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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

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Case No. 2021-CP-22-00927

Steven Michael Okun, Personal Representative
of the Estate of Jane Luanne Okun……...…Respondent,

v.

Pobuckra Properties, LLC and Alliance
Commercial Property Management, Inc……..…Appellants.

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# INITIAL BRIEF OF APPELLANTS

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## STATEMENT OF THE ISSUE ON APPEAL

Whether the trial court abused its discretion by imposing a drastic discovery sanction—striking both defendants' answers and all affirmative defenses—for violation of a consent order requiring preservation of certain evidence, where:

- It is undisputed that the loss of evidence was inadvertent, and not the product of bad faith, willful disobedience, or gross indifference to plaintiff's rights;
- The condition of the lost evidence can be established through multiple alternative sources of proof, such that plaintiff is not unduly prejudiced; and
- The drastic sanction was not narrowly tailored to the loss of evidence.

## STATEMENT OF THE CASE

### The Parties

Plaintiff Steven Michael Okun ("Okun") is the personal representative of the Estate of Jane Luann Okun ("decedent"), who died in a slip-and-fall accident. (Second Am. Compl. ¶ 2) Defendant Pobuckra Properties, LLC ("Pobuckra") owns the property where the accident occurred: 21 Professional Lane, Pawleys Island, South Carolina. (Defs. Opp'n to Pl. Mot. to Strike, Ex. B (hereafter "Teems Aff.") at ¶ 4) Defendant Alliance Commercial Property Management, Inc. ("Alliance") manages the property where the accident occurred. (Teems Aff. ¶ 4)

### The Accident

Nearly two years ago, on July 27, 2021, 87-year-old decedent was going to a hair stylist appointment at Island Day Spa. (Second Am. Compl. ¶ 5; Defs. Opp'n to Pl. Mot. to Strike at 2; Teems Aff. ¶ 5) Island Day Spa leases the property from Pobuckra. (Teems Aff. ¶ 5) A footbridge with railings and secondary handrails connected the parking lot to Island Day Spa's rear entrance. (Teems Aff. ¶ 6) The left-hand secondary handrail (from the perspective of one entering the building) consisted of one piece of wood, while the right-hand secondary handrail consisted of two pieces of wood. (Teems Aff. ¶ 6) Both secondary handrails were attached to the railings by brackets and screws. (Teems Aff. ¶ 6)

Decedent approached the rear entrance by crossing the footbridge. (Second Am. Compl. ¶ 5) Decedent grasped the right-hand secondary handrail, which gave way and

detached from the railing. (Second Am. Compl. ¶ 5; Teems Aff. ¶ 7) Decedent fell backward and was injured. (Second Am. Compl. ¶¶ 5, 7) Decedent was hospitalized and, several days later, succumbed to her injuries. (Second Am. Compl. ¶¶ 7–8)

**Alliance's Immediate Efforts To Preserve The Secondary Handrails**

Alliance's Regional Property Manager, David Teems ("Teems"), immediately undertook to preserve the secondary handrails. (Teems Aff. ¶¶ 3, 9–12) Teems removed the partially detached right-hand secondary handrail from the railing and stored it in a fenced area next to Island Day Spa. (Teems Aff. ¶ 9) Teems engaged a contractor to repair the right-hand secondary handrail, which was replaced. (Teems Aff. ¶ 10) The contractor also removed the left-hand secondary handrail and placed it against the building. (Teems Aff. ¶ 10) The railings are unaltered. (Teems Aff. ¶ 10)

Ten days after the accident, Teems met with an independent claims adjuster. (Teems Aff. ¶ 11) The independent claims adjuster photographed the old and new secondary handrails, railings, and footbridge. (Teems Aff. ¶ 11; Defs. Opp'n to Pl. Mot. to Strike, Ex. A) The photographs below depict the footbridge and railings with the removed left-hand secondary handrail and replaced right-hand secondary handrail:


(Defs. Opp'n to Pl. Mot. to Strike, Ex. A) The photographs accurately depict the condition of the secondary handrails, anchor points of the secondary handrails to the railings, and footbridge. (Teems Aff. ¶ 11) After the inspection concluded, Teems continued to store the right-hand secondary handrail in a fenced area next to the building and the left-hand secondary handrail against the building. (Teems Aff. ¶ 12)

**The Present Action: Some Of Defendants' Affirmative Defenses Are Unrelated To The Secondary Handrails**

A few months after the accident, on November 4, 2021, Okun filed this lawsuit. (Compl.) Okun initially sued Pobuckra and attempted to sue Alliance, but misnamed it "Alliance Property Management, LLC." (Compl.) Okun amended the complaint to name solely Pobuckra. (Am. Compl.) Okun amended the complaint again to properly name Alliance. (Second Am. Compl.)

