THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Please

The Honorable Robert E. Hood, Circuit Court Judge

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Appellate Case No. 2020-000581

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Harland Jones.....Appellant,

v.

Karen Robinson .....Respondent.

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

This appeal arises from a sanctions order dismissing Appellant Harland Jones' Complaint and ordering Mr. Jones' counsel to pay all attorney's fees and costs incurred during the entire litigation by Respondent Karen Robinson. Mr. Jones initiated this action after he suffered a catastrophic injury when he was hit by Respondent's vehicle while riding his bicycle. As a result of the collision, he sustained a head injury, broken bones, and more than $240,000.00 in medical bills. In pursuing his claims, Mr. Jones has maintained that he believed there were witnesses to the collision and provided what little information he had about the witnesses. However, his attorneys were never able to locate the witnesses that Mr. Jones described. Additionally, Mr. Jones' lead counsel did not attend the mediation of the matter but sent another attorney in his firm instead. Rather than litigating on the merits, Respondent's counsel concocted a narrative of alleged discovery abuse and rules violations that the record clearly shows to be fictitious and without factual support. After a full trial on Mr. Jones' claims ended in a mistrial, Respondent used this false narrative to convince the circuit court to order the most severe sanctions available against Mr. Jones and his counsel. The order dismissed Mr. Jones' claims with prejudice and required his counsel to pay approximately $30,000.00 in fees and costs.

This appeal raises the following issues for review by this Court:

1. Did the circuit court err in granting Respondent's Motion for Sanctions where the motion was based on mis-statements of fact and there was no factual support in the record for the ruling?

2. Did the circuit court err in granting Respondent's Motion for Sanctions where the sanctions imposed were grossly disproportionate to the alleged misconduct and inconsistent with South Carolina law reserving the most severe sanctions for only the most egregious cases?

3. Did the circuit court exceed its authority in ordering Mr. Jones' counsel to pay all of Respondent's attorney's fees and costs?

## STATEMENT OF THE CASE

This case began as rather routine litigation arising out of a collision between Mr. Jones' bicycle and Respondent's automobile. Mr. Jones, a relatively unsophisticated plaintiff with very limited education, initiated this action after he suffered a catastrophic injury when he was hit by Respondent's vehicle while riding his bicycle. Respondent initially answered the Complaint but later filed an Amended Answer and Counterclaim ("Counterclaim") on May 22, 2018, asserting a cause of action for negligence against Mr. Jones and seeking recovery for her own alleged damages. Respondent also asserted a claim under the South Carolina Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10(A)(4) for Mr. Jones having filed the case in the first instance.

During discovery, the parties became entangled in a dispute about Mr. Jones' alleged failure to disclose eyewitnesses to the accident. Although Mr. Jones believed that there were witnesses to support his case, he did not have the names, addresses, or any other contact information for them at the time he made his initial and supplemental responses to Respondent's discovery requests. At his deposition, Mr. Jones noted that he believed there were two possible witnesses. However, he was only able to recall the assumed name of one of them, an acquaintance known to him as "Alex," and testified that he did not know Alex's real name and could only identify his possible residence as a shack in the woods without reference to any particular address or landmarks. In regard to the other potential witness, he noted that he did not know her but did recall that his deceased wife had referred to the woman as her cousin. Despite Mr. Jones' inability to recall and lack of knowledge regarding any meaningful identification of the witnesses, Respondent sought to compel the disclosure of the information and pursued sanctions against Mr.

Jones for his failure to provide the information – information that neither Mr. Jones nor his counsel possessed.

Well before the case went to trial, Mr. Jones conceded that he could not identify the witnesses, as he had previously hoped to have in support of his case. However, Respondent unfairly portrayed Mr. Jones' inability to identify the witnesses as a willful refusal to identify the witnesses. Based on her counsel's arguments regarding the factual and procedural history of the case, Respondent secured several favorable rulings from the circuit court on the discovery issue, including the exclusion of any witnesses at trial in support of Mr. Jones' case other than Mr. Jones, himself, not simply the witnesses that had been the subject of her motion practice.[1]

The trial in this matter began on August 13, 2018, before the Honorable Casey Manning. Despite having already secured the sanction of exclusion of Mr. Jones' witnesses, Respondent further argued during pretrial motions that she was also entitled to monetary sanctions against Mr. Jones for alleged discovery abuse. Judge Manning deferred his ruling on the motion to the end of the trial. After granting Mr. Jones' motion for a directed verdict on the issue of negligence *per se*, Judge Manning declared a mistrial due to Respondent's counsel's improper reference to a collateral source during summations. The jury was dismissed and the record closed without Respondent raising any complaint about a mediation violation or renewing her request for monetary sanctions. Additionally, Respondent never pursued any post-trial motions seeking a ruling from Judge Manning on the issue of sanctions.

[1] Prior to trial, Mr. Jones sought to substitute his current caretaker as a damages witness concerning the effect of the injury from the accident on Mr. Jones in place of his deceased wife. He also disclosed the information about the woman he believed to be the one he previously referenced as his wife's cousin, but he never sought to present her as a witness because the information was not sufficient to locate her.

On September 27, 2019, Respondent's Motion for Sanctions was heard by the Honorable Robert Hood, Jr. In the pursuit of sanctions, Respondent's counsel continued to advance arguments regarding Mr. Jones' and his counsel's alleged discovery abuses and violation of court orders. Judge Hood adopted Ms. Robinson's factual and legal arguments to dismiss the Complaint with prejudice. Judge Hood further ordered Mr. Jones's counsel to pay all of Respondent's attorney's fees and costs. *See* (R. pp. 23-45) ("Initial Sanctions Order").

Mr. Jones sought reconsideration of Judge Hood's ruling, which the judge substantially denied on March 2, 2020. *See* (R. pp. 46-70) (together with the March 23rd amendment, the "Final Sanctions Order"). At the invitation of the court, Respondent submitted an affidavit for additional attorney's fees accrued in responding to Mr. Jones' motion for reconsideration, and the circuit court further amended its Final Sanctions Order on March 23, 2020, to increase the amount of monetary sanctions against Mr. Jones' counsel. Mr. Jones filed his Notice of Appeal on April 2, 2020.

## STATEMENT OF THE FACTS

On June 7, 2017, Mr. Jones was riding his bicycle in the eastbound direction on Old Bluff Road in Columbia, South Carolina. At the same time, Respondent was travelling westbound on the same road in her gray sedan. It is undisputed that Respondent hit Mr. Jones with her vehicle at some point after he signaled to make a left turn. Mr. Jones was propelled from his bicycle upon impact resulting in significant injuries, an extended hospital stay, a considerable period of post-hospitalization recovery, medical bills of approximately one quarter of a million dollars, and significant residual health deficiencies.

Mr. Jones filed a Complaint asserting claims of negligence and negligence *per se* against Respondent. (R. pp. 74-80) The Complaint lays out Mr. Jones' version of events and includes

various theories of liability against Respondent. In part, the Complaint alleged "[t]hat, at the time of the subject incident, [Respondent] unlawfully attempted to pass a vehicle immediately in front of her" and "crossed over into [Mr. Jones'] lane of travel" causing him to "strike the front of [Respondent's] vehicle." (R. p. 77, ¶¶ 8-10) In addition to this unlawful passing theory, the Complaint alleges other theories including:

> That the collision and the resulting injuries and damages to Plaintiff were caused, directly and proximately, by one or more of the following negligent, grossly negligent, negligent per se, careless, reckless, willful, wanton and unlawful acts, and/or omissions of Defendant in any one or more of the following respects:
>
> ***
>
> e. In failing to keep a safe distance from Plaintiff;
>
> f. In failing to use due care;
>
> ***
>
> l. In operating her vehicle without using due care and without regard for safety and rights of Plaintiff;
>
> m. In operating her vehicle in a negligent, grossly negligent, careless, reckless, willful, wanton, and unlawful manner so as to create a dangerous situation;
>
> n. In failing to exercise the degree of care and caution that a reasonable and prudent person would have exercised under the circumstances then and there prevailing;
>
> o. In negligently and carelessly operating her vehicle in such a manner as to cause her vehicle to strike Plaintiff and cause personal injuries and property damage to Plaintiff;
>
> p. In driving while distracted;
>
> q. In any other acts that represent a breach of the statutory or common laws of the State of South Carolina; and
>
> r. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

(R. pp. 77-78, ¶ 13)

Thus, consistent with general practice and custom in automobile collision cases, Mr. Jones' Complaint advances several different but related theories of liability. However, very early in this case, Respondent decided to focus almost exclusively on Mr. Jones' unlawful passing theory.

Since the inception of this litigation, Mr. Jones has consistently attested of his own personal knowledge that he displayed the proper hand signal indicating his intention to turn left prior to actually doing so. He also recalled being prompted to complete his turn by a woman driving a blue car and that two other vehicles were following behind the blue car. Based on Mr. Jones' recollection of the accident, his counsel presented the unlawful passing theory as a reasonable explanation why Respondent, who was driving a gray car, ended up colliding with Mr. Jones rather than the blue car in front of which he believed he had turned. Based on this limited information, Mr. Jones' counsel hoped that they could identify and locate witnesses to corroborate Mr. Jones' version of events. That turned out not to be the case.

