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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927
Appellate Case No. 2023-000063

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

vs.

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

---

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court properly exercised its discretion by striking both Defendants' answers and affirmative defenses because Defendants violated a trial court order requiring preservation of a handrail.

II. The trial court issued a standard Form 4 Order and Defendants failed to file a Rule 59(e), SCRCP motion for reconsideration which is required in South Carolina to preserve any error. The reason for this being South Carolina does not subscribe to the "plain error" rule and thus this Court must dismiss the appeal.

III. The condition of the lost handrail which Defendants were required to keep pursuant to Court Order cannot be established by any other evidence; and if the Defendants' arguments were preserved, this Court should find as an additional and sustaining ground that Defendants acted with gross indifference to Respondent's rights by violating a Court Order and losing the crucial handrail evidence which they were required to keep safe.

STATEMENT OF THE CASE

On July 27, 2021, the deceased Jane Luanne Okun, did what she did every week, which was go to a hairstylist appointment at the Island Day Spa in Pawleys Island. Because of her age, her son Steven Michael Okun, always drove her to her appointment. The Island Day Spa leased its space from Pobuckra Properties, LLC in a trendy shopping center in Pawleys Island. Steven Okun drove his mother to the salon and parked in the parking lot as usual. The shopping center has a footbridge with handrails on it from the parking lot to the Spa's entrance. Steven watched closely as his mother walked onto the bridge and placed her hand on the right handrail which pulled loose causing Jane to fall backwards and strike her head severely injuring her. Jane Okun was immediately taken by EMS to the Grand Strand Regional Medical Center and placed in the intensive care trauma unit. Jane Okun lingered in and out of consciousness for approximately two weeks, long enough to learn from her doctor that she would not recover and just long enough to say goodbye to her children and grandchildren. Jane Okun's hospitalization was a long and slow

dying process and her family suffered greatly throughout the process. The medical expenses from her hospitalization are in excess of $500,000.00.

The Pobuckra property was managed by Alliance Commercial Property Management, Inc., with a property manager named David Teems. Upon learning of Okun's fall, Teems immediately undertook to investigate the scene and quickly engaged a contractor to repair the right-hand secondary handrail which was replaced. See Teems Affidavit, ¶9 ("Upon being notified that a secondary handrail detached near the rear entrance to the Island Day Spa, I want to inspect the area where Ms. Okun fell. I removed the remaining screws attaching a portion of the secondary handrail on the right side of the footbridge and safely stored it in a fenced area next to the building.")[1] (R. p. 60).

The Plaintiff brought this wrongful death lawsuit on November 21, 2021 and simultaneously filed a motion for injunctive relief and to preserve the handrail evidence. Prior to a hearing on the preservation of evidence motion, a Consent Order was agreed to between Plaintiff's and Defendants' counsels whereby Plaintiff's expert would be able to view, inspect, examine and/or test the footbridge and/or handrails where Jane had slipped and fallen. (R. p. 1). It is undisputed that the Appellant agreed to the Court Order for preservation of this critical and important evidence.

The parties then engaged in paper discovery and the deposition of Teems was scheduled for September 27, 2022. It was at that deposition that Plaintiff first learned Teems, as manager of Alliance Commercial Property Management, Inc., was fully aware of the Court Order which required the handrail be safeguarded because it was the crucial piece of evidence in this case.

[1] As a result of Teems' actions, Alliance Commercial Property had actual knowledge of Okun's injuries and the railing defect before a lawsuit was ever filed. Teems knew of the safety problems with the handrail because he called a contractor to immediately repair it.

Teems explained that he knew that the handrail was to be preserved, but also testified that a landscaper who was hired by Alliance Commercial Property Management, Inc. had discarded the handrail and it was no longer available for inspection and testing. (R. p. 61). (R. p. 68).

Immediately upon learning that this critical piece of evidence had been lost, Steven Michael Okun, the Personal Representative of the Estate of Jane Luanne Okun, filed a motion to strike Defendants' answers and affirmative defenses based on the prior Order issued by this Court requiring the Defendants to preserve all crucial and critical evidence – in this case the handrail which caused Okun's death. (R. p. 36).

A hearing was held by the circuit court on January 6, 2023 and a circuit court Form 4 Order was issued striking Defendants' answers and affirmative defenses. The Form 4 Order which is routinely used in South Carolina's court system stated:

> Motion to Strike Answers and Affirmative Defenses by Attorney Connell is granted.
> (R. p. 5).

