THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2018-000385

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased and Jeanette Howe . . . . . .
Respondents,

v.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC; Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber company; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber industries, Inc.); Cleaver-Brooks, Inc.; Covil Corporation' Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, individually and as successor-in-interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife, Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc, f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.,; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American & Standard Manufacturing

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Of Which Covil Corporation is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, ... Respondents

v.

CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in-interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation.. . . . . Defendants

Of which Covil Corporation is the Appellant.

AND

James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore, Descendant, Respondent.

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.

AND

Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc.,. . . .Defendants

Of which Covil Corporation is the Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Whether the trial court committed error by striking Appellant Covil Corporation's pleadings where such relief was not requested in any motion or hearing.**

II. **Whether the trial court violated Appellant Covil Corporation's due process rights by striking its pleadings without a motion or hearing.**

III. **Whether the trial court abused its discretion in imposing sanctions under Rule 37(b) of the South Carolina Rules of Civil Procedure when Covil Corporation did not violate any relevant discovery order.**

IV. **Whether the trial court erred by failing to make the required finding that Appellant Covil Corporation's alleged conduct involved bad faith, willfulness, or gross indifference to the rights of the Plaintiffs and by failing to narrowly tailor the sanctions to fit the circumstances.**

STATEMENT OF THE CASE

The trial court's orders striking Appellant Covil Corporation's ("Covil") answers should be reversed because the orders granted relief far beyond what was raised in any motion or hearing, the manner in which the orders were entered violated Covil's due process rights, and the trial court failed to weigh the proper factors, make the proper findings, or tailor the sanctions to the circumstances presented as required by applicable law. As a result, the trial court's entry of the orders striking Covil's pleadings should be overturned or "set aside".

This appeal arises from the trial court's improper entry of orders in three separate asbestos lawsuits (collectively "Underlying Actions"). The Underlying Actions have been consolidated on appeal. The early procedural histories of the Underlying Actions vary and are set out in separate sections below. The later procedural history and events leading up to the entry of the orders appealed from overlap and have been combined below.

I. Roxanne Falls v. CBS Corporation, et al., York County Case No.: 2015-CP-46-02155.

On July 20, 2015, Charlotte Gaye Smith and Gary Dean Smith commenced this action against Covil and numerous other defendants, alleging Ms. Smith was exposed to asbestos fibers for which defendants are legally responsible ("Falls Action"). [R. p. ¶ 21-p. 78, ¶ 33]. Against Covil, the Complaint asserted claims for negligent failure to warn and defective product design, breach of implied warranty, strict liability, loss of consortium, and punitive damages. [R. p. 84, ¶ 24-p. 86, ¶ 63; R. p. 99, ¶ 122-p. 100, ¶ 131]. On September 10, 2015, Covil filed an Answer to the Complaint denying all material allegations and asserting affirmative defenses. [R. p. 105].

On March 10, 2016, a First Amended Complaint was filed, changing the Plaintiff to Gary Dean Smith, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith. [R. p. 119]. In addition, the First Amended Complaint added several new defendants and a claim

for wrongful death. [R. p. 119]. Other than these changes, the substantive allegations and claims in the First Amended Complaint were the same as in the original Complaint. [Id.].

On November 15, 2017, a Second Amended Complaint was filed, changing the Plaintiff to Roxanne Falls, individually and as Personal Representative to the Estate of Charlotte Gay Smith. [R. p. 149]. The Second Amended Complaint also added Defendant Union Carbide Corporation and removed the cause of action for loss of consortium. [Id.]. Other than these changes, the substantive allegations and claims in the Second Amended Complaint were the same as in the First Amended Complaint. [Id.]. On December 8, 2017, Covil filed an Answer to the Second Amended Complaint denying all material allegations and asserting affirmative defenses. [R. p. 170].

II. Timothy Howe, et al. v. Air & Liquid Systems, Corp., et al., York County Case No.: 2015-CP-46-03456.

On November 9, 2015, Wayne Ervin Howe and Jeanette Howe commenced this action against Covil and numerous other defendants, alleging Mr. Howe was exposed to asbestos fibers for which defendants are legally responsible ("Howe Action"). [R. p. 205, ¶ 42-p.208, ¶ 64]. Against Covil, the Complaint asserted claims for negligent failure to warn and defective product design, breach of implied warranty, strict liability, loss of consortium, and punitive damages. [R. p. 208, ¶ 65-p. 214, ¶ 107; R. p. 219, ¶ 134-p. 221, ¶ 148]. On February 8, 2016, Covil filed an Answer to the Complaint denying all material allegations and asserting affirmative defenses. [R. p. 226].

On September 23, 2016, a First Amended Complaint was filed, changing the Plaintiffs to Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased, and Jeanette Howe. [R. p. 243]. In addition, the First Amended Complaint added several new defendants and a claim for wrongful death. [Id.]. Other than these changes,

the substantive allegations and claims in the First Amended Complaint were the same as in the original Complaint. [Id.]. On October 10, 2016, Covil filed an Answer to the First Amended Complaint denying all material allegations and asserting affirmative defenses. [R. p. 273].

III. James Calvin Sizemore v. Bowater Paper Mill, et al., Hampton County Case No.: 2016-CP-25-440.

On December 9, 2016, James Calvin Sizemore commenced this action against Covil and numerous other defendants, alleging he was exposed to asbestos fibers for which defendants are legally responsible ("Sizemore Action"). [R. p. 298, ¶ 1-p. 302, ¶ 10]. Against Covil, the Complaint asserted claims for negligence, strict liability, vicarious liability, premises liability, breach of implied warranties, and punitive damages. [R. p. 303, ¶ 11-p. 318, ¶ 83]. On February 17, 2017, Covil filed an Answer to the Complaint denying all material allegations and asserting affirmative defenses. [R. p. 322].

On February 1, 2018, a First Amended Complaint was filed, changing the Plaintiff to James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore. [R. p. 338]. In addition, the First Amended Complaint also added wrongful death and survival actions. [Id.]. Other than these changes, the substantive allegations and claims in the First Amended Complaint were the same as in the original Complaint. [Id.]. On February 15, 2018, Covil filed an Answer to the First Amended Complaint denying all material allegations and asserting affirmative defenses. [R. p. 368].

IV. Additional Procedural History and Discovery Motions.

By standing order entered in 2010, all asbestos cases filed in the South Carolina Circuit Courts are subject to a coordinated docket and uniform discovery procedures. [R. p. 1]. Initially, The Honorable Judge D. Garrison Hill was designated as the Administrative Judge for all such asbestos litigation. The South Carolina Supreme Court has since designated The Honorable

Judge Jean Hoefer Toal, Former Madam Chief Justice of the South Carolina Supreme Court, as the Administrative Judge for the asbestos docket.

