THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHALND COUNTY
Court of Common Pleas

The Hon. Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2015-000244

Kerry Paul, Appellant,

v.

South Carolina Department of
Employment and Workforce, Respondent.

RESPONDENT'S AMENDED INTIAL BRIEF

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III. Did the trial court properly exercise its inherent discretion to dismiss Appellant's claims after Appellant engaged in a pattern of repeated, bad faith discovery abuses and intentional lack of candor before the court?

STATEMENT OF THE CASE

On January 5, 2015, after conducting three separate hearings, Circuit Court Judge Robert E. Hood issued a thirteen page Order ("Order") dismissing Appellant's claims as a sanction for Appellant's repeated discovery abuses, intentional and prejudicial breaches of Respondent's attorney-client privileged communications and lack of candor before the court, in an effort to conceal discoverable information. In its Order the circuit court also held that dismissal was justified, pursuant to Rules 11 and 12 S.C.R.C.P., because Appellant's claims were based upon nothing more than "speculation and innuendo." Order at 13.

In this Appeal, Appellant does not challenge the lower court's factual findings regarding Appellant's willful discovery abuses,[1] nor does Appellant challenge the circuit court's holding that Appellant's claims were purely speculative and insufficient to state a claim as a matter of law. Rather, Appellant's sole argument on appeal is that Judge Hood had no authority to dismiss Appellant's claims without first issuing a written discovery order under Rule 37(b)(2), SCRCP. Respondent submits that the Appellant's basis for appeal is without merit and respectfully requests that the circuit court's Order be affirmed.

This case arises from events surrounding Appellant's termination as Director of Human Resources from the South Carolina Department of Employment and Workforce ("SCDEW"). On January 14, 2014, Appellant was terminated by SCDEW after discovering that Appellant had downloaded Personal Identifying Information ("PII") from SCDEW's secure computer network.[2] On January 15, 2014, Appellant filed this action against SCDEW and its director, Cheryl

[1] In Appendix A, SCDEW attaches a list of most of the factual findings and legal conclusions contained in the circuit court's Order, all of which are unchallenged by Appellant.

[2] Prior to filing this lawsuit, Appellant initiated a grievance proceeding challenging her suspension and termination from SCDEW. After a hearing before the full grievance panel in September 2014, the panel unanimously upheld the Plaintiff's termination. The Plaintiff has appealed that decision to the Administrative Law Court.

Stanton, asserting claims for defamation, abuse of process and violation of S.C. Code §1-11-490.[3] On October 23, 2014, Appellant voluntarily dismissed all individual claims against Stanton with prejudice. Joint Stipulation of Dismissal as to Stanton, filed Oct. 23, 2014.

On March 28, 2014 SCDEW served initial interrogatories and requests for production of documents on Appellant. First Set of Interrogatories to Plaintiff; First Set of Requests for Production to Plaintiff. SCDEW's discovery requests sought basic information such as the names of the alleged witnesses to the specific allegations in Appellant's complaint and the specific defamatory statements allegedly made by SCDEW. On May 30, 2014, Appellant provided her initial response to the discovery requests. However, as the circuit court noted, Appellant's responses were "not made in good faith," they were "deficient," and were tantamount to no response at all. Order at 5; July 23, 2014 Hearing Trans. at 21-25. Among other deficiencies, Appellant "flatly refused to identify the names of the witnesses or alleged sources of the facts alleged in her complaint." Order at 4. Appellant also failed to disclose the names of SCDEW employees whom Appellant claimed were direct witnesses to the allegations in her complaint. *See* Plaintiff's Responses to Interrogatories ¶¶ 26, 28, 31, 32. Appellant further failed to identify any specific defamatory statements allegedly made by SCDEW. Id. ¶ 24. Consequently, on June 11, 2014 Respondent filed a motion to compel. Motion to Compel of Defendants.