The Form 4 Order was entered in the South Carolina Judicial Department public index January 6, 2023 at 12:49 p.m.

Immediately thereafter the parties received an email which is not in the public index from Margaret Scalise, Law Clerk for the Honorable William Seals, which stated:

> Good Afternoon,
>
> Judge Seals wanted to explain his form 4 Order more thoroughly for the above-referenced matter; therefore, please read the following:
>
> I understand that in South Carolina there is no specific cause of action for spoliation; however, there is a jury charge for spoliation whereby the jury can draw adverse inferences against the Defendant. This 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. The Defendant, or a third party under his control, disposed of the crucial evidence. 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. 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. Moreover, considering the Circuit Court Order, I will grant the Plaintiff's Motion/Strike Answers and Affirmative Defenses.
>
> Sincerely,
> Margaret Scalise
>
> **Margaret Scalise**
> Law Clerk to the Honorable William H. Seals, Jr. (R. p. 8).

The Defendants' timely filed a notice of appeal, but curiously failed to file a motion for reconsideration under Rule 59(e), SCRCP. Defendants made no request of the trial court to explain its Form 4 Order or to reconsider and/or alter and/or amend its ruling, which is a prerequisite to filing an appeal and preserving any error, as South Carolina does not recognize the "plain error rule." See *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001) (As Chief Judge Alex Sanders so aptly stated: "Appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 11, 817 (Ct. App. 1991).

STANDARD OF REVIEW

Generally the imposition of sanctions is entrusted to the sound discretion of the trial court. See *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317, 318 (Ct. App. 1987). The heavy burden is upon the appealing party to show that the trial court abused its discretion in imposing sanctions for a violation of a discovery order. *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual

support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id* at 395, 396 S.E.2d at 372.

Also, important to the standard of review, is Rule 37(b)(2), SCRCP which provides in pertinent part that, if a party fails to obey an order for discovery, the court "may make such orders in regard to the failure as are just," including... (C) striking the pleadings or parts thereof, dismissing all or part of the action, or rendering a judgment by default against the disobedient party;"

In this case, as in all cases regarding discovery orders, this Court will yield to the sound discretion of the trial court unless an abuse of discretion has been shown by clear and convincing evidence.

ARGUMENT

I. SOUTH CAROLINA COURTS HAVE ROUTINELY STRUCK THE ANSWER OF A DEFENDANT AS A SANCTION.

Appellants claim that striking of the affirmative defenses is error and an abuse of discretion. However, South Carolina courts have long been open to striking the answer and defenses of a party. See *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 586 S.E.2d 572, 576 (2003) (holding the circuit court did not abuse its discretion by dismissing one of the plaintiff's actions "given plaintiff's persistent refusal to comply with the trial court's orders"); *McNair*, 379 S.C. at 464-67, 665 S.E.2d at 831, 833 (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, after the court told defendant to correct the discovery issues several times and warned the defendant it was inclined to strike the defendant's answer); *QZO, Inc. v.*

Moyer, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding the circuit court did not abuse its discretion by striking appellant's answer in response to appellant's intentional defiance of the trial court's temporary restraining order and his willful destruction of evidence); *Griffin Grading & Clearing Inc.*, 334 S.C. at 199-200, 511 S.E.2d at 719 (affirming the circuit court's order striking defendant's answer when defendant "admitted at oral argument that the failure to comply with certain discovery in this case was 'indefensible' and had failed to comply with four prior orders from the court); *Halverson v. Yawn*, 328 S.C. 618, 620-621, 493 S.E.2d 883, 884-85 (Ct. App. 1997) (affirming the circuit court's order striking appellant's complaint because plaintiff failed to comply with the court's order to comply with discovery and presented no evidence showing she complied with that order).

