medicine that should not be administered lightly.'" QZO, Inc., v. Moyer, 358 S.C. 246, 257, 594 S.E.2d 541, __ (Ct. App. 2004). When a 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. Id. A sanction of dismissal is too severe if there is no evidence of intentional misconduct. Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353, 355 (1996). Sanctions should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case. Karppi, 327 S.C. 538, 489 S.E.2d 697, 681 (Ct. App. 1997).

A. Steffani Walther's conduct did not warrant the sanctions imposed because she agreed to cooperate in discovery, her failure to comply was justified by a genuine family emergency and the Defendants were not prejudiced.

The record does not support a finding of willful disregard for the discovery rules by the Plaintiffs and the trial court stated as much at the hearing. The document record reveals that Defense counsel twice sent Notices of Depositions to Plaintiff's counsel with little or no advanced coordination, in the spring of 2013. The same day the March 25th notice was forwarded, Plaintiff's counsel informed defense counsel that he had another obligation in court on that date. Plaintiff's counsel then requested dates during the weeks of April 8, and April 15. Without, offering any options, Defense counsel forwarded notices of deposition for April 8th. Again, Plaintiff's counsel's had obligations in court which he attempted to resolve, but could not until the last minute. A third deposition date in early July, which both Plaintiffs agreed to attend, was postponed because of illness.

On August 7, 2013, Defense counsel again unilaterally scheduled depositions to take place on August 28, 2013. On the same day the notice was received, Plaintiffs' counsel informed defense counsel that Michael Walther would be able to attend and that Plaintiffs' counsel might have to be in Columbia before the Securities Commissioner on August 28th. He also advised of his availability on three days the following week. On

August 19th and August 27th, Plaintiff's counsel informed Defense counsel that the deposition would not take place and that his office would be closed. [See Aff. of P. Florence; Exhibit A, Invoice 11; Email Corresp., dated August 27, 2013].

Steffani Walther confirmed her availability to attend the August 28th deposition, but was prevented from attending because of an unexpected family emergency. Ms. Walther's son, Pedram Davoud, was severely attacked on August 25, 2013. Mrs. Walther immediately went to California to attend to him. She did not return until August 31, 2013. This unplanned exigency can hardly be characterized as "willful" or "intentional" misconduct.

At the hearing on October 28, 2013, the trial court specifically noted that there was no evidence of who was at fault for the missed depositions. Because there was no evidence of willfulness, the court declined to grant the Defendants' request for a dismissal with prejudice, noting the record was unclear about whether the failure to attend was Mr. and Mrs. Walther's fault. Nevertheless, the court dismissed the case, even though she could not say "whose fault it is." Mrs. Walther's affidavit demonstrated that she was clearly not at fault under the circumstances, and the court should have taken her unique circumstances into consideration in reviewing the decision to impose such a harsh sanction.

The prejudice to the Defendants, if any, was slight, and could have been easily cured by waiting five days or the payment of valid costs. The Plaintiffs and Plaintiffs' counsel had agreed to deposition dates fewer than five days after the date unilaterally scheduled by the Defendants. Additionally, the failure to satisfy the August 28, 2013, deadline did not, in itself, create any prejudice to the Defendants. *See,* Orlando v. Boyd,

320 S.C. 509, 466 S.E.2d 353, 355 (1996) (failure to comply with court-ordered deadline to depose witness did not prejudice party seeking to take the deposition). The Defendants planned to take depositions of more than a dozen other witnesses. [Aff. of P. Florence, Exhibit], and the case had not been set for trial.

Accordingly, the court's dismissal of the action without evidence showing a willful or deliberate disregard for the Defendants' right to discovery, and with minimal prejudice to the Defendants, amounted to an abuse of discretion, and should be reversed.

II. A. The Court Abused its Discretion, because the unintended consequence of the dismissal without prejudice was tantamount to a dismissal with prejudice, precluding an adjudication on the merits.

