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.

FINAL BRIEF OF APPELLANTS

Kate Cappelmann
Lewis Brisbois Bisgaard & Smith LLP
1180 Peachtree Street, NE
Suite 2900
Atlanta, Georgia 30309
(404) 348-8585
Attorney for Appellants

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1. *Did the trial court err in striking Appellants' Answers for failure to comply with its order compelling discovery?*

STATEMENT OF THE CASE

On February 24, 2016, Judge Edgar Dickson granted Respondent's Motion to Compel, requesting both parties to submit proposed orders. Several months later, on July 7, 2016, Judge Dickson advised he would execute the Appellants' Proposed Order, but Respondent objected, requesting the trial court to delay enforcement of the Order until she could demonstrate a basis for reconsideration.

On November 30, 2016, after consideration of Respondent's objections, Judge Dickson changed his decision, deciding instead to execute Respondent's Proposed Order. With only twenty days to comply with the new order, Appellants were further hampered by an internal calendaring issue, and they scrambled to gather the needed responses.

Realizing more time would be needed, the Parties agreed to an extension through January 13, 2017. Still, many responses needed further supplementation, as documents continued to be gathered. At that time, the cumulative number of documents produced by Appellants stood at nearly ten thousand pages.

Days later, Respondent moved for sanctions claiming to be without essential documents and information needed to prepare her case and take depositions. Judge Alison Renee Lee scheduled a hearing on the motion for July 27, 2017, and days prior to the hearing, Appellants supplemented their responses. Nearly nine months later, on April 19, 2018, Judge Lee granted the motion, striking Appellants' Answer.

Appellants served their timely Notice of Appeal on May 11, 2018.

STANDARD OF REVIEW

A circuit court may impose sanctions on a party subject to its sound discretion.[1] But if an appellant shows that the circuit court imposed sanctions (1) without reasonable factual support that (2) resulted in prejudice to the rights of the appellant, then the circuit court's decision constitutes an error of law.[2]

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[1] *Skywaves I Corp. v. Branch Banking & Trust Co.*, Opinion No. Op. 5557, 2018 S.C. App. LEXIS 32, at *32 (Ct. App. May 2, 2018) (quoting *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)); *Karppi*, 327 S.C. at 542, 489 S.E.2d at 681 ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.")

[2] *Skywaves*, 2018 S.C. App. LEXIS 32, at *31–32.

FACTS

On August 22, 2014, Respondent served written discovery requests on Appellants, and Appellants responded on November 20, 2014.[3] Appellants supplemented their discovery responses on May 5, 2015, and again on September 25, 2015.[4] In total, over ten thousand pages of documents were produced.[5]

Before Appellants supplemented their responses for a third time, on July 29, 2015, Respondent filed a Motion to Compel.[6] On February 24, 2016, a hearing was held before the Honorable Judge Edgar Dickson who granted the motion.[7] Thereafter, the trial court informed the parties it would be executing Appellants' Proposed Order,[8] but later, on November 30, 2016, it changed its mind and executed the Respondent's Proposed Order.[9] The Order to Compel gave Appellants twenty days—that is, until December 20, 2016—to comply.[10]

On December 29, 2016, Respondent penned a letter to Appellants requesting that, by January 6, 2017, they produce the information specified by the court's order.[11] Four days later, Appellants responded that they discovered that the deadline, inadvertently, had not been calendared and were gathering the documents

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[3] R. p. 29.
[4] R. p. 30.
[5] R. p. 74, lines 6–14.
[6] R. p. 30.
[7] R. p. 30.
[8] R. p. 53, lines 17–21.
[9] R. p. 432.
[10] R. p. 319, paragraph 4.
[11] R. p. 433.

to respond as soon as possible.[12] In addition, one of the attorneys for Appellants communicated to Respondent that she had been ill during the end of December and still needed to reach out to the client.[13] In turn, Respondent agreed to extend the deadline by a week, until January 13, 2017.[14] Appellants served their responses to discovery on January 13, 2017.[15] But, nevertheless, Appellants continued their efforts to gather the many documents needed to comprehensively address the scope of the trial court's order.[16]

Days later, Respondent moved for sanctions, claiming to be without essential documents and information needed to prepare her case and take depositions.[17] Appellants further supplemented, taking demonstrated efforts to comply with the Order to Compel—*e.g.*, conclusively stating Appellants were not in possession of information or documents, as appropriate,[18] and producing unredacted copies of documents previously produced in redacted form.[19]

On July 10, 2017, the Motion for Rule to Show Cause hearing took place before Judge Alison Renee Lee.[20] During the hearing, Judge Lee questioned the Appellants' failure to obtain an extension with the Court to avoid violating its terms.

