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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**SC Court of Appeals**

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.

**PETITION FOR REHEARING**

Nancy Bloodgood, Esq., SC Bar No. 6459  
Lucy C. Sanders, Esq., SC Bar No. 78169  
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*Attorneys for the Appellant*

Pursuant to Rule 221, SCACR, Appellant respectfully requests a rehearing in this case on the following grounds:

1. The Court overlooked citations to the Record demonstrating Appellant properly preserved her argument that the Lower Court's dismissal of the entire case was an improper remedy for Respondent's Motion to Compel; and
2. The Court misapprehended the Lower Court's Rule 37 Order.

The grounds for this Petition are more fully set forth in the accompanying Memorandum in Support of Petition for Rehearing.



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*Attorneys for the Appellant*

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**MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

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## I. ARGUMENT

Appellant respectfully requests this Court reconsider its decision to affirm the Lower Court's dismissal of Appellant's Complaint. In deciding to affirm the Lower Court's Order, this Court overlooked citations to the Record demonstrating Appellant properly preserved her argument that the Lower Court's dismissal of the entire case was an improper remedy for Respondent's Motion to Compel. Respondent first requested dismissal of Appellant's Complaint on September 8, 2014 during the second hearing on this matter. The request was included in Respondent's Memorandum of Law Regarding Sanctions Under Rule 37, SCRCF, which was handed to the Lower Court Judge and Appellant's Counsel during this hearing. (R. p. 819, ll. 14-20; R. pp. 222-451.) Respondent's Memorandum cited Rule 37(b)(2)(C) and requested dismissal of Appellant's Complaint. Appellant's Counsel made several objections to dismissal during the hearing despite the fact that Appellant and her Counsel had no notice of Respondent's request for dismissal until the September 8th hearing began.

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 "I don't think dismissal of the case is warranted at this point" (R. p. 865, ll. 9-10) and explained, "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). As the hearing concluded, the Lower Court Judge referenced the possible sanction of legal fees (not dismissal) 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 and instead scheduled a third hearing.

During the third hearing, Respondent's Counsel again requested dismissal and 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.) The substance of Appellant's objection was clear—dismissal was improper because Appellant had not 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. Appellant's Counsel repeatedly objected to dismissal of the case (R. p. 864, ll. 5-6 and 865, ll. 9-10) and preserved the argument that dismissal of the entire case was improper (R. p. 865, ll. 4-10).

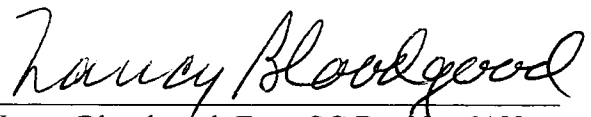
Appellant further requests a rehearing of this matter because the Court misapprehended the Lower Court's Order. The Lower Court actually made a ruling on Appellant's argument that dismissal was improper, thus a Rule 59 Motion was unnecessary. A Rule 59(e) motion is only required (for purposes of preservation) "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). Here, the Lower Court ruled on Appellant's argument that dismissal was improper due to Appellant's efforts to respond to discovery requests. *See Downey v. Dixon*, 249 S.C. 42, 362 S.E.2d 317, 318 (Ct. App. 1987) ("[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.") The Lower Court *ruled* that dismissal was proper pursuant to Rule 37(b)(2)(C). (R. p. 12.) Thus, a Rule 59 Motion was unnecessary.

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 as the Lower Court had already ruled on the issue. This Court misapprehended the Lower Court's Order and overlooked the fact that Appellant had preserved her argument and the Lower Court had already ruled on the issue of whether dismissal was a proper remedy for Respondent's Motion to Compel. Thus, Appellant requests this Court reconsider its decision in this case.

## II. CONCLUSION

Pursuant to Rule 221, SCACR, Appellant respectfully requests the Court rehear this matter, reconsider its ruling in this case, and reverse the Lower Court's Order.



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**PROOF OF SERVICE FOR APPELLANT'S PETITION FOR REHEARING AND  
MEMORANDUM**

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*Attorneys for the Appellant*

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I hereby certify that on November 1, 2016 I served a copy of Appellant's Petition for Rehearing and Memorandum in Support of Petition for Rehearing 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*

  
Amanda Kramer

Charleston, South Carolina

Date: 11/1/16



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**SC Court of Appeals**

The Honorable Jenny Kitchings  
Clerk, South Carolina Court of Appeals  
1205 Pendleton Street  
Columbia, SC 29201

RE: *Kerry Paul v. South Carolina Department of Employment and Workforce*  
Appellate Case: 2015-000244  
Case No.: 2014-CP-40-271  
Our File No.: 11463

Dear Ms. Kitchings,

Enclosed please find for filing the unbound original and seven copies of Appellant's Petition for Rehearing and Memorandum in Support, as well as the original and one copy of the Proof of Service of the same.

Please file the originals of each of these documents and return one clocked-in copy of each to me in the enclosed self-addressed stamped envelopes. I have enclosed a \$25.00 check for the filing fee.

By copy of this letter to opposing counsel, I am likewise providing her with a copy of the same. Thank you for your assistance in this matter and please let me know if you need anything else.

With kindest regards, I am

Sincerely,

Nancy Bloodgood

NB/alk  
Enclosures

cc: Kerry Paul  
Christi P. Cox, Esquire