STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	C/A No.: 2019-CP-43-01021
	)	
Judy Haselden,	)	
	)	
Plaintiff,	)	
	)	**ORDER**
v.	)	
	)	
Michael D. Smoak and Murray Sand Co., Inc.	)	
	)	
Defendants.	)	
_____	)	

The matter before the Court is Plaintiff Judy Haselden's motion for sanctions requesting the Court to strike Defendants Michael Smoak and Murray Sand Co., Inc.'s (collectively "Defendants") answer and hold them in default. A hearing on Plaintiff's motion was held on August 4, 2023. G. Murrell Smith, Jr., E. Hood Temple, and Alexander S. Hogsette appeared on behalf of Plaintiff. Jeffery T. Ammons and Sarah Rand-McDaniel appeared on behalf of Defendants. The Court has carefully considered Plaintiff's motion, the arguments offered during the hearing, and the relevant law. For the reasons set forth below, the Court grants the motion for sanctions, strikes Defendants' answer, and holds Defendants in default.

BACKGROUND

This case arises out of a motor vehicle accident that occurred in Sumter County. On February 9, 2017, Haselden was rear-ended by a tractor-trailer driven by Smoak and owned by Murray Sand. Smoak was acting in the course and scope of his employment with Murray Sand at the time of the accident. Specifically, Smoak was in the process of hauling riprap from Kershaw to Edisto Beach, where Crowder Construction Co. was involved in a beach renourishment project.

I. The Lawsuit and Initial Discovery

Plaintiff filed her complaint against Smoak and Murray Sand on May 21, 2019, and immediately served Defendants with her first interrogatories and requests for production. Plaintiff's initial discovery requests sought basic information about the accident and parties involved, such as the load being hauled, the names of shippers and consignees, fax transmissions and invoices to any entity concerning the trip, trip summaries, pickup and delivery records, and applicable insurance policies. Murray Sand filed its answer on July 25, 2019, and Smoak filed his answer on August 26, 2019.[1] Plaintiff requested Defendants to respond to her first discovery requests on September 25, 2019. Neither Murray Sand nor Smoak timely responded, so Plaintiff filed her first motion to compel on November 5, 2019.

On January 23, 2020, approximately 8 months after being served with the requests, Murray Sand provided its first discovery responses. Along with its responses, Murray Sand produced 552 pages of documents without any Bates Stamps or numbers. As discussed in more detail below, Murray Sand did not produce all documents responsive to Plaintiff's requests.

On April 30, 2020, Smoak provided his first discovery responses. Smoak did not produce any documents along with his discovery responses. The same day, Murray Sand supplemented its discovery responses with 40 additional pages of documents. Like Murray Sand's first production, these documents were not Bates Stamped.

Defendants also filed their response to Plaintiff's motion to compel on April 30, 2020. In the response, Murray Sand represented that it had "spent a number of hours diligently searching for the records Plaintiff claims have been withheld, and has not, to date, discovered the documents Plaintiff describes in her memorandum. Murray Sand is not in possession of the documents

[1] Haselden filed an amended complaint on September 3, 2020. Defendants filed a joint answer to the amended complaint on September 17, 2020.

Plaintiff seeks[.]" Nevertheless, on May 18, 2020, the eve of the hearing on Plaintiff's motion to compel, Murray Sand produced an additional 246 pages of documents. Some of these documents were duplicates of documents already produced. The undersigned heard Plaintiff's motion to compel on May 19, 2020.

On May 27, 2020, Murray Sand moved to dismiss Plaintiff's complaint. Murray Sand's motion to dismiss did not state any grounds for dismissal, and Murray Sand never filed a memorandum in support of its motion. The same day, Murray Sand also moved for a protective order and for a stay of discovery. In a memorandum in support of its motion for a protective order filed July 22, 2020, Murray Sand again represented that it had produced all documents in its possession: "During the hearing [on Plaintiff's motion to compel], counsel for Murray Sand confirmed, again, that after numerous exhaustive searches on behalf of Murray Sand, she had produced everything in her possession that was not privileged."

The Court granted Plaintiff's motion to compel on August 27, 2020. Specifically, the Court ordered Murray Sand to produce all post-accident incident reports and post-accident drug testing. In contravention of the Court's Order, Murray Sand has never produced these documents. Murray Sand continues to represent that it is not in possession of these documents, despite Smoak's deposition testimony that he provided a written statement to Murray Sand and took a drug test on the day of the accident.