In this case, Appellants lost the crucial piece of evidence – the handrail which caused Jane Okun to fall -- after it was ordered to safeguard it and now seeks unfair advantage for its own misdeeds. Appellants' argument that it was inadvertent, that the other handrail could be reviewed, and that a third party lost it are unavailing. It defies logic and common sense for Appellants to be allowed to argue constructive notice and comparative negligence defenses when it was Appellants sole legal responsibility to maintain the crucial evidence consistent with the trial court's order. The trial court made a wise and reasonable decision that because the evidence the Defendants lost was so crucial, their answers and defenses should be struck. Thus, the trial court was simply using its sound judicial discretion consistent with existing case law. See *S.C. Dept. of Health & Environmental Control v. Fed-Serve Industries, Inc.*, 294 S.C. 33, 39, 362 S.E.2d 311, 314-15 (Ct. App. 1987) ("A motion to strike is addressed to the sound discretion of the [circuit court] and will not be disturbed in the absence of a clear showing of prejudicial error.")

Here, the trial court was faced with the loss of the crucial and arguably the most important and key piece of evidence in the case. The loss of the handrail, the fact that there were pictures of it, and the fact that there was another handrail which was affixed to the walkway did not override the trial court's decision that a specific order of the trial court required Appellants to keep safe the handrail which caused Respondent's injuries and ultimately her death.

II. THE SANCTION WAS APPROPRIATE AND REASONABLE.

The trial courts of South Carolina may consider certain factors in determining what sanction is appropriate. Those factors are willfulness, the degree of prejudice, the precise nature of this discovery, and the discovery posture of the case. See *McNair v. Fairfield County*, 379 S.C. 462, 467 665 S.E. 2d 830, 832-833 (Ct. App. 2008) (quoting *Griffin Grading & Clearing Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E. 2d 716 (Ct. App. 1999). The Appellants, however, failed to file a Rule 59(e), SCRCP motion but now ask the Court to address each of these factors. Respondent believes these arguments need not be addressed but offers these additional arguments if the Court is inclined to consider Appellants' arguments.

Here, the court was concerned not only with a discovery request but a specific order of the court requiring Appellants to keep safe a vital and important piece of evidence -- the handrail which caused the fall. Further, the court considered the arguments of the Appellants that a third-party contractor had lost the handrail and determined that to be grossly negligent and willful in light of the trial court's Order.[2] (R. p. 1). Also the fact that this was the crucial piece of evidence, i.e., the whole enchilada in regard to what caused the fall, constrained the trial court to issue its ruling. The trial court realized the significant degree of prejudice the Plaintiff suffered which is unlike *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396

[2] This argument is not preserved for review without a Rule 59(e), SCRCP motion.

S.E.2d 369 (1990), where asbestos had been removed in only one of the many schools in the school district.[3] Respondent is at a significant disadvantage if Appellants are allowed to argue notice, comparative negligence and other defenses which go directly to the handrail they lost. Appellants, in failing to comply with the court order, showed gross indifference to the Respondent's rights which justified the sanction in this case by striking the answer and affirmative defenses. Significantly, the trial court did not issue an order of default, opting to strike the answer and defenses. In fact, the court would have been justified in holding Appellants in default based on their egregious conduct.

A party discovering factual information is at the core of our civil discovery system. Thus, the disobedience of the trial court's order carries with it certain penalties. Otherwise litigants would routinely disregard the court's orders with impunity to their advantage. The trial court in this case applied a measured, reasonable and appropriate sanction to Appellants who lost the crucial and pivotal handrail evidence that it was required by court order to retain. Essentially, the court considered the precise and important nature of the lost discovery, i.e., the lost handrail which caused the death of Okun, in making its ruling. To hold otherwise rewards the Appellants for losing critical evidence and provides no deterrence for future conduct in litigation.

III. APPELLANTS FAILED TO FILE A RULE 59(E), SCRCP MOTION PRIOR TO FILING THE APPEAL.

It is well settled in South Carolina that in order to preserve an error it must be raised and ruled on by the court. In this case, the Court's Form 4 Order provides no reason for striking Appellants' answers and defenses, and if this was an issue it was incumbent upon Appellants'

[3] The Court can take judicial notice the Kershaw County School District has nineteen schools according to its website.

counsel to obtain a ruling on each point it contested in order to preserve them for appellate review under well-established South Carolina law.

Rule 59(e), SCRCP requires a party to ask the trial court to reconsider its decision even if it means rehashing all or part of an argument previously presented. See *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in decision of the merits"); *Curcio v. Caterpillar Inc.* 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration.")

In *Elam v. S. C. Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court specifically addressed Rule 59(e) and said: "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an early argument, but also to revisit a previously raised argument."