In her Counterclaim, Respondent alleged a claim for negligence against Mr. Jones founded, in part, upon her allegation that she "was lawfully operating her motor vehicle at the time of the collision." (R. p. 90, ¶ 38) She further alleged that "[Mr. Jones] suddenly and without warning turned left directly into the path of [her] car." *Id*. at ¶ 40. Respondent insisted that "[she] had no warning of [Mr. Jones'] illegal left turn." *Id*. at ¶ 44. Therefore, she claimed:

> As a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness, and/or wantonness of [Mr. Jones], as is more fully set forth herein, [Respondent] has been damaged and/or injured in the following respects:
>
> a. [Respondent] may be required to expend significant amounts of money for care, treatment, services, and other needs
>
> b. Upon information and belief, the nature of [Respondent's] injuries and damages may require her to expend significant sums of money in the future
>
> c. [Respondent] may have lost wages, past or future, as a result of [Mr. Jones'] negligence

> d. Upon information and belief, [Mr. Jones'] negligence may deprive [Respondent] of opportunity and income in the future
>
> e. The pain and shock of the injuries and/or damages inflicted by [Mr. Jones] has resulted in loss of enjoyment of life and/or changes in personality all to the detriment of her health and/or well-being
>
> f. [Respondent] was required to expend significant sums of money to replace and repair property damage caused by [Mr. Jones] in the accident . . .

(R. p. 93-94, ¶55) Respondent also asserted a cause of action under the Frivolous Proceedings Act because:

> the facts as set out [in her pleading] show that [Mr. Jones] turned his vehicle directly into oncoming traffic with no warning or explanation and that [Mr. Jones] was the sole proximate cause of the accident in question. No reasonable attorney could infer from those facts after any reasonable investigation, required by our Rules, that [Respondent] was negligent or at fault in the accident complained of.
>
> [Mr. Jones] has no good faith factual basis for the allegations contained in the Summons and Complaint. A reasonable investigation of [Mr. Jones'] own actions and conviction in this accident would have revealed this information and, upon so finding, no reasonable attorney would initiate suit against [Respondent] and/or no reasonable attorney would believe the allegations raised in the Summons and Complaint are reasonably supported by the actual facts.

(R. p. 96, ¶¶ 65-66)

As is common in defensive pleadings, Respondent alleged every conceivable defense and pled her Counterclaim so as to preserve any and every possible element of damages that might be available to mitigate or offset any potential liability to Mr. Jones. Notably, despite her own knowledge that she was not wearing her glasses as required by the conditions of her license at the time of the accident, Respondent denied that she was negligent in any way and asserted that she was operating her vehicle lawfully. Additionally, while she claimed to have incurred damages other than the property damage to her car – from lost wages to detrimental impact on her health and well-being – Respondent has never presented any evidence in support of the same.

On May 29, 2018, Mr. Jones moved to dismiss Respondent's Frivolous Proceedings Act claim on the basis that it was premature. *See* (R. pp. 110) ("Motion to Dismiss") (noting that "pursuant to the terms of Section 15-36-10(C)(1), relief under the Act must be sought at the conclusion of the trial by way of motion") (emphasis omitted). In explaining that discovery was in its infancy, Mr. Jones' Motion to Dismiss further noted

> Here, discovery in this matter is now underway with Defendant's responses to Plaintiff's First Set of Requests for Admission having been received by Plaintiff on May 21, 2018, and Defendant's first set of discovery requests to Plaintiff having been received by Plaintiff on May 10, 2018. Given that discovery is in its infancy, Defendant's assertion that Plaintiff's claim is one of frivolity is unsupported and inappropriate, both in fact and in law. In fact, under the Act and the cases inquiring as to the scope and applicability of same, Defendant's Counterclaim is expressly prohibited under the Act and must be sought at the conclusion of the trial by way of motion. This matter is not close to trial; rather, discovery is only now underway. Upon information and belief, discovery in this case <u>is expected</u> to reveal witnesses to the events giving rise to the subject motor vehicle collision who believe that Defendant was speeding, that Defendant was not paying attention to the roadway at the time of the subject collision, and/or that Defendant unlawfully attempted to unlawfully pass a vehicle immediately in front of her at the time she (Defendant) unlawfully caused Plaintiff to strike Defendant's vehicle.

(R. p. 111) (emphasis added and omitted). This language expressly provided that discovery had not yet revealed the identity of such witnesses, but rather that Mr. Jones "expected" it would.

Mr. Jones succinctly stated that the issue raised by his motion was "whether the [Frivolous Procedures] Act creates an independent cause of action that may be pled by a party in a pending lawsuit [because] several sections of the Act indicate that the procedural mechanism for triggering enforcement of the Act is by motion."(R. p. 109) Furthermore, Mr. Jones ended his Motion to Dismiss by summarizing that "Defendant's Counterclaim under the Act is simply premature as a matter of procedure and a matter of law. Consequently, Defendant's Counterclaim under the Act should be dismissed." (R. p. 112) Notably, Respondent never moved to dismiss Mr. Jones' Complaint despite her position that it lacked plausibility.

When Mr. Jones' Motion to Dismiss was filed, Respondent was delinquent with her discovery responses. (R. pp. 117-23) Mr. Jones initiated written discovery on April 12, 2018, by serving Respondent with interrogatories, requests for the production of documents, and requests to admit certain facts simultaneously with the Complaint. (R. pp. 117) However, Respondent failed to respond to the interrogatories or requests for the production. *Id.* Accordingly, Mr. Jones inquired about the overdue responses by consultation letter in accordance with Rule 11, and Respondent eventually responded to the discovery requests on June 29, 2018.[2] *Id.*

Likewise, Respondent served Mr. Jones with her initial set of interrogatories and requests for production of documents on May 8, 2018. (R. pp. 113-14) Admittedly, Mr. Jones was late in responding to Respondent's initial discovery requests, as was Respondent. Therefore, Respondent filed a Notice of Motion and Motion to Compel Discovery on August 10, 2018. *Id*. The only subject of the First Motion to Compel was Mr. Jones' failure to respond to Respondent's initial set of interrogatories and requests for production of documents.

**Hearing With Judge Benjamin**

The hearing on Mr. Jones' Motion to Dismiss and Respondent's First Motion to Compel occurred on October 1, 2018, before the Honorable DeAndrea Benjamin. (R. pp. 462-88) Although Mr. Jones had already served his responses to the discovery requests that were relevant to the First Motion to Compel, including a listing of the witnesses for which he had information and several thousand pages of documents, Respondent nonetheless proceeded with her First Motion to Compel. (R. pp. 465-66) The crux of her argument was that Mr. Jones had yet to respond to additional discovery served on August 14, 2018, after she filed the First Motion to Compel. *See*

[2] Ms. Robinson also failed to serve a timely response to Mr. Jones' Second Set of Interrogatories to Defendant. *See* (R. pp. 124-25)

(R. pp. 217-20) ("Supplementary Discovery"). This Supplemental Discovery specifically sought the identity of and contact information for the witnesses expected to be revealed by discovery as referenced in Mr. Jones' Motion to Dismiss. *Id*. Mr. Jones conceded that the response to the Supplemental Discovery was past due, and Judge Benjamin issued a Form 4 order instructing him to respond within 20 days. (R. pp. 1-2) Unfortunately, Mr. Jones did not have sufficient information to be able to identify the witnesses, and he conceded as much in his response to the Supplemental Discovery on November 7, 2018. (R. pp. 225-26)

During the October 1st hearing, Judge Benjamin also addressed Mr. Jones' Motion to Dismiss. Mr. Jones argued for dismissal of the Frivolous Procedures Act claim on procedural grounds. (R. pp. 471-73) Particularly, Mr. Jones' counsel asserted that a claim under the Frivolous Procedures Act could only be brought by motion and was improperly raised as a counterclaim by Respondent. *Id*. As additional grounds for dismissal, he also argued that there was a genuine dispute regarding how the accident occurred and, therefore, the claim could not be frivolous. (R. pp. 473-76). In support of this argument, counsel recounted to Judge Benjamin Respondent's version of the accident – specifically, that "bicyclist, Mr. Jones, turned suddenly and without warning . . . right in front of me, there was nothing I could do, I hit him." (R. p. 473) He also presented Mr. Jones' version of events including that Mr. Jones "did not turn in front of the Defendant, whether suddenly or not." *Id*. He concluded his argument by noting that Respondent's own witness confirmed that "Mr. Jones signaled for a left turn before he was hit." (R. p. 474) At no time did Mr. Jones present any argument to Judge Benjamin that relied on any witnesses yet to be identified.

Judge Benjamin issued her Order Granting Plaintiff's Motion to Dismiss Frivolous Civil Proceedings Sanctions Act Counterclaim Without Prejudice on October 9, 2018 ("Benjamin

Order") on the basis that it was improperly and prematurely asserted as a counterclaim rather than by motion. (R. pp. 4-7) The Benjamin Order found that:

> the Frivolous Civil Proceedings Sanctions Act ("Act") does not provide for an independent cause of action which may be brought by counterclaim. Accordingly, Plaintiff's Motion to Dismiss Defendant's Counterclaim must be, and hereby is, GRANTED. Defendant's Counterclaim is dismissed without prejudice to Defendant's rights under the Act, if any, to seek relief in the future.

(R. p. 4) She did not rely on or address, in any way, Mr. Jones' arguments regarding the merits of his claim against Ms. Robinson.

**The Jones Deposition**

Discovery continued and Mr. Jones sat for his deposition on March 6, 2019. (R. pp. 1095-234) During the deposition, Mr. Jones testified as to his limited recollection of the accident. He recalled that he was riding his bicycle for exercise on Old Bluff Road at the time of the accident. Although he could not recall anything about the actual impact, he testified to his recollection of what occurred just prior to impact as follows:

> When I was riding my bike back down the street towards my house, I normally turn left because I normally ride on the right side of the street, so I normally turn left. So I put my hand out to turn left in front of the car. And then when I put my hand out left to turn in front of the car, letting the car know that I was turning in front of them, I looked over at the car and the lady and let her know that I was turning in front of her, so I put my hand out. So it was cars behind her, so she slowed down and let me know that I could turn in front of her. So when she slowed down, let me know that it was all right for me to turn to front of her, I proceeded to turn in front of her. The next thing I know, I had a heavenly experience.

