THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity and Special Circuit Court Judge

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Case No. 2018-CP-07-01457
Appellate Case No. 2020-001178

Olivia Austin and Michelle Dinatale, as Co-Executors of the Estate of Albert R. Scansaroli — Respondents,

v.

Helen Rizzo, — Appellant.

INITIAL BRIEF OF APPELLANT

Evan A. Smith (SCB#100991)
Evan Smith Law Firm, LLC
P.O. Box 976
Charleston, SC 29402
843-804-8550
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court improperly rule that Appellant Helen Rizzo is in contempt of court?
2. Did the trial court improperly place Appellant Helen Rizzo in default in accordance with South Carolina Rule of Civil Procedure 55(a)?
3. Did the trial court improperly grant a default judgment under the Respondents' First through Fifth causes of action?
4. Did the trial court err in issuing an award of actual or compensatory damages and post-judgment interest under the trial court's Amended Order?
5. Did the trial improperly order the disbursement, release and delivery of all funds being held in escrow and on deposit?

STATEMENT OF THE CASE

Respondent Olivia Austin ("Olivia") is the adult daughter of and was the court-appointed guardian for Albert Robert Scansaroli ("Albert"), now deceased. When the original action was commenced, Albert was 88 years old. Albert passed away during the underlying litigation on January 4, 2019. His estate is being administered in Wake County, State of North Carolina. By Verified Complaint filed on July 18, 2018, Olivia initially commenced her action against Appellant Helen Rizzo to recover $250,000.00 in funds that Albert had contributed to a joint bank account opened at Bank of America in Albert's and Rizzo's names. (R. p.____). On February 20, 2019, a Consent Order of Substitution was filed under which Olivia and Michelle Dinatale, as Co-Executors for the Estate of Albert R. Scansaroli, were substituted as the party-Plaintiffs. Respondents' Verified Complaint asserted causes of action against Rizzo for (1) Declaratory Judgment; (2) Conversion; (3) Constructive Trust; (4) Temporary Restraining Order/Preliminary and Permanent Injunction; and (5) Recovery of Attorneys' Fees and Costs. Appellant Rizzo filed an Answer with Affirmative Defenses and also alleged Counterclaims for Conversion, Abuse of Process, Intentional Infliction of Emotional Distress, and Recovery of Attorneys' Fees and Costs. (R. p.____). On October 29, 2018, the parties filed a Stipulation in which Appellant Rizzo dismissed her Counterclaims for Abuse of Process and Intentional Infliction of Emotional Distress "with prejudice" pursuant to S.C. R. CIV. PRO. 41(a)(1)(B). (R. p.____). On August 1, 2018, Respondents filed a Motion for Temporary Restraining Order and/or Preliminary Injunction seeking to restrain Rizzo from transferring or using any of the funds she had withdrawn from the Bank of America account. On December 7, 2018, the trial court granted the Motion for Temporary Restraining Order and/or Preliminary Injunction and issued a preliminary injunction. (R. p.____). On January 8, 2019, Plaintiff filed a Motion to Compel against Rizzo. (R. p.____). On September 20, 2019, a Consent Order regarding the Motion to Compel was entered into by the parties. (R.

p.____). On November 13, 2019, Respondents filed a Motion for Sanctions and/or for Finding of Contempt based on Rizzo's violations of the Court's Injunction Order and its Discovery Order. (R. p.____). Among other relief, the motion requested the Court to sanction Rizzo for her violations of the Court's Orders, including an Order striking her pleadings and defenses, placing her in default, and entering a default judgment against her. The Motion for Sanctions was heard by the trial court on December 17, 2019. (R. p.____). On March 12, 2020, the trial court entered an Order finding Rizzo to be in contempt of the Court's Injunction Order and Discovery Order and issued sanctions against Rizzo (hereinafter "Sanctions Order"). (R. p.____). On April 21, 2020, Respondents filed a Motion for Sanctions and For Expedited Hearing. (R. p.____). The Motion for Sanctions and for Expedited Hearing was heard by the trial court on May 6, 2020. (R. p.____). On July 17, 2020, the trial court entered an Order on the Motion for Sanctions for Sanctions and for Expedited Hearing. (R. p.____). The Appellant then filed a Motion to Reconsider, Alter or Amend the Judgment on July 27, 2020. (R. p.____). An Amended Order was then issued by the trial court on August 6, 2020. (R. p.____). Among other things, the Amended Order entered a default judgment shall be entered in favor of Respondents Olivia Austin and Michelle Dinatale and against Appellant Helen Rizzo in the amount of $304,897.26 actual or compensatory damages and accrued prejudgment interest. (R. p.____). The Notice of Appeal of the Amended Order was served on the Respondents on August 21, 2020. (R. p.____).