On January 11, 2018, Justice Toal signed a single Scheduling Order to be entered in each of the Underlying Actions. [R. pp. 49, 54, and 59]. Under a heading entitled "Motions to Compel/Motions for Protective Order", the Scheduling Order provided that Justice Toal would hold a hearing on all discovery disputes on January 24, 2018, at the Richland County Courthouse. [Id.]. The Scheduling Order further provided that "[a]ppropriate responses to all properly issued Deposition Subpoenas *Duces Tecum* must be provided by February 2, 2018" and the "[d]epositions of Defendants' 30(b)(6) Representatives for whom a properly served Notice of Deposition has been issued must be completed by February 9, 2018. [Id.].

On January 19, 2018, Covil served a motion for protective order and motion to quash the Rule 30(b)(6) deposition notices served on it by the Plaintiffs in each of the Underlying Actions. [R. pp. 383, 387, and 392]. In each of its motions, Covil sought a protective order under Rule 26 SCRCP ruling that the depositions should not be allowed and striking the Rule 30(b)(6) notices served on Covil. [Id.]. Each of the motions were based on the same grounds, specifically: (1) that the Rule 30(b)(6) notices sought irrelevant documents and information not reasonably calculated to lead to the discovery of admissible evidence; (2) that the Covil Rule 30(b)(6) depositions would be cumulative, duplicative, and unduly burdensome and the information sought was available from other sources; and (3) that the notices were overly broad and the topics were not stated with reasonable particularity. [Id.]. In the event the trial court allowed the depositions to go forward, Covil requested in the alternative that the depositions be postponed until at least mid-February 2018. [Id.].

On January 23, 2018 – the day before Justice Toal's scheduled hearing on discovery

matters – the Plaintiffs filed motions to compel in each of the Underlying Actions. [R. pp. 394, 400, and 420]. The motions were brought under Rule 33 and Rule 37 and sought an order compelling Covil and other defendants to designate a Rule 30(b)(6) representative and produce responsive documents under Rule 30(b)(5). [Id.]. Specifically, Plaintiffs sought the following relief in their motions:

> Plaintiffs request the Court to issue an order 1) compelling production of documents in electronic form within 30 days of the first amended notices; 2) instructing Defendants to provide date(s) to complete the deposition by 5:00 on Friday, January 26th to Plaintiffs' counsel for a deposition date on or before February 9th and 3) if the production of documents and date for a deposition is not provided by the given dates, Defendants forfeit the right to go forward with MSJ on February 26th because the requested discovery was not produced. Plaintiffs further request an award of costs and attorney's fees attendant to this motion as provided by Rule 37, SCRCP.

[R. pp. 396-97].

> Plaintiff request the Court to issue an order stating the following:
> 1) Plaintiffs have issued a proper notice of deposition for a corporate representative, which incorporated a request for documents. Defendants are compelled to produce requested documents in electronic form within a week of this hearing, on January 31, 2018;
> 2) Plaintiffs have issued a proper notice of deposition for a corporate representative. Defendants are compelled to provide date(s) to complete the deposition by 5:00 p.m. on Friday, January 26th to Plaintiffs' counsel for a deposition date on or before February 16, 2018. The witness should be prepared to discuss the topics notice [sic] based on what is known or reasonably available to the Defendant;f [sic]
> 3) An adequate time for discovery must occur prior to having a motion for summary judgment heard. Due to the failure to produce requested documents or corporate witnesses, it is ordered that Defendants' [sic] have forfeited the right to go forward with summary judgment motions on February 26th; and
> 4) Plaintiffs are awarded reasonable costs and attorney's fees attendant for having to bring this motion as provided by Rule 37, SCRCP.

[R. pp. 403-04].

> Plaintiffs request the Court to issue an order (1) compelling production of documents in electronic form within a week of this hearing, on January 31, 2018; (2) instructing Defendants to provide date(s) to complete the

> deposition by 5:00 on Friday, January 26th to Plaintiffs' counsel for a deposition date on or before February 9th; and (3) if the production of documents and date for a deposition is not provided by the given dates, Defendants forfeit the right to go forward with MSJ on February 26th because the requested discovery was not produced. Plaintiffs further request an award of costs and attorney's fees attendant to this motion as provided by Rule 37, SCRCP.

[R. p. 422].

To summarize, the motions to compel in the underlying actions requested: (1) that Covil produce the documents requested in the notices of deposition under Rule 30(b)(5) by the dates requested; (2) that Covil designate a Rule 30(b)(6) representative to be deposed by the date requested; (3) that Covil be barred from moving for summary judgment; and (4) that Covil pay the Plaintiffs' costs and attorneys' fees associated with bringing the motions to compel. [R. pp. 394, 400, and 420]. Notably, none of the Plaintiffs' motions to compel sought any sanctions under Rule 37(b) and were devoid of any request for an order striking Covil's pleadings. [Id.]. The only sanctions sought were for an award of costs and attorneys' fees under Rule 37(a)(4), and a request that Covil be barred from moving for summary judgment. [Id.].

V. Hearing on Discovery Motions.

On January 24, 2018, Justice Toal heard Covil's motions for protective order and Plaintiffs' motions to compel along with a number of other discovery disputes in the Underlying Actions. In response to the Plaintiffs' request for documents under Rule 30(b)(5), Covil's counsel noted the company had been out of business since 1991 that all documents related to the company had already been produced in countless other asbestos cases involving the same Plaintiffs' counsel. [R. p. 504, line 4-p. 505, line 6]. As a result, the Plaintiffs' attorneys were already in possession of all available documents for Covil, making any further production redundant. [Id.]. Covil's counsel further clarified that since October 2017 he had invited

opposing counsel to inspect all potentially-relevant documents in his possession. [R. p. 504, line 4-p. 505, line 6]. Thus, Covil had not refused to produce the documents in question as the Plaintiffs claimed. [Id.].

Concerning Plaintiffs' motion to compel the Rule 30(b)(6) deposition, Covil asserted the deposition was improper and should not allowed. [R. p. 505, line 7-p. 510, line 1]. Counsel for Covil again noted that the company had been out of business for nearly 30 years. [Id.]. The people who had worked for Covil in the 1970s and prior were in their "eighties, nineties, or more" and could not be located. [Id.]. As a result, the only person available and willing to serve as the Rule 30(b)(6) representative was James Covil. [Id.].

According to affidavits submitted to Justice Toal in support of Covil's motions, James Covil is the son of Covil's founder and long-time president, Palmer Covil. [R. pp. 1283, 1285, and 1287]. James Covil began working at Covil in 1974, at which point the company no longer sold asbestos-containing insulation materials. [Id.]. Palmer Covil, who possessed the most knowledge about Covil's business operations and any potential use of asbestos-containing products, died in 1984. [Id.]. James Covil affirmed that, to the best of his knowledge, "due to the passage of time and deaths and old age of former employees", there were no other employees available to testify to the matters requested in the Rule 30(b)(6) SCRCP notices. [Id.]. While James Covil indicated he was willing to represent Covil if absolutely necessary, he testified that he lacked personal knowledge about the topics in the notices and it would require considerable effort and time for him to attempt to become knowledgeable. [Id.].

