THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Robert E. Hood, Circuit Court Judge

Case No. 2014-CP-40-00271

Kerry Paul,

Appellant,

v.

South Carolina Department of Employment and Workforce,

Respondent.

FINAL REPLY BRIEF

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I. Appellant preserved her argument that the Lower Court's use of dismissal as a remedy for Respondent's Motion to Compel was improper.

The Lower Court's Order of Dismissal in this case was issued in response to Respondents' Motion to Compel, which was filed on June 11, 2014. (R. pp. 140-180.) Respondent's Motion requested that the Court compel Appellant to respond fully and completely to several interrogatories and requests for production. (*Id.*) Respondent's Motion did not specifically request dismissal. The Lower Court held three (3) hearings on this Motion then issued an Order dismissing Plaintiff's Complaint on January 6, 2015. (R. pp. 3-16.)

At the first hearing, the Lower Court Judge did not mention dismissal but instead said "the hearing is over for this day . . . I'm going to tell you this. This is where I am in this moment: Rule 37, South Carolina Rules of Civil Procedure, Section 4." (R. p. 808, l. 25—p. 809, l. 2.) The only "Section 4" in Rule 37 is Rule 37(a)(4), which allows the Court to require a party and/or attorney to pay the moving party's reasonable expenses and attorney's fees. SCRCP, Rule 37.

After the first hearing, the parties worked together to resolve their discovery disputes until Respondent requested that the hearing on the Motion to Compel be reconvened. On September 8, 2014, the Lower Court Judge reconvened the hearing. The sanction of dismissal was first requested in Defendants' Memorandum of Law Regarding Sanctions Under Rule 37, SCRCP, which was handed to the Lower Court Judge and Appellant's Counsel during the second hearing on September 8, 2014. (R. p. 819, ll. 14-20; R. pp. 222-451.) The Memorandum cites Rule 37(b)(2)(C) and requests dismissal as

Appellant had "still not named the witnesses relevant to her defamation claims as requested by [Respondent] and as directed by this Court." (R. pp. 222-223.) Respondent's Memorandum also discussed Appellant's alleged breach of Respondent's attorney-client privilege and cited this as "evidence" of bad faith and prejudice to support its request for dismissal pursuant to *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008), which is a Rule 37 case. (R. pp. 228-229.)

Even though Appellant and her Counsel had no notice of Respondent's request for dismissal until the September 8th hearing began, Appellant's Counsel made several objections to the sanction during the hearing. Appellant's Counsel objected on the ground that dismissal was improper because Appellant had responded to discovery and had supplemented her responses several times after the first hearing. Specifically, as the hearing ended, Appellant's Counsel stated "There's no bad faith in that. I'm just trying to be honest with the Court, but we provided the names. After – after that last hearing, we provided all of the names of the people who I think might be retaliated against, and if they are, they are." (R. p. 867, ll. 13-17.) Appellant's Counsel further objected by stating, "I don't think dismissal of the case is warranted at this point." (R. p. 865, ll. 9-10.) At the end of the hearing, the Circuit Court Judge again referenced the possible sanction of legal fees and stated, "I'll let you know in a written order." (R. p. 866, l. 17—p. 867, l. 3; p. 867, ll. 18-19.) However, the Judge did not issue a written order after the second hearing.

Almost three months later, a third hearing was commenced. The majority of the third hearing consisted of Respondent's arguments for dismissal. Appellant's Counsel responded by explaining that Appellant had answered the discovery responses and supplemented her responses at least five (5) times. (R. p. 885, ll. 7-13.) While Appellant's

Counsel did not specifically state a subsection of Rule 37 in her response and objection to dismissal, the substance of her objection was clear—dismissal was improper because Appellant had no engaged in any type of contempt or refusal to obey the Court but had in fact responded to Respondent's discovery requests not only once, but multiple times. Thus, dismissal was improper. This is the same argument Appellant makes in her initial brief.