The *Elam* Court further made clear that at least four generations of the South Carolina Rules of Civil Procedure and the Appellate Court Rules of Practice have emphasized the importance and absolute necessity of insuring that all issues and arguments must be presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. See *Wilder Corp. v. Wilke*, 300 S.C. 71, 497 S.E.2d 731 (1988) ("It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); *Noisette v. Ismail*, 299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989), rev'd on other grounds, 304 S.C. 56, 403 S.E.2d 122 (1991) (when a trial court does not explicitly rule on an

argument raised and appellant makes no Rule 59(e) motion to obtain a ruling, the Appellate Court may not address the issue.)

Elam holds a party must file a Rule 59 motion when an issue or argument has been raised but not ruled on, in order to preserve it for appellate review. The reason for this rule is that South Carolina appellate courts do not recognize the "plain error rule" which authorizes a court in certain circumstances to consider and rectify an error not raised below by the party. The Appellants do not address or acknowledge this critical flaw in their brief. See *Dykema v. Carolina Emergency Physicians*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). See also *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001). (Our mandatory preservation requirements make it doubly important that all litigants generally be freely allowed to file first, a written Rule 59(e) motion without concern a later appeal will be untimely.); *Whaley v. CSX Transportation, Inc.*, 362 S.C. 456, 609 S.E.2d 286 (2005) ("to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.")

Elam holds that if a party is unsure whether he has properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion, or an appellate court may later determine the issue or argument is not preserved for review.

Appellants have raised numerous arguments in this appeal which were not ruled upon by the trial court when it issued its Form 4 Order. (R. p. 5). Those arguments include the following:

- Alliance Commercial Property Management Inc. argues its answer and defenses were struck when it was not a party in the case at the time the order was issued requiring Appellants to keep the handrail. This issue was neither raised nor ruled on by the trial court nor did Appellants file a Rule 59(e) motion; thus, this Court cannot consider it.

- Appellants also raised the evidence of the left side handrail being available as a defense. This issue was not properly preserved nor was it preserved by an appropriate Rule 59(e) motion.
- Appellants raised the issue of no evidence of intentional misconduct by them. However, this issue was not ruled upon by the circuit court nor was it raised on an appropriate Rule 59(e) motion and thus is not preserved for appellate review.
- Appellants argue that Respondent's motion was only to strike those defenses regarding notice. Again, the issue is not preserved for review since it was not raised or ruled on by a Rule 59(e) motion.
- Appellants argue that there is no evidence of bad faith conduct by them. This issue was not properly preserved for review since it was not raised and ruled on pursuant to a Rule 59(e) motion.
- Appellants raised the argument that Appellant Alliance was not bound by the order based on statements at the motion hearing by Respondent's counsel. This issue was not raised and ruled on and accordingly cannot be considered since no Rule 59(e) motion was filed.
- Appellants argue that the loss of the handrail was inadvertent and not willful. Again, this issue was not raised and ruled on appropriately pursuant to Rule 59(e) and thus cannot be considered by this Court.
- Appellants argue that they did not act with a culpable state of mind necessary to impose sanctions. However, this was not raised and ruled on, nor was it preserved pursuant to a motion filed consistent with Rule 59(e).

- Appellants argue that Respondent did not sustain undue prejudice. However, this argument is not preserved for appellate review because it was not raised or ruled on by a proper motion pursuant to Rule 59(e).

In sum, all of Appellants arguments about the striking of Appellants' answers and defenses were not properly preserved because they were not ruled on by the Court on the Form 4 Order. (R. p. 5). Appellants failed to make a Rule 59(e) motion which precludes review by this Court. *Siau v. Kassel*, 369 S.C. 361, 632 S.E.2d 888 (Ct. App. 2006) ("When an issue, presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review."); *Summersell v. South Carolina Dept. of Public Safety*, 337 S.C. 19, 522 S.E.2d 144 (1999).

IV. THE EMAIL BY A JUDGE'S LAW CLERK IS NOT AN ORDER.

Appellants cite an email written by Judge Seals' Law Clerk which is attached to the Notice of Appeal. The email (received after the Form 4 Order) dated Friday; June 6, 2023 is not part of the public record.[4] It states as follows:

> Good Afternoon,
>
> Judge Seals wanted to explain his form 4 Order more thoroughly for the above-referenced matter; therefore, please read the following:
>
> I understand that in South Carolina there is no specific cause of action for spoliation; however, there is a jury charge for spoliation whereby the jury can draw adverse inferences against the Defendant. This 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. The Defendant, or a third party under his control, disposed of the crucial evidence. 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. Under the present circumstances, I want to avoid the argument

[4] An objection made during an off-the-record conference which is not part of the record does not preserve the question for review. *State v. Fletcher*, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005).

