

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2021-000613

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.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions (hereinafter “Optimum”) submits the following reply to Respondent’s Return to the Petition for a Writ of Certiorari:

- I. Optimum cannot comply with the Circuit Court Orders issued in this case because it was not a party to the Orders; therefore, it could not adhere with the requirements of *Ex Parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881-82 (1986) and had no choice but to appeal because if it failed to do so would result in the Circuit Court Orders as being deemed the law of the case.**

Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881-82 (1986) states (“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.”).

S.C. Code Ann § 18-1-30 also states “Any party aggrieved by an order may appeal.” A party is aggrieved by an 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). As already pointed out, Optimum is an aggrieved party, but was not a party to whom the discovery orders were directed and could not refuse to comply and be held in contempt. Optimum had no choice but to appeal because if it failed to do so would result in the Circuit Court’s orders as being deemed as the law of the case. “An unappealed ruling is the law of the case and requires affirmance.” *Shirley’s Iron Works, Inc v. City of Union*, 403 S.C. 560, 743 S.C. S.E.2d 778 (2013).

Respondents have made great mention that the Circuit Court Orders are interlocutory in nature and not directly appealable; however, have offered no rationale or explanation on what a Defendant should do when a discovery order is not directed towards them but affects a substantial right.

II. Complying with the Circuit Court Orders affects a substantial right of Optimum and Optimum would suffer irreparable harm if Burdette were forced to re-answer the Requests to Admit.

By affirming the Circuit Court's original October 8, 2020 Order would be a drastic step as it would essentially preclude Optimum from introducing evidence to rebut these matters. Rule 36(b) SCRPC, 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, Optimum is being forced as a non-party to the Request for Admission to admit factual issues that are inaccurate or concede issues that are to the detriment to the defense of Optimum, which are not clearly established by the laws or facts applicable to this case. The Circuit Court in this instance has abused its discretion because it did not take into account what affect the Discovery Orders would have on other parties to this action. An abuse of discretion may be found by an appellate court with respect to discovery sanctions where the appellant shows "that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and therefore; amounted to an error of law." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543.

Respondents have consistently argued that Burdette is not precluded "from maintaining a denial to the request, denying the request as written, or offering a qualified denial." The reality is that the Circuit Court Discovery Orders are mandating amendment of Burdette's answers. In part, the Discovery Order dated October 8, 2020, reads:

"The Court hereby Orders that each of the aforementioned Requests for Admission be re-answered in light of the sworn deposition testimony of Defendant Burdette, and that Defendant Burdette sign and attach a verification pursuant to Rule 11(c) of the South Carolina Rules of Civil Procedure when providing the new answers within ten (10) days."

In essence, Burdette is being Ordered to re-answer Request to Admit that he has already answered to conform to how the Circuit Court sees the evidence. This affects Optimum because

Optimum now in many circumstances has been put in a position to have to prove a negative if Burdette's responses to the Request to Admit become the law of the case. Burdette's, Cranston's, and Optimum's defense are aligned in this case, and it appears that Respondents have gone to great lengths to attempt to make it look like each interests are divergent when that is not the case. Optimum would submit that Respondents have stooped to this level because the overall liability in this case is indeed questionable. It is the Respondents' responsibility to prove their case by the preponderance of the evidence and Petitioner Optimum should not have to overcome the burden of refuting or conforming to the evidence as the Circuit Court fees fit as it relates to Burdette's deposition testimony. As what has been stated previously, the Circuit Court's unilateral decision to determine the creditability of Burdette by ordering him to change his responses to Plaintiff's Request to Admit is procedurally improper because it has undermined what a trial by 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...”). Optimum submits the Circuit Court is overstepping the province of the jury who is the ultimate factfinder. Burdette's deposition testimony is Burdette's deposition testimony, and it was unnecessary for Respondent to serve Request to Admit, and it was unheard of for a Circuit Court to Order Burdette to re-answer Request to Admit conforming to the Circuit Court's view of the evidence.

III. Optimum maintains this appeal is not frivolous as Respondents maintain and submits it is merely attempting to clarify what a Defendant is supposed to do when a discovery order affects a substantial right but where the discovery order is not directed to the particular Defendant.

Respondents have stated that the underlying cases were placed on the status roster for November 23, 2020, and Petitioners Counsel agreed to place the Jones matter on the date certain

roster on the date certain roster for the term of court beginning April 5, 2021. Counsel for Optimum was not counsel at this date and had no input whether to agree or not agree to this date certain date.

Optimum submits this appeal is not frivolous as Courts in this State have not dealt with the novel issue of what a party should do when a party is not the subject of a discovery order and therefore cannot comply with the procedures set forth in *Ex Parte Whetstone*, but the results of the discovery order affect a substantial right of the party who is not subject to the discovery order. *Ex Parte Whetstone* dealt with the procedures concerning refusal or failure to respond to interrogatories or to produce documents or witnesses for depositions, not with involving requiring specific responses to Request for Admissions or a Circuit Court ordering a party to answer Request for Admission to conform to its view of the evidence. Optimum has a good faith basis to pursuing this appeal.

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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