On multiple occasions, Appellant alerted the Lower Court that dismissal would be improper under the circumstances and the procedural posture of the case. Appellant did not need to raise this issue in a Rule 59(e) motion because a Rule 59(e) motion is only required (for purposes of preservation) "when an issue or argument has been raised, but not ruled on." *Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Throughout the multiple hearings on Respondent's Motion to Compel, Respondent argued that Appellant's discovery responses were inadequate and, therefore, the Complaint should be dismissed. Appellant repetitively argued that dismissal was improper. Appellant explained that she had not engaged in any bad faith conduct and had continued to supplement her discovery responses to address any inadequacies. As Respondent urged dismissal and the Lower Court Judge contemplated dismissal, Appellant notified the Judge that dismissal would be improper. Specifically, Appellant objected to dismissal by stating the following:

- "I don't think that dismissal of the case is warranted at this point." (R. p. 865, ll. 9-10.)
- "I don't think there is any bad faith when my client has four times supplemented discovery." (R. p. 864, ll. 5-6.)
- "So I know they want the case dismissed, but I have to tell you I don't – I think my client has been trying to be as helpful as she can be and we –

anything more that I provide to them at this point would just be guessing." (R. p. 854, ll. 13-16.)

- "[J]ust for the record, in terms of discovery, I answered on May 2nd. I answered on May 30th. I supplemented on August 12th. I supplemented on August 19th. I supplemented on September 10th and I supplemented on September 26th. There has been no lack of effort on my part to be thorough and accurate in my answers." (R. p. 885, ll. 7-13.)

- If you decide that – today that there is no basis – that the privilege has either been abused for the statement or that I cannot use that statement, that's one small piece of my defamation claim." (R. p. 849, ll. 15-20.)

- "If you think that that one statement cannot be proven based on what I -- the information before taking depositions, I would ask that you tell me that my defamation claim can't be based on that statement. I have plenty to go forward with on the other defamation claim, but I – I don't think that dismissal of the case is warranted at this point." (R. p. 865, ll. 4-10.)

Appellant's position is the same now as it was during the hearings. Dismissal was improper because dismissal for discovery abuses is only allowed under Rule 37(b) and (d). Rule 37(b) was never a proper ground for dismissal of Appellant's Complaint because the Court never issued a discovery order. Dismissal under 37(d) was improper and an abuse of discretion because Appellant did not fail to answer interrogatories or attend her own deposition. *See Downey v. Dixon*, 249 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). Subsection (a) of Rule 37 addresses Motions to Compel and permits an award of attorney fees and expenses to the victorious party in a discovery dispute, but does not provide for dismissal.

Appellant presented this argument to the Lower Court. The Lower Court disagreed and misapplied the law, but Appellant was under no duty to file a Rule 59(e) motion because the Lower Court ruled on the issue of Rule 37 dismissal. Appellant's position remains the same—the Court cannot dismiss an entire case pursuant to Rule 37

when Appellant has made an effort to respond to discovery requests. "[I]f the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expenses of determining the justification of his refusal." *Downey* at 44, 362 S.E.2d at 318.

II. The Circuit Court dismissed Appellant's Complaint pursuant to Rule 37, not Rule 11 or Rule 12(b)(6).

The Motion before the Lower Court was a Motion to Compel Discovery, which was filed on June 11, 2014. Respondent later filed a Memorandum in Support of their Motion on September 8, 2014 and then a Motion to Supplement the Rule 37 Discovery Sanctions Record on November 4, 2014. The Lower Court held three hearings on the underlying Motion to Compel and then issued an Order dismissing the complaint on January 6, 2015.

At the final hearing, Respondent's Counsel clearly stated that the issue before the Court was the issue of discovery sanctions.[1] Specifically, Respondent's Counsel stated:

- "We've, essentially, requested that the Court allow the Defendant to supplement the record on the discovery sanctions matter, which is still currently pending by Your Honor." (R. p. 874, ll. 15-18.)
- "this additional information is extremely important to the Court's decision on this discovery sanctions issue. It relates directly to the discovery concerns that were raised . . ." (R. p. 875, ll. 2-5.)

