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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case. No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin…….Appellant,

v.

Bridget D. Inman, Muriel C Kennedy, and Patricia Clarkin Smith……. Respondents,

And

Bruce A. Berlinsky, Intervenor.

FINAL REPLY BRIEF OF APPELLANT TO BRUCE A BERLINSK'S RESPONSE

July 5, 2021

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INTRODUCTORY STATEMENT

In this Reply Brief, Appellant addresses and replies only to those allegations and issues raised directly in the substance of Respondent Bruce A. Berlinsky's (hereinafter "Berlinsky") initial Brief. Appellants would assert that any issue or allegation raised in Appellants' Initial Brief, but not address by Respondent Berlinsky in the body of his initial brief or addressed with only conclusory remarks is deemed conceded to and abandoned. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) ("issues not argued in the brief are deemed abandoned); *R& G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d, 684 (Ct. App 2000) (fn. 8: "she fails to argue the issue in the body of the brief and it is therefore deemed abandoned."); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003) (fn. 3: "Since the County failed to argue this issue in the body of its brief, the issue deemed abandoned."); *Muir v. CR Bard, Inc.*, 336, S.C. 266, 519 S.E.2d 583 (Ct. App.1999) (conclusory arguments are deemed abandoned); *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (an issue is deemed abandoned on appeal and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority). In this case, Berlinsky in his response brief did not address most of the issues or allegations raised by Appellant in its initial brief including his failure to address the nature of the discovery sought, the discovery posture of the case, the timeliness of compliance, and the willfulness of noncompliance. Moreover, Berlinsky made only a short, conclusory statement without supporting authority as to the prejudice suffered by Appellant.

ARGUMENT

I. A COURT MUST CONSIDER THE FOUR FACTORS IN *RICHARDSON* WHEN DETERMINING WHETHER DISCOVERY SANCTIONS ARE APPROPRIATE AND THE COURT ABUSED IT DISCETION BY FAILING TO CONSIDER AND ADDRESS SAID FACTORS.

Berlinsky falsely asserts that prior to taking into to consideration the four factors in *Richardson* the court first make a determination of whether or not it is even appropriate to sanction a party or counsel. In determining whether to impose discovery sanctions a court must consider four factors: "the nature of discovery sought, the discovery stage of the case, willfulness, and the degree of prejudice." *Richardson v. TWENTY-ONE THOUSAND,* 430 S.C. 594, 600, 846 S.E.2d 14 (Ct. App. 2020). "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. A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Teseniar v. PROF'L PLASTER & STUCCO*, 407 S.C. 83, 94, 754 S.E.2d 267 (Ct. App. 2014).

Berlinsky incorrectly asserts that "Appellant has presented no evidence that the trial judge abused his discretion. Here Appellant asserted factual allegations regarding all of the factors in its motion filed April 15, 2019, and raised those issues before the court during the hearing June 24, 2020 (R.pp. 159-170, 370-376, 607-610, 543-559, 214-242). This Court did not file its opinion in *Richardson* until June 17, 2020, and Appellant cited to Richardson in its motion to reconsider the order denying sanctions (R.pp. 214-242). The Court's order denying the motion for sanctions, the order denying Appellant's motion to reconsider, and the two transcripts of hearings do not evidence that the court took into to consideration any of the four factors in *Richardson.* (R.pp. 19-22, 369-378, 381-406). Therefore, Appellant has presented evidence that the court abused its discretion in denying Appellant's motion for sanctions.

In his brief Berlinsky falsely asserted that he personally provided Appellant all of the information sought in discover and ordered to be provided by the court in the Order to Compel Discovery. Berlinsky has provided no evidence to support this assertion. This conflicts with the affidavit testimony of his former client Inman, as well as his own testimony during the motion hearing where he noted that Mr. O'Connell, upon being substituted for Berlinsky as counsel for Inman, thereafter, produced much of the information ordered by the Compel Order. (R.pp. 478-492; 372 lines 7-12). This chart identifies dates Inman produced documents and responses pursuant to the Compel Order.

1/26/18 Plaintiff sent Discovery Requests Inman

3/20/18 Plaintiff filed a Motion to Compel Discovery

6/19/18 Order Compel filed

1. Inman produced supplemental responses to requests to admit 1,2,5 on 11/13/19 through Affidavit Testimony filed with court.

2. Inman produced supplemental responses to interrogatories and/or production 8, 10, 12, 13, and 14 on the following dates:
   a. #8 on 11/13/19
   b. #10 on 4/5/19
   c. #11 on 7/24/18
   d. #'s 12, 13, 14, which involve the location of the Proceeds of Sale. Partial compliance 4/5/19, deposition testimony 4/8/19, full compliance not until 11/13/19 when Inman produced the 9/2/17 Transfer check.

Berlinsky's own client Inman in her Affidavit testimony testified that she provided Berlinsky with a copy of the 9/2/17 Transfer Check in 2017 (R.pp. 478-492). Berlinsky could have provided Appellant with a copy of the check in response to Appellant's January of 2018 discovery requests but he did not. Berlinsky could have provided a copy of the check within fifteen days of the Order to Compel but he did not. Berlinsky could have provided a copy of the check in April of 2019 when he provided the Apple Stock Statements but he did not. Berlinsky could have provided a copy of the check after Inman's April 8, 2019 deposition, when Inman for the first time stated the

check existed, but he did not. Berlinsky could have provided a copy of the check after Appellant filed the motion for sanctions but he did not. In fact, Berlinsky never provided Appellant a copy of the check though the record is clear it was in his possession the entire time. In this case the record is clear that despite repeated requests by Appellant to Berlinsky that he comply with discovery on behalf of Inman, Berlinsky never did so. With regard to most of the discovery addressed in the Order to Compel his partial compliance did not even occur until eight months after the Order to Compel was filed. (R.pp. 159-170, 478-492, 560-606, 369-378, 381-406 , 607-610, 543-559, 54-57) As Appellant has noted, but for this willful non-compliance with discovery Appellant would have already tried this case in 2019. Instead, Appellant still has not had its day in day in Court and likely will not have an opportunity to do so until 2022. Appellant has been severely prejudiced by Inman and her counsel Berlinsky's willful noncompliance with discovery in this matter and it was an abuse of discretion for the Court to deny Appellant's motion for sanctions.

CONCLUSION

Based upon the foregoing arguments, the arguments contained in Appellant's Initial Brief and the lack of arguments set forth in Berlinsky's initial response brief, Appellant would respectfully assert that this Court should undertake appellate review of the order denying Appellant's motion for sanctions and reverse the lower court's order denying sanctions.

SIGNATURE BLOCK TO FOLLOW

RESPECTUFLLY SUBMITTED,

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