Harland Jones Deposition Transcript ("Jones Dep.") (R. p. 1121) Mr. Jones admitted that he did not know the woman driving the car before which he believed he turned. The best he could offer was that "when my wife was living at that time, she said it was her cousin." (R. p. 122) When pressed further as to the name of this woman who had been described to him as his wife's cousin, he responded, "I don't know her name right now." *Id*. He could only recall that she was an older,

African American woman driving a blue car. (R. pp. 1124-25) In following up about the identity of the woman driving the blue car, the following colloquy occurred between Mr. Jones and deposing counsel:

> Q. You mentioned that your wife at the time said it may have been her cousin. Did she explain to you why she said that?
>
> A. No, she didn't explain to me.
>
> Q. Did she tell you if she ever talked to her cousin about it?
>
> A. Yeah, I think she did.
>
> Q. She tell you about that conversation?
>
> A. She just told me that she wasn't going to testify, that she wasn't getting into it.
>
> Q. What do you mean by that?
>
> A. That's what she just told me. That she wasn't going to testify because she wasn't going to get in -- get involved in that situation.
>
> Q. So your wife -- wife told you that her cousin did not want to testify because she did not want to get involved; is that correct?
>
> A. Yeah, uh-huh.
>
> Q. And you don't know this cousin's name?
>
> A. I can't remember, huh-uh.
>
> Q. Do you know anything about where this cousin lives?
>
> A. No. I heard recently that she was in the hospital with cancer. And I don't know whether she passed or not.
>
> Q. When you say that she's your wife at the time's cousin, do you know how she's related? What -- which side she's a cousin on or anything like that?
>
> A. No.

(R. p. 1125, l. 17-p. 1126, l. 21)

Mr. Jones also mentioned in the deposition that an acquaintance, whom he had known for six or seven months, came to his home on the day of the accident because they were going to do some odd jobs together. (R. p. 1116) He did not know the man's "correct real name" but only that "we call him Alex." (*Id*. at ll. 14-15) After Mr. Jones was released from the hospital and recovering at home, Alex checked in on him frequently, but Mr. Jones explained that they had since lost touch

and he did not have a valid phone number to reach Alex. (R. pp. 1138-39) He believed that Alex lived "down on Winnsboro Road" in "a little shack back in the woods," but Mr. Jones could not identify any landmarks related to Alex's home. (R. p. 1140)

**Hearing with Judge Couch**

The day after Mr. Jones' deposition, Respondent filed a Notice of Motion and Motion to Compel Discovery ("Second Motion to Compel"), seeking to compel Mr. Jones' further response to the Supplemental Discovery. (R. pp. 128-32) Respondent argued that Mr. Jones' deposition testimony regarding Alex contradicted his written discovery response of November 7, 2018, where he conceded that, at that time, he did not have the identities of the witnesses that he expected to identify through discovery. *See id*. This marked the beginning of Respondent's efforts to transform this litigation from a simple wreck case into a campaign to secure sanctions.

In the Second Motion to Compel, Respondent's counsel incorrectly suggested that he was previously forced to file a motion to compel Mr. Jones' response to the Supplemental Discovery. However, the record reflects that he did not file the First Motion to Compel for that reason, and could not have because it was filed on August 10, 2018, some four days before the Supplemental Discovery was served. *Compare* (R. pp. 113-14) *with* (R. pp. 218-19) Moreover, the Second Motion to Compel was strategic theatre because Respondent's counsel knew prior to its filing that Mr. Jones could not identify the witnesses. In this way, Respondent's counsel began to weave a false narrative of repetitive discovery violations by Mr. Jones and his counsel.

Respondent's counsel further argued that Mr. Jones and his counsel were intentionally withholding the witness information while relying on the same in court filings. However, Mr. Jones' deposition testimony clearly explained why they thought there were witnesses in support of his claims early on in the case and why his Complaint and Motion to Dismiss, both filed in the

early pleading stages of this case, made reference to his expectation that the identities of such witnesses would be revealed through discovery. His deposition also clarified why these unidentifiable witnesses were never listed in response to discovery requests - undeniably, Mr. Jones testified that he called the acquaintance by the name of "Alex" but he had no information about the friend's actual name, address, current phone number, or any other contact information. Additionally, while his wife had referred to the woman in the blue car as her cousin, Mr. Jones testified that his wife did not explain the woman's exact relationship and that he had no information about the woman's identity or whereabouts.

Judge Couch conducted a hearing on May 7, 2019, to address the Second Motion to Compel and Respondent's Motion for Summary Judgment, which was filed on March 6, 2019.[3] (R. pp. 126-27) The court began the hearing by addressing the Motion for Summary Judgment. In his Memorandum in Opposition to Summary Judgment, Mr. Jones relied exclusively on the conflict between his testimony and Ms. Robinson's testimony. (R. pp. 155-57) There was absolutely no mention of what any other witness might say. Indeed, Mr. Jones' memorandum specifically stated that his argument rested entirely on his and Ms. Robinson's differing personal observations recounted in their depositions. (R. p. 157)

Nowhere in the transcript of the hearing before Judge Couch does Mr. Jones' counsel ever even mention, much less rely upon, the potential testimony from any witness other than Mr. Jones. In fact, counsel specifically informs Judge Couch that "[i]t's not about weighing evidence. They have two witnesses [Ms. Robinson and Michelle Murray]. We have one [Mr. Jones]. If it were

[3] Ms. Robinson filed her Memorandum in Support of the Motion for Summary Judgment ("Summary Judgment Memo") on the morning of the hearing initially setting out the particular bases for her motion (R. pp. 133-51; and 492) Mr. Jones filed his Summary Judgment Opposition just two hours after receiving Respondent's filing. (R. pp. 152-60)

about weighing the evidence, we'd lose. It's not about that. It's about the existence of evidence." (R. pp. 496-97) Judge Couch denied the Respondent's Motion for Summary Judgment from the bench and later issued a Form 4 Order memorializing his ruling. (R. p. 505) Neither the oral ruling from the bench nor the Form 4 order rely in any way on expected testimony from unidentified witnesses.

In arguing her Second Motion to Compel, Respondent's counsel restated the false narrative that Mr. Jones had repeatedly refused to identify the witnesses which he had earlier indicated he expected to identify through discovery in initial pleadings and his Motion to Dismiss. (R. pp. 506-08) Counsel relied upon Mr. Jones' deposition testimony in support of his argument but blatantly distorted the deposition testimony. In describing the events purportedly necessitating the Second Motion to Compel, Respondent's counsel asserted:

> We proceeded to the deposition of the plaintiff in March of 2019, on March 6th, and in that deposition for the first time, the plaintiff testified that a friend of his named Alex witnessed the accident. He couldn't give us a last name. He couldn't give us an address. He couldn't give us a phone number. He couldn't give us any information about where he lives other than somewhere in the woods.
>
> ***
>
> Somewhere in the woods out near Winnsboro is what we were told. So we have now in March of 2019 after discovery, after a Rule to Show -- after a motion to compel, after an order granting the motion to compel after a Rule to Show Cause, after saying there are no witnesses, now there's a witness. We also learned in that deposition -- and we heard here today -- that this other car that might have been there was driven by the plaintiff's wife's cousin. The plaintiff knows who that is. In fact, he testified that she came to the house to see him after all of this. She, if this theory that the car cut back in front of the plaintiff's wife's cousin happened, is an eyewitness to this accident. The testimony in the deposition was she doesn't want to be involved in this. The interrogatory doesn't call for tell us who the witnesses are if you want to be involved.

(R. pp. 507-08) (emphasis added). However, the record is clear and not subject to dispute that Mr. Jones provided all of the information he had about Alex during his deposition and that he never

testified that he actually knew the woman alleged to be his wife's cousin or that the woman ever came to his home. Instead, he testified that he could not remember her name, did not know where she lived, and had no knowledge regarding the woman's actual relationship to his wife. (R. pp. 1116; 11-25-26; and 1138-40) He also stated that the woman only drove by his home, and not that she visited him. (R. p. 1130)

In short, Respondent's argument about failure to identify the witnesses was based on an indisputably false factual predicate.

In response to Respondent's arguments, Mr. Jones' counsel maintained the position he had consistently taken since November of 2018, namely that the two witnesses Mr. Jones hoped to secure could not be sufficiently identified, and that he did not intend to call them at trial if those witnesses were not located by June 1, 2019. As the transcript shows, Judge Couch and Mr. Jones's counsel were in agreement related to the particular witnesses alluded to in Mr. Jones' initial pleadings and Motion to Dismiss.

> THE COURT: What's -- what's the deal?
>
> MR. JEFFERIES: Your Honor, plaintiff's wife passed away about six months ago
>
> THE COURT: I'm sorry.
>
> MR. JEFFERIES: -- as I recall. The plaintiff suffered serious trauma including head trauma in this wreck, and his wife was really his -- his caretaker. His memory -- and, Your Honor, we can swear him in and ask questions right now --
>
> THE COURT: I'm not concerned about the memory as much as -- he remembered enough to identify what the relationship was, and she was there.
>
> MR. JEFFERIES: That's correct.
>
> THE COURT: And that would lead me to believe that there is someone in his family or his community or someone who could identify who this person is and where they are so they could gather that information.
>
> MR. JEFFERIES: That's correct, Your Honor, and what we found is we have tried to -- we want these witnesses, obviously, because if they testify --
>
> THE COURT: Well, I'm going to require that you get them pretty quickly, I think, because this case has been going on a long time.

MR. JEFFERIES: I agree, Your Honor, and we're perfectly comfortable with that. We understand we can't find Alex who lives --

THE COURT: I believe in full --

MR. JEFFERIES: -- in the woods.

THE COURT: I believe in full discovery, and I also believe in not trying cases by ambush.

MR. JEFFERIES: We agree.

THE COURT: When are we going to have this witness's name?

MR. JEFFERIES: Your Honor, I don't know that we can find it. If Your Honor wants to give us 30 days and say that's all you've got, we're comfortable with that.

