

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Jun 11 2021

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Keith Kelly, Circuit Court Judge

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Appeal No.: 2020-001695  
(Filed February 11, 2021, Rehearing Denied May 12, 2021)

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Mark Douglas Hill, III, by and through his  
Duly appointed Guardian ad Litem, Helen  
Kaci Hill, Plaintiff..... Respondent,

v.

Cranston Print Works Company d/b/a  
Cranston Trucking Company, Ryder Truck  
Rental, Inc., Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E.  
Burdette, Defendants,

And

Gregory Jones, Sr., as the Father and Duly  
Appointed Personal Representative of the  
Estate of Jessica Dawn Jones, Deceased, Plaintiff, .....Respondent,

v.

Cranston Print Works Company d/b/a  
Cranston Trucking Company, Ryder Truck  
Rental, Inc., Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E.  
Burdette, Defendants,

of whom Cranston Print Works Company d/b/a  
Cranston Trucking Company, Optimum Staffing, Inc., d/b/a  
Optimum Logistic Solutions, and Jason E. Burdette are the ..... Petitioners.

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**PETITION FOR A WRIT OF CERTIORARI**

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## INDEX

CERTIFICATE OF COUNSEL .....	1
QUESTIONS PRESENTED .....	1
STATEMENT OF THE CASE .....	1
FACTUAL BACKGROUND .....	2
ARGUMENTS:	
I.    Did the Court of Appeals err in holding that the underlying orders on appeal are not immediately appealable relying on <i>Ex parte Whetsone</i> , 289 S.C. 580, 347 S.E.2d 881-82 (1996) and instead recognize that certain discovery orders are immediately appealable absent requiring a party to place themselves in contempt.....	3
CONCLUSION.....	8

## **CERTIFICATE OF COUNSEL**

Counsel for Petitioner Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions certifies the Petition for Rehearing was made (Appx. 29-35) and ruled upon by the Court of Appeals on May 12, 2021 (Appx. 1-2).

### **QUESTIONS PRESENTED FOR REVIEW**

- I. Did the Court of Appeals err in holding that the underlying orders on appeal are not immediately appealable relying on *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-82 (1986), and instead recognize that certain discovery orders are immediately appealable absent requiring a party to place themselves in contempt?

### **STATEMENT OF CASE**

On January 8, 2021, Petitioner Optimum and Petitioner Cranston filed a Notice of Appeal, appealing the discovery order issued by the Circuit Court on October 8, 2020. (Appx. 190-195). On January 11, 2021, Respondents filed a Motion to Dismiss the Appeal. (Appx. 199-206). On January 21, 2021, Petitioner Optimum filed a Return in Opposition to Respondents' Motion to Dismiss Appeal. (Appx. 111-117). On January 25, 2021, Respondents filed a Reply to Appellants' Returns to Respondents' Motion to Dismiss. (Appx. 104-110). On February 11, 2021, the Court of Appeals filed an Order dismissing the appeal stating, "Because the underlying orders on appeal are not immediately appealable, Respondents' motion to dismiss is granted. *See* S.C. Code Ann. § 14-3-330 (2017); *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-82 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly 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.”” (Appx. 3-4). On February 19, 2021, Petitioner Optimum Staffing filed a Petition for Rehearing. (Appx. 29-35). On April 13, 2021, Respondents filed a Reply to all Petitioners’ Petitions for Rehearing. (Appx. 18-26). On April 20, 2021, Petitioner Optimum filed a Reply to Respondents’ Return to the Petition for Rehearing. (Appx. 8-11). On May 12, 2021, the Court of Appeals Denied the Petition for Rehearing. (Appx. 1-2).

### **FACTUAL BACKGROUND**

On February 1, 2019, a collision occurred on Interstate I-85 in Spartanburg, South Carolina between Respondents’ vehicle and a truck being driven by Jason E. Burdette (“Petitioner Burdette”). At the time of the accident, Burdette was employed by Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions (“Petitioner Optimum”) and was driving a truck for Cranston Print Works Company d/b/a Cranston Trucking Company (“Petitioner Cranston”). Respondents filed claims against various parties including Burdette. (Appx. 44-64).

Burdette was deposed on March 20, 2020. (Appx. 78-101). Thereafter, Respondents propounded Request for Admission on Burdette, to which Burdette timely responded on May 19, 2020. (Appx. 208-211). Dissatisfied with Burdette’s responses, Respondents moved to have certain matters deemed admitted, which Burdette opposed.<sup>1</sup>

After a hearing on various motions, the Circuit Court ordered, *inter alia*, that a number of Burdette’s responses to Request for Admission be revised or “re-answer[ed]” based on his deposition testimony. However most if not all of the responses targeted by the Circuit Court are supported either by Burdette’s deposition testimony, other evidence submitted to the court, or both.