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[12] R. p. 434.
[13] R. p. 435.
[14] R. p. 436.
[15] R. pp. 330–431.
[16] R. p. 31.
[17] R. p. 32.
[18] R. p. 71, line 19–p. 73, line 6.
[19] R. p. 57, lines 11–17.
[20] R. p. 29.

> I . . . realize that Judge Dickson's order did not give you an awful lot of time to be able to . . . respond to the request, but . . . . I never saw any correspondence that showed any attempt to have discussions with counsel about the information, or even tailoring the request in a more narrow way . . . .
>
> Now, granted, I did not read the transcript; I don't even think I had access to the transcript. I think there may have been—the transcript may have been sent to me but I have a real hard time, given the request that was made and the specificity of Judge Dickson's order. And I understand that there were some issues around which order he was going to sign once he heard the motion. That you were told one thing and then he changed his mind and all of that. I didn't see where there was a request back to Judge Dickson to say Judge Dickson, we need more time to be able to respond to this, given the specificity of what you've ordered.[21]
>
> * * *
>
> You should have asked a motion to reconsider, a motion to clarify to Judge Dickson to ask for additional time and say you know, Judge Dickson, you said produce it twenty days from the date of your order. Well, in the middle of the Christmas holidays, there's no way we can produce the amount of information that we need to produce. Can we, can we get some additional time in order to do that?[22]

Arguably, the trial court channeled most of its frustration with Appellants' perceived lack of knowledge regarding what was produced. "[D]efense counsel repeatedly admitted that they do not have even so much as a list or other documentation which reflects the items produced in response to each discovery request to date."[23] The trial court went on to comment that Respondent did not possess basic information, such as insurance policies, and relied on a spreadsheet

[21] R. p. 52, line 2–p. 53, line 24.
[22] R. p. 80, lines 8–10.
[23] R. p. 35.

produced by Respondent at the hearing, outlining the allegedly missing information.[24]

Although the trial court was aware that Appellants had supplemented discovery leading up to the hearing, the trial court did not assess how that recent effort affected the posture of the motion. Nor did it weigh the sheer breadth and depth of the discovery order itself as one request for production, for example, spanned nine pages and contained over eighty subparts.[25] In its outline of the case, the trial court wrote "[d]uring the six (6) months between the [Respondent's] filing of the Motion and the date of hearing, no further documents or information were produced by any [Appellant] to the [Respondent], until just prior to the hearing."[26] Appellants possessed at the hearing a detailed outline of all of the documents produced by Country Wood in the case—11,496 pages.[27] The documents produced were discussed with Respondent as discovery progressed in the case.[28] If the documents or information did not exist, Appellants stated that as well.[29] Nevertheless, the trial court insisted that the rules required Appellants' outline of their production to be more specific—*e.g.*, instead of denoting "financial documents," the trial court wanted identification of "tax returns," or "financial statements."[30]

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[24] R. p. 34.
[25] R. pp. 361–71.
[26] R. p. 32.
[27] R. p. 74, lines 6–14.
[28] R. p. 62, line 7–p. 63, line 5.
[29] R. p. 71, line 19–p. 73, line 6.
[30] R. p. 79, lines 4–7; p. 81, lines 10–22.

Moreover, the spreadsheet submitted by Respondent, mentioned multiple times by the trial court within its order, cannot be found on its own docket.[31]

The trial court reached its decision repeating the exact language of Respondent's brief: "Many responses indicated: 'Defendant is still in the process of collecting information responsive to this request and will fully respond to the same as soon as such information is located.' . . . Ultimately, the Defendant's responses speak for themselves and do not comply with Judge Dickson's Order in timeliness or content."[32]

Nearly nine months later, on April 19, 2018, Judge Lee granted the motion, striking Appellants' Answers.[33] Among other things, Judge Lee concluded that, in light of delays on the part of Appellants in producing documents that Judge Dickson previously had ordered to be produced, Appellee had been prejudiced to the extent that Appellants' Answers should be stricken.[34]

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[31] The trial court cites to the spreadsheet at "Exhibits 3–8 to Plaintiff's Memorandum in Support of Rule of Show Cause." R. p. 34, n.21. But that specific memorandum relied on exhibits lettered A-H, none of which included a spreadsheet.

