THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2016-CP-40-04463

Jean Watkins, as Personal Representative of the Estate of Mildred Watkins,

Respondent,

v.

Sterling Healthcare, Inc., Country Wood Nursing Center, LLC, and Guardian Resources, LLC,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Appellants Sterling Healthcare, Inc., County Wood Nursing Center, LLC, and Guardian Resources, LLC, maintain a single position on appeal: The trial court erred as a matter of law when it failed adequately to state the basis for the exercise of its discretion to strike Appellants' Answers. Appellants argue that the trial court committed error in this respect by failing to explain the grounds for its conclusion in the Order striking Appellants' Answers (the "Order") that Respondent suffered prejudice arising from Appellants' discovery shortcomings, an express factor in the discovery sanction context.[1]

In her Brief of Respondent, Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, offers little in terms of direct response to Appellants' legal argument. In large part, Respondent's brief merely recycles many of the same fact-based arguments that she used in trial court motions practice regarding the sufficiency of Appellants' discovery responses, which simply are irrelevant to the only issue on appeal: whether the trial court stated a sufficient basis for its decision to strike Appellants' Answers. And it is evident from the face of the Order that lacks such as basis. This Court should REVERSE.

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[1] Appellants' Br. at 13 ("Here, this Court should reverse because the trial court announced a conclusory finding of prejudice without weighing the facts or concerns necessary to support its ruling.")

ARGUMENT AND CITATIONS OF AUTHORITY

RESPONDENT DOES NOT MEANINGFULLY RESPOND TO APPELLANTS' ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT STRUCK APPELLANTS' ANSWERS BY FAILING ADEQUATELY TO EXPLAIN ITS DECISION TO DO SO.

As noted in the Initial Brief of Appellants, a trial court presented with a motion seeking discovery sanctions must consider several factors, including the degree of prejudice experienced by the movant as a result of the non-movant's failure to produce certain discovery: "In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice."[2]

Moreover, as this Court has stated, "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion."[3] And most significantly, the Supreme Court requires a trial court to state the basis for the exercise of its discretion: "We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to

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[2] *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 467, 662 S.E.2d 830, 832 (Ct. App. 2008) ("In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice."); *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 457, 814 S.E.2d 643, 656 (Ct. App. 2018); *Teseniar v. Prof'l Plastering & Stucco, Inc.*, 407 S.C. 83, 94, 754 S.E.2d 267, 273 (Ct. App. 2014); *see also Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770–71 (Ct. App. 2015) (quoting *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

[3] *Teseniar*, 407 S.C. at 94–95, 754 S.E.2d at 273 (internal quotation marks omitted).; *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (1997) ("Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors.").

bring into operation a determination that discretion was exercised. *It should be stated on what basis the discretion was exercised."*[4]

Here, however, the trial court neglected to explain the basis for its decision to strike Appellants' Answers insofar as the prejudice factor—described in *Historic Charleston Holdings* and *McNair*—is concerned. Respondent has not succeeded in rebutting this error of law.

The portions of the trial court Order that address prejudice are as follows:

> Over three (3) years and seven (7) months after being served with discovery requests, and despite Judge Dickson's Order compelling discovery over one (1) year and four (4) months ago, the Plaintiff remains without all of the information ordered by Judge Dickson and has been *substantially prejudiced* in the advancement of her case. The information withheld by the defense is essential to the Plaintiff's case and there is no legitimate reason for the defense to withhold the same.[5]
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> * * *
>
> The Plaintiff is no further along in the discovery process than she was nearly three (3) years ago when she filed her Motion to Compel. The unreasonable and unjustifiable delays in the production of discovery documents and responses for over three (3) years has resulted in a complete standstill in the progression of the case and the total inability of the Plaintiff's counsel to further her client's interests. In this passing time, memories fade, witnesses disappear, and critical documents can be lost and/or destroyed. The *harm to the Plaintiff in this case is irreparable* and must be met with the harshest of sanctions against the Defendants.[6]

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[4] *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (emphasis added).
[5] Order Striking Answers of All Defs. 6 (emphasis added).
[6] Order Striking Answers of All Defs. 8.