The operative second amended complaint asserts wrongful death and survival causes of action. (Second Am. Compl. ¶¶ 10–18) Okun alleges that defendants negligently permitted a dangerous condition to exist on the property by failing to

repair known defects, secure the handrail, inspect the property, and warn of a dangerous condition. (Second Am. Compl. ¶ 6) Okun demands a jury trial, seeking an unspecified amount of compensatory damages, punitive damages, and costs. (Second Am. Compl. ¶¶ 10–18, A–C)

Pobuckra and Alliance answered the second amended complaint, generally denying any negligence. (Defs. Answers) Pobuckra and Alliance also asserted multiple affirmative defenses, including comparative negligence and intervening or superseding causes. (Pobuckra Answer ¶¶ 15–16, 18; Alliance Answer ¶¶ 16–17, 23–24) These defenses were based on evidence that decedent was not using her medically required walker at the time of the accident, and that decedent's advanced age, preexisting medical conditions, and ill health had caused or contributed to her death. (Alliance Answer ¶¶ 16–17, 23–24; Defs. Opp'n to Pl. Mot. to Strike at 3)

**The Consent Order: Pobuckra Alone Agrees To Preserve Evidence**

One week after commencing this action, Okun moved for injunctive relief to preserve the footbridge and secondary handrails. (Pl. Mot. for Inj. Relief) Okun sought to enjoin Pobuckra from altering the evidence and to conduct an on-site inspection. (Pl. Mot. for Inj. Relief) Okun's supporting affidavit of counsel attested that the footbridge was "crucial evidence" and that Okun intended to inspect and conduct non-destructive testing on the footbridge and handrails. (Connell Aff.)

Before the hearing on Okun's motion for injunctive relief, Okun and Pobuckra reached a resolution. (Consent Order at 1) Pobuckra agreed to preserve the

footbridge in its current condition and not to repair, replace, or alter it. (Consent Order at 1) Pobuckra further agreed to allow Okun and his experts to view, inspect, examine, and test the footbridge and secondary handrails. (Consent Order at 1)

The agreement was memorialized in a consent order, entered January 11, 2022:

> 1) Pobuckra Properties, LLC will not take any further action to replace, repair or alter the footbridge and handrails located at 21 Professional Lane in Pawleys Island, South Carolina until further order of this Court and;
>
> 2) That Pubuckra [*sic*] Properties, LLC will allow Plaintiff, his counsel, and Plaintiff's experts to view, inspect, examine and/or to perform an agreed upon scope of testing of the footbridge and handrails at a mutually agreeable time when Defendant and/or its experts are able to attend such inspection and testing.

(Consent Order at 2) The consent order does not state that a violation of its terms would subject Pobuckra to drastic discovery sanctions. (Consent Order) Nor does the consent order state that it applies to Alliance, which was not yet a party to the lawsuit. (Consent Order) After the second amended complaint was filed, naming Alliance as a defendant, the consent order was not amended to include Alliance. (Consent Order)

**Discovery Reveals Other Evidence Of The Secondary Handrails**

The same day Okun requested preservation of the footbridge and secondary handrails, he also served written discovery on Pobuckra. Okun's written discovery did not request inspection or testing of the footbridge, railings, or secondary handrails. (Defs. Opp'n to Pl. Mot. to Strike at 8; Jan. 6, 2023 Tr. at 8-9)

In response to Okun's written discovery, Pobuckra disclosed other evidence of the right-hand secondary handrail's condition. (Teems Aff. ¶ 11) Pobuckra identified and produced the photographs taken by the independent claims adjuster. (Teems Aff. ¶ 11) Pobuckra also identified witnesses with knowledge of the secondary handrails: 1) Teems, who will testify about repairs; 2) Robert Brinson or another representative of Brinson General Contractors, LLC, the contractor that removed the left-hand secondary handrail and replaced the right-hand secondary handrail, who will also testify about repairs; and 3) Dennis Cubit of James C. Greene Company, the independent claims examiner who photographed the footbridge, railings, and secondary handrails. (Teems Aff. ¶¶ 10-11)

Additionally, the left-hand secondary handrail's condition is similar to that of the right-hand secondary handrail. (Teems Aff. ¶ 17) Both handrails are the same age and are composed of the same material. (Teems Aff. ¶ 17)

**A Landscaping Contractor Inadvertently Discards The Right-Hand Secondary Handrail, Which Alliance Unsuccessfully Tries To Retrieve**

Pobuckra had retained a landscaping contractor to maintain the grounds surrounding its property. (Teems Aff. ¶ 13) In the spring of 2022, after the independent claims adjuster had inspected and photographed the scene of the accident, the landscaping contractor inadvertently discarded the right-hand secondary handrail from the fenced area next to Island Day Spa. (Teems Aff. ¶¶ 13, 15) The

landscaping contractor did so without Pobuckra's or Alliance's knowledge, consent, or permission. (Teems Aff. ¶¶ 13, 15)

Immediately upon noticing that the right-hand secondary handrail was missing, Teems contacted the landscaping contractor and learned what had happened. (Teems Aff. ¶ 14) Teems requested retrieval of the handrail, but it was no longer in the landscaping contractor's possession. (Teems Aff. ¶ 14)