Even with preparation, Covil's counsel made it clear that any information James Covil could provide would be derived from an earlier deposition of his father. Prior to his death, James Covil's father, Palmer Covil, was deposed in 1977 about the company's use and sale of asbestos

products. [R. p. 507, lines 3-19]. The deposition lasted several days, resulted in a transcript of approximately 500 pages, and was conducted by preeminent product liability attorneys. [Id.]. This transcript was provided to Plaintiffs' counsel. [Id.]. Indeed, Covil's counsel noted that whatever James Covil testified to at the Rule 30(b)(6) deposition would be a "regurgitation" of Palmer Covil's testimony. [Id.]. The remainder of James Covil's knowledge would come from a review of the Covil documents that had been produced to Plaintiffs' counsel in numerous other cases. [Id.]. Finally, Covil's counsel stated that if the trial court was going to allow the Rule 30(b)(6) depositions in the Underlying Actions to go forward, James Covil needed additional time to prepare and requested that the deposition be pushed back to February 7 or 8, 2018. [R. p. 507, line 25-p. 510, line 1].

Justice Toal's comments at the hearing indicate that she understood James Covil may not possess relevant personal knowledge beyond what was contained in the Covil documents and Palmer Covil's deposition, but that the Plaintiffs were still entitled to take his deposition. For instance, the following exchange is illustrative:

> THE COURT: Mr. Rheney, I'm not going to forbid them from taking a 30(b)(6) of the person that is still around to be deposed, the son.
>
> MR. RHENEY: Well, and then ---
>
> THE COURT: I'm not going to do that. What we're talking about now if [sic] when we can do it.
>
> MR. RHENEY: Well, Your Honor, I guess I, I do understand that, just so you know, and I'm not arguing with you. Please understand. What Jimmy Covil knows is going to be a regurgitation of what Palmer testified to.
>
> THE COURT: Well, that may be.
>
> MR. RHENEY: Palmer testified to. That I know.
>
> THE COURT: But we're going to have the time. We've got a bunch of cases in which they want to depose him.

> MR. RHENEY: Well, the week ---
>
> THE COURT: They're going to depose him one time. At least they're ready to do that. I think that's reasonable. **I think it's very reasonable for you to say (a) he doesn't know anything** and (b) if he's going to be deposed, it all ought to be just one time.

[R. p. 507, line 10-p. 508, line 4 (emphasis added)].

Justice Toal made an oral ruling applicable to each of the Underlying Actions that Covil was required to produce responsive documents by Friday, January 26, 2018, and that the Rule 30(b)(6) depositions in each matter would take place on February 7, 2018. [R. p. 510, lines 2-16]. Justice Toal made no oral rulings on what level of preparation or knowledge James Covil was required to possess regarding the Rule 30(b)(6) topics or what sanctions, if any, would be imposed if he lacked such knowledge. [See generally R. pp. 442-577]. By her own comments on the record, Justice Toal understood that James Covil lacked personal knowledge about almost all issues related to the Underlying Actions. [R. p. 507, line 10-p. 508, line 4]. Justice Toal instructed Covil's counsel, David Rheney, to prepare an order reflecting her bench ruling. [R. p. 510, lines 2-8]. Shortly after Justice Toal's ruling, the parties stated on the record that they had reached an agreement to extend the deadline for the production of documents in the Underlying Actions to Monday, January 29, 2018, rather than Friday, January 26, 2018. [R. p. 513, line 21-p. 514, line 14].

At no point during the hearing did Justice Toal grant the Plaintiffs' request for sanctions such as barring Covil from moving for summary judgment or awarding attorneys' fees and costs under Rule 37 SCRCP. [See generally R. p. 442]. In fact, Justice Toal squarely addressed the summary judgment issue during arguments as to another Defendant and rejected such sanctions, stating "I have no hesitation about having sanctions hearings on people that don't produce

documents when they're supposed to, but I'm not going to sanction them by saying they can't pursue their motion for summary judgment." [R. p. 463, lines 10-17]. By her own statements, Justice Toal acknowledged that further hearings would be necessary before sanctions could be imposed on any Defendant for future discovery deficiencies. [Id.]. Finally, counsel for Plaintiffs made no request at the hearing that Covil's pleadings be struck. [Id.]. Despite the fact that there was no request for an order striking Covil's pleadings, that was the relief ultimately granted by Justice Toal.

VI. Post-Hearing Correspondence with Justice Toal, Proposed Orders, and Entry of Orders Relevant to this Appeal.

On January 29, 2018, Covil produced all available documents to Plaintiffs in the Underlying Actions in compliance with Justice Toal's bench ruling and the agreement of the parties. [R. p. 1012]. On the same date, Covil's counsel David Rheney sent a proposed order to be entered in each of the Underlying Actions to Justice Toal by email and copied opposing counsel. [R. p. 1013]. This comported with Justice Toal's instructions that Covil's counsel prepare and submit the proposed orders as to her ruling on the discovery motions involving Covil. [R. p. 510; lines 2-8].

On February 1, 2018, Plaintiffs' counsel emailed proposed orders related to all of Judge Toal's rulings on all discovery matters covered at the hearing, including competing proposed orders on the discovery motions relevant to Covil. [R. pp. 1018-19].

On February 2, 2018, at 10:32 a.m., Covil's counsel David Rheney sent an email to Justice Toal, objecting to the proposed orders submitted by Plaintiffs' counsel on the grounds that they did not accurately reflect her rulings during the hearing and they violated her instructions that Covil's counsel prepare the proposed orders. [R. pp. 1026-27]. Plaintiffs' counsel responded at 11:23 a.m., stating "[a]s it relates to Covil we believe either order (Covil's

order with our proposed change or Plaintiff's proposed order) is in line with the court's rulings . . . ." [R. pp. 1027-28]. Plaintiffs' counsel further represented that Covil did not produce documents until January 30, 2018. [R. p. 1028]. Finally, Plaintiffs' counsel noted that while Justice Toal had not specifically ruled on how many days James Covil could be deposed, the Plaintiffs' position was that they were entitled to more than a single day as long as the deposition was completed by the February 9, 2018, discovery deadline. [Id.]. At 12:26 p.m. on February 2, 2018, Covil's counsel responded clarifying that Covil produced all available documents by midday on January 29, 2018, not on January 30, 2018, as asserted by Plaintiffs' counsel. [R. pp. 1026-27]. Further, Covil's counsel objected to Plaintiffs' proposed orders because they included language that Covil's Rule 30(b)(6) deposition would continue day to day when Justice Toal made no such ruling. [R. p. 1027]. In spite of this, Covil's counsel indicated that James Covil had made arrangements to be free the morning of a second day if it was necessary. [Id.]. At 12:29 p.m. on February 2, 2018, Justice Toal's Law Clerk, Jamie Rutkoski, responded indicating Justice Toal's displeasure at the parties' continued disputes as to the discovery orders and requesting that any parties with disagreements should submit their own proposed orders, and that "Judge Toal will look at both proposed orders and make a decision as to what the orders will contain." [R. p. 1026].