STANDARD OF REVIEW

The imposition of sanctions [under Rule 37] is generally entrusted to the sound discretion of the Circuit Court." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App.1987). "Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain

discovery requests." Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542, 489 S.E.2d 679, 682 (Ct. App. 1997). "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 511 S.E.2d 716, 718 (S.C. Ct. App. 1999) (citing S.C. R. CIV. PRO. 37(b)(2)(C)); see also QZO, Inc. v. Moyer, 594 S.E.2d 541, 547 (S.C. Ct. App. 2004) ("When a party fails to obey an order relating to discovery, the trial court may strike that party's pleadings and enter a default judgment."); Rickerson v. Karl, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015).

In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (citations omitted). "Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes 'should serve to protect the rights of discovery provided by the Rules[,]'" and "[o]verly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Id. at 114, 495 S.E.2d at 217 (citations omitted). (S.C. Ct. App. 2008); QZO, Inc., 594 S.E.2d at 548; Griffin, 511 S.E.2d at 719. Discovery sanctions are imposed to "penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510, 524 (Ct.App.1998), quoting, Karppi at 683. Sanctions are to be imposed commensurate to the abuse they are designed to address. Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990). The entire thrust of discovery rules involved full and fair disclosure, to

prevent a trial from becoming a guessing game or one of surprise for either party. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 217 (Ct. App. 1997).

A determination of contempt is within the sound discretion of the trial judge. Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992). "Contempt results from the willful disobedience of an order of the court." Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct.App.2001) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)).

In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman, 348 S.C. at 119, 557 S.E.2d at 705. "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." Id. at 120, 557 S.E.2d at 705.

The Court has wide discretion in determining the appropriate relief for contempt of court. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d, 915 (1982). "A trial court's determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). "An abuse of discretion occurs either when the court is

controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

STATEMENT OF FACTS

Since on or about September 11, 2019, diligent efforts had been made by the elderly Appellant, in the midst of a global pandemic, to move the present case forward and substantial progress had been made as of the date of the trial court's Amended Order. Appellant did not sit on her hands and do nothing. Despite these efforts and the Respondents being armed with ample information in order to proceed with further discovery through the taking of depositions or any other relevant discovery, Respondents refused to do so. The record reflects that Respondents were entirely opposed to trying this matter on the merits and did everything to thwart such a result. Respondents created a moving target replete with misinformation. If this matter had been allowed to proceed to trial, there would have been no guessing game or surprise for either party. Rather, the record is full of factual information on which a trial court could have properly applied the law and rule on the facts as they apply therein. The trial court's Amended Order foreclosed Appellant from a fair adjudication of the matter on the merits.

ARGUMENTS

I. BECAUSE RESPONDENTS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT APPELLANT HELEN RIZZO WAS IN WILLFUL CONTEMPT OF COURT, IT WAS IMPROPER FOR THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT OF COURT.

The trial court abused its discretion in finding that Appellant was in willful contempt of court. The Amended Order states, in part, "[d]espite these opportunities, Rizzo failed or refused to provide the information or documents." (Amended Order p. 8). This statement is clearly inaccurate when considering the record as a whole. Appellant made her best and significant efforts to provide the information and documents available to her and has provided that information and

documentation. On numerous occasions, Appellant respectfully requested that the trial court carefully reconsider the timeline and meaningful efforts made therein. Those requests were either ignored or denied. (R. p.____). By holding Appellant in contempt of court, the trial court then allowed itself to continue to go down a path of overreaching sanctions against Appellant.