On July 23, 2014, the parties appeared before the court for the first of three hearings to address Appellant's discovery abuses. July 23, 2014 Hearing Trans. At that hearing, Appellant

[3] S.C. Code § 1-11-490 requires state agencies to "disclose a breach of the security of the system following discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident."

again refused to identify her alleged witnesses, despite the court's direct instruction that Appellant must "name them." Id. at 25. Indeed, Appellant's counsel asserted that the fact witnesses' names were "confidential" and "non-discoverable" because they were now clients of Appellant's attorney. Id. at 27-28. The circuit court rejected Appellant's position, immediately adjourned the hearing, and advised the parties that he was at the point of reconvening the hearing to consider sanctions under Rule 37 S.C.R.C.P. (Failure to Make or Cooperate in Discovery; Sanctions). Id. at 29; *see also* Order at 5.

Appellant never named witnesses with firsthand knowledge of SCDEW's alleged defamation, as required by the court. Order at 10. When Appellant did supplement her written discovery responses, the additional information provided contradicted Appellant's previous factual assertions to the court and was inconsistent with Appellant's earlier discovery objections. Order at 10. Appellant's supplemental responses also contained communications from a meeting between SCDEW employees and SCDEW's outside legal counsel which, on its face, apparently violated Respondent's attorney-client privilege. Order at 6. After reviewing Appellant's supplemental discovery responses, SCDEW moved to reconvene the hearing and specifically requested that Appellant's complaint be dismissed as a sanction for discovery misconduct. *See* Respondents' Memorandum of Law Regarding Sanctions, filed September 8, 2014.

On September 8, 2014, the court held a hearing on SCDEW's motion for sanctions, which was the second hearing concerning Appellant's conduct in discovery. *See* Sept. 8, 2014 Hearing Trans. At that hearing, the circuit court "engaged [Appellant's] Counsel in a lengthy dialogue in an effort to ascertain the true identity of [Appellant's alleged witnesses]." Order at 7. Upon questioning by the court, Appellant retracted her previous discovery representations and admitted Appellant actually had no firsthand witnesses to verify the defamation allegations in her

complaint. Id.; *see also* Sept. 8, 2014 Hearing Trans. at 32. As for the breach of Respondent's attorney-client privileged information, Appellant's Counsel assured the court that Appellant "knows what the attorney/client privilege is" and further represented that neither Appellant nor her attorney had communicated with any of SCDEW's employees about Appellant's case. Sept. 8, 2014 Hearing Trans. at 45; 31. At that hearing, the circuit court expressed its concern that Appellant was "misrepresenting information to the court." Id. at 23. In fact, the court specifically warned Appellant that it was "very concerned about [Appellant's] ability to be truthful in these responses." Id. The court took the matter under advisement and indicated that a ruling would be forthcoming.

Before a written order could be issued, however, SCDEW discovered that Appellant and her attorney had, in fact, been communicating with its SCDEW's General Counsel, despite Appellant's contrary representations to the court. Supplemental Affidavit of John Faust; Supplement Affidavit of Derrick McFarland. These communications were not initially discovered because Appellant's discovery responses included over 600 document redactions, which concealed Appellant's telephone communications with SCDEW's General Counsel. Order at 7. On November 4, 2014, SCDEW moved to supplement the record with the newly discovered information, and renewed its motion for sanctions and for dismissal of Appellant's complaint. See Amended Motion of Respondent, filed November 6, 2014; Order at 8.

On November 25, 2014, the court held its third and final hearing. At that hearing, Appellant's counsel admitted, for the first time and only after SCDEW discovered the communications independently, that she and Appellant had communicated with SCDEW's General Counsel during the pendency of the action. Nov. 25, 2014 Hearing Trans. at 13; Order at 11. Appellant also confirmed that, at the time she filed her complaint, Appellant could not

identify any witnesses with personal knowledge of the meeting during which Appellant alleges she was defamed. November 25, 2014 Hearing Trans. at 16. The court then ruled, from the bench, that Appellant's case was dismissed with prejudice. Id. Appellant requested, and was granted, an opportunity to supplement the record. Id. at 17. However, Appellant never submitted any supplemental information or legal memorandum to the court.