In a separate email chain to Justice Toal on February 2, 2018, numerous other defendants also objected to Plaintiffs' counsel's proposed orders related to their clients. [R. pp. 1030-41]. In light of the logistical hurdles associated with so many parties submitting their own proposed orders, counsel for all parties recommended that Justice Toal rely on the transcript for the hearing to prepare the orders. [R. p. 1032]. Justice Toal's clerk responded that it would still be preferable for both sides to send their own proposed orders. [R. p. 1030]. Later the same day,

Covil submitted a new version of its draft proposed orders incorporating changes suggested by Plaintiffs' counsel. [R. pp. 1042-45]. Therefore, by the end of the day on February 2, 2018, the trial court had a proposed order from the Plaintiffs' counsel and an updated proposed order from Covil's counsel incorporating changes submitted by Plaintiffs' counsel. According to its own email communication with the parties, the trial court should have then reviewed both proposed orders, made a decision about what the order should contain, and filed the order in the Underlying Actions. This did not happen. Instead, the proposed orders submitted by the parties were never entered. Nearly a month later, proposed orders submitted by Plaintiffs' counsel and seeking entirely new relief were granted without proper process or a hearing.

James Covil was deposed starting on Wednesday, February 7, 2018, in compliance with Justice Toal's oral ruling. [R. p. 1049]. The deposition continued to February 8, 2018. [Id.]. On February 14, 2018, Justice Toal's clerk emailed all defendants requesting that all proposed orders concerning the January 24, 2018, hearing be submitted to her no later than Wednesday, February 21, 2018. [R. p. 1053].

On February 16, 2018, Plaintiffs' counsel emailed Justice Toal and asserted for the first time that Covil had failed to comply with her oral rulings. [R. p. 1066]. To support this position, however, Plaintiffs included excerpts of James Covil's deposition from February 7-8, 2018, which had not occurred when Justice Toal announced her rulings on January 24, 2018. [R. pp. 1083-114, 1133-64, and 1174-205]. Plaintiffs took issue with what they contended was a failure by James Covil to educate himself sufficiently about minute details of Covil's business and insurance practices spanning decades and about which he had no personal knowledge. [R. p. 1066].

In addition, Plaintiffs' counsel attached proposed orders that were radically different

than the proposed orders submitted by the Plaintiffs on February 1, 2018. [R. pp. 1080-82; 1130-32; and 1165-73 with R. pp. 1020-25]. These new orders struck Covil's answers in the Underyling Actions – relief that Plaintiffs never requested in their motions to compel or at the hearing. [R. p. 1221]. Moreover, the new proposed orders made no references whatsoever to Justice Toal's rulings as to Covil's protective order motions. [R. pp. 1080-82; 1130-32; and 1165-73]. The new proposed orders appear to strike Covil's Answers based on James Covil's lack of knowledge at his deposition. [Id.]. Justice Toal never, however, issued any ruling as to what level of preparation James Covil was required to have. [R. p. 502, line 4-p. 514, line 13]. To the contrary, Justice Toal's comments at the hearing indicated she ordered the deposition proceed with the understanding that James Covil likely lacked personal knowledge regarding a number of matters relevant to the Underlying Actions. [R. p. 507, line 18-p. 508, line 4].

Later, at 2:53 p.m. on February 16, 2018, Justice Toal's law clerk emailed the parties to inform them that any party in disagreement with Plaintiffs' counsel's proposed orders should submit their own proposed orders within 24 hours, and that Justice Toal would be signing and submitting final orders by Monday, February 19, 2018. [R. p. 1206]. At 3:27 p.m., counsel for another Defendant, Aurora Pump Company, responded and noted that, among other issues, Plaintiffs' counsel had not actually moved for the "draconian sanctions -- striking the Defendant's pleadings -- which they now incorporate in their proposed Order" and requesting an opportunity to be heard. [R. p. 1222]. At 3:52 p.m., Covil's counsel responded lodging the same objections as counsel for Aurora Pump Company, noting that "no motion for sanctions regarding . . . [Covil's] representative's deposition answers has been served." [R. p. 1221]. At 4:31 p.m., Justice Toal's law clerk notified the parties that the deadline to submit proposed orders had been extended to Wednesday, February 21, 2018. [R. p. 1239]. Despite Covil's and Aurora Pump

Company's objections, the email also stated "[t]here will be no further hearing in furtherance of the ruling made at the January 24th hearing." [Id.]. Instead, "[a]ny and all arguments" of the parties were to be sent in writing by February 21 along with the proposed orders. [Id.]. Covil's counsel resubmitted the same proposed order that had been submitted to Justice Toal via email on February 2, 2018. [R. p. 1258].

On February 21, 2018, Covil's counsel emailed Justice Toal and attached another copy of the February 2, 2018, proposed order, as well as an explanatory letter. In the letter, Covil's counsel set out the procedural history detailed above and raised the following objections to the Plaintiffs' new proposed order:

> Essentially, the proposed orders of the plaintiffs grossly overreach the subject matter of the hearing on January 24, since the matters complained of, with which we strongly disagree, had not even occurred yet. In addition, the proposed orders attempt to find both that Covil violated your order and should be sanctioned, while at the same time denying Covil the opportunity to be heard on the matter. To say the least, this attempted overreach is concerning to us and, we believe, improper under the SCRCP. For these reasons, we respectfully request that you disregard the proposed orders from the plaintiffs, as they do not reflect what you ordered that day.

[R. p. 1049].

On February 23, 2018, Justice Toal's law clerk emailed all parties stating that the proposed orders and objections related to the discovery issues from the January 24, 2018, hearing had been reviewed and the signed orders were to be filed shortly. [R. p. 1277]. On the same date, Justice Toal signed the proposed orders submitted by Plaintiffs on February 16, 2018, striking Covil's answers in the Underlying Actions (collectively "Subject Orders"). [R. pp. 62, 65, and 68]. The Subject Orders were subsequently file-stamped in the Falls and Sizemore Action on February 28, 2018, and in the Howe Action on March 1, 2018. [Id.]. Covil filed its Notice of Appeal in the Sizemore Action on March 1, 2018, and in the Falls and Howe Actions on March

2, 2018. [R. pp. 426, 420, and 433].