Appellant's withdrawal of the CPM Federal Credit Union funds and her subsequent payment of the funds into the Beaufort County Clerk of Court, which were clearly timely under the South Carolina Supreme Court's Order, only served to further preserve the disputed funds and cannot be considered a willful violation of the Injunction Order. Further, Respondents' suggestion that she return the funds to the CPM Federal Credit Union account is a disingenuous statement made only to distract from the case as a whole as the funds were now held by an independent third party. (R. p.____). As stated at the hearing, Appellant had no other funds available to her and relied solely on a small pension payment for her support. At 76 years-old, she was working part-time for the United States Census but earning very little. (R. p.____).

The Amended Order further states that "Rizzo's affidavit fails to provide sufficient details regarding her expenditure or use of the $40,000.00 in cash withdrawals that she made from the First Citizens Bank account and the $19,000.00 in cash withdrawals that she made from the CPM Federal Credit Union account as discussed in the Sanctions Order. Although Appellant Rizzo withdrew at least $59,000.00 in cash from these accounts, she has failed to produce a single invoice, receipt, estimate, quote, or other record showing where she spent any of those funds, the amount she spent, or other required information. The information provided in her affidavit continues to be vague and insufficient. It fails to explain or describe what she did with the $59,000.00 in cash withdrawals. The few repairs or other expenses she mentions in the affidavit are set forth in general terms and cannot explain expenditures totaling $59,000.00."

(Amended Order p. 13). The Appellant worked diligently to recover any and all bills, permits, estimates or other documents corroborating her already-made statements from which she has never wavered. (R. p.____). She had been unable to do so despite her best efforts and for the aforesaid reasons. She set forth a sworn statement, under penalty of perjury, that most accurately reflects her recollection as to the requested information. (R. p.____). Respondents had the ready ability to further depose her regarding the statements already made but refused to even attempt to do so.

II. IT WAS IMPROPER FOR THE TRIAL COURT TO PLACE APPELLANT IN DEFAULT AND GRANT A DEFAULT JUDGMENT UNDER RESPONDENTS' FIRST THROUGH FIFTH CAUSES OF ACTION.

As previously stated, "[i}n deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (citations omitted). "Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes 'should serve to protect the rights of discovery provided by the Rules[,]'" and "[o]verly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Id. at 114, 495 S.E.2d at 217 (citations omitted). (S.C. Ct. App. 2008); QZO, Inc., 594 S.E.2d at 548; Griffin, 511 S.E.2d at 719. When looking at the circumstances as whole, the sanctions in the Amended Order cannot be considered commensurate to the alleged abuse. Certainly, the deterrence of entirely non-participatory parties in discovery and other portions of case is critical to the protection of the rights of parties in suit. This is simply not the case here. Appellant made numerous and reasonable forward efforts throughout the course of the litigation to comply with the rules of discovery and to satisfy the trial court that she had substantially done so. The trial court's Amended Order contains several overreaching and

hyperbolic statements that do not align with the actual record. (R. p.____). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." State v. Smith, 276 S.C. 494, 498, 280 S.E. (2d) 200, 202 (1981). Unfortunately, the trial court opted to take the most drastic action despite having the authority to take far less under the circumstances. Additionally, Appellant Rizzo's entitlement to the funds remained, or should have remained, a factual and legal question for determination by the trial court. By taking this remarkable leap and awarding such sanctions, the trial court undercut any ability for a trial court to apply the facts to the law and issue a judgment. As such, the result was essentially a granting of summary judgment without Respondents ever having to file such a motion.

The Amended Order states that "[t]he affidavit and attachments do not include any e-mails, correspondence, or other electronic or written communications between Appellant Rizzo (or her former or current legal counsel) and Scott Rizzo involving any of the funds withdrawn from the Bank of America account or any other matter referenced in the pleadings in this action." (Amended Order p. 13). Appellant clearly asserted at the hearing on the motion that no such communications exist or have been discovered thus negating the need for a privilege log. (May 6, 2020 Transcript p. 17, lines 1-9). Additionally, Appellant sought further guidance from the trial court on how to handle that particular issue. (May 6, 2020 Transcript p. 17, lines 1-9). However, the trial court declined to address that request. (R. p.____). As such, the trial court based at least a portion of its sanctions award on information that could not have been given and did not exist. (R. p.____).