(R. pp. 508, l. 19-p. 510, l. 5) (emphasis added).

Respondent also asked for the sanction of dismissal for Mr. Jones' purported failure to name the two people referenced in his deposition as witnesses in response to written discovery. However, Judge Couch summarily dismissed Respondent's request for such a severe sanction and found that exclusion of the two witnesses from testifying would be a more appropriate remedy. The parties engaged in the following discussion with Judge Couch:

MR. BAYNE: And our motion that we filed calls to produce that -- or we would ask the case be dismissed as a sanction at this point for failing to disclose whatever time Your Honor deems proper. Obviously, we would abide by it.

THE COURT: Well, I mean, what I would do is I would bar them from presenting the witness to give you time to be prepared if they don't produce the person by a certain point in time.

MR. BAYNE: Certainly, Judge.

MR. JEFFERIES: And we agree with that, Your Honor. We're perfectly comfortable not being able to use that witness.

THE COURT: All right. So you're looking at sometime in July?

MR. BAYNE: I believe it's the July, the week after July 4th.

THE COURT: Okay. If they don't have it by June 1st if they don't have it, that witness will be prevented from testifying.

MR. BAYNE: That will work, Judge.

MR. JEFFERIES: Thank you, Your Honor.

(R. p. 510, l. 11-511, l. 7) Accordingly, the hearing concluded and Respondent's counsel was tasked with drafting the order on the Second Motion to Compel.

Rather than submitting a simple proposed order memorializing Judge Couch's instructions from the bench, Respondent's counsel proposed a sweeping order going beyond the scope of Judge Couch's oral ruling. Most significantly, the proposed order differed from Judge Couch's stated intention to bar "Alex" and Mr. Jones' wife's cousin from testifying at trial unless Mr. Jones supplemented his written discovery to identify them before June 1, 2019, and instead dramatically expanded the ruling so that Mr. Jones would be prohibited from calling all witnesses who were not identified prior to the June 1st deadline.

Mr. Jones objected to Respondent's attempt to turn Judge Couch's specific ruling into an omnibus ruling barring all witnesses regardless of whether or not related to the alleged discovery deficiencies and regardless of the circumstances of any witness disclosures after the deadline. (R. pp. 228 and 230) Nonetheless, Judge Couch signed the proposed order on July 3, 2019, which stated (as drafted by Respondent's counsel, contrary to Judge Couch's ruling from the bench), "Plaintiff shall fully respond to Defendant's discovery regarding the identification and contact information of these purported factual witnesses . . . compliance with this Order shall be had on or by June 1, 2019…failure of Plaintiff to comply with this Order shall result in Plaintiff's inability to use the aforementioned witnesses or any other unidentified witness at trial…" (R. pp. 12-13) ("Couch Order") (emphasis added). Thus, because of the timing of entry of the Couch Order, it required compliance by a date (June 1) that actually preceded the date of the order (July 3) by a month. The Couch Order also adopted Respondent's counsel's incorrect recitation of the history of the discovery dispute and the mischaracterizations of Mr. Jones' initial pleadings and Motion to Dismiss. (R. pp. 10-13)

Given that the Couch Order was the first time Judge Couch had ruled on extending the June 1st deadline to witnesses other than the two witnesses that were the topic of discussion during the hearing, Mr. Jones sought reconsideration of the Couch Order on July 3, 2019, the same day it was issued. (R. pp. 190-95) In addition to objecting to the timing requirements of the Couch Order, Mr. Jones also sought to correct numerous unsupported factual statements in the Couch Order. For example, the Couch Order states: "Plaintiff, through his filings, depositions, memoranda, and oral arguments, has consistently referenced an individual who remains unidentified, yet, according to Plaintiff, witnessed the accident." The Couch Order also provides: "Plaintiff has introduced evidence of these witnesses." (R. p. 194) These mis-statements, as provided to Judge Couch by Respondent's counsel, are demonstrably false.

As referenced above, the statement about other witnesses that Respondent claims as the lynchpin of her motion practice against Mr. Jones were made only during the initial pleading stage of this litigation. After filing his Motion to Dismiss, Mr. Jones has never actually relied upon any witnesses other than himself, Respondent, and Ms. Murray, the driver who was following behind Mr. Jones at the time of the collision, in filings, memoranda, and oral arguments before the court. Moreover, during Mr. Jones' deposition, Respondent learned precisely why Mr. Jones did not include any such representation in writing or oral argument before the court beyond the pleading stage. As Mr. Jones testified quite clearly in his deposition, he could not actually identify the witnesses with any specificity, although he had hoped to do so when the case began.

The chart below compares Mr. Jones' deposition transcript against the Couch Order and shows additional examples of statements provided to Judge Couch by Respondent's counsel that are contrary to Mr. Jones' actual testimony.

| Jones Deposition | Couch Order |
|---|---|
| A. . . .when my wife was living at that time, she said it was her cousin. (R. p. 1122) (emphasis added). | "According to Plaintiff, this individual is his wife's cousin." (R. p. 12) (emphasis added). |
| Q. How do you know that her car is still drivable?<br><br>A. Because the car came to my house -- passed my house a couple of times.<br><br>Q. When did you see this car come past your house a couple of times?<br><br>A. When I got out of the hospital and I was walking around and I able to walk around outside. (R. p. 1130) (emphasis added). | "However, Plaintiff seeks to rely on testimony or inferences arising from this individual, as they allegedly were operating the vehicle in front of Defendant immediately prior to the accident, according to Plaintiff they observed the accident, and according to Plaintiff they spoke with Plaintiff about the accident at a later date." (R. p. 12)<br><br>"Plaintiff has admitted he has spoken to this individual and this individual has come to his house after the accident." (R. p. 12) (emphasis added). |
| Q. So your wife -- wife told you that her cousin did not want to testify because she did not want to get involved; is that correct?<br><br>A. Yeah, uh-huh. (R. p. 1126) | "Plaintiff represents he did not disclose this individual because she did not want to be involved in the case." (R. p. 12) (emphasis added). |

Despite Mr. Jones' notation of these flaws, Judge Couch denied his request to amend the ruling on July 24, 2019.

**Roster Meeting with Judge Lee**

The case was set on the July 8, 2019, trial roster with the Honorable Allison Lee presiding. However, Judge Couch had not yet ruled on Mr. Jones' Rule 59 motion as to Judge Couch's July 3 Order. In discussing the case status, Mr. Jones' counsel informed Judge Lee that he made a timely motion for reconsideration of the Couch Order based on a disagreement "with what the Judge's instructions were." (R. p. 518, l. 10). In attempting to refute Mr. Jones' position, Respondent's counsel selectively recited the history of the motion practice in seeking to compel disclosure of the two witnesses of which Respondent certainly knew, by this time, that Mr. Jones lacked sufficient information to be able to identify. (R. pp. 524-34)

As with the proposed order submitted to Judge Couch, Respondent's counsel made several mis-statements regarding Mr. Jones' prior deposition testimony and representations before the court. For example, Respondent's counsel told Judge Lee that Mr. Jones repeatedly relied on the unnamed witnesses throughout the case, including in an attempt to prevail on the Motion to Dismiss and to defeat the Motion for Summary Judgment.[4] (R. p. 526-29) (referencing Mr. Jones' Summary Judgment Memorandum to wrongly imply that Mr. Jones presented arguments to Judge Benjamin regarding the unidentifiable witnesses; as the record demonstrates beyond dispute, there is nothing to support such statement other than Respondent's counsel's own prior statements); (R. p. 527) (stating unequivocally that the second witness Mr. Jones failed to identify is "his wife's cousin" despite Mr. Jones' explicit testimony that he did not actually know the woman but had been told by his wife that she was a cousin and, further, that his wife never explained how she and the woman were related);[5] (R. p. 527) (acknowledging that "[Mr. Jones] couldn't give us anything about Alex" yet erroneously stating that "[Mr. Jones] relied on Alex."); (R. p. 528) (stating "Mr. Jones, in his deposition, refused to give her name, then said he didn't know her name; then said he's talked to her about, but she doesn't want to be involved in this case," despite the fact that such statements have absolutely no support, and are indeed contradicted by, the Jones Deposition

[4] This is not an exhaustive list of the statements made before Judge Lee that were taken out of context or referenced in a misleading way.

[5] The concept of fictive kinship is common within the African-American community. Therefore, it is overly presumptive to conclude that Mr. Jones' wife actually had a familial relationship with the woman in the blue car or that her identification of the woman as a cousin would have provided meaningful information for Mr. Jones to identify and locate her, particularly after his wife's death. *C.f.* Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. Colo. L. Rev. 941, 986-1011 (2019) (A "structure quite common in African American communities is that of fictive kin. Here, families establish familial relationships with people who are not related by blood and who may or may not live with the nuclear family. Friends or neighbors are likely candidates for fictive kin relationships and may be given kinship titles, such as aunt or uncle.") (citations omitted).

transcript); (R. p. 531) (asserting "Mr. Jefferies stood up and said, 'Alex wife's cousin' – made this same argument, this same sequence of facts to the Court, in an argument to deny summary judgment," when the transcript unequivocally shows that Mr. Jefferies never made such an argument. Instead, Mr. Jefferies only referenced deposition testimony from Mr. Jones, Respondent, and Ms. Murray in opposing the Motion for Summary Judgment before Judge Couch).

In response, Mr. Jones's counsel conceded that "[t]his is definitely a case where we have struggled to identify witnesses," and explained that

> [Mr. Jones] was hospitalized for a long time. His memory -- and Your Honor will see this when we do go to trial -- his memory is not what it was. We'd love to have easily obtained every single one of these witnesses because it's our burden, right, to prove our case. So we're not trying to hold back. We don't want to surprise anybody.