The Court also denied Murray Sand's motion for a protective order on August 27, 2020. The Court ruled: "The discovery sought by Plaintiff in connection with the instant matter is within the ambit of the South Carolina Rules of Civil Procedure. Specifically, the Court finds that discovery sought is not oppressive, unduly burdensome, disproportionate to the needs of the case, or irrelevant."

On September 25, 2020, Murray Sand produced an additional 90 pages of documents. These documents were Bates Stamped, but in a different format from Murray Sand's previous production. As noted above, this production also did not include the documents the Court ordered Murray Sand to produce in its August 27, 2020 Order. Over the course of the next year, despite several requests from Plaintiff, Defendants did not supplement their production.

As of May 2021, Defendants had produced roughly 1,000 pages of documents throughout two years of litigation. The parties entered a consent scheduling order dated May 17, 2021. The Order provided: "Written discovery shall be completed no later than September 1, 2021."

II. Defendants' Belated Production and the Disclosure of Blue Max Trucking

As noted above, prior to the written discovery deadline, Defendants and their counsel represented on multiple occasions to both the Court and Plaintiff that they had searched for and produced all discoverable documents. However, on September 30, 2021, a month after the written discovery deadline, Defendants produced **5,110** pages of documents—over five times the total number of documents produced in the previous two years. Like their earlier productions, many of the documents were duplicates, and none were Bates Stamped. The production was simply separated into five pdf documents as follows:

- Document Production 1: This production was 532 pages of documents. 340 of these documents had already been produced, some of which more than once. However, Defendants also intermingled 192 new documents amongst the old documents.
- Document Production 2 RESP – SCYAP Subpoena: This production was 763 pages of documents Defendants received in response to a subpoena.
- Document Production 3 RESP – Medical: This production was 3,096 pages of documents Defendants received in response to subpoenas issued over two years prior.
- Document Production 4 Safety Meeting Docs: This production was 148 pages of new documents.

- Document Production 5 Tax Returns: This production was 763 pages of documents that Defendants were ordered to produce following a motion to compel hearing.

All told, Defendants produced well over 3,000 pages of new, previously undisclosed documents in their September 30, 2021 production—contrary to Defendants' representations that they had been conducting exhaustive searches throughout the previous two years. Many of these documents were responsive to the initial discovery requests Plaintiff served in May 2019 and were undoubtedly within Defendants' possession from the time of the accident in 2017.

The September 30, 2021 production revealed several pieces of key, previously undisclosed information. For the first time, Defendants disclosed (1) accident registers and other data relating to Ms. Haselden's accident; (2) the existence of an excess liability insurance policy; and (3) the involvement of Blue Max Trucking. Accordingly, over two years into the case, after an unsuccessful mediation and the discovery deadline, Defendants first provided Plaintiff with basic information about the accident, Murray Sand's insurance coverage, and Blue Max Trucking. Again, Plaintiff requested this information in May 2019, and there is no question that Defendants should have provided it in their first production.[2]

Defendants' delayed disclosure of Blue Max Trucking particularly prejudiced Plaintiff. Buried amongst duplicate documents in Defendants' "Document Production 1" were three pages of documents revealing that Murray Sand was hauling riprap for Blue Max Trucking on the date of the accident. Specifically, the documents identifying Blue Max Trucking consisted of a two-

[2] Additionally, Defendants were copied on a subpoena Plaintiff served on Crowder Construction, dated March 30, 2021, in which Plaintiff asked Crowder Construction to produce all "contracts, agreements, purchase orders, schedules, receipts, delivery logs, delivery records, weight tickets, and any other documents in any form whatsoever relating to Murray Sand Company, Inc. from January 1, 2016 through July 1, 2017." Defendants knew or should have known by copy of this subpoena that Plaintiff was trying to discover the relationship between Crowder Construction and Murray Sand, which Defendants knew would yield nothing because it was Blue Max Trucking, not Murray Sand, that had the relationship with Crowder Construction.

page document summarizing the trips Murray Sand completed for Blue Max Trucking between January 30, 2017 and February 22, 2017, and a one-page invoice dated February 27, 2017 from Murray Sand to Blue Max Trucking. These three pages revealed a significant amount of previously undisclosed information. They showed that Murray Sand hauled well over 1,000 tons of riprap for Blue Max Trucking to Crowder Construction at Edisto Beach throughout February 2017. The one-page invoice also included a customer ID, an invoice number, the identify of a shipper and consignee, and evidenced a $52,756.62 bill submitted to Blue Max Trucking for the month of February 2017.