STANDARD OF REVIEW

The Subject Orders do not cite any particular provision of the South Carolina Rules of Civil Procedure. It is clear, however, that the sanctions imposed were for alleged discovery violations. The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (1987). As a result, orders imposing sanctions should generally not be overturned absent an abuse of such discretion. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (1985). The burden is on the party appealing from the order to demonstrate the trial court abused its discretion. Clark, 284 S.C. at 570, 328 S.E.2d at 107. 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. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)). An abuse of discretion may also occur "when the trial court's ruling is based on an error of law or where the factual conclusions on which it is based lacks evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). A failure to consider required factors showing that a trial court failed to exercise discretion also amounts to an abuse of discretion. Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 216 (1997). In other words, the failure to exercise proper discretion is an abuse of discretion. Id.

ARGUMENT

I. The Trial Court Committed Reversible Error by Striking Covil's Pleadings Where Such Relief was Not Requested in Any Motion or Hearing.

As demonstrated above, the Subject Orders went far beyond any relief requested in the Plaintiffs' motions to compel or at the January 24, 2018, hearing. The issue, therefore, is whether

it is permissible for a court to enter an order striking a party's pleadings where such relief was never requested in a properly-filed motion or otherwise raised before the judge. As shown below, the answer is "no", and the Subject Orders should be reversed.

A motion is the sole mechanism by which a party may request a court to enter an order. See Rule 7 SCRCP. Rule 7(b)(1) states "[A]n application to the Court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." All written motions must also be filed with the court within five days of service. Rule 5(d) SCRCP.

"It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected." Tryon Fed. Sav. & Loan Ass'n v. Phelps, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992). "A notice of motion must apprise the opposing party of the relief sought by the moving party and the grounds therefore." Salvo v. Hewitt, Coleman & Associates, Inc., 274 S.C. 34, 260 S.E.2d 708 (1979). When orders are issued on motions without proper notice, they are improperly presented and should be set aside. Wesley-Burke v. Wesley-Burke, 288 S.C. 28, 30, 339 S.E.2d 512, 513 (1986) (citing Ex parte Apeler, 35 S.C. 417, 14 S.E. 931 (1892); State v. Parker, 7 S.C. 235 (1875)).

Under South Carolina law, a court may not grant relief beyond the limits or scope of what is included in a motion and notice. See Ford v. Calhoun, 53 S.C. 106, 30 S.E. 830, 832 (1898); Coogler v. California Ins. Co., 192 S.C. 54, 5 S.E.2d 459 (1939); Wildhagen v. Ayers, 225 S.C. 384, 82 S.E.2d 609 (1954); Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). Indeed, it is reversible error for a trial court to enter an order that exceeds the limits and scope of

the particular motion before it. See e.g., Skinner 257 S.C. at 549–50, 186 S.E.2d at 526.

For instance, in Skinner a wife moved to modify a court order approving and incorporating a settlement agreement concerning property distribution, child support, and alimony on the grounds that the support provisions were inadequate. Id., 257 S.C. at 548, 186 S.E.2d at 525. In entering the prior order, the trial court found that the wife's misconduct caused the separation of the parties. Id. As a result, she was only entitled to alimony and child support under the written settlement agreement, not under the underlying facts of the case as found by the court. Id. The trial court judge held a hearing on the wife's motion to modify the earlier order, after which he entered a new order making no reference to her motion but instead setting aside the prior order, stating it had been entered "under a misapprehension as to the facts of the case" and increasing the alimony and child support award. Id., 257 S.C. at 548, 186 S.E.2d at 525.

The South Carolina Supreme Court reversed the trial court's order on the grounds that it exceeded the scope of the wife's motion. Id. 257 S.C. at 549, 186 S.E.2d at 526. The motion made by the wife was for an order amending the terms of the settlement agreement incorporated into the earlier order; it was not a motion to reconsider the factual findings upon which the right to alimony was based. Id. As a result, the Skinner court concluded that the trial court judge had committed reversible error by exceeding "the limits and scope of the particular motion before him". Id. 257 S.C. at 550, 186 S.E.2d at 526.

Here, the Subject Orders suffer from the same fundamental and fatal legal defect as the order in Skinner. In short, the Subject Orders granted relief well beyond what was actually requested by the Plaintiffs in their motions to compel. The Plaintiffs' motions were completely devoid of any request that the trial court enter an order striking Covil's pleadings. [R. pp. 394,

400, and 420]. Similarly, the Plaintiffs never requested such relief at the hearing before Justice Toal. [See generally R. pp. 442-507]. Further, nothing at the hearing put Covil on notice that its pleadings could be struck without the filing of further motions and an opportunity to be heard. [Id.]. Justice Toal made oral rulings based on the motions and arguments before her. [Id.]. The Plaintiffs and Covil submitted competing proposed orders reflecting the oral rulings within a week of the hearing. [R. pp. 1012, 1018]. Justice Toal, however, did not sign or enter either of these orders.

It was not until February 16, 2018, that Plaintiffs for the first time requested that Covil's pleadings be struck. [R. p. 1065]. This was more than three weeks after the hearing, and after Covil had complied with Justice Toal's oral rulings to produce documents by January 29, 2018, and produce a Rule 30(b)(6) witness for deposition by February 7, 2018. Plaintiffs' request for new relief was not made in a properly-filed motion setting forth the relief sought and the grounds therefore in compliance with Rule 5 and Rule 7 SCRCP. [Id.]. Instead, the request for new relief was included in an email to Justice Toal and the other parties. [Id.]. Worst still, Plaintiffs couched the request for new relief as a proposed order purporting to relate to Justice Toal's oral rulings from the January 24, 2018, hearing. [R. p. 1065]. Covil strenuously objected to the Plaintiffs' improper actions and requested that the "proposed order" granting new relief not be entered until Covil had the opportunity to be heard on new issues. [R. pp. 1221-23; R. pp. 1046-49].

Despite Covil's objections and Plaintiffs' clear violations of the South Carolina Rules of Civil Procedure, Justice Toal signed the orders striking Covil's pleadings and they were subsequently filed in the Underlying Actions approximately one month after the January 24, 2018, hearing. As in Skinner, Justice Toal's orders "exceeded the limits and scope of the

particular motions" properly before the court. Id. 257 S.C. at 550, 186 S.E.2d at 526. There was simply no motion before Justice Toal requesting that Covil's pleadings be struck. Further, the Plaintiffs never requested such relief in an oral motion at the hearing. Therefore, it was reversible error for Justice Toal to sign and enter the Subject Orders. See City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 230, 599 S.E.2d 462, 464 (2004) ("A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it."); see also Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (1992) (citation omitted) ("It is an error of law for a court to decide a case on a ground not before it."); Bass v. Bass, 272 S.C. 177, 178-80, 249 S.E.2d 905, 906 (1978) (1978) (reversing a monetary award for compensation when no such claim was asserted in the underlying complaint); Turbeville v. Floyd, 288 S.C. 171, 174, 341 S.E.2d 651, 652 (1986) (noting a court ordinarily may not grant relief beyond the scope of the notice of motion) (quoting Skinner, 257 S.C. at 549, 186 S.E.2d at 526).

