

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the Ninth Circuit

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The Honorable Maite Murphy, Circuit Court Judge **JAN 13 2020**

Appellate Case No. 2019-000671

SC Court of Appeals

Tammy C. RichardsonRespondent,

v.

Halcyon Real Estate Services, LLP and McCabe, Trotter &
Beverly, P.C. Defendants,

Of whom McCabe, Trotter & Beverly, P.C. is theAppellant.

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ARGUMENT

I. The Order at Issue Is Immediately Appealable.

As MTB argued in its Initial Brief of Appellant (and in its Memorandum in Support of the Immediate Appealability of the Order Granting Plaintiff's Motion for Sanctions for Deposition Misconduct and Denying (sic) Defendant's Motions for Protection (Self and Gatling)), the underlying Sanctions Order is immediately appealable for several reasons:

- The Sanctions Order imposes compensatory monetary sanctions on MTB, rendering it appealable in the same manner as an order imposing compensatory contempt sanctions. *See e.g., Hooper v. Rockwell*, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999).
- Because the Sanctions Order includes an injunction requiring MTB and counsel to cease and desist certain conduct, it is immediately appealable. *See* S.C. Code §14-3-330(4). The injunction portions of the Sanctions Order are also appealable because it “in effect determines the action and prevents judgment from which an appeal might be taken[.]” *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (citation omitted).
- Because the Sanctions Order has the effect of prohibiting MTB's counsel from taking certain actions in representing it, the Sanction Order “in effect determines the action and prevents judgment from which an appeal might be taken[.]” *See Hagood*, 362 S.C. at 195, 607 S.E.2d at 709.

Following Respondent's prior challenge to the appealability of the Sanctions Order (and full briefing by the parties), this Court ruled that “[a]fter careful consideration of the parties' memoranda addressing appealability, the court has determined this appeal shall proceed at this time.” (*See* June 28, 2019 Order).

Respondent does not directly refute that the Sanctions Order is appealable on one or more of these grounds. Instead, Respondent argues that the Sanctions Order is not appealable because: (a) MTB should have gone into contempt for violating the Sanctions Order and appealed from the contempt finding; and (b) the Sanctions Order is not appealable because MTB's compliance rendered it moot. For the reasons that follow, these arguments are misplaced.

A. Contrary to Richardson’s Arguments, MTB Was Not Required to Have a Separate “Contempt” Order Entered Against It.

Respondent contends that the Sanctions Order is not appealable because “MTB did not obtain a contempt order for failing to comply” before filing an appeal from the Sanctions Order. (See Init. Br. Resp’t, at 14). This argument misses the mark. Respondent’s argument is focused upon the two-step procedure normally followed under South Carolina Rule of Civil Procedure 37. First, under subsection (a), a court may enter an order “compelling discovery” under certain circumstances:

If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

See S.C.R. Civ. P. 37(a)(2). Second, Rule 37(b) provides for sanctions orders in the event an order compelling discovery is violated:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just

See S.C.R. Civ. P. 37(b). In this two-step process, the first order, “[a]n order compelling a party to submit to discovery is interlocutory and not directly appealable.” See *Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc.*, 378 S.C. 160, 166, 662 S.E.2d 430, 433 (Ct. App. 2008), *vacated*, 381 S.C. 332, 673 S.E.2d 417 (2009). “[A] party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal.” *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 407 (2003). Respondent cites a number of cases for the proposition that “[t]o challenge the specific rulings of discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt

finding.” (See Init. Br. Resp’t, at 13-14). However, the cases that Respondent cites are inapposite, as they involve appeals from orders *compelling* discovery under Rule 37(a), not orders imposing sanctions. The cases that Respondent cites all arise out of the Rule 37 dichotomy of an order compelling discovery and a subsequent order imposing sanctions for violation of the first order. For example, in one case that Respondent cites (arising in the context of third-party discovery), the Court held that an order merely *compelling* discovery is not appealable:

Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply. This is the same rule applied by the federal courts. [Citations omitted.]