Upon receiving this information, Plaintiff immediately issued a subpoena to Blue Max Trucking on October 8, 2021. However, because Defendants concealed Blue Max Trucking's involvement up to that point, Blue Max responded that all "documents responsive to this subpoena have been purged in accordance with State and Federal laws and regulations or are otherwise unable to be located."

As discussed in more detail below, Plaintiff was irreparably prejudiced by Defendants' intentional decision to hide Blue Max Trucking's involvement until September 30, 2021. Although the production demonstrated that Smoak and Murray Sand were hauling riprap for Blue Max Trucking on the date of the accident, Plaintiff was not aware of that fact until over two years into the litigation and after the statute of limitations had run. Additionally, because Defendants did not disclose Blue Max Trucking until after the discovery deadline and after Blue Max Trucking had purged all records relating to the accident, Plaintiff was unable to conduct discovery and learn the full scope of Blue Max Trucking's involvement in this accident.

LEGAL STANDARD

The purpose of discovery is to ensure "full and fair disclosure" of information and to "prevent a trial from becoming a guessing game" for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); *Scott v. Greenville Housing Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151 (2003) ("The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming an guessing game or one of ambush for either party."). The South Carolina Supreme Court has held that the purpose of our State's discovery rules is not to promote gamesmanship or obfuscation, but rather to ensure that "lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of the S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999)).

"The selection of a sanction for discovery violations is within the trial court's discretion." *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). "Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 682 (Ct. App. 1997). Rule 37 provides, in relevant part, that if a party "fails to obey an order to provide or permit discovery," the court may issue an order "striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Rule 37(b)(2)(c), SCRCP.

Before a court imposes a sanction tantamount to granting a judgment by default, "the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199,

511 S.E.2d 716, 719 (Ct. App. 1999). Additionally, "the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Id.*

ANALYSIS

The Court finds Defendants' discovery conduct in this case warrants the harsh sanction of striking Defendants' answer. Throughout this litigation, Defendants have systematically interfered with Plaintiff's ability to prepare for trial. Defendants consistently failed to provide or supplement discovery responses in a timely fashion, disobeyed the Court's discovery orders, and misled the Court and Plaintiff. Most importantly, Defendants intentionally withheld the identity of a potential defendant, Blue Max Trucking, from Plaintiff until after the statute of limitations. Because these willful actions have irreparably prejudiced Plaintiff, it is proper to strike Defendants' answer.

Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct.

I. Discovery Posture

In determining the appropriate sanction to impose, the first factor the Court considers is "the precise nature of the discovery and the discovery posture of the case." *Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. This factor supports the sanction of striking Defendants' answer.

Plaintiff filed her complaint in May 2019, and this litigation has been ongoing for well over four years. The parties have already attempted to mediate this case, and the discovery deadline has long passed. Although the South Carolina Rules of Civil Procedure exist to secure the "just,

speedy, and inexpensive determination of every action," Rule 1, SCRCP, Defendants' conduct has continually frustrated Plaintiff's ability to obtain discoverable information in a timely fashion and prosecute this action.

Plaintiff served Defendants with her first discovery requests in May 2019. Defendants did not respond until after Plaintiff filed her first motion to compel on November 5, 2019. Even then, Defendants did not make a full production. Instead, Defendants only produced a portion of the documents in their possession responsive to Plaintiff's requests, forcing Plaintiff to file additional motions to compel on November 5, 2020, July 14, 2021, and September 15, 2021.

It is clear from the Court's review of proceedings in this matter that Defendants have engaged in a pattern of forcing Plaintiff to threaten or obtain court intervention before providing basic discovery. More troublingly, even after Plaintiff filed numerous motions to compel and the Court ordered Defendants to provide certain discovery, Defendants continued to withhold key information. Finally, over two years into the case, Defendants produced over 5,000 pages of documents on September 30, 2021.