Notably, such reversal is proper even where the standard of review is abuse of discretion. "It is an error of law for a court to decide a case on a ground not before it." Griffin, 310 S.C. at 294, 423 S.E.2d at 147 (citations omitted). An abuse of discretion occurs when a decision is controlled by an error of law or is without evidentiary support. Mictronics v. South Carolina Dep't of Revenue, 345 S.C. 506, 510, 548 S.E.2d 223, 225 (2001). The trial court's entry of the Subject Orders, which granted relief beyond what was requested in the motions or at the hearing, was an error of law amounting to an abuse of discretion. Therefore, reversal is proper.

II. The Trial Court Violated Covil's Due Process Rights by Striking its Pleadings Without Requiring the Service and Filing of a Motion Requesting Such Relief and Without Conducting a Hearing on the Issue, Necessitating Reversal.

In addition to running afoul of South Carolina's procedural rules and common law, a court that grants relief in excess of what is contained in a motion and without a hearing violates a

litigant's due process rights. Under Both Article I, Section 3 of the South Carolina Constitution and the Fourteenth Amendment to the United States Constitution, a person cannot be deprived "of life, liberty, or property without due process of law." Due process "requires that a litigant be placed on notice of the issues which the court will consider to afford the litigant an opportunity to be heard." Wilson v. Walker, 340 S.C. 531, 537, 532 S.E.2d 19, 22 (2000) (citing Abbott v. Gore, 304 S.C. 116, 119, 403 S.E.2d 154, 156 (1991)). "The fundamental right of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." S.C. Nat. Bank v. Cent. Carolina Livestock Mkt., Inc., 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986) (citing Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Due process does not mandate a uniform procedure in all cases but instead its requirements depend upon "the importance of the interest involved and the circumstances under which the deprivation may occur." Id. (citations omitted). At a minimum, due process requires that a "litigant must be given an opportunity to meet an issue before an adverse determination is made." Lowndes Prod., Inc. v. Brower, 259 S.C. 322, 338, 191 S.E.2d 761, 770 (1972).

Applying the law above to this case, it is clear that Covil was not afforded adequate notice and opportunity to be heard to satisfy its rights under the due process clause. The Subject Orders imposed extreme sanctions tantamount to entering a default judgment against Covil. If allowed to stand, the Subject Orders would effectively preclude Covil from contesting liability or raising legal defenses. The only remaining issue for trial would be damages. Sanctions striking pleadings or entering default judgment have been found to involve the deprivation of a protected interest under the due process clause. See e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); Insurance Corp. of Ireland, Ltd., v. Campagnie des Bauxites de Guinee, 456 U.S. 694,

707, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982); RDLG, LLC v. Leonard, 649 F. App'x 343, 347–48 (4th Cir. 2016); Axiom Worldwide, Inc. v. Excite Med. Corp., 591 F. App'x 767, 774–75 (11th Cir. 2014); ClearValue, Inc. v. Pearl River Polymers, Inc., 560 F.3d 1291, 1307 (Fed. Cir. 2009).

Given the importance of Covil's interests at stake (i.e., its ability to contest liability and raise legal defenses in the Underlying Actions), it should have at least been afforded the process set out in the South Carolina Rules of Civil Procedure. In other words, the Plaintiffs should have served and filed a motion under Rule 5, Rule 7, and Rule 37 SCRCP seeking such relief well in advance of a full hearing on the issue before a court reporter. That did not occur.

In contrast, the Plaintiffs first requested that Covil's pleadings be struck in the Underlying Actions by email and further cloaked the request as a proposed order related to the January 24, 2018, hearing. [R. pp. 1065-66]. Despite Covil's objections and request for a hearing, the trial court did not allow a hearing and instead required that all arguments and objections be submitted by email. [R. p. 1206; R. pp. 1046-49]. One week after the Plaintiffs first requested the relief, and without any formal hearing on the issue, Justice Toal signed the Subject Orders. [R. pp. 62, 65, and 68].

The actions of the Plaintiffs and Justice Toal in this case violated the basic requirements of notice and the opportunity to be heard as mandated by the South Carolina Rules of Civil Procedure. Under the circumstances, and in light of the severe sanction imposed, this also constituted a violation of Covil's due process rights. State ex rel. McLeod v. Brown, 278 S.C. 281, 284, 294 S.E.2d 781, 782 (1982) ("[A]n order substantially affecting a party's rights should not be made in a case without notice to the party prejudiced by it and an opportunity to be heard."). Covil was not afforded a meaningful opportunity to meet the issue of its pleadings

being struck before the adverse determination was made. See Lowndes, 259 S.C. at 338, 191 S.E.2d at 770. Stated differently, Covil was robbed of its right to be heard "at a meaningful time and in a meaningful manner." S.C. Nat. Bank, 289 S.C. at 313, 345 S.E.2d at 488. As a result, the Subject Orders violated Covil's due process rights and should be overturned.

III. The Trial Court Abused its Discretion by Imposing Sanctions Under Rule 37(b) of the South Carolina Rules of Civil Procedure Where Covil Did Not Violate Any Relevant Discovery Order.

Even if the Subject Orders are not subject to reversal because they exceeded the relief sought in Plaintiffs' motions and violate Covil's due process rights, the trial court's actions still constitute an abuse of discretion under South Carolina law. Justice Toal's oral rulings at the January 24, 2018, hearing were not final orders or binding on the parties and could not form the basis of sanctions under Rule 37(b) SCRCP, which apply only where a party violates a discovery "order". Similarly, there was no evidence before the trial court that Covil violated any other relevant discovery orders, making imposition of sanctions under Rule 37(b) SCRCP improper as a matter of law and an abuse of discretion.

The Subject Orders do not cite any provision of the South Carolina Rules of Civil Procedure. The relief granted, however, is authorized under Rule 37(b)(2)(C) SCRCP, which provides in the relevant part:

> (b) Failure to Comply with Order.
>
> . . .
>
> (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(emphasis added). The plain language of Rule 37 makes it clear that a party must violate a court order requiring or permitting discovery before sanctions can be imposed against it. Id. Here, the record shows Covil did not violate any such orders. As a result, the trial court's entry of the Subject Orders was premised on an error of law and should be reversed.

The Subject Orders reference two court orders Covil allegedly violated: (1) the "Court's Standing Order Discovery"; and (2) Justice Toal's oral rulings at the January 24, 2018, hearing. There is no evidence, however, that Covil violated the Standing Order. Further, Justice Toal never made an oral ruling regarding what amount of knowledge, if any, James Covil was required to have at his deposition. Even if she had, her oral rulings were never reduced to writing and filed with the court, meaning they never became "orders" that were binding on the parties.