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<sup>1</sup> At that time, all Petitioners were represented by the same counsel. Separate counsel was engaged for Optimum in December 2020.

Despite Burdette's opposition, and despite the imprecise wording of the various Requests for Admission, the Circuit Court on October 8, 2020, took the remarkable step of ordering Burdette to rewrite or "re-answer" his May 19, 2020, responses to Respondents' Request for Admission Nos. 2, 4, 5, 7, 8, 10, and 11, accepting Respondents' argument that those responses were "directly contradicted" by his prior deposition testimony. (Appx. 217-223). On December 18, 2020, the Circuit Court also denied Burdette's and other Petitioners' motion to Alter or Amend. (Appx. 226-232).

### **ARGUMENTS**

Pursuant to Rule 242, SCACP, Petitioner Optimum hereby petitions this Court for a writ of certiorari to review the Court of Appeals' dismissal of the appeal. The Court of Appeals erred in dismissing the appeal because it deemed the appeals interlocutory in nature. However, this appeal falls within the category of permissible interlocutory appeals as it raises an issue that directly affects Petitioner Optimum's defenses in the underlying case. More specifically, and as is explained below, the Circuit Court's October 19, 2020, Order improperly invades the role of the jury as the factfinder.

Burdette was deposed on March 20, 2020. (Appx. 78-101). Thereafter, Respondents propounded Request for Admission on Burdette, to which Burdette timely responded on May 19, 2020. (Appx. 208-211). Dissatisfied with Burdette's responses, Respondents moved to have certain matters deemed admitted, which Burdette opposed.

"Any party aggrieved by an order may appeal." *See* S.C. Code Ann. § 18-1-30. A party is aggrieved by an order when the order when the order "operates on his rights of property or bears upon his interest..." *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). Also, an order affects a substantial right when it, among other things, strikes out a defense such that the defense

is lost. *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) An Order that effectively forecloses a party from contesting portions of an opposing party's case on the merits affects a substantial right and is immediately appealable. *McLaughlin v. Strickland*, 279 S.C. 513, 516, 309 S.E. 2d 787, 790.

In the Complaints in the instant case, the Plaintiff in both cases have alleged Optimum: 1) failed to properly train its driver; 2) failed to properly supervise and monitor its driver; and 3) violating federal regulations including, but not limited to, 49 CFR Sections 350-359. In other words, Plaintiff in both cases is looking to hold Optimum vicariously liable for Burdette's actions. To concede that Optimum is not giving up a substantial right or interest by requiring Burdette change his responses to Requests to Admit conforming to the evidence as the Circuit Court believes the way it should is fundamentally unfair and invades the interest of Optimum. *See Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), where the Court of Appeals determined the sanction against one defendant affected (both positively and negatively) another defendant.

Optimum is an aggrieved party. However, Optimum was not a party to whom the discovery orders were directed, and its current counsel entered their Notice of Appearance on December 9, 2020, after Circuit Court's October 8, 2020, initial Order, directing Burdette to re-answer Request to Admit. Counsel for Optimum had no choice but to appeal because if it failed to do so would result Circuit Court's orders as being deemed as law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) ('An unappealed ruling is the law of the case and requires affirmance.') Optimum submits to this Court that the Circuit Court's seemingly unilateral decision to determine the creditability of Burdette by ordering him to change his responses to Plaintiff's Request to Admit was premature because discovery has not been

completed, and at that time no depositions of Optimum personal have been taken, and his Orders have essentially undermined what a trial by a jury is supposed to do, which is to weigh the creditability of witnesses presented by each party. Weighing the evidence is a function reserved to the factfinder. *See, generally, Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010) (“[t]he jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial...”)

As the Requests for Admission that specifically relates to Optimum and the specific requests that the Circuit Court ordered Burdette to re-answer, Request for Admission No. 8 sought an admission that, “Defendant Jason E. Burdette was never given any safety instruction or underwent any safety training while employed by Defendant Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions, prior to February 1, 2019,” to which Burdette responded, “**Denied.**” The Circuit Court ordered Burdette to “re-answer” his admission to conform to page 71 of his deposition transcript. However, while Burdette testified that Optimum itself did not provide any training, Request for Admission No. 8 is not limited to Optimum and, in fact, Burdette testified that he attended safety meetings with another employer he was leased to on behalf of Optimum, Diamond Hill Plywood. (Appx. 199-120). As a result, Burdette’s response to Request for Admission No. 8 as written, is correct. Request for Admission No. 7 sought an admission that, “Defendant Jason R. Burdette was neither provided an employee handbook nor a safety handbook by Defendant Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions prior to February 1, 2019,” to which Burdette responded, “**Denied.**” The Circuit Court ordered Burdette to “re-answer” his admission to conform to pages 77 and 78 of his deposition transcript. However, there is documentation in his employee file kept by Optimum that showed Burdette signing for the handbook. It is reasonable to assume that Burdette could have forgotten that he received the