Moreover, this rule is consistent with S.C. Code Ann. § 18-1-30 (1976), which limits appellate review to parties aggrieved by a judgment or order below. *Brode v. Brode*, 278 S.C. 457, 298 S.E.2d 443 (1982); *Asbury v. South Carolina*, 268 S.C. 40, 231 S.E.2d 306 (1977). This Court has defined an aggrieved party as one who is injured in a legal sense or one who has suffered an injury to person or property.

See *Ex parte Whetstone*, 289 S.C. 580, 580–81, 347 S.E.2d 881, 881–82 (1986). In other words, when the only order entered against an appellant is one directing him to comply with a discovery request, he is not sufficiently aggrieved to challenge the order on appeal. Similarly, *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) involves an appeal from an order dismissing the action “as sanctions for Appellants’ continued refusal to comply with his previous discovery rulings.” See *id.*, 409 S.C. at 272, 762 S.E.2d at 538. These previous discovery rulings were orders granting motions to compel discovery, *i.e.*, Rule 37(a) orders. The appellants did not refuse to comply with those initial orders. Instead, they attempted to delay and incompletely responded to the orders to compel. As a result, the trial judge entered a Rule 37(b) sanctions order dismissing the appellants’ claims and awarding attorneys’ fees. The Court held, while the orders to compel were not subject to review under these facts, it could review the order imposing sanctions under Rule 37(b):

Appellants continued to accept the circuit court’s formulation of discovery. Right or wrong, these decisions form the law of the case, and Appellants are bound by them now. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Only after Respondents filed a motion for sanctions,

and Appellants were found to be in contempt of court as part of those sanctions, did they appeal. While this was a final order for purposes of appellate review, as it ordered dismissal of the case, the merits of the underlying discovery orders are not before this Court on appeal. Thus, despite Appellants' vehement objections to the Privilege Order and Discovery Order, the only reviewable question before this Court is whether the sanctions were properly awarded.

See Davis, 409 S.C. at 281, 762 S.E.2d at 543. Even accepting Respondent's arguments, the *Davis* case actually supports the appealability of the propriety of the Sanctions Order. The unappealed discovery orders were not reviewable, but the sanctions order was.

In this case, by contrast, the trial judge did not impose sanctions merely by virtue of Rule 37. To the contrary, the trial court concluded that the Appellant acted in violation of Rule 30, which includes its own sanctions provision that does *not* require the initial step of a motion to compel. *See S.C.R. Civ. P. 30(j)(9)* ("Violation of this rule may subject the violator to sanctions under Rule 37, SCRCF."). Unlike Rule 37, Rule 30 sanctions do not have the prerequisite of the violation of a court order. Because of this, the Rule 37 two-step process never comes into play.

The trial judge's Order granting sanctions does not even mention Rule 37; instead, it relies exclusively on Rule 30's authorization of sanctions, as well as the court's inherent power to impose sanctions:

The conduct of attorneys during the course of depositions is set forth in SCRCF, Rule 30, and particularly in *In the Matter of Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001).

The South Carolina deposition conduct rules boil down to "if you can't do it in front of a judge, you shouldn't do it in a deposition." *The Supreme Court has warned lawyers their conduct in depositions can result in ethical violations and sanctions. In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001). South Carolina adopted deposition conduct rules derived from *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). Having adopted the *Hall* approach, our Court requires attorneys to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation. [Citation omitted.]

Prohibited conduct includes off-the record conferences, suggestive objections and interjections and unauthorized instructions not to answer. *There are various additional contempt powers available to the trial court when counsel violates the Rules.*

In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees. . . .

Id. at 194, 18.

(*See* April 2, 2019 Order Granting Pl.’s Mot. for Sancts. for Depo. Misconduct and Denying Def.’s Mots. for Protection (Self), at 2-3 (emphasis added)). Beyond simply compelling discovery, the Sanctions Order imposes multiple, definite sanctions, including requiring that the depositions of witnesses be reconvened, that MTB’s counsel not engage in certain conduct at those reconvened depositions, that MTB pay the costs of those depositions (including Respondent’s attorneys’ fees), and that MTB’s counsel “cease and desist from the prohibited behavior discussed herein.” (*See id.*, at 7-9).