> that even though there is a Court Order, one can ignore it and blame it on their lawn care management. Moreover, considering the Circuit Court Order, I will grant the Plaintiff's Motion/Strike Answers and Affirmative Defenses.
>
> Sincerely,
> Margaret Scalise
>
> **Margaret Scalise**
> Law Clerk to the Honorable William H. Seals, Jr. (R. p. 8).

The email of Judge Seals' Law Clerk is not an order of the Court; however it does seem to explain his ruling and provides counsel with some idea of his thought process in this case. It is not a publicly filed document and more significantly Appellant failed to file a motion for reconsideration pursuant to Rule 59(e), SCRCP, so that Judge Seals' informal thoughts could be put into the form of a proper order. It is well settled in South Carolina that correspondence from judges that are not filed in the public record are not orders of the court. In South Carolina, an order of a Court is filed in the public index, or an order is announced in open Court. In this case, the email from Judge Seals' Law Clerk is neither and as has been indicated, Appellants took no action by filing the appropriate Rule 59(e) motion to preserve any appealable issues. Clearly, Appellants had notice of what Judge Seals was thinking when he issued his ruling but for some reason failed to act on it.

The Appellants include not only the Form 4 Order but an email purportedly from the Judge written by the Judge's law clerk as part of their Notice of Appeal. Appellants argue the email is part and parcel of the Form 4 Order despite the fact that it is unrecorded, is not recorded in the public index, nor is it written by the Judge himself. The Supreme Court of South Carolina considered just such an issue in *Long v. McMillan*, 226 S.C. 598, 86 S.E.2d 477 (1955). In that case, Cpl. Crawford of the South Carolina Highway Patrol had seized a gun from an individual named Huggins. Apparently, the highway patrol had been given a directive by the Commander of

the patrol that any guns seized must be accounted for and turned in to the clerk of court. Cpl. Crawford went to the chambers of Circuit Judge Baker and during that meeting in chambers, Judge Baker told Cpl. Crawford to keep the pistol until further order of the court. The conversation between Cpl. Crawford and Judge Baker took place in the judge's chambers and not in open court, was not put in writing, or entered upon the public records of the court.

Later litigation was brought, and the question became whether or not an order given in chambers to a patrol officer was an order of the Court. In *Long v. McMillan*, 226 S.C. 598, 86 S.E.2d 477 (1955), the Supreme Court made clear that such an order issued in chambers, not in open court or in writing, was not an order of the court. ("The acts of a court of record are known by its records alone and cannot be established by parol testimony.")

Similarly in this case an email from a law clerk to the parties is not an order of the court and cannot be construed to be so. In *State v. Highsmith*, 105 S.C. 505, 90 S.E.2d 154 (1958), the Court made clear that a judge's oral construction of his own order done unofficially is not an order of the court. The correct practice would have been to move before the court for an official on-the-record ruling.

Here, Appellants have not sought a formal order of the circuit court regarding the email of Judge Seals' Law Clerk, nor did they file a proper Rule 59(e), SCRCP motion; and accordingly they cannot raise issues about the email of Judge Seals' Law Clerk as it is not an order of Judge Seals. See also *Andrews v. Dorchester County School District*, 292 S.C. 392, 356 S.E. 2d 439 (1987) (holding a letter from a lawyer for the school board to parties is not an order of the school board). Thus, because Appellants failed to ask for reconsideration, the appeal only applies to the Form 4 Order and they cannot avail themselves to the email from Margaret Scalise, Law Clerk, because it was not a public record, was not written by the Judge himself and was not entered into

the public records for Horry County. In light of the above, Appellants failed to preserve the issues they now appeal and thus are precluded from asserting them based on longstanding South Carolina case law. In sum, a Law Clerk's email is not an order of the court and thus not properly a part of this appeal.