At Teems' September 27, 2022 deposition, Okun learned that the right-hand secondary handrail had been inadvertently discarded. (Pl. Mot. to Strike at 1) After his deposition, Teems moved the left-hand secondary handrail into his office for storage. (Teems Aff. ¶ 16) Teems retains possession of the left-hand secondary handrail, which is available for inspection. (Teems Aff. ¶ 17)

**Okun Requests The Most Drastic Sanction Possible, Citing No Legal Authority Or Evidence Of Intentional Misconduct**

Within two weeks of learning that the right-hand secondary handrail had been inadvertently discarded, Okun moved to strike Pobuckra's and Alliance's answers and all affirmative defenses. (Pl. Mot. to Strike) The motion was filed approximately eleven months after Okun had filed suit and requested preservation of the secondary handrails as "crucial evidence," and nine months after entry of the consent order. (Compl.; Second Am. Compl. ¶ 5; Mot. for Inj. Relief; Connell Aff. ¶ 1; Consent Order; Pl. Mot. to Strike) During that time, Okun had never asked to inspect the secondary handrails. (Defs. Opp'n to Pl. Mot. to Strike at 2, 7–8)

Okun requested imposition of the most drastic sanction possible, based solely on violation of the consent order. (Pl. Mot. to Strike) Okun asserted that the loss of evidence barred Pobuckra and Alliance from disputing actual or constructive notice of a defective condition. (Pl. Mot. to Strike at 1) Okun's two-page motion did not cite any legal authority endorsing his position, did not contend that the evidence was willfully destroyed, and tendered no supporting evidence. (Pl. Mot. to Strike) Okun asserted that Alliance should be sanctioned, in addition to Pobuckra, even though Alliance was not a party to the consent order. (Pl. Mot. to Strike)

In opposition to Okun's motion to strike, Pobuckra and Alliance raised three main arguments. (Defs. Opp'n to Pl. Mot. to Strike) First, Pobuckra and Alliance argued that they had not acted in bad faith, intentionally, or with gross indifference to Okun's rights. (Defs. Opp'n to Pl. Mot. to Strike at 3, 6–7, 9) Pobuckra and Alliance submitted Teems' affidavit attesting that the landscaping contractor's disposal of the evidence was inadvertent and done without Pobuckra's or Alliance's knowledge, consent, or permission. (Teems Aff. ¶¶ 13, 15)

Second, Pobuckra and Alliance argued that Okun was not unduly prejudiced, as there is other evidence of the right-hand secondary handrail—namely, photographs and the extant similar left-hand secondary handrail. (Defs. Opp'n to Pl. Mot. to Strike at 3, 5–6, 8–10) Pobuckra and Alliance submitted the photographs, along with Teems' affidavit attesting that the photographs had been produced and the extant left-hand secondary handrail is in a similar condition to the right-hand secondary handrail and is

available for inspection. (Defs. Opp'n to Pl. Mot. to Strike, Ex. A; Teems Aff. ¶¶ 11, 17)

Third, Pobuckra and Alliance argued that drastic sanctions were too harsh. (Defs. Opp'n to Pl. Mot. to Strike at 3, 6–9) If any sanction was warranted, an adverse inference jury instruction was more fitting. (Defs. Opp'n to Pl. Mot. to Strike at 10)

Okun did not file a reply brief or tender any rebuttal evidence. As such, Pobuckra and Alliance's tendered evidence stands uncontradicted.

**The Hearing: Okun Agrees That Alliance Did Not Violate The Consent Order**

On January 6, 2023, the trial court held a hearing on Okun's request for sanctions. (Jan. 6, 2023 Tr.) Okun's position at the hearing was identical to his position in the written motion, to the extent Okun urged drastic sanctions based solely on violation of the consent order. (Jan. 6, 2023 Tr. at 2–3) Okun conceded, however, that Alliance was not a party to the consent order: "So as to the argument about the management company, I agree they didn't have—they weren't party to the order, so they shouldn't be bound by any order." (Jan. 6, 2023 Tr. at 8)

Defense counsel responded that neither Pobuckra nor Alliance had acted in bad faith, intentionally, or with gross indifference to Okun's rights. (Jan. 6, 2023 Tr. at 3, 5–6, 9) Okun noted that Pobuckra had retained the landscaping contractor who had discarded the right-hand secondary handrail, but Okun neither disputed that defendants had not directed the landscaping contractor to do so nor cited any contrary evidence. (Jan. 6, 2023 Tr. at 9)

Defense counsel also responded that Okun was not unduly prejudiced. (Jan. 6, 2023 Tr. at 5–8) The right-hand secondary handrail had been photographed, its condition was similar to the extant left-hand secondary handrail, and fact witnesses could be examined on the topic. (Jan. 6, 2023 Tr. at 3, 5–7, 9–10) Okun neither disputed these facts, including that the secondary handrails were similar in condition, nor cited any contrary evidence. (Jan. 6, 2023 Tr. at 1–10)

Defense counsel further responded that Okun's requested sanction was too harsh. (Jan. 6, 2023 Tr. at 6) Okun's counsel countered by citing a South Carolina Supreme Court case[1] for the proposition that a litigant may be penalized for spoliation of evidence, even—as Okun's counsel represented—absent an order requiring preservation: "There's actually a penalty if you lose the evidence without a court order, and the Kershaw County Gypsum case says that." (Jan. 6, 2023 Tr. at 8) Okun's counsel urged imposition of a harsher sanction, stating that "this is even a stronger case because there was a court order in effect." (Jan. 6, 2023 Tr. at 8)

Although Okun's written motion sought to strike Pobuckra's and Alliance's answers and all affirmative defenses, Okun's counsel clarified that he was focused on either the answers or those defenses denying prior notice of a defective condition: "And so my motion is simply … to strike their answer, or to strike those defenses that say that we didn't have any notice." (Jan. 6, 2023 Tr. at 3)

[1] Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990).