Where a sanction short of a default judgment has the effect of a default judgment precluding a decision on the merits, an abuse of discretion has occurred. *See* Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353, 355 (1996). In Orlando, the court excluded the testimony of an expert witness as a sanction for the witness's failure to appear at a court-ordered deposition. By excluding the testimony, the decision of the court effectively prohibited the plaintiffs from surviving summary judgment. The Court of Appeals reversed, holding that a sanction short of dismissal that nevertheless prevents a decision on the merits amounts to an abuse of discretion. Orlando, 320 S.C. 509, 512, 466 S.E.2d 353, 555 (1996).

In this case, the court's dismissal *without* prejudice was tantamount to a decision *with* prejudice, given the statute of limitations and the circumstances surrounding the entry of the order. Following a dismissal without prejudice a claimant is entitled to refile its action, provided the statute of limitations has not run. Davis v. Lunceford, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985). South Carolina has a two year statute of

limitations on actions for libel and slander. S.C. Code Ann. § 15-3-550(1) (2010). Steffani and Michael Walther filed this defamation action against the Defendants based on events that occurred on or around November 4 and 5, 2011. As a result, the Plaintiffs' claims were time-barred by Novmeber 4, 2013.

Defense counsel submitted his proposed sanctions order without simultaneously providing a copy to opposing counsel on October 29, 2013, in violation of Rule 5(b)(3), SCRCP. (Requiring simultaneous service of proposed orders to opposing parties in the same manner and at the same time it is submitted to the court). The Order granting Defendants' Motion for Sanctions and ending the case was entered on November 18, 2013, two weeks after the statute of limitations had run. Plaintiff did not receive any notice of the submission, signature or entry of the written order until November 18, 2013, at the earliest—again, two weeks after the Statute of Limitations had run.

"[A]n order is not final until it is entered by the clerk of court; . . . [T]he moment . . . [the order] is filed by the clerk of court, it becomes the judgment of the court, and fixes the rights of the parties[.] Stated otherwise, the *effective date of an order is not when it is signed by the judge, but when it is entered by the clerk of court.*" Upchurch v. Upchurch, 367 S.C. 16, 22-23, 624 S.E.2d 643, 646 (2006), (internal citations omitted) (emphasis added).

Needless to say, a party may not simultaneously maintain two suits for the same claim against the same defendants. Even though the instant case had been orally dismissed, the order did not take effect until its the entry with the Clerk of Court. Without any notice about the existence of a written order (signed or otherwise), the Plaintiffs had no possibility of filing their claim before the running of the statute. Thus,

the Dismissal without Prejudice had the effect of totally precluding Plaintiffs' defamation claims against the Defendants, and amounts to an error of law requiring reversal.

At the hearing, the court specifically denied Defendants' request for a dismissal with prejudice, noting a lack of evidence regarding the willfulness or fault on the Plaintiffs'; however, the entry and service of the order after the running of the statute of limitations had that precise effect. As a result, the court abused its discretion and the decision of the trial court should be reversed.

B. Defense Counsel's misconduct in submitting a proposed order for signature *ex parte*, and delaying any service of the order, materially altered the nature of relief granted by the court, and prejudiced the Plaintiff beyond the court's intended sanctions.

Defense counsel submitted a proposed order to the court on October 29, 2013, without providing simultaneous notice to opposing counsel. Rule 5(b)(3), SCRCP, requires a party submitting a proposed order or finding of fact to serve a copy on opposing parties at the same time and in the same manner as the proposed order is submitted to the court. Rule 5(b)(3), SCRCP; *see* In re Cheatham, 390 S.C. 439, 702 S.E.2d 559 (2010). A party is not required to wait for a filed, stamped copy of the order before serving opposing counsel with notice of an order, but merely provide notice that the written order was entered. Rosen Rosen & Hagood v. Hiller, 307 S.C. 331, 334, 415 S.E.2d 588, 592 (Ct. App. 1992). Nevertheless, Defendants sent no copy of the Order (signed or unsigned) dismissing the case without prejudice, nor any notice of the existence of the proposed order until November 18, 2013—nearly three weeks after it was presented to the judge and two weeks after the statute of limitations had run.[1]

[1] Appellants would note that Rule 5(a)(1), SCRCP, requires service of "written orders" as prescribed by Rule 5(b), and that an email regarding a document does not satisfy the service requirement. *See* Trowell v.