On January 17, 2015 the circuit court issued its written order of dismissal. Appellant did not move for reconsideration of any of the trial court's findings or conclusions in that order. Appellant filed her notice of appeal on February 2, 2015. Notice of Appeal.

STANDARD OF REVIEW

On appeal from an order that strikes a party's pleading or imposes other sanctions, the circuit court should not be reversed unless it has abused its discretion or has erroneously applied the law of this state. Robinson v. Code, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009); Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542, 489 S.E.2d 679, 682 (1997); QZO, Inc. v. Moyer, 358 S.C. 246, 255, 594 S.E.2d 541, 546 (Ct. App. 2005). An abuse of discretion exists only where the conclusion reached by the circuit court was without reasonable factual support and resulted in prejudice to the rights of the appellant. QZO, Inc. v. Moyer, 358 S.C. 246, 255, 594 S.E.2d 541, 546-47 (Ct. App. 2005). Appellant bears the burden of establishing that the circuit court abused its discretion. Id.

Furthermore, "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the un-appealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "An unchallenged ruling, right or wrong, is the law of the case and requires

affirmance." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 544, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

ARGUMENT

In this appeal, Appellant does not challenge the lower court's conclusions that she failed to fully and truthfully respond to SCDEW's discovery requests, that she improperly accessed and disclosed privileged communications between SCDEW and its outside counsel, or that she intentionally misrepresented information to the court. Plaintiff instead argues, for the first time, that the Court was without authority to sanction her, pursuant to Rule 37, for the above conduct because she did not violate a written order of the court. However, this issue regarding the court's authority, or lack thereof, to issue Rule 37 sanctions has not been preserved for appellate review because Appellant failed to raise it in the court below - either at the July hearing, the September hearing, the November hearing, or in a SCRCP 59(e) motion. Additionally, while this court should not take up Plaintiff's unpreserved argument, even if it did and ruled in her favor, this court should still uphold the dismissal of Plaintiff's Complaint because she has not appealed the court's additional holding that Appellant's complaint was based upon nothing more than speculation and innuendo, and is therefore subject to dismissal under Rules 11 and 12(b)(6).

I. Appellant failed to preserve her only issue on appeal, thereby justifying dismissal as a matter of law.

To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court. Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct.App.2005). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.' " Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

Without an initial ruling by the trial court, a reviewing court simply is not able to evaluate whether the trial court committed error. Id. Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review. Washington v. Washington, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992).

For the first time, Appellant argues on appeal that the circuit court lacked the "authority" to dismiss Appellant's complaint because the circuit court did not first issue a written order compelling her to respond to SCDEW's discovery requests. Through three hearings before the circuit court, and even after receiving the circuit court's written order of dismissal, Appellant did not assert that the trial court had "no authority" to dismiss her claims without first issuing a written order compelling discovery. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). "Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986).

For months, Appellant *knew* that the circuit court was contemplating sanctions, including dismissal of her entire complaint, yet she never once asserted that the circuit court was without authority to sanction her because no written discovery order had been issued. On July 23, 2014, Judge Hood stated on the record that the parties would reconvene for proceedings under Rule 37. July 23, 2014 Hearing Trans. at 25. On September 8, 2014 and again on November 25, 2014, SCDEW sought dismissal of Appellant's claims under Rule 37, SCRCP, based upon Appellant's repeated discovery abuses and her intentional lack of candor before the court. At each hearing, SCDEW argued that dismissal was warranted, and cited specific legal authority supporting its

position. In response, Appellant's counsel argued that sanctions were not appropriate because she had answered SCDEW's discovery requests appropriately and neither she nor Appellant had misrepresented facts or disclosed SCDEW's attorney-client communications. But she did not argue, as she does on appeal, that Judge Hood lacked authority to issue Rule 37 sanctions without first issuing a written order to compel discovery.