**The Trial Court Imposes The "Death Penalty" Of Sanctions, Despite The Undisputed Absence Of Intentional Misconduct**

The same day as the hearing, the trial court entered an order granting Okun's motion to strike Pobuckra's and Alliance's answers and all affirmative defenses. (Form 4 Order) In a separate email to the parties, sent one minute later, the court explained the reasons for its decision. (Jan. 6, 2023 E-Mail)

The court imposed drastic sanctions due to Pobuckra's violation of the consent order, requiring preservation of the right-hand secondary handrail. (Jan. 6, 2023 E-Mail) The court found that either Pobuckra, or the landscaping contractor under its control, disposed of crucial evidence. (Jan. 6, 2023 E-Mail) The court did not find that either defendant had acted in bad faith, intentionally, or with gross indifference to Okun's rights. (Jan. 6, 2023 E-Mail)

The court also found that Okun was prejudiced by the loss. (Jan. 6, 2023 E-Mail) Notwithstanding the extant left-hand secondary handrail, the court determined that it was not in the same condition as the right-hand secondary handrail. (Jan. 6, 2023 E-Mail) The court inferred this from the mere fact that the left-hand secondary handrail had not detached from the railing: "Despite the Defendant arguing that the left-hand handrail is still there, one can infer that it is intact because the left-side was mounted more securely or there was less rot, etc." (Jan. 6, 2023 E-Mail)

The court refused to impose a lesser sanction, such as an adverse inference jury instruction, because Pobuckra had violated the consent order:

> This [giving an adverse inference jury instruction] is what we would normally do. This case is distinguished by the fact that there is a Circuit Court Order that orders the Defendant specifically to preserve the crucial evidence of the right-hand handrail that broke. … Under the present circumstances, I want to avoid the argument that even though there is a Court Order, one can ignore it and blame it on their lawn care management.

(Jan. 6, 2023 E-Mail) The court extended the drastic sanction to Alliance, even though Okun agreed that Alliance was not bound by the consent order. (Jan. 6 Tr. at 8; Form 4 Order; Jan. 6, 2023 E-Mail)

This appeal timely followed. (Not. of Appeal; Am. Not. of Appeal) Pobuckra and Alliance served and filed their notice of appeal on January 13, 2023. (Not. of Appeal) Pobuckra and Alliance served and filed their amended notice of appeal on January 18, 2023. (Am. Not. of Appeal)

## STANDARD OF REVIEW

Although a court has discretion to impose discovery sanctions, its discretion is not boundless. Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). In the case of drastic discovery sanctions, the range of discretion is narrower than when a court imposes less severe sanctions. Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 550, 489 S.E.2d 679, 685–86 (Ct. App. 1997) (Anderson, J., concurring) (citation omitted). A court abuses its discretion when the sanction is without reasonable factual support and unduly prejudices the sanctioned party's rights, amounting to an error of law. Kershaw, 302 S.C. at 395.

## ARGUMENT

### I. The trial court abused its discretion by imposing the "death penalty" of sanctions for spoliation of evidence.

A party who fails to comply with a discovery order is subject to sanctions. RULE 37(b)(2), SCRCP (stating that "the court in which the action is pending may make such orders in regard to the failure as are just"); Kershaw, 302 S.C. at 395 (stating that an order requiring preservation of evidence, as a discovery order, is subject to Rule 37, SCRCP). A court has available a full spectrum of possible options, ranging from an attorneys' fees award to case-dispositive sanctions. RULE 37(b)(2)(C), SCRCP (stating that the most drastic sanctions are striking all or a portion of a party's pleadings, dismissing all or a portion of the case, or entering a default judgment); Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990) ("The rule empowers the Court to impose a wide variety of sanctions.").

In crafting an appropriate sanction for a discovery violation, courts consider multiple factors: 1) the precise nature of the discovery; 2) the case's discovery posture; 3) the offending party's willfulness; and 4) the degree of prejudice to the aggrieved party. Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 457, 814 S.E.2d 643, 656 (Ct. App. 2018). The sanction should be narrowly tailored to the specific conduct of the sanctioned party and should not go beyond the necessities of the situation to foreclose a resolution on the merits. Skywaves., 423 S.C. at 457. The sanction should also serve to protect discovery rights. Kershaw, 302 S.C. at 395.

