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 BRIEF OF APPELLANT

Nancy Bloodgood, Esq., SC Bar No. 6459
Lucy C. Sanders, Esq., SC Bar No. 78169
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
lsanders@fosterfoster.com

Attorneys for the Appellant

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STATEMENT OF ISSUES ON APPEAL

I. Did the Lower Court err as a matter of law when it dismissed this case pursuant to SCRCP Rule 37 for alleged discovery abuses when it had never issued a discovery order?

STATEMENT OF THE CASE

Appellant filed a Complaint on January 15, 2014 against the Department of Employment and Workforce and its Director Cheryl Stanton in her individual capacity. (R. pp. 17-43.) Appellant, Respondent's former HR Director, alleged causes of action for defamation, abuse of process, and violation of S.C. Code § 1-11-490 (which statute pertains to the release of personal identifying information by a state agency.) (*Id.*) Respondent filed an Answer on February 25, 2015. (R. pp. 44-94.) On October 23, 2014, the parties agreed to dismiss the individually named Defendant. (R. p. 1.)

Written discovery was exchanged by both parties and both parties filed motions to compel. The Lower Court held three (3) hearings on discovery issues between July and November of 2014, but never issued a discovery order. (R. pp. 2, 808-809, 867-868, 885.) No depositions were taken by the parties. The Lower Court issued an Order on January 6, 2015 dismissing Appellant's case per SCRCP, Rule 37. (R. pp. 3-16.) Appellant filed a Notice of Appeal on February 2, 2015 and this appeal ensued. (R. pp. 779-780.)

STATEMENT OF FACTS

Appellant sent a First Set of Interrogatories and Requests to Produce to Respondent on March 4, 2014. (R. p. 96.) Respondent served Interrogatories and Requests to Produce on Appellant on March 28, 2014. (R. p. 141.) By agreement of counsel, the deadlines for the

parties to respond to each set of discovery were extended. (R. pp. 96, 141.) Both parties subsequently objected to each other's discovery responses. (R. pp. 129-131, 175-180.) On June 20 2014, Appellant responded to Respondent's objections with a twelve page letter. (R. pp. 187-199.) Similarly, Respondent responded to Appellant's June 13, 2014 objections by letter dated July 2, 2014. (R. pp. 132-139.) Both parties remained dissatisfied with the other's responses. Appellant filed a Motion to Compel on July 14, 2014 (R. pp. 95-139). Respondent filed a Motion to Compel on June 11, 2014. (R. pp. 140-180.) Appellant filed a Response to Respondent's Motion to Compel on July 22, 2014. (R. pp. 181-221.) A hearing before Judge Robert E. Hood was held on July 23, 2014 only on Respondent's Motion to Compel. No order was issued after the hearing. (R. p. 2.) Judge Hood ended the hearing to preside over a separate trial and scheduled the remainder of the hearing for the following week at a different location in the event the parties did not resolve the discovery issues. (R. pp. 808-809.) The following week, Respondent's counsel informed Judge Hood, the parties had resolved the discovery issues.

On August 5, 2014, Appellant sent a second letter to Respondent in response to its discovery objections. Appellant's letter addressed four (4) of Respondent's Interrogatories which requested the names of Respondent's employees who had heard defamatory statements. (R. pp. 308-315.) In that letter, Appellant named all of the employees who, to her knowledge, attended Executive Leadership Meetings on December 20, 2013 and January 3, 2014 during which defamatory comments about her were made. (*Id.*) On August 12, 2014, Appellant sent a third letter to Respondent's counsel further supplementing her discovery responses and providing more information regarding the defamation claim. (R. pp. 318-324.) On August 12, 2014, Appellant further supplemented her answers to

Respondent's Requests for Production. (R. p. 318.) On August 15, 2014, Appellant sent Respondent a second set of supplemental production consisting of Appellant's cell phone records. (R. pp. 325-430.) On August 19, 2014, Appellant sent to Respondent a third set of supplemental production of documents. (R. p. 885.)

Another hearing was held before Judge Hood on September 8, 2014. Judge Hood took the Motion to Compel under advisement stating, "I'll let you know in a written order. " (R. p. 867.) Judge Hood never issued a written order. Respondent requested a third hearing that was held before Judge Hood on November 25, 2014. (R. pp. 888-889.) At this hearing, Judge Hood still did not issue a discovery order but dismissed the case from the bench (R. p. 885) and then issued a written order of dismissal on January 6, 2015. (R. pp. 3-16).

ARGUMENTS

Applicable Standard of Review

A trial court's imposition of discovery sanctions will be reversed on appeal if there has been an abuse of discretion. *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). The Appellant has the burden of proving an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "[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)).

SCRCP, Rule 37, entitled "Failure To Make Or Cooperate in Discovery:

Sanctions," states in pertinent part, "[i]f a party... fails to obey an order to provide or permit discovery..., the court in which the action is pending may make such orders in regard to the failure as are just and among others the following: ... (C) An order...dismissing the action." SCRCP Rule 37(b)(2)(C) (emphasis added). Severe sanctions involving the dismissal of an action "should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

I. The Lower Court erred as a matter of law when it dismissed this case pursuant to SCRCP Rule 37 for alleged discovery abuses when it had never issued a discovery order.