[32] R. pp. 31; 442.

[33] R. p. 37.

[34] R. pp. 34, 36. ("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, Plaintiff remains without all of the information ordered by Judge Dickson and has been substantially prejudiced in the advancement of her case. . . . 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 or destroyed. The harm to the Plaintiff in this case is irreparable and must be met with the harshest of sanctions against the Defendants.")

ARGUMENT

I. ***The trial court abused its discretion when it decided to strike Appellants' answers, because there is no basis for its finding that Appellee has been prejudiced by the delay in production of documents.***

In order for a circuit court to order a sanction that essentially causes default to enter, the moving party must specifically show (1) bad faith, (2) willful disobedience, or (3) gross indifference to its rights.[35] These specific findings must be demonstrated because "the end result is harsh medicine that should not be administered lightly."[36] Prejudice is also an element of the sanctions equation: "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."[37] "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion."[38]

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[35] *Skywaves I Corp.*, 2018 S.C. App. LEXIS 32, at *32 (quoting *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198–99, 511 S.E.2d 716, 719 (Ct. App. 1999)).

[36] *Davis v. Parkview Apts.*, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014) (quoting *Griffin Grading*, 334 S.C. at 198, 511 S.E.2d at 718).

[37] *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009); *Skywaves I Corp.*, 2018 S.C. App. LEXIS 32, at *32 ; *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) ("The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.").

[38] *Teseniar*, 407 S.C. at 94, 754 S.E.2d at 273.

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.[39]

For support of its decision to strike Appellants' answers, the trial court summarily concluded that Appellants' delay prejudiced Respondent as a matter of law, citing *McNair v. Fairfield County*.[40] In *McNair*, a property owner filed an action challenging Fairfield County's right to condemn his land, moving for sanctions under Rule 37(b)(2)(C), SCRCP, after receiving inadequate responses to discovery requests following an order to compel.[41] Several forms of inaction by the county precipitated the trial court's ultimate decision to strike its answer. Following the granting of the motion to compel, the county did nothing to address the deficiencies in its discovery responses.[42] Further still, McNair's counsel wrote six letters seeking compliance with the order before finally moving for sanctions, six months after the order compelling discovery took effect.[43] The court continued the hearing upon the promise by the county's attorney that the discovery problems would be resolved within a month.[44] Then, the county's attorney cited budgetary restraints as the basis for failure to comply and even failed to submit a proposed order following the second hearing.[45] The court struck its answer.[46]

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[39] R. p. 36.
[40] 379 S.C. 462, 662 S.E.2d 830 (Ct. App. 2008).
[41] *Id.*
[42] 379 S.C. at 464, 662 S.E.2d at 831.
[43] *Id.*
[44] *Id.*
[45] 379 S.C. at 465, 662 S.E.2d at 831.

The trial court described three explicit factors it considered in reaching its decision: (1) whether a sanction less than striking the Answer would achieve justice; (2) whether the County's failure to make any attempt to comply with the court order blatantly violated Rule 37(b)(2), SCRCP, such that the integrity of the judicial system was implicated; and (3) whether the delay of 7 ½ months after the issuance of the order compelling discovery further prejudiced the plaintiff's right to have his claim heard.[47]

Under *McNair*, Judge Lee concluded that the Appellants' delay resulted in a standstill of the case's progression, the "total inability of the [Respondent's] counsel to further her client's interests," the effect of which substantially prejudiced her case.[48] In effect, the trial court selectively applied the analysis of *McNair* to hold that a delay in responding to discovery, and nothing more, permitted it to strike Appellants' answer. This, however, fails to weigh all of the required factors and concerns.

The factors considered by the *McNair* court seek to measure the degree of prejudice at issue. This is evidenced by the *McNair* court's reasoning that the "delay caused by defendant is a *further* prejudice to plaintiff's right to have his claim heard," and the court's consideration of whether *any lesser sanction could achieve*

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[46] *Id.*
[47] 379 S.C. at 467, 662 S.E.2d at 832.
[48] R. pp. 34, 36.

justice.[49] In other words, in *McNair*, several concerns were reviewed to assess the cumulative prejudice before the court to make its decision.