However, the September 30, 2021 production did not remedy Defendants' prior discovery violations. Instead, because Defendants chose to disclose key case information after the statute of limitations, Plaintiff was denied the opportunity to pursue a claim against Blue Max Trucking. The Court finds the discovery posture in this case has been continually impaired by Defendants' bad faith and disobedience of the Court's orders. Moreover, because Defendants' discovery violations denied Plaintiff the opportunity to pursue a claim against Blue Max Trucking, this factor favors the harsh sanction of striking Defendants' answer.

II. Willfulness

Next, the Court considers the willfulness of the discovery violation. *Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. Before the Court may enter an order striking a party's pleading, "the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* As the Court will now explain, Plaintiff has satisfied her burden of demonstrating that Defendants' conduct meets the "willful" standard. Specifically, Plaintiff has shown that Defendants intentionally withheld the identity of Blue Max Trucking until after the statute of limitations and violated Court orders relating to discovery.

At the hearing on Plaintiff's motion, Defendants raised two arguments in support of their position that the delayed disclosure of Blue Max Trucking was not intentional. First, Defendants contend Plaintiff's May 2019 discovery requests did not contain any interrogatories or requests for production that would have required them to disclose Blue Max Trucking's identity. Second, Defendants argue that any delay in disclosing Blue Max Trucking was merely the result of poor record keeping. The Court will address these arguments in turn.

Defendants' argument respecting the scope of Plaintiff's May 2019 discovery requests turns upon whether the three-page document identifying Blue Max Trucking was responsive to any of Plaintiff's first interrogatories or requests for production. As noted above, the three-page document consisted of a two-page summary of trips Murray Sand completed for Blue Max Trucking in February 2017 and a one-page invoice from Murray Sand to Blue Max Trucking. The two-page summary reveals that Murray Sand hauled over 1200 tons of riprap for Blue Max Trucking to Crowder Construction throughout February 2017. The summary also reveals that, on February 9, 2017, the date of Plaintiff's accident, Murray Sand hauled roughly 100 tons of riprap to Crowder Construction over the course of four separate trips. The one-page invoice reveals that

on February 27, 2018, Murray Sand sent Blue Max Trucking a bill for $52,756.62 for the work it performed in the preceding weeks.

Contrary to Defendants' argument, the three-page document identifying Blue Max Trucking was responsive to several of Plaintiff's May 2019 discovery requests. In her first requests for production, Plaintiff requested Defendants to produce:

> 14. A copy of all fax transmissions to any entity concerning the trip surrounding the collision of February 9, 2017.
>
> 20. A copy of all pickup and delivery records pertaining to the trip in which the tractor and/or trailer were engaged at the time of the collision of February 9, 2017.
>
> 21. A copy of all trip summaries pertaining to the trip in which the tractor and/or trailer were engaged at the time of the collision of February 9, 2017.
>
> 24. A copy of all expense sheets, all trailer interchange records, and bills of lading pertaining to the trip in which the tractor and/or trailer were engaged at the time of the collision of February 9, 2017.
>
> 47. A copy of all trip reports pertaining to the trip in which the tractor trailer was engaged on February 9, 2017.

The Court finds the documentation identifying Blue Max Trucking was requested by each of the foregoing requests for production; therefore, Defendants should have produced the document in response to Plaintiff's May 2019 discovery requests, at the onset of this litigation. Defendants' arguments to the contrary strain credulity and work against the purpose of discovery—to promote "full and fair disclosure" and "prevent a trial from becoming a guessing game or surprise for either party." *Samples*, 329 S.C. at 113, 495 S.E.2d at 217. Defendants cannot avoid production of relevant and responsive materials by unilaterally narrowing the scope of discovery requests through forced interpretations. *See* Rule 34(b), SCRCP ("The party upon whom the request is served shall serve a written response . . . ." (emphasis added)); *Samples*, 329 S.C. at 109-10, 495 S.E.2d at 215-16 (stating that parties must disclose all evidence, or at least the existence of evidence, that relates to the case, not only evidence which they intend to use at trial).

Of course, Defendants' argument that Plaintiff never requested the three-page document identifying Blue Max Trucking is further negated by the fact that Defendants ultimately produced the document in September 2021. Defendants cannot justify their belated production by pointing their fingers back at Plaintiff and arguing she never requested the materials.