The Amended Order states that "[t]he affidavit and attachments do not include Rizzo's

initial 2017 federal and state income tax returns or written confirmation or corroboration that she has requested copies of such records from the appropriate federal and state tax authorities." (Amended Order page 13). At the hearing on Respondents' motion, Appellant asserted that she has requested this information but has not yet received it. (R. p.____). Regardless, the lack of this information was not prejudicial to the case, in its state at the time of the issuance of the Amended Order, and would have been information necessary only prior to the trial of this matter – a trial that was not remotely imminent under the circumstances. Again, the trial court based at least a portion of its punitive sanctions award on this de minimus issue. (R. p.____); however, it is unclear how exactly the trial court weighed any of the issues in setting forth the relief in its Amended Order. Rather, the trial opted to rubber stamp the proposed order offered by Respondents (with minor revisions subsequent to Appellant's motion to reconsider).

Respondents and the trial court asserted numerous cases have upheld orders striking pleadings and entering default judgment in circumstances similar to the present case and cite three cases (McNair v. Fairfield Cnty., 665 S.E.2d 830, 832-33 (S.C. Ct. App. 2008); QZO, Inc., 594 S.E.2d at 548); and Griffin, 511 S.E.2d at 719). (R. p.____). These three cases are greatly distinguishable from Appellant's case as they relate to individuals and entities that chose to entirely thwart the discovery process. Appellant is elderly and made significant efforts during a pandemic, one in which one of her friends has succumbed to the virus, to provide the requested information. . (R. p.____). She went to the bank, had an affidavit notarized, and suffered significant stress as a result of the pandemic and this action. (R. p.____). As such, Appellant's efforts cannot be characterized as in bad faith or with gross indifference to Respondents' rights. During that difficult time and in the months immediately prior to the pandemic, Appellant supplemented her discovery responses in numerous ways and left only a few minor outstanding items which she

continued to pursue thereafter. (R. p.____). Respondents themselves have provided a detailed account of that supplementation and effort in their exhibits and submissions to the Court. (R. p.____). Indeed, as previously stated on numerous occasions, Appellant continued to be affected by the Coronavirus Emergency. However, Respondents have always remained unconcerned or unmoved by this issue. For the aforesaid reasons, the trial court should have given great weight to the overall nature of this case of the willfulness of the elderly Appellant Rizzo. Perhaps most importantly, the low degree of prejudice to the Respondents should have been seriously considered by the trial court. Notably, the parties had yet to engage in mandatory mediation pursuant to the South Carolina Rules of Alternative Dispute Resolution despite having ample disputed factual information on which to proceed to mediation. (R. p.____). Furthermore, the trial court freely discussed these deficiencies during the hearings and in subsequent informal teleconferences. Additionally, a large portion of the Respondents' motion to compel was resolved by consent due to the waiver of any claims to Appellant being a common law spouse. (December 17, 2020 Transcript p. 23, lines 27-20). That left only a few items to which Appellant continued to seek resolution and to satisfy the trial court. The Amended Order states that Appellant "acted willfully, maliciously, recklessly, carelessly, and/or wantonly for the purpose of causing injury to Mr. Scansaroli and/or his Estate" (Amended Order p. 22). However, nothing in the record supports this finding. If the Amended Order is not properly overturned, Respondents will have had the benefit of a significant award without ever having to adjudicate the facts of the case. More importantly, the Estate of Mr. Scansaroli will be unjustly enriched.

