RECEIVED
Jul 12 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Appeal No. 2021-000613

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

and

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

PETITIONER BURDETTE'S REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

McAngus Goudelock & Courie

Geoffrey W. Gibbon
P.O. Box 2980

Greenville, South Carolina 29602
(864) 239-4000
ggibbon@mgclaw.com

Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com
Counsel for Petitioner Jason E. Burdette

Other Counsel of Record:

Alexander P. Lewis, Esq.
W. Blake Cummings, Esq.
CUMMINGS & LEWIS, LLC
P.O. Box 5766
Spartanburg, South Carolina 29304
(864) 573-9688

Alex.lewis@cummingslewis.com
Blake.cummings@cummingslewis.com
Patrick E. Knie, Esq.
PATRICK E. KNIE LAW OFFICES
250 Magnolia Street
Spartanburg, South Carolina 29306
(864) 582-5118
pknie@knielaw.com
Counsel for Respondents

T. David Rheney, Esq.
William T. Young, III, Esq.
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589, F.S.
Greenville, South Carolina 29603
(864) 271-9580
drheney@gwblawfirm.com
byoung@gwblawfirm.com
Counsel for Petitioner Cranston Print Works Company d/b/a Cranston Trucking Company,
Robert M. Peele, III, Esq.

COLLINS & LACY, P.A.
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
rpeele@collinsandlacy.com
Counsel for Petitioner Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions

Petitioner Jason E. Burdette hereby replies to Respondents' Return in opposition to his Petition for a writ of certiorari.[1] Respondents make a few arguments that they then repeat over and over in their effort to convince this Court to turn a blind eye to the serious issues raised by Petitioners. In truth, however, Respondents' arguments gain no strength through repetition. Instead, the fact that they repeat the same objections over and over indicates they have run out of salient arguments against the Court hearing and resolving this important and novel issue of law.

First, Respondents lean heavily on the undersigned's candid acknowledgment that an appeal of a discovery order generally is considered interlocutory, carefully ignoring the existence of permissible interlocutory appeals, which are authorized by statute and supported by case law. *See*, S.C. Code Ann. § 14-3-330 (providing for appeals from interlocutory orders that involve the merits and/or affect a substantial right); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) "[a]n order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby *preventing the issue from being litigated on the merits*, and preventing the party from seeking to correct any errors in the order during or after trial") (emphasis added); *McLaughlin v. Strickland*, 279 S.C. 513 at 516, 309 S.E.2d 787, 790 (Ct. App. 1983) (allowing appellant to contest a consent to adoption that did not comport with his intentions, which simply required the respondent to prove her case below). Thus, simply stating that the appeal is interlocutory answers only part of the question, and Respondents have not and cannot show that the instant appeal is not a

[1] Burdette joins in and adopts by reference the arguments raised in Petitioners Cranston's and Optimum's replies, to the extent not inconsistent herewith.

permissible interlocutory appeal for the simple reason that Petitioners have shown that the Orders at issue affect a substantial right.

Next, Respondents repeat, as though it is a mantra, the accusation that neither Burdette nor the other Respondents have clearly or "actually articulated what or how that substantial right or defense would be affected." Burdette has explained in detail that matters admitted in response to a request for admission are "conclusively established" and are considered a "judicial admission." Respondents studiously ignore the very nature of an answer to a request for admission, and attempt to place them on the same evidentiary footing as deposition testimony or the written response to an interrogatory. Without going into extensive detail, Burdette refers to his Petition at pp. 7-9, and notes that Rule 36(b) provides that "[a]ny matter admitted under this rule is *conclusively established*," Rule 36(b), SCRCP (emphasis added); *see also Airco Indus. Gases, Inc. Div. of BOC Group, Inc. v Teamsters Health & Welfare Pens Fund*, 850 F.2d 1028, 1036 (3rd Cir. 1988) (a response to a request to admit is comparable to "[a] judicial admission, deliberately drafted by counsel for the express purpose of limiting and defining the facts in issue, [and] is traditionally regarded as conclusive").[2]

Fundamentally, as was the case in *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), which addressed the issue of a party's right to choose counsel, here the Orders under appeal "implicitly fall[] within the statutory definition of a substantial right under Section 14-3-330(2)(a)." Given the binding nature of answers to

[2] Notes to Rule 36 explain that "[t]his is the language of current Federal Rule 36." Rule 36, SCRCP, Notes; *see also Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 649, 579 S.E.2d 151, 156 (Ct. App. 2003) (the federal rule on requests "for admissions is substantively similar to our rule").