The Lower Court dismissed this case pursuant to SCRCP, Rule 37. (R. p. 4.) SCRCP, Rule 37 has six (6) subsections which address six (6) different issues: (a) Motion for Order Compelling Discovery; (b) Failure to Comply With Order; (c) Expenses on Failure to Admit; (d) Failure of Party to Attend Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection; (e) Failure to Participate in the Framing of a Discovery Plan; and (f) Electronically Stored Information. The only subsections relevant to this case are subsections (a) and (b) as it is undisputed there is no issue regarding request to admit, attendance at depositions or failure to respond to discovery,[1] failure to participate in a discovery plan, or electronically stored information.

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. The only

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[1] Per *Downey v. Dixon*, 249 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), SCRCP, Rule 37 (d) does not apply when a party responds to discovery; it only applies when a party makes no response at all. " [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." 249 S.C. at 44, 362 S.E.2d at 318.

sanction available in subsection (a) is an award of attorney fees and expenses; there is no provision for dismissal. SCRCP Rule 37(a). Subsection (b) permits the court to impose the serious sanction of dismissal but subsection (b) only applies to violations of court orders. SCRCP, Rule 37(b). In *Downey v. Dixon*, 249 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), the Court of Appeals differentiated between subsections (d) and (b), holding that while a party may move for sanctions without a court order in subsection (d), it may not do so in subsection (b) without an order. Specifically, this Court held:

> The sanctions which [plaintiff] sought to have imposed against [defendant] are provided under both subdivision (b) and subdivision (d) of the Rule. Rule 37(b) provides sanctions for the violation of an order of the Court to provide or permit discovery. Rule 37(d), on the other hand, provides for sanctions against a party who fails to answer interrogatories or attend his own deposition. The distinction between the two subdivisions is that there must be an order of the Court before sanctions are imposed under subdivision (b), while under subdivision (d) a party may move directly for the imposition of sanctions. *Id.*

Subsection (b) of SCRP, Rule 37 does not apply here as the Lower Court never issued a discovery order. As there was no discovery order, Appellant could not have failed to comply with a discovery order. "If a party... fails to obey an *order* to provide or permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just . . . [including] An order . . .dismissing the action." SCRCP, Rule 37 (b) (2) (C)) (emphasis added). In short, Rule 37 does not permit dismissal of a case absent willful failure to comply with a discovery order, and here it is undisputed the Lower Court never issued a discovery order.

The cases cited in the Lower Court's Order are not on point as there were discovery orders issued in all of those cases or they involved depositions. Here, the Lower Court never issued a discovery order and no depositions were ever taken. In *Davis v. Parkview Apartments*, 409 S.C. 266, 274-75, 762 S.E.2d 535, 539-40 (2014), the trial

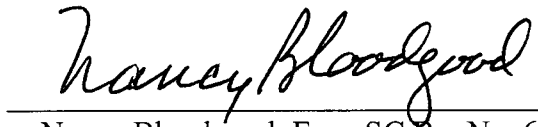
court issued an order in March of 2009 granting defendants' motion to compel production of documents and required plaintiffs to clarify a privilege log. Subsequently, the court conducted an *in camera* review of the privileged documents and issued a written order in July of 2009 requiring the disclosure of 96 of the documents on the privilege log within thirty days. *Id.* at 275-76, 762 S.E.2d at 540. The documents were never produced by plaintiffs so defendants filed two (2) motions for sanctions. *Id.* at 276-77, 762 S.E.2d at 541. The judge warned he would dismiss the case if the documents he had ordered produced were not produced by trial in January of the next year, which they were not. *Id.*

Similarly, in *Barnette v. Adams Brothers Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 572 (2003), the plaintiffs failed to comply with a discovery order. In *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008), a discovery order was issued in April of 2006 giving defendant fifteen (15) days to correct discovery responses. Over six months later, defendant had failed to make any effort to correct its responses or otherwise comply with the court's order. The court issued another order giving the defendant an additional forty-five (45) days to comply and, after defendant still failed to comply, the court struck defendant's answer. *Id.* at 465, 665 S.E.2d at 831.

Here, the Lower Court abused its discretion by committing an error of law and applying the severe sanction of dismissal. Noncompliance with a discovery order is a necessary prerequisite to the sanction of dismissal, yet the Court here had never issued any type of discovery order.

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.



Nancy Bloodgood, Esq., SC Bar No. 6459
Lucy C. Sanders, Esq., SC Bar No. 78169
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
lsanders@fosterfoster.com

Attorneys for the Appellant

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CERTIFICATE OF COUNSEL

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

Nancy Bloodgood, Esq., SC Bar No. 6459
Lucy C. Sanders, Esq., SC Bar No. 78169
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
lsanders@fosterfoster.com
Attorneys for the Appellant

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PROOF OF SERVICE FOR APPELLANT'S FINAL BRIEF

Nancy Bloodgood, Esq., SC Bar No. 6459
Lucy C. Sanders, Esq., SC Bar No. 78169
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
lsanders@fosterfoster.com
Attorneys for the Appellant

I hereby certify that on October 5, 2015 I served a copy of the Appellant's Final 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:

Christi P. Cox, Esquire
Hamilton Martens Ballou & Carroll
PO Box 10940
Rock Hill, SC 29731
Attorneys for the Respondent

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Nancy Bloodgood

Nancy Bloodgood, Esquire

Charleston, South Carolina

Date: 10/5/15