Respondent has failed to cite any authority even suggesting that an order imposing sanctions, including monetary sanctions, is not immediately appealable. To the contrary, the *Davis* case that Respondent relies upon actually lends support to the appealability of the imposition of monetary or other sanctions by holding that the award of sanctions was appealable. Respondent has not directed the Court to any authority precluding the appellate review of an order imposing sanctions under Rule 30 for alleged deposition misconduct. As a result, Respondent’s argument that the Sanctions Order is not appealable because MTB should have disobeyed the order and gone into contempt is without legal support.

B. The Sanctions Order Is Not Moot.

Respondent next argues that this appeal is moot because “MTB chose to comply with the Discovery Sanctions Order and the depositions have gone forward.” (*See* Init. Br. Resp’t, at 16). In reality, this is just a rewording of the argument addressed in the preceding section, *i.e.*, that “in order to preserve the right to appeal a discovery order, a party must refuse to comply with the

order, be cited for contempt and then appeal.” (*See id.*). For the reasons that follow, Respondent’s arguments in this regard are without merit.

As set forth above, this argument is misplaced, as it overlooks the distinction between an order imposing sanctions and an order compelling discovery. The Sanctions Order in this case does not merely require that MTB provide certain information to Respondent, such that it would become moot upon compliance. To the contrary, the Sanctions Order expressly finds that Appellant is responsible for deposition misconduct and, as a result, was required to make certain compensatory payments to Respondent for her expenses in taking (and reconvening) depositions. Respondent’s argument that the Sanctions Order is not appealable for mootness is lacking in merit; Appellant has actually incurred and paid the monetary sanction and has performed the non-monetary sanctions.

Moreover, it is apparent that at least one exception to the mootness doctrine would apply to the Sanctions Order, to maintain its appealability:

[T]here are three exceptions to the mootness doctrine. [Citation omitted.] First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. [Citations omitted.] “Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.” [Citation omitted.] Application of the public interest exception requires the question at issue to be (1) of “public importance,” and (2) of “imperative and manifest urgency.” [Citation omitted.] Third, “if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” [Citation omitted.] The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked.

See Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). Specifically, the issues raised in the Sanctions Order are of significant public importance and will impact the orderly practice of law in South Carolina. As the trial judge noted, South Carolina has adopted “one of the most sweeping and comprehensive rules on deposition conduct in the nation.” (*See* April 2, 2019 Order Granting Pl.’s Mot. for Sancts. for Depo. Misconduct and Denying Def.’s Mots. for Protection (Self), at 2-3). As argued in Appellant’s Initial Brief, the Sanctions Order

strips SCRC P 30(j)(8) of all meaning. A party taking a deposition could comply with the requirement to provide or identify documents to be shown to the witness simply by generally identifying thousands of documents, as Respondent's counsel did here. The Bar should know whether it is sanctionable conduct for an attorney to demand some measure of good faith by opposing counsel in identifying documents to be shown to the witness during the deposition. This is a novel question of significant interest to the Bar.

II. Respondent's Arguments on the Merits Are All Fundamentally Flawed.

As set forth in MTB's principal Brief, this case involves, at worst, a good faith disagreement over the meaning of a Rule of Civil Procedure. As MTB has previously pointed out, Rule 30(j)(8) provides, in relevant part, rules governing the use of documents in depositions:

Deposing counsel shall provide to opposing counsel a copy of all documents shown to the witness during the deposition, either before the deposition begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness' counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document.

See S.C.R. Civ. P. 30(j)(8). For this case, there are two primary parts of this Rule:

- (a) Deposing counsel must identify or provide documents to be shown to the witness; and
- (b) If deposing counsel fails to do so within two days prior to the deposition, counsel for the witness may privately discuss the documents with the witness before the witness answers questions about them.

Respondent contends that, if a document is simply contained within the hundreds of thousands of pages produced in discovery, she has complied with her obligation to "provide (or otherwise identify)" those documents by saying she may use any document produced in discovery. MTB believes that Rule 30(j)(8) should be read to require a party to provide a reasonable identification of the documents intended to be shown to a deponent so the witness' counsel may adequately prepare the witness for her deposition. To be sure, the identification of documents might be

overinclusive or underinclusive and still be in reasonable compliance with the Rule. After all, an attorney preparing to take a deposition might well be uncertain about the specific documents he or she will actually show the witness. Yet, Rule 30(j)(8) undoubtedly contemplates a good faith effort on the part of counsel to narrow the universe of potential documents in order to avoid the private discussion that the Rule authorizes.