At the third and final hearing on November 25, 2014, after the court announced its intention to dismiss Appellant's complaint, Appellant requested an opportunity to supplement the record but then did not do so, much less challenge, through Rule 59(e) motion or otherwise, Judge Hood's authority to dismiss her complaint. Nov. 24, 2014 Hearing Trans. at 17. As Judge Hood noted in his final order:

> Plaintiff did not present any evidence to refute the affidavits submitted by SCDEW nor did she present any memorandum or authority in opposition to SCDEW's request for dismissal under Rule 37, SCRCP. At that hearing, [on November 25, 2014] Plaintiff requested and was granted an opportunity to supplement the record. However, Plaintiff did not avail herself of that opportunity and has now waived that right.

Order at 9.

Thus, even after the circuit court issued its order of dismissal, Appellant did not seek reconsideration under Rule 59 or argue that the court's order exceeded the limits of its discretion. Because Appellant never raised the sole issue she now argues on appeal, Appellant has not preserved that issue. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). This court should not, then, take up the issue for the first time on appeal.

II. Because Appellant's complaint lacked evidentiary support, and was based entirely upon "speculation, rumor or innuendo," the circuit court properly dismissed the complaint pursuant to the provisions of Rules 11 and 12(b)(6) S.C.R.C.P.

As Judge Hood detailed in his order, the reasons for dismissing Appellant's case went beyond Appellant's failure to cooperate during discovery. Specifically, Judge Hood found that following Appellant's voluntary dismissal of SCDEW's director, Cheryl Stanton, as a defendant "the remaining allegations of the Complaint were insufficient to state viable claims against SCDEW for abuse of process or [for] violation under S.C. Code Ann. §1-11-490." Order at 3, n.2. In addition, Judge Hood found that Appellant had no good faith basis to support the allegations of her complaint, justifying dismissal under Rule 11 S.C.R.C.P. *See* Order at 2 ("[Appellant] has now ultimately admitted her allegations are nothing more than mere speculation."). Appellant did not appeal either of those rulings by the circuit court. Those rulings are now the law of the case, and they require this court to affirm. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013), *citing*, Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010)("An unappealed ruling is the law of the case.").

As Judge Hood understood, Rule 11(a) provides, in pertinent part that: "The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; [and] that to the best of his knowledge, information and belief there is good ground to support it . . . ." If a party filing a pleading that "does not comply with this Rule," a court "may impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." Rule 11 S.C.R.C.P.; *see also* Simpson v. Potomac Tel. Co., 552 A.2d 880, 886 ("A plaintiff . . . is not permitted to file a suit in the mere hope that pretrial discovery will provide a basis for the case."). The comments to the 1989 amendments to Rule 11(a) provide that the language was changed to be "more consistent with the language on sanctions for

discovery abuse." "The imposition of sanctions . . . will not be disturbed on appeal absent a clear abuse of discretion." Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996).

In each of the three hearings conducted by Judge Hood, the judge asked Appellant's counsel to identify the witnesses she had at the time of filing the complaint who had personal knowledge of what was allegedly said that constituted defamation of Appellant. The third and final hearing ended with the following exchange:

> THE COURT: Well, I would be very careful about that statement, Ms. Bloodgood. So here's my question, so the time you filed the lawsuit, tell me what witness that you had personal knowledge of that had personal knowledge of what happened in that meeting?
>
> MS. BLOODGOOD: Nobody, Your Honor.
>
> THE COURT: Okay. All right. [SCDEW's] motion to dismiss is granted. Prepare an order in 30 days.