The aggrieved party is not automatically entitled to a case-dispositive sanction, even where evidence is lost. Id. at 394–95 (holding that where plaintiff had spoliated evidence, in violation of an order requiring its preservation, "dismissal under Rule 37(b)(2)(C) is not mandatory"). This is because drastic sanctions should never be lightly invoked. Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); see also Karppi, 327 S.C. at 543 (observing that drastic sanctions constitute "harsh medicine that should not be administered lightly").

In this case, loss of the right-hand secondary handrail did not justify imposition of the "death penalty" of sanctions. This is true for three separate and independent reasons, each of which alone demonstrates reversible error: 1) it is undisputed that neither Pobuckra nor Alliance willfully destroyed the evidence, which was inadvertently discarded by one of Pobuckra's contractors without defendants' knowledge, consent, or permission; 2) Okun was not unduly prejudiced, as there exist multiple alternative sources of proof concerning the right-hand secondary handrail's condition; and 3) the drastic discovery sanction was overly broad, in that Okun agreed that Alliance did not violate the consent order, the sanction extended to affirmative defenses that were wholly unrelated to the right-hand secondary handrail, and a lesser sanction would have still protected Okun's discovery rights and redressed the loss of evidence. For any or all of these reasons, as explained more fully below, the sanctions order withers under scrutiny.

### A. It is undisputed that the loss of evidence was inadvertent, not willful.

When a sanction would be tantamount to granting judgment by default or dismissal, the sanction cannot be imposed unless the moving party presents evidence of bad faith, willful disobedience, or gross indifference to its rights. Orlando, 320 S.C. at 511. Absent such a showing, imposition of a case-dispositive sanction is an abuse of discretion. Id. at 511–12 (holding that the trial court abused its discretion in barring plaintiffs' expert witness in a medical malpractice action, effectively dismissing the case, where the record contained no evidence of intentional misconduct and the trial court had found that plaintiffs' discovery efforts were merely "lax"); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991) (finding error in the trial court's exclusion of plaintiffs' expert witness, where defendant had made no showing of or even alleged willful disobedience or gross indifference to its rights); Skywaves, 423 S.C. at 457–58 (affirming the trial court's refusal to strike defendants' answers, where defendants had not acted in bad faith).

In cases upholding drastic sanctions for discovery violations, the common thread is obstreperous parties who had been forewarned of the impending consequences of their continued intentional misconduct. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 594–95, 586 S.E.2d 572, 576 (2003) (affirming dismissal of plaintiff's action, given her "persistent refusal" to comply with discovery orders, noting that the trial court had warned that plaintiff's continued bad faith and willful disobedience could result in dismissal); Rogers v. Rogers, 432 S.C. 168, 182–83, 851 S.E.2d 447, 454–55

(Ct. App. 2020) (affirming order striking a party's evidence, reasoning that she had committed "[n]umerous discovery violations," had acted willfully, and had been forewarned that she would be sanctioned for continued defiance); McNair v. Fairfield Cnty., 379 S.C. 462, 464–67, 665 S.E.2d 830, 832–33 (Ct. App. 2008) (affirming order striking defendant's answer, where defendant had willfully violated multiple discovery orders and had been warned that the trial court was inclined to impose the sanction); Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 199–200, 511 S.E.2d 716, 719 (Ct. App. 1999) (affirming order striking defendant's answer, where defendant had intentionally violated four discovery orders, a prior sanction imposing attorneys' fees had not coerced defendant's compliance, and the trial court had warned that continued defiance would subject defendant to drastic sanctions).

In the spoliation of evidence context, drastic sanctions are justified only where a party willfully destroys evidence. Compare QZO, Inc. v. Moyer, 358 S.C. 246, 257–58, 594 S.E.2d 541, 547–48 (Ct. App. 2004) (affirming order striking defendant's answer for intentional defiance of a temporary restraining order requiring defendant to produce his computer, reasoning that defendant had produced the computer late and willfully destroyed evidence by erasing the hard-drive), with Kershaw, 302 S.C. at 394–95 (affirming trial court's refusal to dismiss plaintiff's claims for inadvertent spoliation of evidence, despite violation of a preservation order).

Kershaw illustrates the point. There, a school board sued a manufacturer of asbestos-containing ceiling materials. 302 S.C. at 392. Before the lawsuit was filed, the

school district had begun removing the materials from certain schools within its district. Id. at 392, 394. One month after the project was underway, the trial court entered an order requiring the school board to notify the manufacturer before removing asbestos from the schools at issue. Id. Despite the order, the school district removed asbestos from one school before the manufacturer was notified and afforded an opportunity to inspect the building. Id. at 392. The school district and its counsel denied deliberate concealment of the information, and the manufacturer conceded that it was not suggesting otherwise. Id. at 394.

Based on the school board's violation of the preservation order, the manufacturer moved for judgment on the claims related to that school. Id. The trial court denied the motion, but gave an adverse inference jury instruction. Id. After the jury found for the school district, the manufacturer appealed. Id.

On appeal, the high court agreed that the school district's claims should not have been dismissed. Id. at 395. The high court reasoned that such a sanction would have been "too severe," noting that there was no evidence of intentional misconduct by the school district or its counsel. Id. at 394–95. Rather, the trial court's decision was tailored to facilitate and protect discovery rights. Id. at 395.