As discussed below, Respondent's arguments are premised upon several foundational positions: (a) that, under Rule 30(j)(8), the term "provided (or otherwise identified)" should be construed to cover *any* document produced during the course of discovery; (b) any private discussions under Rule 30(j)(8) were limited to the issue of whether to assert a privilege; and (c) Counsel for MTB engaged in "coaching" of witnesses.

A. Contrary to Richardson's Assertions, Rule 30 Required Her to Do More Than Vaguely Refer to All Documents Produced in Discovery.

The first foundation of Respondent's arguments on appeal is that Rule 30 did not require her to inform MTB which documents, of the hundreds of thousands of pages of discovery, counsel would actually use in the depositions at issue. Instead, she contends that, so long as a document is produced somewhere in discovery, a party defending a deposition may not discuss the document with the witness during the deposition. As set forth in MTB's primary brief, Respondent's interpretation of Rule 30(j)(8) is inconsistent with common sense and rules of construction.

Providing or identifying documents—in some reasonable degree of detail—to be shown to a witness during a deposition will allow the witness to review and be prepared to discuss such documents. This would reduce surprises at the deposition and allow witnesses to testify knowledgeably. This comports with the spirit of South Carolina's comprehensive deposition rule, which promotes full disclosure and fair play, while guarding against surprise.

In contravention to this, despite multiple pre-deposition requests, Plaintiff's counsel refused to identify in *any* detail or provide any specific material he planned to show witnesses in the subject depositions. Instead, he feigned compliance with Rule 30(j)(8) by indicating he might show the witness any of more than 100,000 pages of documents produced in discovery. This

provided MTB with no notice of what documents counsel might actually show the witnesses during their depositions and created a situation of surprise for the witnesses and unnecessary delay during the depositions.

As detailed in Appellant's Initial Brief, MTB's counsel addressed this issue with Respondent's counsel on multiple occasions prior to the depositions and made clear that, in his reading of Rule 30(j)(8), broadly referring to all material produced in discovery did not identify documents in compliance with that Rule. Among other things, counsel sent multiple letters, as early as *two months before the depositions*, detailing his position on Rule 30(j)(8) and reserving the right to discuss documents with the witnesses if deposing counsel did not identify with particularity documents he intended to show the witnesses (out of the many thousands of documents exchanged in discovery). Deposing counsel never responded to those letters. MTB's counsel made every possible effort to resolve the matter prior to the deposition, and his client should not have been sanctioned even if he was mistaken in his interpretation of Rule 30(j)(8).

Respondent's position in this appeal is that merely referencing *everything* produced in discovery satisfies Rule 30(j)(8). Her brief questions how Rule 30(j)(8) could possibly require that a deposing lawyer identify the *exact documents* he intends to use in a deposition, as if that is an unduly burdensome request. The Rule does not require exact precision in identifying documents. Indeed, it does not *require* any documents to be identified prior to the deposition. The modest consequence for failing to do so is that the witness is permitted to discuss the documents privately with opposing counsel. Respondent's cynical argument, that the Rule is intended to be circumvented by the expedient identifying all documents in existence, essentially renders the Rule meaningless.

B. Contrary to Richardson's Assertions, Opposing Counsel Was Not Limited to Private Discussions with the Witnesses About Whether to Assert a Privilege.

Respondent's next argument is that, if opposing counsel was allowed to talk to the witnesses about documents during the deposition at all, he could only talk about whether to assert a privilege. This, however, is not what Rule 30 says or means.

To the contrary, Rule 30(j)(8), the operative subdivision of the Rule, states only that if a document is not timely provided or identified “counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document.” There is no limitation on the substance of what counsel and the witness may discuss. The meeting is plainly “private[.]” Nothing in this language suggests that either the discussion is restricted in subject matter or that the witness may then be asked about the conversation. To the contrary, the plain language of Rule 30(j)(8) is consistent with MTB’s counsel’s actions here. As the Rule permits, he had a short, private meeting with his client witnesses and instructed them not to disclose what was discussed.

Respondent seems to argue that *other* subsections of Rule 30(j) limited counsel’s conversations with his witnesses:

(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

(6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.