(R. p. 541-42). Mr. Jones's counsel further clarified that his objection to the Couch Order related to Judge Couch's decision to bar every witness who wasn't disclosed by June 1st, (R. p. 546), rather than just the two unidentifiable witnesses discussed at the hearing and to which Judge Couch's ruling from the bench was intended to apply. Ultimately, Judge Lee continued the case to allow Judge Couch to rule on Mr. Jones' Rule 59 motion. Judge Couch denied the motion on July 24, 2019. (R. pp. 15-22)

The trial was rescheduled for the week of August 12, 2019. Following the continuance, Respondent's counsel again contacted the Administrative Judge with a request to have the sanctions hearing scheduled as soon as possible. (R. pp. 394-97). Judge Jocelyn Newman instructed the parties to appear at the roster meeting before Judge Manning on August 12, 2019, "prepared to argue all outstanding motions." (R. p. 398-402)

**Trial with Judge Manning**

The trial began on August 13, 2019, with Judge Manning presiding. Prior to jury selection, Judge Manning addressed pre-trial motions, including Respondent's Motion in Limine seeking the exclusion of witnesses, her renewed Motion for Summary Judgment on her counterclaim ("Second Summary Judgment Motion"), and her Motion for Sanctions. (R. pp. 558-70) Respondent first argued in support of her Second Summary Judgment Motion, which sought judgment as a matter of law on her counterclaim for negligence against Mr. Jones. *Id.* Her counsel recounted Respondent's version of the accident and argued that Mr. Jones violated statutory law by riding his bicycle against the flow of traffic. *Id.* In opposition, Mr. Jones' counsel relied only on Mr. Jones' recollection of what occurred just prior to impact and Ms. Murray's testimony corroborating that Mr. Jones did signal his intent to turn. *Id.* Mr. Jones' counsel also contended that there was no evidence in the record to support a finding that Mr. Jones ever rode his bicycle in violation of the referenced statute. *Id.* Following Mr. Jones' argument, Judge Manning asked Respondent's counsel whether or not Mr. Jones ever actually rode on the wrong side of the road.

> THE COURT: All right. Thank you. How about that, Mr. Bayne? He said he never rode on the wrong side of the road. There's a difference between being prohibited and, actually, doing something.
>
> MR. BAYNE: Well --
>
> THE COURT: Did he make it? Did -- did he make it to the other side of the road? Was he going the wrong way when he was hit?
>
> MR. BAYNE: He was. And his bicycle --
>
> THE COURT: Wait. You said he was. He said he wasn't.
>
> MR. BAYNE: Well, the -- the issue then becomes -- and this is from -- I guess this is from Mr. Jones' deposition. He says, As I proceeded to turn in front of the car, the next thing I know, I was in heaven. So --
>
> THE COURT: But your -- your motion for summary judgment is based on something that did not occur; is that correct?
>
> MR. BAYNE: Judge, the issue here would be --
>
> THE COURT: Well, no. Mr. Bayne, please, just answer my question.

MR. BAYNE: Yes, he did turn, Judge. And –

THE COURT: All right. Did he make it across the road? Was he ever on the wrong side of the road?

MR. BAYNE: Yes.

THE COURT: When?

MR. BAYNE: When he was hit.

THE COURT: Was that in the middle of the road or the other side of the road?

MR. BAYNE: I can show you a photograph.

THE COURT: Sure.

MR. BAYNE: It was on the -- the middle --

THE COURT: Well, let me ask you this. Was he ever riding -- was he on the left side of the road when he was hit, or was he hit as he was crossing to get on the other side of the road?

MR. BAYNE: He was perpendicular. So it's as he was –

(R. p. 564, l. 16-p. 566, l. 4) Upon confirming that Respondent could not provide any evidence that Mr. Jones was violating the statute, Judge Manning determined that there was an issue of fact for the jury and denied Respondent's Second Summary Judgment Motion. (R. p. 566, l. 5)

Respondent then turned to her Motion for Sanctions. During the arguments, her counsel made multiple allegations related to perceived discovery abuses, again relying on his unsupported and fictitious recitation of the case history. Respondent's counsel also mischaracterized Mr. Jones' substitution of his current caretaker, Treacy Foster, for his deceased wife, whom he had previously named as a damages witness for the purpose of attesting to changes in his quality of life. Respondent's counsel's argument to Judge Manning was solely focused on monetary sanctions. (R. pp. 566-68) Remarkably, as further discussed below, Respondent never mentioned the alleged mediation violation and never requested dismissal of Mr. Jones' Complaint as a sanction despite Judge Newman's instructions to present the motion to the trial judge. *Id*. At the conclusion of arguments on the Motion for Sanctions, Judge Manning decided to hold his ruling in abeyance and indicated that he would address the motion "before we finish this trial." (R. p. 568)

Respondent's final pretrial motion concerned the exclusion of witnesses based on the Couch Order. Respondent's counsel began his argument by insinuating that Mr. Jones purposely withheld the names of two witnesses first identified on July 5, 2019; Lettie Jackson and Treacy Foster. (R. pp. 629-30) ("there are witnesses that they purport to have that they refuse to identify to us"). He also distorted statements Mr. Jones' counsel made before Judge Couch to suggest that Mr. Jones had agreed to the Couch Order deadline for naming all witnesses by June 1, when the record is clear that Mr. Jones' counsel's agreement with Judge Couch was only as to the two unidentified potential eye witnesses. *Compare* (R. p. 633, ll. 9-13) ("And that order memorializes the original order. And it says, Any witness not identified by June 1st is barred from trial. Mr. Jefferies agreed with that at the hearing. It's in -- it's in the order by Judge Couch."), *with supra* (R. pp. 569-70) (citing Mr. Jones' agreement to disclose information about Alex and the woman described to him as his wife's cousin in the hearing before Judge Couch).

Mr. Jones' counsel was forthright with Judge Manning in conceding that he did not meet the June 1 deadline for naming Ms. Foster and Ms. Jackson. He explained

> MR. JEFFERIES: That is correct. The order was memorialized on July 3rd. We disclosed the witnesses on July 5th, and not just the name, but the name and address of Treacy Randolph, which is what we had at the time. We did not disclose the address of Lettie Jackson because we didn't know. We still do not know the address
>
> THE COURT: It doesn't matter whether you knew it or not. He had a cutoff date that you didn't meet, apparently.
>
> MR. JEFFERIES: That's correct, Your Honor.

(R. p. 633, l. 19-p. 634, l. 4) Judge Manning granted Respondent's motion in limine to exclude Ms. Foster and Ms. Jackson, even though Mr. Jones never had any intention of calling Ms. Jackson during the trial because he did not know her location.

After the parties made opening statements, Mr. Jones called Ms. Foster to proffer her testimony, which was excluded by Judge Manning's ruling on the Motion in Limine. Ms. Foster was not proffered as an eyewitness to the accident but merely as a witness related to Mr. Jones' damages. (R. p. 665) She explained that she and her husband began assisting Mr. Jones due to the effects of the accident after death of her mother (Mr. Jones' wife), which occurred in late January of 2019. (R. pp. 665-66) She did not specify the particular date on which she took over these duties, whether immediately or some period of time after her mother died. At the conclusion of her proffered testimony, Judge Manning confirmed his ruling to exclude her testimony based on the Benjamin Order and the Couch Order. (R. p. 679)

Mr. Jones was the first witness to testify in the presence of the jury. During his testimony, he explained that he now required substantial assistance from Ms. Foster. (R. pp. 682-83) He also recounted the same version of accident as he disclosed in his deposition; namely, that on his return home from a bicycle ride, he signaled to turn left across the roadway and believed that there was a blue car driven by a woman who slowed down to allow him to cross but, then, he was hit by Respondent's car. (R. pp. 686-89) However, he did not recall the actual moment of impact or seeing Respondent cross the center line. (R. p. 711)

Although he was unable to recall her name at his deposition, he testified that the woman driving the blue car was someone "[t]hey said was my wife's cousin" and "they said her name was" Lettie Jackson. (R. p. 688, ll. 10 and 14) On cross-examination, he testified that he had no knowledge regarding whether or not Ms. Jackson actually saw the accident. (R. p. 707)

Respondent testified after Mr. Jones. She testified that she hit Mr. Jones on his right side with the middle, front of her car. (R. pp. 739-40) She further testified that she did not see him give a turn signal but admitted that she was not wearing her glasses at the time despite the requirement

on her license to do so. (R. pp. 741-46) She contended that she was not aware of her license restriction and did not know that it was a violation of South Carolina law for her to fail to wear her glasses while driving if her license included a corrective lens restriction. (R. pp. 745-46) She also testified that it costs approximately $8,000 to repair the damage to her car and that she brought her counterclaim against Mr. Jones simply in retaliation for his suit against her. (R. pp. 760-61) In response to questions about her allegations of other damages she claimed to have sustained in her pleadings, like lost wages and detriment to her health and well-being, she admitted that she had no evidence to present at trial to support those claims. (R. pp. 765-67)

At the close of Mr. Jones' presentation of his case, Respondent moved for a directed verdict on her counterclaim, which was summarily denied. (R. pp. 769-473 Then, she closed her case with testimony from Ms. Murray. Ms. Murray said she was following Mr. Jones on the day of the accident. She saw him signal for a left turn and slowed her speed in anticipation of his turn. (R. pp. 777-78) However, she also stated that she screamed when he turned because she could see the car in the other lane of travel approaching. (R. p. 778) According to Ms. Murray, there were no cars at the location of the accident at the time of the collision other than hers and Ms. Robinson's. (R. p. 784)

At the close of all evidence, Judge Manning heard each parties' directed verdict motions. Mr. Jones moved for a directed verdict on the issue of negligence *per se* against Respondent for failing to wear her required eyeglasses, which Judge Manning granted and agreed to note on the verdict form. (R. pp. 800-02) Respondent renewed her prior motion for directed verdict, which the court denied. (R. pp. 803-04) The court also considered and denied Mr. Jones' motion to include punitive damages on the verdict form. (R. p. 804). No other motions or issues were raised before closing arguments.