The prejudice to the Plaintiffs and the windfall to the Defendants from this delay is obvious. When crafting sanctions, the court should impose sanctions that vindicate the right of discovery offended by the non-compliant party's conduct, but the sanctions should not provide other parties with a windfall. *See* Karppi, 327 S.C. 538, 489 S.E.2d 697, 681 (Ct. App. 1997), (Sanction dismissing counterclaim was inappropriate as it resulted in unintended windfall to third-party defendant, whose right of discovery was not impeded). Defense counsel's failure to comply with the rule and the delay in entry and service of the order directly impaired the Plaintiff's right to refile—which the court expressly sought to protect in its ruling—and resulted in an unintended boon to the Defendants.

Because the sanction imposed resulted in an outright dismissal, where none was intended, the decision of the trial court should be reversed.

III. The court improperly awarded attorney's fees and costs that were not supported by the evidence and without notice to the Plaintiffs.

The court improperly awarded costs and fees to the Defendants that were unrelated to any alleged misconduct by the Plaintiffs. There was no evidence at the hearing or in the *ex parte* affidavit, which supported the courts finding with respect to the fees and costs awarded. Accordingly, the award of $9,691.19 in attorney's amounts to an abuse of discretion, and should be reversed on appeal.

The submission and determination of attorney's fees awarded in the order occurred entirely *ex parte*. On the same day Defense Counsel submitted its proposed order and Affidavit of Attorney's fees to the court, he also sent Plaintiffs' counsel a copy

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SC Dept. of Public Safety, 384 S.C. 232, 237, 681 S.E.2d 893, 896 (Ct. App. 2009) (holding service may not be completed by facsimile).

of his Affidavit for Attorney's Fees (but not the order), *by regular mail.* The Affidavit was not clocked in the Clerk's office until October 31, 2013, however, the amount attested in the Affidavit, $9,691.19, was included in the order signed two days earlier. Plaintiffs' counsel received Defense counsel's affidavit on October 31, 2013, but did not learn of the order's existence until November 18, 2013, more than fifteen days after it was signed and the fees were awarded. Granting the award without any notice or input from Plaintiffs or even a right to object was improper.[2]

Pursuant to Rule 37(d), SCRCP, the court may "require the party failing to act . . . to pay the reasonable expenses, including attorney's fees, *caused by the failure* . . ." (emphasis added). The affidavit of attorney's fees shows Defense counsel received compensation for numerous fees unrelated to Plaintiffs' alleged misconduct. The court awarded fees and costs for services unrelated to Plaintiffs' alleged failure to attend depositions. For example, Defense counsel included fees and costs for time and travel in attending a "mandatory status conference," and hours of consultation with his clients and other witnesses. [Aff. of P. Florence, Exhibits].

None of the foregoing costs were properly attributable to any misconduct by the Plaintiffs, and as a result, there is no evidence to support the award granted in the Order.

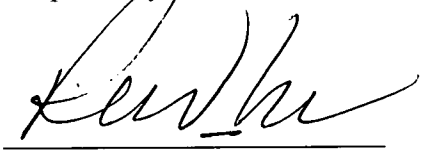
Awarding attorney's fees based on the *ex parte* affidavit, for costs unrelated to taking the Plaintiffs' depositions, amounts to an abuse of discretion, and the order should be reversed.

[2] Appellants would note that even a party in default is entitled to notice when there is to be a determination of unliquidated damages. Rule 5(a), SCRCP.

CONCLUSION

The court should reverse the decision of the lower court imposing the sanctions of dismissal and awarding costs. Dismissing the Plaintiff's case without prejudice was not warranted in light of the evidence of this case, especially because it amounted to a dismissal with prejudice, despite the court's clear intention to avoid that outcome. The award of attorney's fees in the amount of $9,691.19, was supported only by an *ex parte* affidavit, which showed many of the costs awarded were not traceable to the conduct of the Plaintiffs. Because there was no evidence for the amount actually awarded, the decision to award those costs was an abuse of discretion which should be reversed.

Respectfully Submitted,

By: 

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