Therefore, the trial court concluded that Respondent was "substantially prejudiced" by, and suffered "irreparable" harm from, the delays caused by Appellants' discovery short-fallings, but it never explained *how* or *why* this is so in the context of this case. It may generally be so that over time, "memories fade, witnesses disappear, and critical documents can be lost and/or destroyed," but the trial court never alluded to any memories that actually have faded, any witnesses that actually have disappeared, or any essential documents that actually have been lost or destroyed *in this case*. It thus follows that, unless delay arising from failure to produce documents *always* constitutes prejudice sufficient to justify the striking of an answer, the trial court's conclusory findings of prejudice in this case do not suffice as an explanation of the basis on which it exercised its discretion to strike Appellants' Answers under *State v. Smith*.

In any event, even if the trial court did adequately articulate a basis for its finding of prejudice, the trial court never assessed whether any alternative, more targeted sanctions were available to redress the specific conduct of Appellants. The law commands such an assessment: "[T]he sanction 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 a case."[7] Of necessity, such an analysis would have encompassed "whether a sanction less than striking the Answer would achieve

[7] *Skywaves I Corp.*, 423 S.C. at 457, 814 S.E.2d at 656–57 (emphasis added); *see also Teseniar*, 407 S.C. at 94–95, 754 S.E.2d 267 (outlining five factors a trial judge is required to consider before excluding witness testimony and noting the sanction should not be "lightly invoked").

justice. . . . ."[8] South Carolina Rule of Civil Procedure 37(b)(2) sets out several options for a trial court to consider. The trial court may:

(1) designate certain facts as having been established;

(2) refuse to allow the disobedient party to support or oppose certain claims or defenses, or even prohibit the party from introducing certain matters into evidence;

(3) stay proceedings until the order is obeyed;

(4) render a judgment by default against the disobedient party;

(5) dismiss the action; or

(6) strike the disobedient party's pleading.

In addition to these options, or as an alternative, the trial court may choose to treat any failure to obey as contempt.[9]

This variety of sanctions permits the trial court to impose reasonable sanctions, targeted to address specific discovery misconduct. In short, "[t]he sanction should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast."[10] Here, even if a shotgun approach ultimately might have been warranted, the trial court did not even consider whether a rifle shot would have addressed its concerns.

Instead of addressing the foregoing legal argument of Appellants, Respondent dedicates over twenty pages of her Initial Brief to recounting numerous factual allegations—often times unsupported by citation to the record—that she presented

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[8] *McNair*, 379 S.C. at 467, 662 S.E.2d at 832.
[9] Rule 37(b)(2)(D), SCRCP.
[10] *Balloon Plantation, Inc.*, 303 S.C. at 154, 399 S.E.2d at 440.

in the trial court to justify both her original motion to compel and her later motion for sanctions. But the reiteration of these *factual* points does not address the *legal* deficiency of the trial court's order. The crux of this appeal is not whether Respondent provided factual support for her arguments, nor whether the trial court had the opportunity to mull over those points. Because even if this Court were to accept both as given, this issue persists: the trial court failed to set forth an adequate basis for the exercise of its discretion to strike Appellants' Answers.

This failing constitutes an abuse of discretion as a matter of law.

CONCLUSION

WHEREFORE, for the foregoing reasons and for the reasons set forth in the Initial Brief of Appellants, this Court should REVERSE the trial court's order striking Appellants' Answers.

Respectfully submitted,

November 1, 2018

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PROOF OF SERVICE OF REPLY BRIEF OF APPELLANTS

I certify that I have served the Reply Brief of Appellants on Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, by depositing a copy of it in the United States Mail, postage prepaid, on November 1, 2018, addressed to her attorney of record, Jennifer R. Purdy, P.O. Box 7397, Columbia, South Carolina 29202.

November 1, 2018

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November 1, 2018

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Re: Watkins v. Sterling Healthcare, Inc., et al.
Appellate Case No. 2018-000924

Dear Ms. Kitchings:

Enclosed are the original and six (6) copies of ***Reply Brief of Appellants*** in the above-referenced matter. Please file the original in the Court file and return a file-stamped copy in the self-addressed, stamped envelope provided for your convenience.

Thank you in advance for your assistance with this matter.

Very truly yours,

Kerri M Coakley

Kerri M. Coakley, Assistant to
Kate Cappelmann for
LEWIS BRISBOIS BISGAARD & SMITH LLP

/kmc
Enclosures

cc: Jennifer R. Purdy (w/encl.; via U.S. Mail)

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