Ultimately, the trial ended in a mistrial which was precipitated by Respondent's counsel's improper remarks to the jury during closing arguments. (R. pp. 851-58) Respondent's counsel told the jury "The Judge is going to be very clear with you that what has been paid is not the measure of damages. If that were the case, Mr. Jones would have zero dollars in damages because he hasn't paid those bills." (R. p. 846, ll. 19-23) Once again, upon dismissal of the jury, Respondent failed to renew any motions for discovery sanctions and did not address the purported ADR violations.

**Motion for Sanctions and Hearing with Judge Hood**

Before the case was originally set for trial, the parties conducted mediation on June 21, 2019. Gus Anastopoulo, an associate attorney with Anastopoulo firm representing Mr. Jones in the action, appeared with Mr. Jones for the purpose of participating in the mediation conference. The record indicates that the parties convened and gave opening statements. (R. pp. 257-58) After separating, Mr. Anastopoulo made a reasonable opening demand on behalf of Mr. Jones of roughly double the medical bills incurred as a result of the collision. (R. pp. 896-98) However, despite clear evidence disclosed in discovery of her negligence *per se*, Respondent refused to offer any money to settle Mr. Jones' claim - not even one dollar. *Id.* Instead, she demanded that Mr. Jones pay her more than $40,000.00. *Id.* Her demand amount was five times the repair estimate for the damage to her car and her actual out-of-pocket expense for the property damage was only one hundred dollars. Unsurprisingly, the mediation ended in an impasse. *Id.*

Respondent did not object to the commencement of the mediation conference after realizing that Mr. Jones' lead counsel, Lane Jefferies, was not in attendance, nor did she request the mediator suspend or continue the mediation for the purposes of securing Mr. Jefferies' or any other more senior attorney's attendance. Only after the mediation resulted in an impasse and the mediator released the parties from mediation did Respondent complain to Mr. Jefferies about Mr.

Anastopoulo's participation in the mediation. (R. p. 188) Moreover, Ms. Robinson elected not to raise the issue with the mediator after the mediation. (R. p. 189) (noting the mediation was complete and the parties ending in impasse rather than electing to continue the mediation).

Notwithstanding the failure to make any objection at the mediation, Respondent filed a Motion for Sanctions requesting "an [o]rder sanctioning Plaintiff and Plaintiff's counsel for violations of ADR Rule 6 [because] Plaintiff failed to participate in mediation as required by Rule 6." (R. p. 161) The gravamen of Respondent's motion was Mr. Anastopoulo's participation in the mediation prior to his filing of a formal notice of appearance with the court. (R. p. 167) Respondent also requested an expedited hearing before the Chief Administrative Judge prior to the trial date and emailed the Honorable Jocelyn Newman, who was designated as the Chief Administrative Judge for Richland County at the time. (R. p. 1260) Judge Newman assigned Respondent's Motion for Sanctions to the trial judge for pretrial review. (R. pp. 291 and 517)

About a month and a half after the mistrial, Respondent's Motion for Sanctions was set for a hearing before Judge Hood. The hearing was originally scheduled for September 25, 2019, but Judge Hood continued it to September 27, 2019, due to Mr. Jefferies' participation in another court matter. Despite having previously failed to raise any alleged mediation violation before Judge Manning in seeking the imposition of monetary sanctions against Mr. Jones and his counsel, Respondent's counsel substantially relied on the argument in an effort to obtain an order for the most severe sanctions available under the court rules. Counsel portrayed Mr. Anastopoulo's attendance at mediation as an obstacle to resolution, when he readily admitted to Judge Hood that the case was unlikely to settle in any event due to the difference in the parties' opening demands. (R. p. 888, ll. 17-19) ("So while the case wouldn't have gotten settled, I don't think if we're talking those numbers, there was no effort made").

Respondent's counsel also continued to make unsubstantiated allegations of perceived discovery abuses and unsupported allegations of false representations to the court by Mr. Jones' counsel. Such mis-statements to the court are particularly egregious in that Respondent's counsel's own statements in filings and before the court were often less than candid. For instance, in arguing that Mr. Jones was not being forthcoming to Judge Hood about his prior arguments in the hearing on Respondent's Summary Judgment Motion, Respondent's counsel interjected

> Your Honor, it may or may not be relevant. This is in response to what Mr. Jefferies said. With respect to the motion for summary judgment that was argued in front of Judge Couch, that motion was denied because Mr. Jefferies alleged at that hearing, which was held immediately before the motion to compel hearing, that they had witnesses that would support their case. Because they alleged they had witnesses to support their cases, even though they had not yet been identified, Judge Couch denied our motion. So that was the reasoning behind it. There was no rubber stamping that their claim was valid. It was because they alleged at that time they had witnesses that would support their case. Just as a point of clarification -- and I'm not sure whether it's relevant to your decision in this case but just to clarify things.

(R. p. 914, ll. 5-20) (emphasis added). Not only was this statement irrelevant, it was simply untrue. As previously explained, Mr. Jones' counsel's arguments and Judge Couch's ruling on summary judgment were based on the conflicting versions of the accident provided by Mr. Jones and Respondent, not upon alleged evidence of unidentified witnesses. Further, as noted above, Respondent's counsel has made many other arguments to the court that had no reasonable factual basis throughout this litigation. *See, supra*, pp. 19-28 (various examples of factually unsupported statements made by Ms. Robinson in this litigation). In fact, Respondent's counsel's penchant for embellishment infected the prior orders on which Respondent relied to weave a fictitious and unsupported tale of Mr. Jones' and his counsel's disregard for the rules of court and, therefore, tainted the Final Sanctions Order.

Judge Hood issued his Initial Sanctions Order on October 31, 2019. (R. pp. 23-45) After holding a hearing on Mr. Jones' motion for reconsideration, Judge Hood issued an amended order and increased the monetary damages to include Respondent's fees and costs incurred in connection with the reconsideration. (R. pp. 923-1004; 46-72)

The Final Sanctions Order cites a litany of factually inaccurate details about the case, taken from Respondent's counsel's representations to the court, in support of the imposed sanctions. Among other things, Judge Hood found that Mr. Jones repeatedly violated court orders and discovery rules by not identifying witnesses of which he was aware while also relying extensively on the existence of those witnesses to avoid summary judgment and advance his case. (R. pp. 50-52) Judge Hood also accepted Respondent's contention that Mr. Jones agreed to June 1st as the deadline for naming all witnesses in the case and, then, he and his counsel intentionally mislead Judge Lee and Judge Manning about the nature of that agreement. (R. pp. 52-54; 60-62; 65-68) Additionally, Judge Hood concluded that Mr. Anastopoulo's participation in mediation violated Rule 6, SCRADR, based on a "totality of the circumstances." (R. p. 56) He accepted Respondent's counsel's arguments about mediation without any evidence in support of the same and outright rejected Mr. Anastopoulo's affidavit. In the Final Sanctions Order, Judge Hood noted

> Mr. Anastopoulo got several key facts and details wrong about the case. He asserted medical damages that were inaccurate and that have never been produced in discovery. Later, he asserted that there were "several eyewitnesses to the accident who would be called to testify"— something that has been expressly barred by Judge Couch, but that Mr. Anastopoulo was completely unaware of. However, the most egregious part of the mediation occurred during Mr. Anastopoulo's opening wherein he openly admitted that Plaintiff had a "1 in 10 chance" of prevailing at trial but that "1 chance out of 10 is going to be costly to Defendant so you should settle." Mr. Anastopoulo openly and candidly admitted the lawsuit filed by Plaintiff had just a 10% chance of success. Shortly after describing Plaintiff's case as a veritable "snowball's chance", Mr. Anastopoulo revised his prediction to a "1 in 6" chance and compared his case to "a game of Russian Roulette" wherein Defendant "may win 5 out of 6 times but that one time there's a bullet in the chamber and we [Plaintiff] win." After this statement, the parties broke into separate rooms and the

> mediator started with Plaintiff. The mediator returned shortly with a demand of $500,000—20 times the insurance policy limits and, when the demand was rejected, Mr. Anastopoulo left the mediation.

(R. p. 57)

Due to his acceptance of Respondent's counsel's unsupported claims, Judge Hood dismissed Mr. Jones' case with prejudice, while allowing Respondent to proceed with her property damage counterclaim, and ordered Mr. Jones' counsel to pay Respondent $29,788.24.

## ARGUMENT

### Standard of Review

An order imposing sanctions is reviewed on appeal for an abuse of discretion. *Karppi v. Greenville Terrazzo Co*., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770-71 (Ct. App. 2015). "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." *Karppi v. Greenville Terrazzo Co*., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (emphasis added). A failure to consider appropriate factors for the imposition of sanctions amounts to an abuse of discretion. *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 216 (1997). Additionally, in assessing whether there was an abuse of discretion involving monetary sanctions, the appellate court may exercise *de novo* review of the lower court's factual findings. *Ex parte Gregory*, 378 S.C. 430, 437-38, 663 S.E.2d 46, 50 (2008); *accord* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* at 248 (3d ed. 2016) (internal citations omitted) (explaining why an appellate court may take its own view of the facts underlying monetary sanctions because it concerns an equitable matter). Because the circuit court imposed monetary sanctions in its Final Sanctions Order, this Court may make its own factual findings.

## I. The Final Sanctions Order is not Supported By the Record.

The Final Sanctions Order must be vacated because it is founded on unsupported and clearly erroneous factual conclusions. The circuit court concluded that Mr. Jones committed repeated discovery abuses, failed to comply with prior court orders, and violated court rules governing counsel's attendance at mediation. These conclusions were based on the court's belief that Mr. Jones asserted a frivolous lawsuit, concealed the identities of potential witnesses, did not participate in mediation in good faith, and repeatedly lied to the court. Unfortunately, the circuit court's view of this matter was shaped entirely by Respondent's false narrative of the facts and history of this case. There simply is no basis in the record warranting the type of sanctions imposed by the circuit court against Mr. Jones and his counsel.