(7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.

See S.C.R. Civ. P. 30(j)(5)-(7). These subsections of Rule 30(j) deal with general off-the-record discussions with witnesses, not with discussions Rule 30(j)(8) authorizes. The discussions at issue in this appeal did *not* take place under Rule 30(j)(5); instead, they were expressly authorized by Rule 30(j)(8). As a result, the limitations of subsections (j)(5)-(7) simply do not apply. It would have been a simple matter for Rule 30(j)(8) to say that private discussions are limited to assertion of privilege if that had been the intent.

Respondent also argues that Rule 30(j)(8) does not apply because Attorney Countryman was not “the witness’ counsel.” Specifically, Respondent argues that “[t]his contradicts the direct

testimony of the witness and statements made by MTB counsel at the beginning of the deposition before the improper discussions and witness coaching took place.” (*See* Init. Br. Resp’t, at 28). In particular, she relies on the fact that counsel said at the beginning of the deposition that he represented MTB and that the witnesses said they did not hire or pay him. (*See id.*, at 28 n.6). This argument fails for two reasons.

First, Rule 30(b) does not say that private discussions may only be between the witness and his or her own counsel. To the contrary, the Rule specifically refers to “opposing counsel” and to the “witness”, not to the witnesses’ counsel. Indeed, many deposition witnesses do not have their own attorneys. The Rule clearly contemplates a private discussion between opposing counsel and the witness.¹

Second, Plaintiff is mischaracterizing the evidence, which actually suggests that Attorney Countryman represented the witnesses at issue. For example, in the deposition of Sheri Self, Attorney Countryman expressly stated: “I am your lawyer.” (*See* February 7, 2019 Plaintiff’s Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 2 (Self Deposition), at 24:9-10). Likewise, in the deposition of witness Haylen Gatling, an employee of MTB, *Plaintiff’s counsel* on numerous occasions referred to Attorney Countryman as “your attorney.” (*See* February 7, 2019 Plaintiff’s Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3 (Gatling Deposition), at 199:23, 200:7, 12 & 18, 221:11). “An attorney-client relationship does not depend upon the existence of a formal agreement or the payment of a legal fee.” *See* South Carolina Bar Ethics Advisory Committee Op. 91-03, 1991 WL 787734, at *1 (Feb. 1, 1991). Respondent fails to present any evidence that Attorney Countryman was not representing the witnesses—current or former employees of MTB—in their depositions.

¹ The Rule’s reference to “opposing counsel” rather than to the witness’ counsel reinforces that the private discussion is not limited to discussion of privilege, since such a discussion would necessarily be between the witness and his or her own attorney.

C. There Is No Merit to Plaintiff's Accusation of "Witness Coaching".

Respondent makes serious accusations that MTB's counsel "coached" witnesses during his meetings with them. However, the evidence of record does not support this allegation.

The *only* "evidence" supporting this unwarranted attack is that Ms. Gatling clarified her testimony after a discussion with Attorney Countryman and Stephanie Trotter, Esq. of MTB. (*See* Init. Br. Resp't, at 22 ("After improperly meeting with MTB counsel and Trotter to discuss documents, the witness returned and testified she had suddenly 'misremembered' the way documents were put in the box for the MTB attorney Trotter to sign.") (*quoting* Judge Murphy's Sanctions Order)). Respondent's Brief goes so far as to say that MTB "makes up language and glues it together with bits and pieces of the Rules and case law in an effort to justify its improper conduct and witness coaching." (*See id.*, at 31). However, the actual language of the deposition transcripts makes clear that there was nothing as sinister as Respondent (or Judge Murphy) has stated. To the contrary, any allegations of witness coaching are the product of sheer speculation and represent the logical fallacy of *post hoc ergo propter hoc*.

At 3:37 p.m., Attorney Countryman's meeting with Ms. Gatling ended, at page 186 of her deposition transcript. (*See* February 7, 2019 Plaintiff's Motion for Sanctions and Memorandum in Support Thereof Concerning Improper Deposition Conduct of MTB Counsel Ex. 3 (Gatling Deposition), at 186:17-20). However, Ms. Gatling does not clarify her testimony until fourteen pages later, when she noted that she has misremembered something from *four years prior*:

A She would have seen it. I misspoke earlier. It's been four years since I've prepared liens consistently. She gets -- she gets everything.