In light of this admission from Appellant's counsel and Appellant's evasive discovery responses, Judge Hood ultimately concluded that Appellant's allegation that she had been defamed lacked evidentiary support and, therefore, Appellant's complaint violated Rules 11 and 12(b)(6):

- ". . . Plaintiff remains unable or unwilling to identify a single witness who is competent to testify regarding the alleged statements that form the crux of Plaintiff's entire complaint. A civil lawsuit - particularly one alleging defamation - must be based on more than speculation, rumor or innuendo." See Rules 8 & 11 S.C.R. Civ. P. Order at 13.

- "Plaintiff has failed to offer more than that in support of her claims, and - perhaps worse - she has repeatedly misrepresented to this Court the nature of her evidence in efforts to conceal that speculation and innuendo is all she has." Id.

- "Plaintiff's counsel admitted she and her client did not have any witness to provide these facts at the time of filing as required under Rule 11." Id.

On appeal, Appellant does not challenge the trial court's conclusion that her complaint fails to comply with Rule 11. Nor does Appellant challenge the finding that Appellant's

complaint fails to allege facts sufficient to state a cause of action for abuse of process or for violation of S.C. Code Ann. §1-11-490. *See* Order at 3, n.2. Therefore, even if this Court were to rule in Appellant's favor regarding the sole issue she has raised on appeal, which it should not even consider, the dismissal of Appellant's complaint must still stand because she has not appealed Judge Hood's conclusion that her Complaint is subject to dismissal pursuant to Rule 11 and Rule 12(b)(6). Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). "An unchallenged ruling, right or wrong, is the law of the case and requires affirmance." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 544, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

III. The circuit court properly exercised its discretion to dismiss Appellant's claims after Appellant engaged in a pattern of repeated, bad faith discovery abuses and intentionally misrepresented information to the court.

It should be evident that the circuit court exercised patience and restraint in attempting to cajole discoverable (and truthful) information out of Appellant. After all, the circuit court held three separate hearings over a period of six months attempting to address Appellant's discovery abuses. Only when it became clear that Appellant was repeatedly misrepresenting information to the court and had no good faith basis to support the allegations of her Complaint, and only after the court discovered Appellant was intentionally (and prejudicially) breaching Respondent's attorney-client privileged information did the circuit court finally exercise its discretion to dismiss Appellant's complaint. As noted in its order of dismissal, the circuit court did not base its decision solely upon the narrow and technical provisions of Rule 37(b)(2), SCRCP, but instead concluded that Appellant's conduct violated Rule 37, as well as the provisions of Rules

8, 12 and 11, SCRCP. *See* Order at 1, 9, 10, 11, 12 and 13; s*ee also* McNair v. Fairfield County, 379 S.C. 462, 467, 665 S.E.2d 830, 832-833 (Ct. App. 2008); Camden v. Maryland, 910 F. Supp. 1115, 1124 (D. Md. 1996).

"Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers." United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993), *citing*, Chambers v. NASCO, Inc., 501 U.S. 32 (1991). Where a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action. Id.; s*ee also* Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (recognizing the inherent power to dismiss where a party "defiles the judicial system in committing a fraud on the court"); Halaco Engineering Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988) (recognizing the inherent power to dismiss EPA case for discovery abuses); United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir.1986).

The circuit court's order of dismissal makes clear that it did not dismiss Appellant's case solely because she failed to respond to SCDEW's interrogatories. Rather, the circuit court focused upon Appellant's "repeated and intentional lack of candor before this court regarding basic discovery issues." Order at 1. As the court noted:

> Over the course of six months Plaintiff has changed her discovery position no less than four times in hearings and discovery responses. Plaintiff's abusive discovery conduct began with her unjustified refusal to name alleged factual witnesses, and ended with Plaintiff's denial that any such witnesses ever existed. Before finally admitting she had no direct witness to disclose, Plaintiff submitted numerous contradictory statements in her sworn discovery responses, failed to disclose her communications with SCDEW's General Counsel, and intentionally referenced information, which on its face, was covered by the attorney-client privilege. The

> end result is that the Plaintiff admittedly cannot and/or will not identify a single witness capable of verifying the defamation allegations in her Complaint.