requests for admission, the result of Burdette complying with Orders could, in effect, "determine the action and prevent a judgment form which an appeal might be taken …. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect [Burdette's] interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from" Burdette's re-written answers to Respondents' Requests for Admission at issue here. *See Hagood*, 362 S.C. at 195, 607 S.E.2d at 709. Here, as was the case in *Hagood*, Burdette "would find it difficult or impossible to show prejudice resulting from" the Orders during a later appeal. 362 S.C. at 195, 607 S.E.2d at 709. Stated differently, unless the jury specifically found that the re-written answers to these specific Requests for Admission "tipped the scales" in Respondents' favor, it would be extremely difficult or impossible to show the Orders were prejudicial. Furthermore, because this discovery issue involves factual determinations, Burdette must appeal it now or any later challenge likely will be deemed waived. *See Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) ("Where no exception is taken to findings of facts or conclusions of law, they become the 'law of the case'").

Respondents argue repeatedly and misleadingly that Burdette simply can "maintain[] a denial to the request, deny[] the request a written, or offer[] a qualified denial." What Respondents shrewdly omit is that Burdette already has denied the Requests for Admission as they were written—responses that Burdette maintains are true and correct and fully aligned with his deposition testimony—but his denials did not suit Respondents' or, apparently, the Circuit Court's view of his deposition testimony.

Any ambiguity or confusion caused by the wording in the Requests for Admission lies with Respondents, whose Motion to Deem Certain Matters Admitted is nothing more than an attempt to lock Burdette into specific responses that will be favorable to them and that will be binding at trial. Contrary to Respondents' unsupported assertion that "the real party in interest," whomever that cryptic person or entity may be, "was attempting to use Requests for Admission to change Burdette's prior sworn testimony that was unhelpful to the other Petitioners," (Resp. Return p. 8),[3] it is Respondents who are attempting to use their unartfully drafted Requests for Admission and their July 16, 2020 Motion to Deem Certain Matters Admitted to revise Burdette's deposition testimony to better support their claims.[4] Burdette's deposition testimony is what it is. Like many of Respondents' arguments, their attempts at obfuscation are only semi-opaque so that their effort to establish favorable facts via demanding specific responses to their Requests for Admission is apparent.

Respondents repeatedly claim that the Circuit Court did not invade the province of the fact finder because "the Orders on their face" do not contain any "findings of fact, and make no credibility determinations." However, the October 8, 2020 Order held that, "[i]n reviewing the sworn deposition testimony of Defendant Burdette and comparing it to Answers that were provided on Defendant Burdette's behalf to the Plaintiffs' First Set of Requests for Admission the Court notes *significant discrepancies* between the sworn testimony and the Answers to the Requests for Admission." The Circuit Court also found,

[3] Respondents' entirely unsubstantiated accusations regarding the prior joint representation of all three Petitioners are unwarranted and uncalled for.

[4] Patently, Burdette is not under any obligation to re-write Respondents' Request for Admissions for them so that they more closely track his deposition testimony.

as a matter of "*fact* that the testimony under oath was directly contradicted by the unqualified denials of Defendant Burdette." (Appx. p. 250) (emphases added). In other words, the Circuit Court reviewed Burdette's deposition testimony, compared it to his responses to Respondents' requests for admission and made a *factual determination* that *significant discrepancies* existed between the two. Similarly, on rehearing, the Circuit Court "determined that Burdette's Answers to Requests for Admission that were expounded upon him were directly in opposite to his earlier sworn deposition testimony." (Appx. p. 259). It is apparent the Circuit Court determined the deposition testimony was the "correct" version of facts, meaning the Circuit Court made a factual determination.

These findings inform the Circuit Court's actual order, which cannot reasonably be construed as merely an "invitation" or "offer" to Burdette to amend his answers "in whatever manner he chooses," as Respondents now suggest. There is no language in the Orders that suggests they simply present an "offer" or an "opportunity" as opposed to a judicial direction that Burdette conform his responses to Respondents' and the Circuit Court's view of specific pages of his prior deposition testimony.[5] Respondents' strategically myopic view of the language contained in the Orders, as well as the clearly intended effect of the Orders, ignores both the reality of the binding nature of responses to requests for admission and the fact that the Circuit Court ordered Burdette to conform his responses to Respondents' and the Court's view of specifically designated pages of his prior deposition testimony.