Q All right. So after your having a meeting with your lawyer and Stephanie Trotter, your testimony has now changed; is that what you're telling us?

A I misremembered. I can't remember exactly what I said earlier, but --

Q You misremember after having a meeting with your lawyer and Stephanie Trotter; is that what you're telling us?

MR. COUNTRYMAN: Object to the form.

A (Continuing) I now remember.

Q Okay. And you now remember something different than what you've been testifying about after meeting with your lawyer and Stephanie Trotter; right?

MR. COUNTRYMAN: Object to the form.

A (Continuing) Yes.

(*See id.*, at 200:3-20). Respondent presents *zero* evidence that the correction of this testimony was the product of anything other than what Ms. Gatling said it was: a correction of testimony about incidents occurring years prior.

In her examination of the witnesses, Respondent did not ask them whether any coaching occurred. Instead, she asked the objectionable overbroad, generic question of what was talked about in the brief meetings. She has never obtained any testimony suggesting that any testimony was the product of coaching. To the contrary, Respondent relies on rank innuendo and speculation to support her claim that Attorney Countryman somehow coached the witnesses' testimony during meetings.

Respondent's accusation is ironic, inasmuch as an unmistakable purpose of Rule 30(j)(8) is to give witnesses a fair opportunity to refresh their recollections about documents that they are to be questioned about. The Rule's mandate is simple: Either provide the documents to opposing counsel in advance of the deposition so that he or she can discuss them with the deponent before the deposition starts or give the witness and opposing counsel an opportunity to discuss the documents during the deposition. It should be hardly surprising that Ms. Gatling's memory about a document that she might not have seen in years was refreshed when she was finally given the opportunity to review it.

III. Respondent's Arguments Concerning the Standard of Review Are Misplaced.

In her Initial Brief of Appellant, Respondent urges that the proper standard of review is whether the trial judge abused her discretion in imposing sanctions on MTB. However, as discussed herein, Respondent has not refuted that the proper standard of review is *de novo*. Additionally, even under an abuse of discretion standard, the record is clear that the trial judge did abuse her discretion in entering the Sanctions Order.

A. Respondent Has Not Refuted That the Proper Standard of Review Is *De Novo*.

As set forth in Appellant's Initial Brief, the proper standard of review is (at least in part) *de novo*, since the underlying Sanctions Order awarded attorneys' fees in a manner similar to a Rule 11 order. Respondent's Initial Brief does not substantively set forth any flaws in MTB's argument for this standard of review. Therefore, for the reasons it has previously stated, MTB believes that the Court should apply, at least in part, a *de novo* standard of review in this matter.

B. Even Under an Abuse of Discretion Standard, It Is Apparent That the Trial Judge Abused Her Discretion in Entering the Sanctions Order.

Even if the Court reviews this case under an abuse of discretion standard, it should overturn Judge Murphy's Sanctions Order. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *McNair v. Fairfield Cty.*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008). In deciding what sanction to impose, the circuit court should weigh the nature of the discovery at issue, the posture of the case, willfulness, and the degree of prejudice. *See Jameson v. Ford Motor Co.*, 373 S.C. 248, 373 S.E.2d 755 (Ct. App. 2007). A failure to weigh those factors constitutes a failure to exercise discretion and is an abuse of discretion. *See id.*

Judge Murphy's Sanctions Order and denial of reconsideration exhibit a clear abuse of discretion. For example, the Sanctions Order fails to discuss the application of Rule 30(j)(8) and

how Mr. Countryman allegedly violated it. In fact, the Sanction Order does not discuss—or even mention—Rule 30(j)(8), the operative rule governing what occurred during the depositions. MTB’s Motion to Reconsider and supporting brief expressly requested a specific ruling on the application of Rule 30(j)(8). However, Judge Murphy issued a form Order denying MTB’s Motion to Reconsider and failed to provide any explanation at all the potential application of Rule 30(j)(8).