Id. The court, therefore, exercised its inherent power to purge the docket of a case that was not based in fact, was predicated upon "mere speculation, rumor or innuendo"[4] and was advanced through Appellant's efforts to "willfully deceive[] the court and engage[] in conduct utterly inconsistent with the orderly administration of justice." Wyle, 709 F.2d at 589. Certainly, the circuit court should be empowered with discretion to dispose of an action such as this one.

Before dismissing Appellant's case, the circuit court made detailed findings regarding Appellant's repeated discovery abuses.[5] *See* Order; *see also* Appendix A. In addition, the circuit court carefully weighed pertinent factors, including the nature of Appellant's conduct, the posture of the case, the apparent willfulness of Appellant's actions, and the resulting prejudice to SCDEW. Order at 9-12; *see also* Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007). Based upon the totality of those factors, the circuit court ultimately concluded that Appellant's pattern of conduct was "willful" and "grossly indifferent to [SCDEW's rights" in the litigation. Order at 12. The circuit court further concluded that Appellant had "attempt[ed] to gain an unfair advantage" in litigation by "accessing and attempting to use information that was clearly privileged . . . highly prejudicial and seriously damaging to [SCDEW]." Id. at 11-12. Ultimately, the circuit court determined that there was "*overwhelming evidence* . . . that [Appellant] intentionally provided inaccurate information to this court and engaged in willful conduct that was grossly indifferent to the Defendants' rights, including its right to preserve its attorney-client privileged information." Order at 12 (italics added). Given the depth of the circuit court's analysis, the severity of Appellant's

[4] Order at 13.

[5] It should be noted that none of the circuit court's factual findings has been challenged by Appellant.

transgressions, and the undisputed factual record, the circuit court was well within the bounds of its discretion to order dismissal of Appellant's case.

Not once in Appellant's brief does Appellant actually challenge Judge Hood's conclusions that she engaged in discovery abuses and then repeatedly attempted to mislead SCDEW and the court. Instead, Appellant insists that dismissal of her case "must be reversed" because the lower court failed to first issue a *written* discovery order. Appellant's Brief at 7. Appellant's argument, however, fails to recognize the comprehensive basis of the circuit court's order and attempts to obfuscate and minimize the severity of Appellant's misconduct. Rule 37 should not provide Appellant an "escape" from the consequences of her actions. Even if the circuit court's order of dismissal had been based *solely* upon the provisions of Rule 37 (which it was not), Appellant has failed to demonstrate that the circuit court abused its discretion in dismissing her case.

"Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests." Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). "The imposition of sanctions is generally entrusted to the sound discretion of the circuit court." Id. at 546, 489 S.E.2d at 683. In this case, the record is clear that Appellant intentionally and willfully refused to provide good faith responses to SCDEW's basic written discovery requests. When asked by SCDEW to identify witnesses, Appellant objected on the grounds that "she [was] extremely concerned that Defendants will retaliate against an innocent employee of DEW if [the witnesses' names were] provided." Answers to Interrogatories 26, 28, 31, 32. The record is also clear that the circuit court unequivocally ruled from the bench that Appellant must "name them (her witnesses)." July 23, 2014 Hearing Trans. at 25. Appellant

then attempted to circumvent the court's directives by providing names of alleged witnesses who were not SCDEW employees, and therefore could *not* have been targets for "retaliation" by SCDEW. Order at 6. On July 23, 2014, and again on September 8, 2014, the court unequivocally ordered that Appellant *must* identify her witnesses. July 23, 2014 Hearing Trans. at 25 ("Name them."); Sept. 8, 2014 Hearing Trans. at 27 ("I need a specific answer."). Appellant's position that the circuit court could not dismiss her case without first issuing a *written* order compelling discovery is simply not an accurate interpretation or application of Rule 37 under the facts of this case.[6] Furthermore, Appellant's argument elevates form over substance, and would require a formulaic application of Rule 37 rather than vest the court with discretionary authority to enter an appropriate sanction as is necessary in this case.