[5] Indeed, it is Respondents who are "placing language into the Circuit Court's Orders that simply is not there," (Return, p. 18), not Petitioners.

Respondents argue that the Circuit Court Orders are "allowed under Rule 36(a) where answers are insufficient." However, the Circuit Court did not find found Burdette's responses to be "insufficient." Instead, the Court found they did not conform to the Court's view of Burdette's prior deposition testimony and ordered him to re-write his responses to conform to certain pages of his deposition testimony.

Thus, contrary to Respondents' current suggestion, "what comprises" Burdette's amended or re-written answers is **not** "left to Petitioner Burdette to offer in whatever manner he chooses, so long as he verifies his answers." In other words, had the Orders simply found that Burdette's answers were insufficient and instructed him to amend them, then Respondents' argument might be valid. Frankly, if that were the case, Petitioners would not be before this Court. However, both Respondents and the Circuit Court clearly intend for Burdette to re-write his answers in a manner that conforms to their incorrect view of his deposition testimony, effectively putting words into his mouth and requiring him to admit to assertions that are not true.

Respondents now take the position that it is the requirement that he verify his responses "that is centrally in play." Indeed, if it were true that having Burdette simply verify his former responses is the central issue, there would have been no need for the Circuit Court to order Burdette to re-write or amend his prior answers "to conform to his prior deposition testimony," because the Court simply could have required Burdette to sign a verification. (Appx. pp. 251, 259). Even then, it is highly questionable whether Respondents would have been content with that result, seeing how they initially sought to "*Deem Certain Matters Admitted*." Furthermore, there is no requirement that Burdette personally verify his responses; Rule 36(a) allows for the "written answer or objection" to

be "signed by the party *or* by his attorney," Rule 36(a), SCRCP (emphasis added), which is what Burdette's prior counsel did, in full compliance with the Rules.

Tellingly, Respondents focus on an answer to a Request for Admission—Request for Admission No. 2—that was neither discussed in their July 16, 2020 Motion to Deem Certain Matters Admitted nor addressed in either of the Orders currently on appeal. (Resp. Return pp. 14-15). Apparently, this is Respondents' attempt to fabricate a discovery abuse "defense" of the Orders on appeal. In fact, Burdette's response to Request for Admission No. 2 provided both a detailed objection and an explanation of his partial denial, as is appropriate under Rule 36, SCRCP. Furthermore, the fact that Respondents chose to discuss Burdette's response to Request for Admission No. 2 instead of the Requests for Admission actually addressed by the Court and specifically challenged by Burdette on appeal, *i.e.*, Request for Admission Nos. 3, 5, 5, 8, 10 and 11, (*see* Burdette Pet. pp. 2-5), indicates they recognize that the Circuit Court's treatment of those requests for admission is deeply problematic.

Ultimately, Burdette's Petition raises an important and novel issue of law that this Court must address. Burdette was faced with an untenable choice: either fail to comply with the Orders and be placed in contempt, or comply by re-writing his responses to the Requests for Admission to conform to the Circuit Court's view of his deposition testimony, such that his answers would become binding at trial and, thereby, lose any chance to appeal later. *See Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), *quoting Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881, 882 (1986) (the only options available to a party for responding to a discovery order are to "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"); *see also Walters*, 294 S.C. at 151, 363 S.E.2d at 121 (Ct. App. 1987) (facts that are not excepted to below become the "law of the case" and cannot be challenged on appeal). In light of the facts of this case—where Burdette has to choose between re-writing his answers so that they conform to the Circuit Court's (incorrect) view of his deposition testimony, binding him at trial and losing any right to appeal, or subjecting himself to default in order to appeal—Burdette is faced with an untenable choice. Being placed in contempt is a serious matter, for which serious consequences often attach. *E.g.*, *State v. Bevilazua*, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct. App. 1994) (a finding of "contempt is an extreme measure and the power to adjudge a person on contempt is not to be lightly asserted"). Yet according to the Court of Appeals, Burdette is forced to choose between risking *all* disputed facts being deemed admitted in order to challenge the disputed factual findings improperly made by the Circuit Court.