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[1] Appellant's Counsel responded to the discovery issue and also addressed Respondent's attempt to link an alleged attorney-client privilege issue to the discovery issue. Appellant's Counsel explained, "[McFarland] states that he has not abused the privilege. Evidently they don't believe that, but that has nothing to do with a discovery issue that's before the Court." (R. p. 883, ll. 12-15.) Appellant's Counsel also continued to assure the Court that she had named individuals who would testify about defamatory statements, even though she may not yet know which individuals she would call at trial. (R. p. 881, ll. 10-15; p. 882, ll. 5-19.)

- "So when we learned that, we immediately contacted the Court and said we need to move forward with the rule 37 motion." (R. p. 877, ll. 14-16.)

- "And, really, all of these hearings stem from one basic question and that is Defendant's request that the Plaintiff identify all of the alleged defamation and witnesses that they claim support that." (R. p. 875, ll. 11-14.)

The Lower Court's Order cites Rule 37 case law and then holds, "I conclude that dismissal of Plaintiff's complaint is the appropriate remedy." (R. pp. 12-13.) The Lower Court's Order makes reference to Rule 8 and 11 of the South Carolina Rules of Civil Procedure (not Rule 12(b)(6)), but does not dismiss the Complaint pursuant to these Rules, does not engage in any analysis of dismissal under these Rules, and does not hold that dismissal is proper under these Rules. The Lower Court dismissed Appellant's Complaint pursuant to Rule 37 and such dismissal was improper.

III. The Circuit Court abused its discretion in dismissing Appellant's Complaint.

As Appellant noted in her initial brief, when a Court imposes a sanction, "[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of the case." *Rickerson v. Karl, et al.*, 770 S.E. 2d 767 (Ct. App. 2015) (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990)). Here, Respondent takes the position that the Lower Court "should be empowered with discretion to dispose of an action such as this one." (Resp. Brief p. 14.) Respondent misinterprets the Lower Court's discretion to use the "harsh medicine" of dismissal. *See Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 682 (Ct. App. 1997). Respondent cites to *Karppi* as support for its position that the Lower Court had the unfettered discretion to dismiss Appellant's Complaint in response to Respondents'

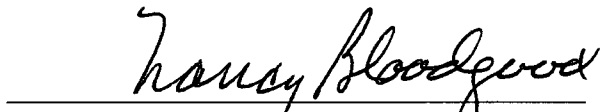
Motion to Compel, but *Karppi* was a case in which dismissal was ordered for violation of a court order then reversed as being too harsh of a sanction. *Id.*

Respondent also attempts to rely on alleged oral rulings from the Lower Court Judge and argues that "Appellant refused to obey the Court's oral rulings from the bench regarding discovery, thereby triggering the Court's power to dismiss Appellant's case under Rule 37(b), SCRCP." (Resp. Br. p. 16 n.6.) However, Appellant attempted to comply with these oral directives by supplementing her discovery responses at least five times and explained this to the Lower Court Judge on multiple occasions. The disagreement between the parties as to whether Appellant complied with the Judge's directives or engaged in contempt of court (which is essentially what Respondent alleges) is precisely why Rule 37 includes the specific condition precedent of a written discovery order prior to dismissal. In *Davis v. Parkview Apartments*, 409 S.C. 266, 274-75, 762 S.E.2d 535, 539-40 (2014), the Court issued a specific order (requiring disclosure of 96 documents within thirty days), then gave another extension and ultimately dismissed the Complaint for plaintiff's failure to comply with the specific discovery order. The same was true in *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). Here, the Lower Court Judge never issued a discovery order. This failure created the situation which the Rules attempt to avoid. Specifically, Appellant made efforts to comply with the Judge's directives and Respondent's wishes yet her efforts were never sufficient from the perspective of Respondent and the Judge, yet there was no way to accurately measure whether Appellant had complied with an order and exposed herself to the harsh medicine of dismissal because the Judge never issued an Order with specific

requirements.

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to overturn the Lower Court's Order and remand this case for the continuation of discovery and trial.



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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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I hereby certify that on October 5, 2015 I served a copy of the Appellant's Final Reply Brief via First Class Mail by placing a copy of the said documents in the United States mail with sufficient postage thereon on the following:

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