Applying these precepts here, Pobuckra and Alliance did not act with the culpable state of mind necessary to impose drastic sanctions. To justify striking Pobuckra's and Alliance's answers and affirmative defenses, Okun had to prove bad faith, willful disobedience, or gross indifference to his rights. This, Okun did not do.

Like Orlando and Baughman, and unlike QZO, the record is devoid of evidence or even an allegation of bad faith, willful disobedience, or gross indifference to Okun's rights. Okun did not contend, either in his written motion or at the hearing on the motion, that Pobuckra or Alliance had intentionally destroyed evidence or directed the landscaping contractor to do so. (Pl. Mot. to Strike; Jan. 6, 2023 Tr.) And Okun presented no supporting evidence at all, much less evidence that Pobuckra or Alliance had acted with a culpable state of mind. (Pl. Mot. to Strike)

In fact, like Skywaves and Kershaw, the record affirmatively proves the absence of bad faith, willful disobedience, or gross indifference to Okun's rights. Even before the lawsuit was filed and the consent order entered, Pobuckra and Alliance unilaterally undertook to preserve the secondary handrails. Immediately after the accident, Teems removed the right-hand secondary handrail and stored it in a fenced area next to Island Day Spa. (Teems Aff. ¶ 9) The left-hand secondary handrail was also removed and placed against the building. (Teems Aff. ¶ 10) Days later, the independent claims adjuster photographed the scene of the accident, including the right-hand secondary handrail. (Teems Aff. ¶ 11; Defs. Opp'n to Pl. Mot. to Strike, Ex. A)

After the lawsuit was filed and the consent order entered, Pobuckra and Alliance complied with the order. Teems continued to store the right-hand secondary handrail, until its loss several months later. (Teems Aff. ¶¶ 12–13) The loss was occasioned by the landscaping contractor's inadvertent disposal of the right-hand secondary handrail, without Pobuckra's or Alliance's knowledge, consent, or permission. (Teems Aff. ¶¶

13, 15) Upon discovering the mistake, Teems tried (albeit unsuccessfully) to retrieve the evidence. (Teems Aff. ¶ 14) These undisputed facts show that Pobuckra and Alliance acted to effectuate—not impede—discovery.

Further, unlike Barnette, Rogers, McNair, and Griffin, there was no prior pattern of discovery violations or warning of drastic sanctions. Apart from the inadvertent loss of the right-hand secondary handrail, there is no evidence or allegation of any other discovery violation. Nor did the trial court or consent order itself give fair warning that violation of the order would subject Pobuckra and Alliance to drastic sanctions. (Consent Order) Karppi, 327 S.C. 538 at 550 (Anderson, J., concurring) (finding that a sanction striking defendant's pleadings and holding it in default was too severe, "especially without warning of the impending default").

For these reasons, the trial court abused its discretion in striking Pobuckra's and Alliance's answers and affirmative defenses. The court could not determine that Pobuckra and Alliance acted with the requisite culpable state of mind, as the record contains no reasonable factual support for that conclusion. Rather, the record conclusively proves that the loss of evidence was inadvertent—a point Okun has never disputed. Therefore, on this basis alone, the sanction order should be vacated.

### B. Okun did not sustain undue prejudice: The condition of the lost evidence can be established through alternative sources of proof.

The propriety of a discovery sanction turns on not only willfulness of the offending party, but the case's discovery posture and prejudice to the aggrieved party. Skywaves, 423 S.C. at 457; Griffin, 334 S.C. at 199.

Here, Okun did not establish that he was unduly prejudiced by loss of the right-hand secondary handrail. Okun's claimed prejudice was that he could no longer prove that Pobuckra and Alliance had actual or constructive notice of a defective condition. (Pl. Mot. to Strike) Garrison v. Target Corp., 435 S.C. 566, 577, 869 S.E.2d 797, 803–04 (2022) (holding that recovery under a premises liability theory requires proof that defendant either created the defective condition, or had actual or constructive notice of the defective condition and failed to remedy it). But Okun offered no evidence to corroborate that contention—for example, affidavits of accident reconstructionists, engineers, or human factors experts attesting to the need for a physical inspection of the right-hand secondary handrail, what testing could have been done, and what information could have been gleaned that would have been pertinent to notice of a defective condition. (Pl. Mot. to Strike) Cf. Garrison, 435 S.C. at 579 (holding that spoliated evidence supported the jury's constructive notice finding, noting that plaintiffs had "provided several examples of actions that could have been taken to derive additional evidence in support of their constructive notice theory, had the [spoliated evidence] been available").