The nature of the dispute giving rise to the Sanctions Order is a simple question of what Rule 30(j)(8) actually requires. Does it, as Respondent argues, allow a lawyer to meet its requirements by simply referring to hundreds of thousands of documents produced in discovery; or even by referring to all documents in the Universe? On the other hand, does Rule 30(j)(8) require a reasonable identification of documents intended to be used in a deposition, so as to permit an attorney to prepare a witness for deposition? Further, what does Rule 30(j)(8) allow a lawyer representing a witness to do when the witness is presented with a document that, in the view of the lawyer, was not previously identified in conformity with that Rule? Finally—and perhaps most importantly—should a party be sanctioned because its lawyer in good faith invoked Rule 30(j)(8), even if his interpretation of the Rule turned out to be wrong? Judge Murphy did not provide any analysis on any of these controlling questions of law and fact. Having failed to address the most basic issues in her Sanctions Order, she plainly abused her discretion.

As argued herein and in MTB’s Initial Brief of Appellant, there is ample evidence that MTB’s counsel took diligent steps to comply with the language and spirit of the Rule as he understood it. The evidence does not support any conclusion that he acted in bad faith or willfully violated any Rule. To the contrary, the record shows that counsel expressly relied on Rule 30(j)(8), indicated his reliance on that Rule to Respondent’s counsel months prior to the subject depositions, and acted consistent with that Rule, as he said he would do. There is no factual support for any finding he acted willfully or in bad faith. At worst, counsel misinterpreted Rule 30(j)(8). However, Judge Murphy did not include *any* interpretation of Rule 30(j)(8) in her Order(s) and has never advised MTB what it or its counsel actually did to violate that Rule. Instead of explaining why counsel’s conduct violated Rule 30(j)(8), Judge Murphy broadly determined that *some* improper

conduct took place and imposed onerous sanctions. Judge Murphy's Orders demonstrate that she did not, in any respect, weigh the factors required for an award of sanctions. Such a failure, in and of itself, constitutes an abuse of discretion and reversible error. Therefore, the Court should reverse the trial judge and vacate the Sanctions Order.

CONCLUSION

The parties to this case and the Bench and Bar would benefit from this Court's interpretation of Rule 30(j)(8). The Rule is meaningless if it should be interpreted to mean that a party noticing a deposition need not in good faith identify the documents that he or she intends to show the witness in order to foreclose the witness's right to consult privately with counsel during the deposition. If this is the proper interpretation of the Rule, then henceforth all deposition notices will include an inscription that counsel will use every document produced in discovery instead of those actually intended to be shown the witness during the deposition.

Even if the Court interprets the Rule this way, it should find that MTB's counsel acted reasonably in invoking the Rule after repeatedly asking Respondent's counsel to identify the documents he intended to use. Whether it applies the *de novo* or abuse of discretion standard of review, this Court should reverse the trial judge's imposition of sanctions and order Plaintiff Richardson to return the money paid pursuant to the Sanctions Order.

January 10, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the Ninth Circuit

The Honorable Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-000671

RECEIVED

JAN 13 2020

SC Court of Appeals

Tammy C. RichardsonRespondent,

v.

Halcyon Real Estate Services, LLP and McCabe, Trotter &
Beverly, P.C. Defendants,

Of whom McCabe, Trotter & Beverly, P.C. is theAppellant.


PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant McCabe, Trotter & Beverly, P.C. on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 10, 2020, addressed to her attorneys of record:

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January 10, 2020

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JAN 13 2020
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Tammy C. Richardson v. Halcyon Real Estate Services, LLP
and McCabe, Trotter & Beverly, PC
Appellate Case No: 2019-000671
Our Matter No. 2116.160

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of each of the following:

- (1) Initial Reply Brief of Appellant;
- (2) Appellant's Reply Designation of Matter for Inclusion in the Record on Appeal; and
- (3) Proofs of Service.

Please file the originals and return clocked copies to me in the enclosed envelope. By copy of this letter, I am serving a copy of the Initial Reply Brief and Designation upon counsel of record.

Sincerely,


Justin P. Novak

JPN/jgc
Enclosures

cc: Justin S. Kahn, Esquire
Mary Leigh Arnold, Esquire
Robert P. Wood, Esquire

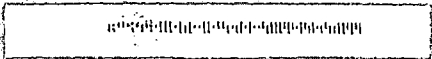
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