THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. D. Quattlebaum, Special Referee

Appellate Case No. 2012-213453

Jeff Yelton, ...Appellant,

v.

ScanSource, Inc., ...Respondent.

Appellant's Reply to Respondent's Return to Appellant's Motion to Supplement the Record

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Appellant's Motion is limited to one issue: The misrepresentations regarding KillDisk that Respondent has made to this Court, as well as to the Special Referee. Respondent's Return goes far beyond the limited issue of the Motion and attempts to argue the merits of the appeal. These efforts are simply aimed at diverting the Court's attention from the fact that Respondent is making representations it knows to be false, and, more disturbingly, that it knew to be false when first made.

Respondent seeks to use Rule 210 as a shield to allow it to knowingly misrepresent facts to this Court. (Memo in Support of Motion at 1 (citing Respondent's Initial Appellate Brief ("IAP") at 4, 5 regarding representation that Appellant deleted all documents); id. at 2 (citing Respondent's IAP at 5 regarding representation of deletion of all data)). Respondent continues to perpetuate its KillDisk allegations by designating its materials presented to the Special Referee, which contain the statements Respondent knows to be false.

The authorities to which Respondent points do not sanction the perpetuation of knowingly false statements. Neither State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) nor Argabright v. Argabright, 398 S.C. 176, 727 S.E.2d 748 (2012) have anything to do with either false statements being made to this Court or the revelation that a party knowingly misrepresented facts while seeking equitable relief.[1]

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[1] White deals with the fact that a criminal co-defendant recanted trial testimony after an appeal was filed. The case simply had nothing to do with the representations of a party seeking an injunction or making misrepresentations to this Court. Argabright had to do with whether a custodial parent could be enjoined from allowing contact between her daughter and a sex offender. The Supreme Court, in a footnote, simply noted that the fact that the mother had married the sex offender was not a fact it would take into consideration. Argabright, 398 S.C. at 179 n.3, 727 S.E.2d at 750 n.3.

The fact that this case arises in the context of an injunction is significant. In trade secret and covenant not to compete cases it is, of course, common for employers to seek injunctive relief with little or no actual discovery.[2] Respondent essentially advocates for a rule that, as long as a party can obtain injunctive relief before its misrepresentations are discovered, this Court's hands are tied. Rule 210 could not have been devised to reach such a perverse result. To approve of such an approach would simply condone conduct specifically proscribed by Rule 3.3(a)(1) and (3) of the South Carolina Rules of Professional Conduct. Rule 407 3.3(a)(1), (3), SCACR.

Respondent never refutes Appellant's quotes of its own statements regarding the representations made to this Court and to the Special Referee. Nor does Appellate contend that Mr. Burke's testimony is inaccurately recounted where it pertains to Respondent's three false assertions: (1) That Appellant destroyed his laptop and rendered it incapable of being used again; (2) that Yelton destroyed ScanSource documents with KillDisk; and (3) that ScanSource was unable to recover any data from the disk without hiring a forensic expert, FTI Consulting. Rather than candidly acknowledging that its statements are not accurate, Respondent actually argues that whether or not they are true is a "distinction without a difference." (Respondent Return at 5). That certainly was not the argument below, and it is not the one Respondent sought to make in this Court.

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[2] In fact, many of these cases involve ex parte motions for temporary restraining orders, which is why our Rules of Professional Conduct impose an obligation to reveal all material facts, including adverse ones. Rule 407 3.3(d), SCACR.

Respondent dismissively refers to the revelations from the Burke deposition as "various snippets" that are "cherry picked." (Respondent's Return at 4). Turning the Court's attention away from the three points at issue, Respondent then points to the objected-to questions posed to Mr. Burke by Respondent's counsel in which Mr. Burke was asked to speculate as to why someone would install and run KillDisk. (Id.) In continued disregard for the veracity of its representations, Respondent affirmatively represents that Mr. Burke's purported speculation relates to issues about which Mr. Burke was never actually questioned and about which he would have no knowledge. (Id. at 5). Likewise, Respondent's arguments relate to assertions that have nothing to do with KillDisk or the misrepresentations Respondent continues to make regarding KillDisk. This is all simply an attempt to change the subject.

Remarkably, Respondent then returns to the misrepresentations themselves and points to activities of the expert witness from FTI, whom Responent claims was able to access data on the hard drive only after the forensics firm took "a series of complicated steps." (Id.). Yet, the quoted portions of the affidavit on page 5 of Respondent's Return do not state that "complicated steps" were necessary to retrieve the data. Rather, the consultant describes the imaging process used in discovery to create a mirror of the hard drive. (See id.). Since Mr. Gaida from FTI and Mr. Burke are referring to different things entirely, Respondent's claim that their testimony is consistent makes no sense. To the extent Appellant is attempting to claim that both Messrs. Gaida and Burke claim that "complicated steps" were necessary to access data, Burke testified unequivocally not only that the data on the

hard drive was readily accessible, but also that he let Respondent know that at the time. (See Appellant's Memo in Support at 3 (citations omitted)). That squarely refutes the representations Respondent repeatedly has made that Appellant "destroyed all the documents on that computer, destroyed all the metadata associated with that," that he "rendered the computer incapable of ever being used again," that he "destroy[ed] that laptop," that he "blew up his computer," that he "rendered the computer incapable of ever being booted and used again," that there was "damage to the machine," and that he "did destroy ScanSource documents and data via KillDisk." Those statements are all undeniably false, and that is what this Motion is about.

The balance of Respondent's Motion is devoted to an argument that, even if this Court does not consider the KillDisk evidence, there is other evidence to support the injunction. (Respondent's Return at 6-8). Appellant contends that such argument is improper with respect to this Motion and that the merits of the injunction should be left to the merits briefs submitted by the parties.

In the end, the fact that Respondent is making representations to this Court that it knows to be false is inarguable. The inappropriateness of Respondent's efforts to divert the Court's attention from the limited issue at hand is eclipsed only by Respondent's brash attempt to defend the indefensible. For these reasons, as well as those set forth in Appellant's Memorandum in Support, the Motion should be granted.

Respectfully submitted,

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April 8, 2013

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Proof of Service

The Undersigned hereby certifies that, on the date indicated below, he served counsel for Respondent with a copy of *Appellant's Reply to Respondent's Return to Appellant's Motion to Supplement the Record* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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Respectfully submitted,

April 8, 2013

Brian P. Murphy