Not only that, the record is replete with indirect evidence of the right-hand secondary handrail. First, Okun has been provided with the photographs taken by the independent claims adjuster days after the accident. (Teems Aff. ¶ 11; Defs. Opp'n to Pl. Mot. to Strike, Ex. A) The photographs accurately depict the condition of the secondary handrails, anchor points of the secondary handrails to the railings, and footbridge. (Teems Aff. ¶ 11)

Second, Pobuckra identified fact witnesses with knowledge of the right-hand secondary handrail. These witnesses include: 1) Teems, who observed the handrail immediately after the accident, removed the handrail from the railing, arranged to have the handrail repaired, and stored the handrail until it was inadvertently discarded; 2) a representative of Brinson General Contractors, LLC, who replaced the handrail; and 3) the independent claims adjuster, who photographed the handrail. (Teems Aff. ¶¶ 9–10, 12) Okun could have examined any or all of these witnesses regarding the condition of the lost evidence.

Third, the left-hand secondary handrail exists and remains available for inspection. (Teems Aff. ¶ 17) The condition of the left-hand secondary handrail is similar to that of the right-hand secondary handrail, in that both are the same age and composed of the same material. (Teems Aff. ¶ 17)

Notably, Okun offered no contrary evidence. To wit, there is no factual basis on which to conclude that any of these alternative sources of evidence is inadequate. See Garrison, 435 S.C. at 572–73, 578 (holding that photographs of and witness testimony

about the spoliated evidence supported the jury's constructive notice finding). And Okun did not dispute that the photographs accurately depict the right-hand secondary handrail, fact witness can testify about their observations of the right-hand secondary handrail, or that the left-hand secondary handrail is in a materially similar condition.

Okun's insistence that the loss of evidence was prejudicial is belied by his contemporaneous conduct. Despite professing at the outset that the right-hand secondary handrail was "crucial" to his case, Okun's counsel never once asked to inspect the evidence in the ensuing eleven months. (Connell Aff.; Defs. Opp'n to Pl. Mot. to Strike at 2, 7–8) Only after Okun learned that the right-hand secondary handrail had been accidentally discarded did the evidence suddenly become pivotal to proving notice of a defective condition. Translation: Okun was concerned not so much with the loss of evidence, as with capitalizing on an innocent mistake to bypass the merits of the case.

Under these facts, the trial court's finding that Okun was prejudiced is without reasonable factual support. The court ruled that the left-hand secondary handrail is an inadequate substitute because it is dissimilar to the right-hand secondary handrail, remarking that "one can infer that it is intact because the left-side was mounted more securely or there was less rot, etc." (Jan. 6, 2023 E-Mail) But this is pure speculation. It is equally possible that, had decedent exerted the same force on the left-hand secondary handrail, it would have detached in the same manner.

In sum, in light of the undisputed existence of multiple proxies for the missing evidence, imposition of drastic sanctions did not serve to protect discovery rights. Accordingly, striking Pobuckra's and Alliance's answers and affirmative defenses constituted an abuse of discretion.

### C. The "death penalty" of sanctions was too harsh: The sanction went beyond spoliation of evidence, by eliminating defenses that had nothing to do with the right-hand secondary handrail.

Consonant with the requirement that a discovery sanction be narrowly tailored to the offending conduct, the sanction cannot go beyond the necessities of the situation to foreclose a decision on the merits. Karppi, 327 S.C. at 543 (finding that striking defendant's pleadings was excessively harsh, even where defendant had committed intentional discovery violations). "In other words, the sanction should be a rifle-shot, not a shotgun blast." Balloon Plantation, 303 S.C. at 154.

This principle applies with plenary force, in the multi-party litigation context:

> The need for the trial court to narrowly tailor its sanction to the offense committed by a party is never more evident than in cases involving multiple parties. Where, as here, multiple parties are involved, the trial court must closely scrutinize the dynamics of the litigation and be extremely cautious before striking the pleadings of a transgressing party because of the effects such action is likely to have on the other parties.

Karppi, 327 S.C. at 543.

Under the particular facts of the present case, striking the entirety of Pobuckra's and Alliance's pleadings went far beyond what was reasonably necessary to redress the loss of evidence. Okun's own admissions are proof positive.

For one, Okun agrees that Alliance did not violate the consent order. When the consent order was entered, Alliance was not yet a party to the lawsuit. (Consent Order) And after Alliance became a party to the lawsuit, the consent order was not amended to extend its strictures to Alliance. (Consent Order) At the hearing on Okun's request for sanctions, Okun conceded that Alliance was not bound by the consent order: "So as to the argument about the management company, I agree they didn't have—they weren't party to the order, so they shouldn't be bound by any order." (Jan. 6, 2023 Tr. at 8) Because Alliance was not a party to the violated consent order, striking Alliance's pleadings was excessive. Karppi, 327 S.C. at 544 (holding that striking defendant seller's pleadings was unduly harsh because the sanction prejudiced the innocent co-defendant supplier, by creating a presumption that both defendants were at fault).

What is more, Okun was focused on only those portions of the pleadings denying prior notice of a defective condition. At the hearing, Okun stated as follows: "And so my motion is simply … to strike their answer, or to strike those defenses that say that we didn't have any notice." (Jan. 6, 2023 Tr. at 3) It follows that striking the entirety of Pobuckra's and Alliance's pleadings, which included allegations unrelated to prior notice of a defective condition, was overly broad.