CONCLUSION

As the January 5, 2015 Order reflects, the circuit court conducted three separate hearings on this matter and considered all of the documents submitted, arguments made and legal authority submitted by all parties before rendering its final decision. The court's decision was amply supported by the factual record, which Plaintiff does not dispute on appeal, and its decision was rooted in basic principles regarding pleading and discovery standards. Given the egregious nature of Appellant's misconduct, Judge Hood's order dismissing Appellant's claims was justified as an exercise of the judiciary's inherent authority to protect the orderly administration of justice and to preserve the integrity of the judicial system. For these reasons, Respondent respectfully requests that the Circuit Court's order be affirmed.

[6] Appellant refused to obey the Court's oral rulings from the bench regarding discovery, thereby triggering the Court's power to dismiss the Appellant's case under Rule 37(b), SCRCP. Additionally, the Appellant's improper objections, misrepresentations of fact, and ultimate refusal and/or inability to provide truthful responses to Respondents' discovery requests were tantamount to no response at all, thereby triggering the authority to dismiss the Appellant's claims under Rule 37(d), SCRCP.

August 12, 2015

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

Appendix A
Factual Findings and Legal Conclusions Regarding Appellant's Discovery Abuses
January 6, 2015 Order

- Appellant committed "repeated discovery abuses in violation of Rule 37, SCRP." (Order at p.1.)
- Appellant's "intentional breach of and improper use of SCDEW's attorney-client privileged information" (Order at p.1)
- Appellant's "repeated and intentional lack of candor before this Court." (Order at p.1)
- Appellant "changed her discovery position no less than four times in hearings and discovery responses." (Order at p.1; See also p.10)
- Appellant unjustifiably refused to name alleged factual witnesses and later denied that any such witnesses ever existed. (Order at p.1-2)
- Appellant "submitted numerous contradictory statements in her sworn discovery responses, failed to disclose her communications with SCDEW's General Counsel, and intentionally referenced information, which on its face, was covered by [SCDEW's] attorney-client privilege." (Order at p.2; See also p.11)
- Appellant "admittedly cannot and/or will not identify a single witness capable of verifying the defamation allegations in her Complaint." (Order at p.2)
- Appellant "is unwilling to abide by the rules and orders of this Court." (Order at p.2)
- Appellant "admitted her allegations are nothing more than mere speculation." (Order at p.2)
- Appellant "fails to respond to the written discovery in good faith and refuses to identify the names of the 'current SCDEW employees' whom she claims are witnesses to her claims." (Order at p.4).
- In her initial written discovery responses, Appellant "failed to identify any specific defamatory statements allegedly made" and "further refused to identify any direct witnesses who allegedly heard the defamatory statements," responding argumentatively that "the names of these employees are already known to Defendants." (Order at p.4)
- Appellant "flatly refused to identify the names of the witnesses or alleged sources of the facts alleged in her complaint." (Order at p.4)
- In her initial sworn discovery responses, Appellant represented that "she spoke with current SCDEW employees whom she believes are direct witnesses to substantiate her allegations, but she refuses to name them." (Order at p. 4-5)
- Appellant initially refused to name alleged SCDEW employee witnesses as witnesses based upon her fear they would be retaliated against. (Order at p.4)

Appendix A
Factual Findings and Legal Conclusions Regarding Appellant's Discovery Abuses
January 6, 2015 Order

- At the initial hearing, despite the Court's repeated direction to "name the witnesses" Appellant "again refuses to divulge the names of the alleged SCDEW employee witnesses but now asserts that the witnesses are 'undiscoverable' because they are clients of Plaintiff's attorney." (Order at p.5)

- In supplemental responses, Appellant attempted to identify non-SCDEW employees as direct witnesses to events that she knew were noshe knew were not even employed t the time the alleged events transpired. (Order at p. 6)