Appellant reasserts her statement that all of the sanctions requested by the Respondents should have been denied entirely as they far exceeded anything that should be granted under the circumstances discussed herein. (R. p.____). Additionally, any failure by the Appellant was

substantially justified under the circumstances set forth in the entirety of the record. An award of attorney's fees and expenses should have been denied or held in abeyance. It was highly prejudicial to Appellant under the circumstances to take such action. Appellant asserts that the relief awarded in the Amended Order should be entirely reversed and this matter should proceed in its normal course via depositions, mediation, and other steps toward resolution.

III. IT WAS IMPROPER FOR THE TRIAL COURT TO ISSUE AN AWARD OF ACTUAL OR COMPENSATORY DAMAGES AND POST-JUDGMENT INTEREST UNDER THE TRIAL COURT'S AMENDED ORDER AND TO ORDER THE DISBURSEMENT, RELEASE AND DELIVERY OF ALL FUNDS BEING HELD IN ESCROW AND ON DEPOSIT.

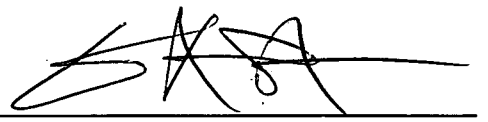
For the aforementioned reasons, Appellant should not have been held in contempt of court and the sanctions imposed therefrom were an abuse of the trial court's discretion. As such, it was improper for the trial court to issue an award of actual or compensatory damages (notably, not distinguished by the trial court in the Amended Order) and post-judgment interest and to order the disbursement, release and delivery of all funds being held in escrow and on deposit. As previously stated and applicable herein as well, "[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." State v. Smith, 276 S.C. 494, 498, 280 S.E. (2d) 200, 202 (1981). By ordering funds to be released, the trial court took yet another extraordinary step and placed the funds at significant risk of never being recovered if it were to be later be determined that the allocation was incorrect.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the trial court that Appellant Helen Rizzo is in contempt of court, reverse the placement of Appellant in default, reverse the striking of Appellant's Answer and Counterclaims, reverse the granting of Respondents' First through Fifth Causes of Action, reverse the award of actual or compensatory

damages and post-judgment interest, and withhold the disbursement, release, and delivery of all funds being held in escrow and on deposit. This case should be remanded to the trial court for a determination on the merits.

December 21, 2020



Evan A. Smith (SCB#100991)
Evan Smith Law Firm, LLC
P.O. Box 976
Charleston, SC 29402
843-804-8550
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity and Special Circuit Court Judge

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Case No. 2018-CP-07-01457
Appellate Case No. 2020-001178

Olivia Austin and Michelle Dinatale,
as Co-Executors of the Estate of
Albert R. Scansaroli,

Respondents,

v.

Helen Rizzo,

Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served the Respondents, Olivia Austin and Michelle Dinatale, through their attorney, Daniel F. Blanchard, III, with a copy of Initial Brief and Designation of Matter to Be Included in Record on Appeal by mailing a copy of the same by United States Mail with first class postage to the following address on December 21, 2020 and by emailing the same.

Daniel F. Blanchard, III
Rosen & Hagood
151 Meeting Street, Suite 400
Charleston, SC 29401
dblanchard@rosenhagood.com

December 21, 2020

Evan A. Smith, Esq.

127 King Street, Suite 203
Charleston, SC 29401
Tel: 843.804.8550
Fax: 843.203.5708

EVAN SMITH
LAW FIRM, LLC

PO Box 976
Charleston, SC 29402
www.evansmithlawfirm.com
evan@evansmithlawfirm.com

December 21, 2020

Via U.S. Mail and Facsimile
Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
(803) 734-1839

Re: Olivia Austin and Michelle Dinatale, as Co-Executors of the Estate of Albert T. Scansaroli v. Helen Rizzo
Appellate Case No. 2020-00178

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Brief and Designation of Matter to be Included in Record on Appeal in the above-referenced case. We have also enclosed the Proof of Service of the same.

Please file the enclosed documents and return copies to my office in the enclosed self-addressed envelope.

Thank you for your assistance in this matter.

Sincerely,

Evan A. Smith

Enclosures (as stated)
cc: Daniel F. Blanchard, III

EVAN SMITH
LAW FIRM, LLC

Evan Smith
PO Box 976
Charleston, SC 29402

Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211