For instance, Pobuckra and Alliance asserted the affirmative defenses of comparative negligence and intervening or superseding causes. (Pobuckra Answer ¶¶ 15–16, 18; Alliance Answer ¶¶ 16–17, 23–24) Evidence that decedent was not using

her medically required walker at the time of the accident could have supported a comparative fault assessment, while evidence of decedent's advanced age, preexisting medical conditions, and ill health could have supported a finding that other factors caused or contributed to her death. (Alliance Answer ¶¶ 16–17, 23–24; Defs. Opp'n to Pl. Mot. to Strike at 3) Because these defenses were grounded in decedent's own conduct and conditions, they are unaffected by loss of the right-hand secondary handrail. As such, striking the entirety of the pleadings bestowed on Okun an undeserved windfall. Karppi, 327 S.C. at 543–44 (holding that striking defendant seller's pleadings, which included a cross-claim against co-defendant supplier, was a windfall to the supplier because its discovery rights had not been violated).

To be sure, elimination of these potentially meritorious affirmative defenses is prejudicial. The sanction prevents Pobuckra and Alliance from developing further evidence of comparative fault and intervening or superseding causes. The sanction also prevents the jury from rendering a decision on all issues of liability and damages. At trial, Okun will be able to exploit the error by telling the jury that—contrary to the facts—decedent was injured through no fault of her own and defendants' negligence was the sole cause of her death. Okun will thereby be able to dodge what might otherwise have been a defense verdict or substantial reduction in damages.

Finally, Okun made no showing that a lesser sanction—for example, an adverse inference jury instruction—would have been insufficient both to protect discovery rights and redress the loss of evidence. Kershaw, 302 S.C. at 394 (stating that such an

instruction allows a jury to infer that the lost evidence would have been adverse to the spoliating party, who may explain the circumstances of the loss). Indeed, this is how courts typically confront spoliation of evidence. E.g., Garrison, 435 S.C. at 579 (noting that the trial court, without objection, gave an adverse inference jury instruction regarding spoliated evidence); Kershaw, 302 S.C. at 395 (affirming decision to give an adverse inference jury instruction, where plaintiff lost evidence that was subject to a preservation order, reasoning that this more limited sanction facilitated discovery); Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (holding that an adverse inference jury instruction should have been given in a medical malpractice action, where defendant hospital lost medical records that would have established decedent's cause of death).

The trial court disagreed, holding that a harsher sanction was required because Pobuckra violated the consent order. (Jan. 6, 2023 E-Mail) The court's reasoning is faulty. Violation of the consent order did not mandate drastic sanctions. Kershaw, 302 S.C. at 394–95. The Kershaw plaintiff likewise violated an order requiring preservation of evidence. Id. at 394. Yet the high court still held that dismissing plaintiff's claims would have been "too severe," instead approving the trial court's decision to give an adverse inference jury instruction. Id. at 395.

Below, the parties called Kershaw to the trial court's attention. (Defs. Opp'n to Pl. Mot. to Strike at 6; Jan. 6, 2023 Tr. at 8) Yet, the trial court did not heed Kershaw's ruling and imposed a case dispositive sanction.

Under these circumstances, striking the entirety of Pobuckra's and Alliance's pleadings was excessively harsh. Bluntly put, the sanction was not a rifle shot or even a shotgun blast—it was, in this Court's apt words, "a hydrogen bomb." Balloon Plantation, 303 S.C. at 154. Thus, the sanction constitutes an abuse of discretion.

## CONCLUSION

The remedy is to vacate the sanctions order and remand the case for further proceedings. Karppi, 327 S.C. at 545. To the extent the loss of evidence merits a sanction against one or both defendants, the trial court should be instructed to consider imposition of a more narrowly tailored sanction. An adverse inference jury instruction is among the available options, assuming the missing evidence supports the inference(s) Okun advocates. Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009) (holding that the party seeking an adverse inference jury instruction in a premises liability case must show that the spoliated evidence might have reasonably supported the requested presumption). But in no event are drastic sanctions within the bounds of this discretion.

For these reasons and those set forth above, Pobuckra and Alliance respectfully request that this Court: 1) vacate and reverse the January 6, 2023 order granting Okun's motion to strike their answers and affirmative defenses; 2) remand the case for additional proceedings; and 3) grant such further relief as this Court deems just.

Respectfully submitted,

/s/ *Agelo L. Reppas*

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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Appellate Case No. 2023-000063

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Steven Michael Okun, as Personal Representative
of the Estate of Jane Luanne Okun.....Respondent,

v.

Pobuckra Properties, LLC and Alliance Commercial
Property Management, Inc. ..... Appellants.

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PROOF OF SERVICE

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I certify that I have served Appellants' Initial Brief on Respondent Steven Michael Okun, as Personal Representative of the Estate of Jane Luanne Okun by depositing a copy of it in the United States Mail, postage prepaid, on March 20, 2023, addressed to Respondent's counsel of record, Gene M. Connell, Jr., Esq., P.O. Drawer 14547, Surfside Beach, SC 29587-4547.

Barnwell Whaley Patterson & Helms, LLC

s/Janet Segell
Janet Segell, Legal Assistant to
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