The Final Sanctions Order includes numerous unsupported allegations of false statements purportedly made on behalf of Mr. Jones to the court in filings, hearings, and trial. For example, the Final Sanctions Order adopted the following conclusions advanced by Respondent, despite the lack of any evidentiary support for them and, in some instances, despite that they are clearly contradicted by undisputed record evidence:

- Mr. Jones repeatedly relied on "unidentified and unnamed" eyewitnesses (namely, "Alex" and the driver of the blue car) in support of the Motion to Dismiss *and* to defeat Respondent's Summary Judgment Motion;
- Mr. Jones intentionally withheld witness information;
- Mr. Jones agreed to the June 1st deadline for identifying all witnesses in the hearing before Judge Couch;
- Mr. Jones misled Judge Lee and Judge Manning in seeking to clarify that his agreement to Judge Couch's June 1st deadline was only as to the unidentifiable eyewitnesses;
- Mr. Jones moved for reconsideration of the Couch Order for the purpose of delay; and
- Mr. Jones' counsel made false and misleading statements to Judge Benjamin, Judge Couch, Judge Lee, and Judge Manning.

There is simply no evidentiary support for these conclusions, nothing more than the mere arguments of Respondent's counsel. As previously detailed herein, Respondent's counsel has

inaccurately represented the facts that are otherwise apparent from actual reference to the record. *See* Statement of Facts, *infra* pp. 4-32.

The Final Sanctions Order also concludes that Mr. Jones' counsel engaged in a pattern of ongoing discovery violations after Judge Benjamin ordered him to answer Respondent's written discovery requests and subsequently issued an order on a Rule to Show Cause. While Mr. Jones does not deny that he submitted untimely responses to the discovery requests, there is nothing in the record indicating he refused to answer discovery or intentionally withheld what little information he had regarding witnesses in this case. Any failure by Mr. Jones to fully respond to the requests seeking the identification of witnesses was the unavoidable result of Mr. Jones' limited knowledge of responsive information and lack of recall of an accident that caused serious brain injury.

In relevant part, Respondent's discovery requests sought "the full name, address, and contact information (including telephone number and email address[])" of witnesses in general and more specifically of the witnesses expected to be revealed by discovery as referenced in Mr. Jones' Motion to Dismiss. (R. pp. 209 and 218) On November 7, 2018, Mr. Jones responded that he had none of the requested information about the witnesses he previously expressed hope to identify through the discovery process. (R. p. 225) His deposition testimony actually confirmed his November 7th response. Even Respondent acknowledged that the only information Mr. Jones was able to recall about anyone who possibly could have been one of the expected witnesses was (1) the assumed name of an acquaintance he knew only as "Alex" and (2) a woman his wife had previously indicated was her cousin but whose name he could not remember.

While Mr. Jones could have listed "a friend I call Alex who lives in the woods" and "a woman my wife said was her cousin" in his discovery responses with no actual names or contact

information, this would have accomplished little in the way of providing any meaningful information responsive to the discovery request, and certainly the failure to do so is not cause for the most extreme of sanctions. Further to that point, Mr. Jones could have also listed "the drivers of the cars following the blue car" but, like Alex and his wife's alleged cousin, he could not actually identify them. (R. p. 1127) Nonetheless, the Supplemental Discovery did not ask for any and all information about the alleged witnesses or any and all information that might lead to the identification of such witnesses. It asked for a name, address, and contact information, none of which was within Mr. Jones' personal knowledge at the time he responded to the discovery requests and sat for his deposition. *See Baughman v. AT&T Co*., 306 S.C. 101, 108, 410 S.E.2d 537, 541 (1991) ("Absent any specification, the interrogatory should be construed as seeking current information as of the time the question is asked and answered.").

Additionally, the Final Sanctions Order concluded that Mr. Jones' denial of Respondent's requests for admissions related to the unlawful passing theory of liability lacked any good faith basis at the time it was made because Mr. Jones "admitted he did not see the accident" and "never disclosed any alleged witnesses from the June 5, 201[9] Memorandum." However, the factual basis of this conclusion is false: Mr. Jones never said he did not see the accident – he said he did not see the moment of impact.

He actually testified in his deposition that he signaled to make a left turn, that a blue car driven by a woman slowed down to allow him to complete his turn, that there were at least two other cars behind the blue car, that he initiated his turn, and then he was in heaven. He did testify that he had no memory of the moment of impact but he remembered much about the events leading up to the impact, which is entirely different from "admit[ing] he did not see the accident". Mr. Jones' trial testimony was entirely consistent with his deposition. (R. pp. 686-89) Inexplicably, the

Final Sanctions Order completely disregards Mr. Jones' personal account of the accident and presupposes that the unlawful passing theory depended on the witnesses instead of inferences that a jury could reasonably make solely from Mr. Jones' testimony.

It is worth noting that two different judges on three different occasions found Mr. Jones' testimony alone to be adequate to support the unlawful passing theory so as to make it a jury issue. After Respondent moved for summary judgment essentially on the grounds that there was no evidence to support the theory, Judge Couch denied the motion based solely on Mr. Jones' sworn deposition testimony as addressed above. (R. p. 505) Respondent also moved for summary judgment before Judge Manning on the same grounds. Judge Manning denied the motion. (R. p. 566) Respondent then moved for directed verdict on the same grounds. Judge Manning denied that motion as well, based solely on Mr. Jones' sworn trial testimony, which was consistent with his sworn deposition testimony. (R. p. 773)

Contrary to Judge Hood's conclusion, there is not a shred of evidence that Mr. Jones' responses to Respondent's requests to admit were based on the existence of any potential eyewitnesses as opposed to reasonable inferences drawn from Mr. Jones' own personal observations to which he testified. Therefore, the finding in the Final Sanctions Order that these denials "clearly lacked any good faith basis" is not supported by the record.

Judge Hood also held little regard for the unlawful passing theory asserted in the Complaint and was sympathetic to Respondent's contention that the assertion of such claim violated Rule 11. In fact, Judge Hood initially held that Mr. Jones' claim was a violation of Rule 11 because of Mr. Anastopoulo's supposed estimate of success relayed at mediation. In the Initial Sanctions Order, he held

> the most egregious part of the mediation occurred during Mr. Anastopoulo's opening wherein he openly admitted that Plaintiff had a "1 in 10 chance" of

> prevailing at trial but that "1 chance out of 10 is going to be costly to Defendant so you should settle." Mr. Anastopoulo openly and candidly admitted the lawsuit filed by Plaintiff had just a 10% chance of success—an open and brazen violation of SCRCP Rule 11.

(R. p. 33 and n. 13) (emphasis added). Although the Final Sanctions Order does not include this language, Judge Hood still makes much of Mr. Anastopoulo's estimate of the likelihood of success of Mr. Jones' case maintaining that it was "the most egregious part of the mediation" without expressly declaring it proof of a Rule 11 violation. (R. p. 57) Again, it is significant that Mr. Jones' Complaint withstood three attempts by Respondent to have it summarily dismissed. It is also significant that the unlawful passing theory was just one of several theories of liability – and Mr. Jones actually secured a directed verdict on his negligence *per se* claim at trial. So, to the extent the Final Sanctions Order is based on Rule 11, it is not a fair conclusion that asserting the claim was frivolous even if it turned out not to be the ultimately prevailing theory.

The same or substantially similar erroneous contentions advanced by Respondent were incorporated into the proposed orders submitted to the court on numerous occasions, which were adopted by the court (i.e. the Benjamin Order and the Couch Order) and form the foundation of Respondent's discovery abuse false narrative. Without the unsubstantiated statements included in prior court orders, it is unlikely Respondents would have had any basis at all to allege repeated discovery abuse.

Here, Respondent's counsel attempted to influence the court with unfounded interpretations of Mr. Jones' counsel's conduct and motives. Whether such methods are considered mere advocacy or something else is not the point of this appeal, but it is absolutely hypocritical for Respondent to seek a sanctions award against Mr. Jones and his counsel purportedly for the very type of conduct employed by Respondent throughout this case. Respondent should not be rewarded for such subterfuge. Accordingly, the Final Sanctions Order should be reversed because the circuit

court made the order without factual support and Mr. Jones' rights were prejudiced as a result. *Karppi v. Greenville Terrazzo Co*., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997).

## II. The Sanctions Imposed by the Final Sanctions Order Are Grossly Disproportionate to the Alleged Misconduct.

The sanctions of dismissal with prejudice and an award of Respondent's attorneys' fees and costs for the entire litigation constitute an abuse of discretion, because such sanctions are completely disproportionate to the alleged misconduct.

In determining the appropriateness of a sanction, "the sanction should be aimed at the specific conduct of the party sanctioned." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co*., 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct. App. 1999). The sanctions must "be reasonable, and ... not go beyond the necessities of the situation to foreclose a decision on the merits of a case. . . . The sanction should be a rifle shot, not a shotgun blast." *The Balloon Plantation, Inc. vs. Head Balloons, Inc., et al.,* 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (reversing the trial court's dismissal of a claim for a party's failure to comply with a discovery order, calling the sanction "a hydrogen bomb."). "When the court orders ... dismissal, or the sanction itself results in ... dismissal, the end result is harsh medicine that should not be administered lightly... The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Griffin Grading & Clearing, Inc*., 334 S.C. at 198-99, 511 S.E.2d at 719. Moreover, dismissal is an inappropriate sanction where "any number of lesser, more narrowly tailored sanctions would have sufficed..." *Karppi v. Greenville Terrazzo Co., Inc.* 327 S.C. 528, 489 S.E.2d 679 (Ct. App. 1997).