In addition, being forced to "re-write" answers to requests for admission—which will be treated as judicially binding admissions—in a manner that a court or the other side sees fit compromises the adversary process and improperly allows the Court to usurp the role of the jury. "'The adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute.' [citation omitted] The production of evidence is a function of the advocate and not the judge or jury. Where, as here, the roles of advocate, judge or jury become intermingled, the fundamental basis of our adversarial system is undermined." *Day v. Kilgore*, 314 S.C. 365, 368, 444 S.E.2d 515, 517 (1994). Accordingly, this Court has "restricted the trial judge's power to enter

the realm generally reserved for the advocate." 314 S.C. at 370, 444 S.E.2d at 518. Indeed, while a judge may question a witness during a trial, the judge "must do so in an impartial manner that does not indicate the trial judge's opinion as to any fact or 'have an unintended prejudicial effect.'" 314 S.C. at 369, 444 S.E.2d at 518. This Court must address the issues raised by Petitioners because the Circuit Court clearly has stepped out of its impartial role, engaged in the production of evidence and usurped the role of the jury. Clearly, a judge would be in error to instruct a jury on what testimony to believe from a witness, but that is effectively what has occurred here.

While the options set forth in *Davis* and *Whetstone* may be adequate for orders simply compelling a party to *participate* in discovery, they are woefully inadequate to address discovery orders such as the Orders on appeal, which invade the province of the jury and require a party either to "admit" to facts that simply are not true, or suffer the serious consequences of being placed in default in order to appeal.

CONCLUSION

For the reasons stated herein and in his Petition, Petitioner Jason E. Burdette respectfully requests that this Court grant his Petition and reverse the Court of Appeals' decision dismissing this appeal. In addition, Petitioner Burdette respectfully requests 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.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

July 12, 2021

By: _____

MCANGUS GOUDELOCK & COURIE

Geoffrey W. Gibbon
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000
ggibbon@mgclaw.com

Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com
Counsel for Petitioner Jason E. Burdette

RECEIVED
Jul 12 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

PROOF OF SERVICE

I certify that I have served **Petitioner Burdette's Reply to Return to Petition for Writ of Certiorari** on counsel for Mark Douglas Hill, III, by and through his Duly Appointed Guardian ad Litem, Helen Kaci Hill, and Gregory Jones, Sr., as the Father and Duly Appointed Personal Representative of the Estate of Jessica Dawn Jones, and other counsel of record by emailing it as follows:

Alexander P. Lewis, Esq.
W. Blake Cummings, Esq.
CUMMINGS & LEWIS, LLC
P.O. Box 5766
Spartanburg, South Carolina 29304
(864) 573-9688
Alex.lewis@cummingslewis.com
Blake.cummings@cummingslewis.com

Patrick E. Knie, Esq.
PATRICK E. KNIE LAW OFFICES
250 Magnolia Street
Spartanburg, South Carolina 29306
(864) 582-5118
pknie@knielaw.com
Counsel for Respondents

T. David Rheney, Esq.
William T. Young, III, Esq.
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589, F.S.
Greenville, South Carolina 29603
(864) 271-9580
drheney@gwblawfirm.com
byoung@gwblawfirm.com
Counsel for Petitioner Cranston Print Works Company d/b/a Cranston Trucking Company,

Robert M. Peele, III, Esq.
COLLINS & LACY, P.A.
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
rpeele@collinsandlacy.com
Counsel for Petitioner Optimum Staffing, Inc. d/b/a Optimum Logistic Solutions

July 12, 2021

s/Anna Yeandel

Anna Yeandel
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Petitioner Jason E. Burdette

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

RECEIVED
Jul 12 2021
SC Court of Appeals

July 12, 2021

VIA S.C. COURTS E-FILING & U.S. MAIL
The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Gregory Jones, Sr., as the father and duly appointed Personal Representative of the Estate of Jessica Dawn Jones 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

Civil Action No.:	2019-CP-42-02215 (Spartanburg)
Date of Incident:	February 1, 2019
Carrier Claim No.:	8475923542US
MGC File No.:	2094.20153
Supreme Court No.:	2021-000613

Dear Mr. Shearouse:

Enclosed for filing please find Petitioner Burdette's Reply to Return to Petition for Writ of Certiorari, along with Petitioners' Proof of Service in this matter. A copy of each of these documents is being placed in the mail today.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Alexander P. Lewis, Esq. (*via e-mail only*)
W. Blake Cummings, Esq. (*via e-mail only*)
Patrick E. Knie, Esq. (*via e-mail only*)
Brandt Horton, Esq. (*via e-mail only*)
T. David Rheney, Esq. (*via e-mail only*)

William T. Young, III, Esq. (*via e-mail only*)
Robert M. Peele, III, Esq. (*via e-mail only*)