V. THE CASES CITED BY APPELLANTS REGARDING SANCTIONS HAVE NO APPLICATION HERE.

As has been stated throughout this brief, the question raised is whether or not the trial court abused its discretion in striking Appellants' answer and affirmative defenses. South Carolina appellate courts defer to the trial court unless there is a manifest abuse of discretion. *Gray v. Davis*, 247 S.C. 536, 148 S.E.2d 682 (1966) (For this court to disturb the decision of the lower court, it must clearly appear the trial court abused its discretion.) As an example, even the cases Appellants cite do not stand for the principle that the trial court committed a grievous error and abused its discretion. In fact, just the opposite. See *Barnette v. Adams Bros. Logging*, 355 S.C. 588, 586 S.E.2d 572, 576 (2003) (The Court of Appeals holds the trial court did not abuse its discretion by dismissing one of the plaintiff's causes of action); *McNair v. Fairfield County*, 379 S.C. 462, 467 665 S.E. 2d 830, 832-833 (Ct. App. 2008 (holding circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to produce documents requested in discovery, failed to organized documents coherently, and failed to completely answer interrogatories); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding circuit court did not abuse its discretion by striking appellant's answer in response to appellant's failing to abide by trial court's temporary restraining order); *Griffin Grading & Clearing Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E. 2d 716 (Ct. App. 1999) (affirming the circuit court's order striking defendant's answer when defendant admitted at oral argument that the failure to comply with certain discovery was not defensible); *Skywaves I Corp.*

v. Branch Banking & Trust, 423 S.E.2d 432, 814 S.E. 2d 643 (Ct. App. 2018) (finding circuit court did not abuse its discretion in denying Skywaves' motion to strike BB&T's and Edahl's answers).

Each of the above cases are cited in the Appellants' brief as authority the Judge abused his discretion. In each of these cases, this court declined to find that the judge abused his discretion. In fact, the other cases cited by Appellants all involve court orders that have no application to this case. See *Orlando v. Boyd*, 320 S.C. 509, 466 S.E. 2d 353 (1996) (trial court's exclusion of expert witness because witness was not deposed by August 3, 1992 is error); *Baughman v. Am. Tel & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (court reverses exclusion of witness because the plaintiff had not received crucial information he was entitled to from AT&T); *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) (trial court reversed for striking pleadings of appellant because of the effect on innocent co-defendant). Here, the co-Defendant Alliance had actual notice of the preservation order and the severity of Okun's injuries so much so that Teems acted immediately to repair the railing . In spite of all this, Teems was grossly negligent in handling crucial evidence involving the death of Okun. See Teems Affidavit. (R. p. 59).

In actuality the trial court had no choice but to strike the affirmative defenses and the answers because of the severe prejudice caused to the Respondent by Appellants jointly. In *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), this court held that a sanction must be imposed which would serve to protect the rights of discovery provided by the rules and that leniency in the imposition of sanctions is to be avoided where it results in inadequate protection of discovery. Without adequate sanctions the discovery process would be ineffectual to the parties and encourage the conduct we have in this case which is deliberate mishandling of evidence in the face of a Court Order.

The *Downey* Court found that a lenient sanction does not protect the rules of procedure or a party's right to discovery. In *Downey*, the trial court's ruling was not a meaningful deterrent to those who might fail to submit to discovery in the future. The *Downey* Court made clear that discovery orders were to be obeyed and that the trial court must enforce those rules for the benefit of all litigants. Similarly this trial court was required to strike the "answers and defenses" to protect Respondent's rights and the Order of the court.

VI. THE TRIAL COURT REALIZED THE SEVERE PREJUDICE TO RESPONDENT BY APPELLANTS' LOSS OF CRUCIAL EVIDENCE.

The email from the Judge's Law Clerk makes clear that while not part of the Form 4 Order it shows the Court's "informal" thinking on this matter. Respondent was and is severely prejudiced because the critical and only piece of important evidence -- the handrail -- was lost because of the careless and reckless retention plan of the Appellants. What litigant would, while under a court order, place a critical and crucial piece of evidence in an outdoor fencing area that is unprotected where third parties can come and go and can take that evidence at their whim? Answer: No one who takes a court order seriously and believes the court will excuse their reckless conduct. The Appellants' employee, Teems, exhibited reckless indifference and contemptable conduct by failing to safeguard the handrail when he knew of the Court's Order of preservation and of the importance of the evidence. Further Appellants hypocritically want no penalty to be issued and boldly request they be allowed to assert affirmative defenses such as comparative negligence, constructive notice and other defenses. This puts the Respondent in the untenable position of having to prove a negative since Appellants lost critical evidence which the Court required them to preserve. Appellants would have this Court provide no penalty to it for losing the critical piece of evidence because Appellants' landscaping contractor moved it from an outside fencing area. Translation: Appellants want a free pass for their reckless conduct in losing evidence which would explain the