- Appellant retracted that she knew any SCDEW witness that would substantiate her claims. (Order at p.7)

- Appellant "played 'fast and loose' in discovery and with this Court by providing shifting explanations for her failure to identify her alleged witnesses – to finally disclose only after direct questioning by this Court that she never had such a witness who could corroborate the allegations of defamation she asserted against Defendants." (Order at p.10)

- Appellant's "discovery position has changed four times in no less than six months." (Order at p.10)

- Appellant's "conduct can only be characterized as bad faith, willfulness or gross indifference to the rights of Defendants." (Order at p.11)

- For months, Appellant failed to disclose pertinent facts to the Court which she had numerous opportunities to disclose and an affirmative obligation to disclose. (Order at p.11)

- Appellant "deliberately tried to conceal her communications with SCDEW employees (including the agency's General Counsel) by redacting certain telephone numbers from Plaintiff's telephone records before producing those records to Defendants." (Order at p.11)

- Appellant's "transgressions and discovery abuses have caused significant prejudice to Defendants." (Order at p.11)

- Respondent had to spend "considerable time and expense trying to defend itself against serious allegations of defamation that Plaintiff now concedes was based on her own speculation and not on any concrete facts she received from a witness before filing suit." (Order at p.11)

- Appellant's "shifting description of her witnesses without identifying them (prior to admitting there are none) has made it impossible for SCDEW to investigate and defend itself against Plaintiff's seemingly unfounded allegations for months." (Order at p.11, Parenthetical added)

- Appellant and Appellant's counsel engaged in (impermissible) communications with SCDEW's General Counsel during the pendency of this action, which she attempted to conceal. (Order at p.11, Parenthetical added)

- Appellant attempted to use information in her written discovery responses that were on their face clearly protected by the attorney-client privilege, as it concerned discussions with SCDEW's outside legal counsel. (Order at p.11)

- The "willful conduct by the Plaintiff displays a direct disregard of SCDEW's fundamental right to preserve its privileged information as well as the rules of this Court." (Order at p.11)

- Appellant's "attempt to gain an unfair advantage in this litigation by accessing and attempting to use information that was clearly privileged is highly prejudicial and seriously damaging to SCDEW." (Order at p.11-12) That harm cannot be undone - that "bell cannot be unrung."

- "Appellant intentionally provided inaccurate information to this Court and engaged in willful conduct that was grossly indifferent to the Defendants' rights." (Order at p.12)

- Appellant repeatedly "verified" numerous discovery answers that had to be false as they were "contrary." Appellant's "initial written response is completely opposite to her final representation before this Court." (Order at p.12)

- Appellant disregarded her own counsel's direction and intentionally engaged in improper communications with SCDEW's counsel that she admitted were improper. (Order at p.12)

- Appellant's "story" to her attorney repeatedly changed over time. (Order at p.12)

- Appellant's "refusal to provide discovery is not credible, and she has not explained why her story has changed so drastically over time." (Order at p.12)

- "Nearly a year after the filing of this action, Plaintiff remains unable or unwilling to identify a single witness who is competent to testify regarding the alleged statements that form the crux of Plaintiff's entire complaint. (Order at p.13)

- Appellant has failed to offer more than speculation, rumor, or innuendo "in support of her claims—and perhaps worse—she has repeatedly misrepresented to this Court the nature of her evidence in efforts to conceal that speculation and innuendo is all she has." (Order at p.13)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHALND COUNTY
Court of Common Pleas

The Hon. Robert E. Hood, Circuit Court Judge

Case No.: 2014-CP-40-00271

Kerry Paul, Appellant,

v.

South Carolina Department of Employment and Workforce, Respondent.

PROOF OF SERVICE

The undersigned certifies that she has served Respondent's Amended Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on August 12, 2015, addressed to its attorney of record, Nancy Bloodgood, 895 Island Park Drive, Suite 202, Charleston, SC 29492.

August 12, 2015

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