Here, though this does not excuse lapses in the production of documents, the trial court never evaluated the significance of specific documents or categories of documents that Respondent claimed not to have vis-a-vis (a) any depositions she intended to take,[50] and ultimately (b) the issues to be tried. Instead, to support its finding and conclusion that Respondent had suffered prejudice from the production delay, the trial court merely stated that "memories fade, witnesses disappear, and critical documents can be lost and/or destroyed." However, the trial court never found that, *in this case*, any delay in the production of documents actually has resulted in (a) any witness' failure to recall facts once known, (b) the inability to locate any witnesses, or (c) the loss or destruction of any critical documents. In short, the trial court failed to support its finding of prejudice, a crucial finding that led to the extreme sanction of entry of default.

In addition, at no point did the trial court take into account whether lesser sanctions could achieve justice. Unlike Fairfield County's complete lack of involvement in discovery, Appellants made several attempts to abide by the order compelling discovery in this healthcare case, arguably one of the most heavily regulated areas of law.[51] In cases lacking such severe misconduct, the appellate

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[49] 379 S.C. at 467, 662 S.E.2d at 832.

[50] *See* R. p. 443.

[51] To be clear, the South Carolina appellate courts have upheld cases similar to *McNair* where delay was considered. But in each of those cases, like *McNair*, the responding party *purposefully* disregarded the court's order—*making no attempt whatsoever to comply*—or even overtly attempting

courts have reversed trial courts when a sanction amounting to entry of default or dismissal was too severe.[52] Again, the degree of prejudice is key: whether the potency of the sanction squares with the *degree* of consequential prejudice to the party harmed. Or, as this Court once plainly stated: "The sanction should be a rifle-shot, not a shotgun blast. In the instant case, the sanction was a hydrogen bomb. The defendants were denied the opportunity to present a defense."[53]

Here, Appellants lost their entire ability to present a defense after having produced over twenty-one thousand pages of production in an effort to fully comply with Judge Dickson's order.[54]

CONCLUSION

Admittedly, Appellants failed to comply with the court's order compelling discovery in the time allowed. But at no point have Appellants completely ignored their duty to engage in discovery. In fact, Appellants have produced roughly 21,000

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to sabotage the opposing party's case by destroying relevant documents. *See, e.g., Davis*, 409 S.C. at 283, 762 S.E.2d at 544 (striking the responding party's answer after it repeatedly failed to comply with various orders of the trial court); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257–58, 594 S.E.2d 541, 548 (Ct. App. 2004) (striking the responding party's answer after intentionally defying the court's order and willfully destroying evidence); *Griffin Grading*, 334 S.C. at 199, 511 S.E.2d at 719 (striking the responding party's answer for failure to comply with four prior orders compelling discovery).

[52] *See, e.g., Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394–95, 396 S.E.2d 369, 371–72 (1990) (reversal of a trial court's dismissal of plaintiff's complaint for failure to comply with a court order to notify defendants before removing asbestos); *Orlando v. Boyd*, 320 S.C. 509, 511–12 466 S.E.2d 353, 354–55 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of intentional misconduct when exclusion amounted to a judgment of default or dismissal); *Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 129–30, 378 S.E.2d 599, 600–01 (1989) (holding a $100 fine, not dismissal with prejudice, was the appropriate sanction for the eight plaintiffs' failure to answer interrogatories even despite warnings from the trial court and prior sanctions because the requesting party had not been prejudiced by not receiving formal responses to the interrogatories).

[53] *Balloon Plantation*, 303 S.C. at 154, 399 S.E.2d at 440.

[54] R. p. 59, lines 15–19.

documents in their attempts to comply. This fact, standing alone, should not have triggered—as it did—the harshest sanction at the court's disposal.

In sum, the trial court failed to demonstrate the reasonable factual support necessary to reach a finding of prejudice. And, in failing to support that finding, the trial court struck Appellants' answers, denying them the opportunity to try the issue of liability, without considering whether lesser alternatives could be harnessed to achieve the ends of justice. These shortcomings are errors of law, and thus, render the trial court's order striking Appellants' answers an abuse of discretion.

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

December 20, 2018

Kate Cappelmann
Lewis Brisbois Bisgaard & Smith LLP
1180 Peachtree Street, NE
Suite 2900
Atlanta, Georgia 30309
(404) 348-8585
Attorney for Appellants