cause of the death of Okun. The trial judge used his experience, wisdom and common sense in determining that the loss of this crucial evidence severely handicapped Respondent and that Appellants violated an order of the circuit court requiring them to retain it. This cavalier approach to safeguarding important evidence must result in Appellants not being able to present their answers and affirmative defenses. In fact, no other remedy was reasonably possible or "just" under these circumstances. (See Rule 37, SCRCP). If Appellants were fined, it would mean nothing. If the adverse inference jury charge was given, Appellants would gladly accept it since they lost the crucial piece of evidence but would still have their affirmative defenses. The trial court's only "just sanction" was to penalize Appellants for their failure to do what the court had ordered which was to safeguard the crucial and critical evidence in the case – the handrail which caused the death of Okun.

As a further example, had Appellants done what the court had ordered and kept the handrail, Respondent could have tested the handrail, could have inspected the condition of the wood, could have inspected the condition of the screws, could have had expert analysis of the handrail, could have seen if the wood was appropriate for outdoor use, could have seen if the handrail was built pursuant to the building codes and could have determined whether or not the handrail was properly affixed to the bridge. In sum, the lost handrail evidence by the Defendants is the heart of this case and its loss is a catastrophic misstep which affects Plaintiff's prosecution of the case.

VII. THE TRIAL COURT CORRECTLY APPLIED RULE 37, SCRCP BASED ON APPELLANTS' WILLFUL VIOLATION OF A COURT ORDER.

Rule 37(b)(2), SCRCP allows a court to make such orders as are just if a "party fails to obey an order entered under Rule 26(f)." In this case, the Plaintiff diligently obtained a court order requiring the Defendant to safeguard the handrail which caused Okun's fall and death. The

Defendants recklessly left the handrail in an outdoor fence area exposed to the elements and without supervision with actual knowledge of a Court Order requiring them to protect it.. This conduct caused the loss of the key evidence because of Defendants' gross negligence. The court in considering the unusual facts of this case found the only "just" decision was to strike the answers and affirmative defenses. Any other ruling rewards the Appellants' misconduct and severely penalizes the Respondent at trial. In fact, if the Court did not take this action it would signal to Defendants they could lose evidence and suffer little or no consequences. See *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 318 (Ct. App. 1987) (prejudice would be presumed from the failure to reply to discovery requests.)

CONCLUSION

In sum, Appellants had a legal duty to preserve evidence pursuant to a Court Order. The failure of Appellants to preserve the handrail threatens the integrity of the judicial process. Our adversarial process is designed to tolerate human failings, erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. When critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures – and our civil justice system suffers. See *United Medical Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007). ("Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoilation of evidence.") ("injured party need not demonstrate bad faith in order for the court to impose spoilation sanctions."). In this case the trial court did the only thing it could do when the Appellants lost the key and crucial piece of evidence it struck its answers and affirmative defenses. To hold otherwise would have rewarded the Appellants for their cavalier attitude and indifference to properly protecting the handrail from getting lost or misplaced. Since the handrail was in Appellants' possession and they were under a

court order to preserve it, Appellants must bear the consequences of their actions. To hold otherwise rewards the Appellants for their conduct and sends the message that court orders need not be obeyed. Accordingly, Respondent requests the trial court's order be affirmed as there was no abuse of discretion, just common-sense justice based on the terrible facts which caused Okun's untimely demise.

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August 1, 2023
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
AUG 03 2023
SC Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927
Appellate Case No. 2023-000063

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

vs.

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

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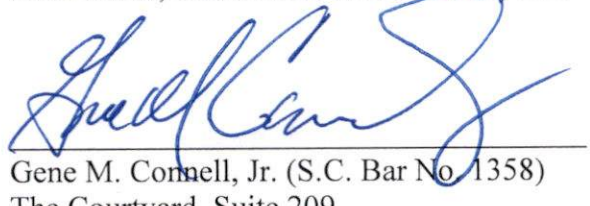
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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