It appears the reference to the "Court's Standing Order Discovery" in the Subject Orders refers to the "Master Discovery/Scheduling Order" applicable to all asbestos matters. [R. p. 1]. It is unclear, however, how the Master Discovery/Scheduling Order has any bearing on the Subject Orders. The sole evidence the Plaintiffs submitted in support of their request that Covil's pleadings be struck was excerpts from James Covil's deposition purporting to show he lacked personal knowledge about certain deposition topics and was otherwise unprepared. [R. p. 1065]. The Master Discovery/Scheduling Order, however, lacks any provisions related to what level of preparation or knowledge a Rule 30(b)(6) deponent must have. [R. p. 1]. Therefore, the Master Discovery/Scheduling Order cannot be the order Covil violated to support the trial court's entry

of sanctions under Rule 37(b).

The other "order" Covil purportedly violated was Justice Toal's oral rulings at the January 24, 2018, hearing. The oral rulings, however, were not formal "orders" and had no binding effect on the parties until they were reduced to writing and filed with the court. That never happened in this case. Instead, the trial court entered written orders granting entirely new relief. No written orders were ever entered reflecting Justice Toal's oral rulings. Therefore, even if had Covil not complied with Justice Toal's oral rulings (which it denies), such failure to obey could not support the imposition of sanctions under Rule 37(b).

An oral ruling by a judge made in open court is effective only when reduced to writing and entered into the record. Rule 58(a)(2) SCRCP ("A judgment is effective only when so set forth and entered in the record"); Case v. Case, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (providing that an oral decision "is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the [j]udge and delivered for recordation."); Simpson v. Simpson, 377 S.C. 519, 524, 660 S.E.2d 274, 278 (2008) (holding oral motion to recuse had no binding effect where it was never reduced to writing and filed with the court).

The record shows Covil complied with Justice Toal's oral rulings requiring it to produce documents by January 29, 2018, and to produce a Rule 30(b)(6) representative for deposition by February 7, 2018. As noted above, Justice Toal made no rulings as to what topics the corporate representative had to be prepared to answer. [See generally R. p. 502, line 4-p. 514, line 13]. To the contrary, she made statements indicating she understood James Covil may not possess knowledge relevant to the case, but that the Plaintiffs should have the opportunity to depose him anyway. [R. p. 507, line 10-p. 508, line 4]. Further, even if she had made an oral ruling as to

what level of preparation or knowledge James Covil was required to exhibit at his deposition, such an oral ruling would not technically qualify as an "order" and would not have been binding on the parties until it was reduced to writing and filed with the court. Rule 58(a)(2) SCRCP. Since that never happened, Covil could not have violated any "order" related to the January 24, 2018, hearing to justify sanctions under Rule 37(b).

Since Covil did not fail to "obey an order to provide or permit discovery" as required by Rule 37(b)(2), it was reversible error for the trial court to enter the Subject Orders striking Covil's Answers.

IV. The Trial Court Erred by Failing to Make the Required Finding that Covil's Alleged Conduct Involved Bad Faith, Willfulness, or Gross Indifference to the Rights of the Plaintiffs and Failing to Narrowly Tailor the Sanctions to Fit the Circumstances.

There is no indication whatsoever that the trial court made the required determination that Covil's conduct involved bad faith, willfulness, or gross indifference to the rights of other litigants. In addition, the trial court abused its discretion in striking Covil's pleadings because the sanctions were unreasonable, went beyond the necessities of the situation, and improperly foreclosed a decision on the merits in the Underlying Actions. For these reasons, the Subject Orders should be reversed.

While Rule 37 grants trial courts the power to strike pleadings or order judgment by default, such sanctions are "harsh medicine that should not be administered lightly." Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542–43, 489 S.E.2d 679, 681–82 (1997) (citations omitted). For this reason, the moving party must show bad faith, willfulness, or gross indifference to its rights to justify such sanctions. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198-99, 511 S.E.2d 716, 718-19 (1999) (citing Baughman v. AT & T Co., 306 S.C. 101, 410 S.E.2d 537 (1991)); see also McNair v. Fairfield Cty., 379 S.C. 462,

466, 665 S.E.2d 830, 832 (2008) ("[S]evere sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights.").

In addition to the requirement that the moving party show bad faith, willfulness, or gross indifference, a trial court's discretion to impose severe sanctions under Rule 37 is further circumscribed by the rule that sanctions must be reasonable and cannot go "beyond the necessities of the situation to foreclose a decision on the merits of a case." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (1990); see also Jackson v. H & S Oil Co., 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975) (noting the rule allowing sanctions is "designed to promote decisions on the merits" and harsh sanctions "should never be lightly invoked") (citation omitted). In effect, the sanction must be limited and narrowly tailored to match the violation of the order at issue. Karppi, 327 S.C. at 543, 489 S.E.2d at 682 (1997) (overturning the trial court's order striking pleadings because it was unduly harsh under the circumstances and the sanctions were not limited to match the violation at issue).

Failure to weigh the factors above or to narrowly tailor sanctions demonstrates a "failure to exercise discretion and amounts to an abuse of discretion." Jamison v. Ford Motor Co., 373 S.C. 248, 270, 644 S.E.2d 755, 767 (2007). In construing Rule 37 of the Federal Rules of Civil Procedure, which is substantively similar to the South Carolina rule, the Fourth Circuit has noted that, "[i]n the case of default, the range of discretion is more narrow than when a court imposes less severe sanctions." RDLG, 649 F. App'x 343, 347 (citations and quotations omitted).

Turning to this case, the trial court abused its discretion because it made no meaningful determination that Covil's conduct involved bad faith, was willful, or that it involved gross indifference to the Plaintiffs' rights. The terms "bad faith" and "willful" connote intentional or

conscious wrongdoing. See Turner v. Sinclair Ref. Co., 254 S.C. 36, 44, 173 S.E.2d 356, 360 (1970) ("Willfulness is the conscious failure to use due care"). "Gross indifference" appears to be akin to the legal concept of reckless disregard, where a party's conduct is not provably intentional but falls so far outside the bounds of reasonable conduct that it is akin to and punishable as intentional conduct. See e.g., Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 266, 478 S.E.2d 282, 284 (1996) (noting to establish recklessness there must be an extreme departure from the reasonable standard of care).

The Subject Orders lack any indication that the trial court weighed the evidence before it as to whether Covil's alleged conduct was done intentionally or with "gross indifference" to the Plaintiffs' rights. The Subject Orders cite and quote case law about its obligation to consider factors such as the nature of discovery, willfulness, and the degree of prejudice in imposing sanctions. [Orders Regarding Covil Corporation Discovery Motions; R. 62; 65; and 68]. The Subject Orders, however, lack any meaningful analysis and application of the required factors. [Id.]. The mere recital of applicable law and factors controlling a court's discretion is insufficient. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.").