The Final Sanctions Order holds that Mr. Jones' counsel continuously violated and willfully ignored prior court orders. Judge Hood further concluded that Mr. Jones and his counsel

acted in bad faith, with willful disobedience, and with gross indifference to the court and counsel in failing to abide but the discovery rules and court orders. For the reasons already explained, the record simply does not support such findings and indeed, clearly contradicts them. Moreover, in addition to the utter lack of actual record support, dismissal of the Complaint was a particularly cruel punishment under the circumstances.

Mr. Jones suffered a serious injury. The record in this case demonstrates that he requires substantial assistance and that he occasionally has issues recalling information. The record also reflects, in his testimony at his deposition and at trial, he is forthcoming in the information he is able to recall. Although Mr. Jones' discovery responses were untimely, to the extent that they required him to identify witnesses, the responses submitted were as complete as Mr. Jones was capable of making them at the time, and the court had previously addressed this conduct by excluding the undisclosed witnesses from trial.

It makes no sense that Mr. Jones would have willfully failed to disclose the subject witnesses, particularly given that he believed that the witnesses would have supported his version of the accident. If the circuit court credited the testimony of the independent witness at all, there were no other cars around at the time of the accident other than hers and Ms. Robinson's. Therefore, under Respondent's version of events, there was never a woman in a blue car to disclose in response to discovery, whether Lettie Jackson (if that is the correct name) or some other woman. It is impossible to say whether or not "Alex" witnessed the accident either, but Mr. Jones could not recall enough information for him to be identified with specificity or to be located. The facts clearly do not suggest that Mr. Jones ever lied under oath, or that his counsel misrepresented anything to the court, but to the contrary demonstrate that it is well within reason to believe that the version of the accident that he relayed in his deposition and at trial is what he truly believes

and is the same version he relayed to counsel. This would explain why Mr. Jones' early filings made reference to witnesses he expected to identify in the course of investigation and why he had difficulty in timely disclosing the identities of the alleged witnesses.

Furthermore, Mr. Jones demonstrated that he had a strong claim based on negligence *per se*; he did secure a directed verdict on the claim at trial. By dismissing his Complaint, the court deprived him of any opportunity to pursue the merits of his claim simply because he had difficulty identifying witnesses that may or may not exist and because the law firm representing him authorized an associate working on the case to attend mediation instead of lead counsel. The Final Sanctions Order in this case does more harm to the purposes of the court rules than it does to encourage compliance with them.

Additionally, this case is easily distinguishable from those cases where our courts have found dismissal of a claim to be appropriate. Many of those cases involve prejudicial discovery violations or noncompliance despite prior warnings that the conduct would result in dismissal. For instance, in *QZO, Inc. v. Moyer,* this Court determined there was no abuse of discretion by the lower court in striking the defendant's answer because the facts showed that the defendant intentionally and willfully violated the court's discovery order resulting in the loss of evidence. 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). The trial court ordered the defendant to produce a computer. However, before doing so, the defendant re-formatted the hard-drive and erased information stored on the computer. The Court found that such actions clearly showed gross indifference to the plaintiff's rights. No such destruction of evidence, or anything comparable to it, occurred here.

In *McNair v. Fairfield County*, the Court found it appropriate for the lower court to strike the County's condemnation claim. 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008). The County

failed to adequately respond to discovery, so the court compelled it to supplement its discovery responses. Thereafter, the County failed to respond within the time set in the court's order compelling the discovery. After six letters from the plaintiff seeking compliance and a period of six months, the plaintiff moved for sanctions. At the first sanctions hearing, the court allowed the County an additional month to respond, yet no response was provided. The parties appeared before the court again, at which point, the court warned that it was inclined to strike the County's pleading if the parties did not reach an agreement and submit proposed scheduling orders within the forty-five days. The County continued to ignore the court and did not even bother to submit a proposed scheduling order, as requested. So, the court struck the pleading. Here, no such court warning was provided to Mr. Jones or his counsel.

In contrast, our courts take a more measured approach when the alleged misconduct is relatively minor such that it is not unduly prejudicial. Case in point, this Court has reversed striking a pleading where a party failed to respond to a discovery orders issued by way of a written order and a verbal order during a status conference, including the requirement to make a party available for a deposition prior to trial. *See Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc*., 327 S.C. at 538, 489 S.E.2d at 679. In reversing the trial court's order, the Court emphasized that it did not condone Ogden Teck's violation of the discovery orders, but, "[u]nder the circumstances ... the harsh sanction imposed was not commensurate with Ogden Teck's disobedience, and any number of lesser, more narrowly tailored sanctions would have sufficed to protect Karppi's rights while adequately punishing the wrongdoing of Ogden Teck." *Id*. at 545, 683.

In a concurring opinion, Judge Anderson noted

> The judge's frustration at Ogden Teck's sluggish and incomplete response to the discovery order is absolutely justified, and I agree that Ogden Teck should be sanctioned for its failure to timely abide by the trial court's order for the scheduling of a deposition and the provision of certain documents. However, the judicial

> chastisement imposed was excessively punitive. The sanction consisted of a "Scud missile" when a "rifle shot" would have been efficacious. Indubitably, the court was faced with an obstreperous party; however, the record is exiguous in regard to conduct calling for the ultimate penalty. Instead of striking Ogden's pleadings and holding them in default, I believe the judge should have imposed one of the alternative sanctions for its inadequate response, such as assessing them costs for the delay, or holding them in contempt for failing to adequately comply with the discovery order. These remedies have been implemented in situations involving similar misconduct, and I believe any of these alternatives are more appropriate than imposing the "ultimate sanction" of striking Ogden's answer and holding it in default. Denying a party the opportunity to be heard should be carefully invoked and reserved for the most egregious cases.

*Id*. at 558-59, 489 S.E.2d at 685 (emphasis added). Judge Anderson's words are entirely apropos in this case, aside from the matter of lack of record support for Judge Hood's erroneous conclusions.

At bottom, Respondent's Motion for Sanctions sought to address two issues: failing to disclose witnesses and sending the wrong attorney to mediation. When specifically addressing the disclosure issue, Judge Couch previously declined to impose monetary sanctions and, instead, opted to bar Mr. Jones from submitting testimony from any of the unnamed or untimely named witnesses at trial as a more appropriate sanction. Additionally, Respondent didn't even raise the mediation violation before Judge Manning and, when before Judge Hood, Respondent actually conceded that mediation was unlikely to have been successful due to the discrepancy in the parties' opening demands, not because Mr. Anastopoulo showed up instead of Mr. Jefferies.

Any additional sanctions were unwarranted, and the circuit court's dismissal of the Complaint and imposition of all fees and costs incurred by Respondent during the entirety of the litigation were grossly disproportionate. The conduct complained of by Respondent is a far cry from the type of conduct that justifies the "nuclear option." Therefore, the Final Sanctions Order should not stand.

## III. The Monetary Sanctions Imposed by the Final Sanctions Order Are Excessive.

The Final Sanctions Order's assessment of fees and costs against Mr. Jones' counsel is subject to reversal for all the reasons outlined above. Furthermore, the circuit court also failed to limit the monetary sanctions to only those reasonable attorneys' fees and costs related to the Motion for Sanctions.

The South Carolina Rules of Alternative Dispute Resolution only authorize "the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference." Rule 10(b), SCRADR. The South Carolina Rules of Civil Procedure are similarly limited in that monetary sanctions for discovery violations include only "the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Rule 37, SCRCP. Even Rule 11 requires a connection between the amount awarded and the cause of the sanction. *See* Rule 11, SCRCP (limiting sanctions to "the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee").

In her the Motion for Sanctions, Respondent sought monetary sanctions in the amount of her <u>total</u> attorneys' fees and costs in the case, the vast majority of which were unrelated to the untimely discovery responses or mediation. However, the Final Sanctions Order is devoid of any discussion about which of Respondent's claimed fees and costs were actually relevant to the Motion for Sanctions. The circuit court also failed to explain how the monetary sanctions were determined to be appropriate and made no determination regarding the reasonableness of the fees and costs requested by Respondent. In this respect, it seems the monetary sanctions imposed are more in the nature of a punishment against Mr. Jones' counsel rather than compensation to Respondent for having attended a mediation where lead counsel was not present.

The monetary sanctions include payment for the time and costs in preparing for and attending the trial. However, Respondent had the opportunity (and had been instructed by the Chief Administrative Judge) to address any issues about sanctions at trial. That Respondent failed to do so and elected to proceed with trial having not even raised the issue to the trial judge belies the notion that Respondent was aggrieved by having to move forward with the trial in the first instance. More shockingly, the only reason this case remained pending when the circuit court held its hearing and issued the Final Sanctions Order is that the case ended in a mistrial due to Respondent's counsel's improper comments during closing arguments (conspicuously after Plaintiff secured a directed verdict against Defendant on the issue of negligence *per se*).

The Final Sanctions Order veers far away from Respondent's request for sanctions related to a mediation violation by directing Mr. Jones' counsel to pay fees and costs unrelated to mediation. And even as to the supposed witness nondisclosure (which was not a subject of the motion and which the record shows was not a failure to disclose information actually known to the party or counsel), the amount awarded still exceeds the fees and costs related to the discovery issue. For this ground as well, the Court should reverse the Final Sanctions Order.

## CONCLUSION

Mr. Jones and his counsel were sanctioned as a result of an overblown discovery dispute and a harmless technical violation of a mediation rule. Although it is important for the court to ensure that litigants and counsel show due regard for court rules and court orders, the sanctions imposed in this case are not supported by the evidence in the record and are wildly out of proportion to the allege misconduct. Under the undisputable record evidence and the totality of circumstances of this case, the circuit court abused its discretion. Accordingly, the Court should reverse and remand with directions to vacate the Final Sanctions Order in its entirety.

Respectfully Submitted,

s/Wallace K. Lightsey

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