employee handbook. If there is a question of fact as to whether Optimum provided the employee handbook to Burdette, it should be a question for the jury and Burdette should not have to be required to admit that Optimum did not provide him an employee handbook where there is documentation to the contrary. Request for Admission No. 10 sought an admission that, “Defendant Jason E. Burdette was never advised, either orally or in writing, by any individual employed by Defendant Optimum Staffing Inc. d/b/a Optimum Logistic Solutions of any corporate policies or procedures prohibiting the use of cellular phones while driving trucks as an employee of Defendant Optimum Staffing d/b/a Optimum Logistic Solutions prior to February 1, 2019,” to which Burdette responded, “**Denied.**” The Circuit Court ordered Burdette to “re-answer” his admission to conform to pages 77 and 78 of his deposition transcript.

By affirming the Circuit Court’s original October 8, 2020, would be a drastic step as it would essentially preclude Optimum from introducing evidence to rebut these matters. Rule 36(b) SCRCF, states an admitted matter is “conclusively established” unless the court permits withdrawal or amendment. Essentially by requiring Burdette to amend his answers to the Request to Admit, the Circuit Court is requiring Optimum to admit factual issues that are not correct or to concede issues that are to the detriment to the defense of Optimum, which are not clearly established by law or fact. Nothing in Rule 36 authorizes a court to order a party to revise a response based on the Circuit Court’s view of the evidence.

Burdette has consistently taken the position that his answers to the Request to Admit were not inconsistent with his deposition testimony, or that where there was an inconsistency, it was the deposition testimony that was inaccurate. Nonetheless, the Circuit Court ordered the answers be amended.

On appeal, Respondents aver that Burdette is not precluded “from maintaining a denial to the request, denying the request as written, or offering a qualified denial.” If this is truly the outcome that Respondents sought and that the discovery Order intends, then amending the responses appears an exercise in futility, particularly in so much as Respondents argue that Burdette can simply maintain his denial in the amended answers. While Respondents state that the discovery Order is providing Burdette “the opportunity to amend his prior answers to the request to admit,” the reality is that the Order is mandating amendment of Burdette’s answers.

Respondents further contend that Petitioner Optimum is disingenuous in its argument that its position is unique in that it is unable to either comply or face contempt in order to appeal, since the discovery Order is directed to Burdette, but the Order will nonetheless affect Optimum’s defenses at trial. Respondents point to the prior representations of the various defendants by a single attorney as evidence that counsel for all of the parties could have refused to comply and faced contempt, as if then Petitioner Optimum would be in any different position than it is presently. However, it is not counsel that would be held in contempt; it would be the offending party. See Rule 36, SCRCP; Rule 37(b)(2) and 37(c), SCRCP. Thus, no matter what action Burdette took in response to the discovery Order, Optimum would remain aggrieved by the discovery Order that, contrary to Respondents’ repeated assertion otherwise, prematurely, and erroneously requires that Burdette amend his answers to the Request to Admit in a particular manner. Optimum will either be prevented from contradicting the admissions or placed in a forced position to appear contradictory to Burdette when, in fact, its defenses with Burdette is unified in most respects.

Cases instructing that a party must “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,” *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), *citing Ex parte Whetstone*, 289 S.C. 480, 346 S.E.2d 881, 882 (1986), all involve a refusal or failure to respond to interrogatories or to produce documents or witnesses for depositions. Those cases do not involve requiring a specific responses to Request for Admissions or a Circuit Court ordering a party to answer Requests for Admission to confirm to its view of the evidence.

Judicial economy would not be served by denying the writ of certiorari, waiting until the trial is completed, and jury verdict is returned and then ordering a new trial because of errors of the Circuit Court, namely by ordering Burdette to re-write is answers to Request to Admit.

This Court should recognize that this appeal raises a novel issue of South Carolina and hold that an order directing a party to rewrite or “re-answer” a request for admission to conform to the Circuit Court’s view of the evidence is immediately appealable, invades the province of the jury, and exceeds the court’s authority.

### **CONCLUSION**

For all the reasons stated herein, Petitioner Optimum respectfully requests that this Court grant its Petition and reverse the Court of Appeals’ decision dismissing this appeal. Furthermore, Petitioner Optimum respectfully request this Court to hold that a discovery order compelling particular answers to a request for admission is immediately appealable because it affects a substantial right.

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