The Subject Orders also make certain recitations regarding Covil's alleged conduct. These recitations, however, were unsupported by the evidence in the record before the trial court. Further, even if the "factual" recitations in the Subject Orders were supported by competent evidence, the Subject Orders show no indication that the trial court weighed such recitations of "fact", conducted a meaningful analysis, and determined that the necessary factors had been met. For instance, nowhere in the Subject Orders did the trial court actually conclude that Covil's

alleged discovery violations were intentional, "willful", or done in "bad faith". [R. pp. 62, 65, and 68]. Similarly, the trial court made no finding that Covil's conduct involved "gross indifference" to the Plaintiffs' rights. [Id.]. Such failure was an abuse of discretion. The record in this case shows the trial court failed to weigh the required factors, conduct a meaningful analysis by applying the factors to the evidence before it, or make proper findings. Such failure was an abuse of discretion necessitating reversal. Jamison, 373 S.C. at 270, 644 S.E.2d at 767.

The Subject Orders are also devoid of any indication that the trial court considered whether the sanctions were reasonable or proportional in light of Covil's alleged misconduct. For example, there is no explanation whatsoever in the Subject Orders as to why a lesser sanction would not suffice. [R. pp. 62, 65, and 68]. Similarly, the Subject Orders lack any explanation as to why the harsh sanctions were justified under the circumstances, even though the sanctions granted were extremely harsh and foreclosed a decision on the merits of the case. See Balloon Plantation, Inc., 303 S.C. at 154, 399 S.E.2d at 440.

A review of the record serves to further highlight just how disproportionate the sanctions were under the circumstances. In support of their email request to the court to strike Covil's pleadings, the Plaintiffs attached excerpts from the deposition of James Covil. [R. pp. 1083-114, 1133-64, and 1174-205]. At most, these excerpts show James Covil lacked detailed knowledge about every site at which Covil performed work, what products it sold, and what insurance policies were in place relevant to Plaintiffs' claims. [Id.]. As made clear at the January 24, 2018, hearing, however, Covil had been out of business since 1991. [R. p. 504, line 4-p. 505, line 6; See also R. pp. 1283-87]. James Covil volunteered to be the company's Rule 30(b)(6) representative not because he possessed knowledge about all of the noticed topics in the Underlying Actions but because he was the only ex-employee of the company known to Covil's

counsel and who was willing to testify. [R. pp. 1283-87]. Covil's counsel promised to do what he could to prepare James Covil, but he also made it clear that James Covil's knowledge was going to be limited to what he could learn from documents that had already been produced to Plaintiffs' counsel in numerous other cases and Palmer Covil's deposition. [R. p. 505, line 7-p. 510, line 1]. By her own statements at the hearing, Justice Toal acknowledged that James Covil may not possess knowledge on the information sought by the Plaintiffs. [R. p. 507, line 10-p. 508, line 4]. Despite this, Justice Toal ruled that the Plaintiffs should at least have the opportunity to ask questions – even if James Covil lacked knowledge. [Id.].

Under these circumstances, it was unreasonable and disproportionate for the trial court to strike Covil's pleadings based on James Covil's lack of knowledge about or preparation for Plaintiffs' extremely detailed Rule 30(b)(6) deposition topics. Lesser sanctions would have addressed such purported deficiencies just as well, including ordering a second deposition of James Covil and requiring additional preparation as to the topics at issue, depositions by written questions, or special interrogatories and/or requests for production.

Sanctions must be "aimed at the specific misconduct of the party sanctioned". Balloon Plantation, Inc., 303 S.C. at 154–55, 399 S.E.2d at 440. Put differently, "sanctions should be a rifle-shot, not a shotgun blast." Id. Here, the sanctions were a hydrogen bomb. As such, the trial court's entry of the Subject Orders was an abuse of discretion because it was so disproportionate to Covil's alleged misconduct. Id.

CONCLUSION

For the foregoing reasons, Covil respectfully requests that this Court reverse the trial court, order that the Subject Orders be vacated, and remand these actions for further proceedings consistent with this Court's rulings.

Dated this 6th day of December, 2018.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2018-000385

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Erwin Howe, Deceased and Jeanette Howe . . . . . Respondents,

v.

Air & Liquid Systems Corp., Individually and as successor-in-interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC f/k/a National Welding Supply, Inc.; Albany International Corp; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC; Individually and as a subsidiary of Davis-Standard LLC; CBS Corporation, A Delaware corporation f/k/a Viacom, Inc., Successor by merger to CBS Corporation, Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber company; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation (sued individually and as successor in interest to Fiber industries, Inc.); Cleaver-Brooks, Inc.; Covil Corporation' Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc d/b/a Dezurik-APCO Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as successor-in-interest to Buell Engineering Co.; Flowserve Corporation, Individually and as successor-in-interest to Durco Pumps; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, individually and as successor-in-interest to Buell Engineering Co.; Metropolitan Life Insurance Company, A wholly-owned subsidiary of Metlife, Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as successor-in-interest to Babcock Borsig Power, Inc. and Riley Stoker Corporation, Individually and as successor-in-interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc, f/k/a Marley Cooling Technologies, Inc. f/k/a The Marley Cooling Tower Co.,; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc. f/k/a American Standard, Inc. f/k/a American & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc. f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp; Viking Pump, Inc.; Warren Pumps LLC; Yuba

Heat Transfer Corporation; Zurn Industries, ... Defendants

Of Which Covil Corporation is the Appellant.

AND

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, ... Respondents

v.

CBS Corporation, A Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; CAN Holdings, Inc. f/k/a Hoechst Celanese Corporation, sued individually and as a successor-in-interest to Fiber Industries, Inc.; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc. f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill power Supply Company; Resolute FP US, Inc., Union Carbide Corporation; United States Fidelity Guaranty Company; Uniroyal, Inc. f/k/a United States Rubber Company, Inc. and United Conveyor Corporation.. . . . . Defendants

Of which Covil Corporation is the Appellant.

AND

James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore, Descendant, Respondent.

v.

Bowater Paper Mill; E.I. Du Pont De Nemours and Company; Foster Wheeler Energy Corporation; Daniel International Corporation f/k/a Daniel Construction Company, Inc.; Resolute FP US Inc f/k/a Bowater Incorporated; CBS Corporation, a Delaware corporation f/k/a Viacom, Inc. successor-by-merger to CBS Corporation, A Pennsylvania Corporation f/k/a Westinghouse Electric Corporation; Cleaver-Brooks, Inc. f/k/a Aqua-Chem, Inc. d/b/a Cleaver-Brooks Division; Covil Corporation; Fluor Constructors International f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; General Electric Company d/b/a Rayloc a/k/a NAPA; Georgia-Pacific Consumer Products LP; Honeywell International, Inc. f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; SCANA Corporation d/b/a South Carolina Electric & Gas; Riley power, Inc. f/k/a Riley Stoker Corporation and D.B. Riley, Inc.

AND

Waste Management of South Carolina, Inc., as successor by merger to USA Waste of South

Carolina, Inc., successor by merger to Chambers Medical Technologies, Inc.,. . . .Defendants Of which Covil Corporation is the Appellant.

CERTIFICATE OF COUNSEL

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

December 6, 2018.

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