Defendants' second attempt to explain the delayed disclosure of Blue Max Trucking also fails. Again, Defendants sought to explain away the September 2021 production by claiming any delay was the result of poor record keeping. Being disorganized, however, does not justify discovery misconduct. *See Ashmore v. Allied Energy, Inc.*, No. 8:14-CV-00227-JMC, 2016 WL 2898007, at *4 (D.S.C. May 18, 2016) ("The defendant may not excuse itself from compliance with Rule 34 . . . by utilizing a system of record-keeping which conceals rather than discloses relevant records[.]" (citation omitted)). Otherwise, litigants could effectively prevent opposing parties from obtaining relevant evidence simply by engaging in poor recordkeeping. Therefore, even assuming it were true that Defendants delayed disclosure was the result of disorganization, that would not excuse Defendants' bad faith conduct. *See Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719 (explaining the Court may enter an order striking a party's pleading if the moving party shows "bad faith, willful disobedience or gross indifference to its rights to justify the sanction").

In any event, the Court rejects Defendants' explanation that they misplaced or could not find the three-page document identifying Blue Max Trucking for the initial years of this litigation. It is clear from the Court's review that the document was significant to Murray Sand's business operations. In fact, the last page of the document was the invoice, sent to Blue Max Trucking, by which Murray Sand was paid over $50,000 for roughly several weeks' worth of work for Blue

Max Trucking. Defendants' suggestion that they could not identify this document for several years is preposterous.

Instead, the Court agrees with Plaintiff that Defendants intentionally withheld the identity of Blue Max Trucking for over two years. The manner in which Defendants organized their September 2021 production reveals intent to hide discoverable information from Plaintiff. The Court finds the "Document Production 1" pdf that Defendants produced on September 30, 2021, was designed to prevent Plaintiff from finding the three-page document identifying Blue Max Trucking. This pdf contained 192 new documents intermingled between 340 pages of old documents—some of which had been produced multiple times. It is readily evident to the Court that Defendants buried the three-page Blue Max Trucking document with the hope that Plaintiff would skim past it. Of course, the timing with which Defendants disclosed Blue Max Trucking's identity speaks volumes as well—they waited until after the statute of limitations and document retention period provided by law had expired.[3]

Defendants also withheld other materials from Plaintiff for years of this litigation. Defendants failed to provide any credible explanation for why they did not produce the excess

[3] The Court is also persuaded by Plaintiff's argument that Defendants withheld information about Blue Max Trucking for self-serving reasons. Although Plaintiff was denied the opportunity to discover information about the relationship between Murray Sand and Blue Max Trucking, she argued during the hearing that Murray Sand likely agreed to indemnify and hold Blue Max Trucking harmless from any liability arising from Murray Sand's actions on behalf of Blue Max Trucking. Defendants did not respond to this argument or state that such an agreement did not exist. Accordingly, by hiding Blue Max Trucking's identity until after the statute of limitations, Murray Sand avoided the burden of indemnifying Blue Max Trucking. As Justice Hill once wrote, "[t]he practice of law is among the noblest of professions, but it is a hard enough way to earn a living without having to joist with the abrasive and improper tactics of opposing counsel. Courts should not sit passively by as mere spectators while the expanding tide of discovery abuse erodes the collegiality of the bar. The rules of discovery are simple; only one intent on accomplishing a secondary purpose such as stonewalling or delay could feign misunderstanding of their basic principles." *Spencer Pest Control Co. v. Wood*, No. 2005-CP-39-01347 (Pickens Cnty. Com. Pl. Oct. 11, 2006).

insurance policy and the accident register until September 30, 2021. Defendants cannot claim they failed to search for these documents properly, as Defendants represented in April and July 2020 that they had conducted "numerous exhaustive searches" and "produced everything in [their] possession." Accordingly, the only logical explanation is that Defendants intentionally withheld these documents until after mediation and the discovery deadline to devalue Plaintiff's case. Although the insurance policy and accident register were certainly available to Defendants when they received Plaintiff's first discovery requests in May 2019, Defendants chose to delay their production and deny Plaintiff information about applicable insurance coverage and the circumstances of the accident.

Despite this intentional discovery misconduct, Defendants continue to maintain that it would be improper for the Court to strike their answer. Defendants argue they did not violate any Court orders which would warrant the harsh sanction Plaintiff seeks. This argument fails for two primary reasons.

Although the Court may strike a party's pleading when the party "fails to obey an order to provide or permit discovery," Rule 37(b)(2), SCRCP, that is not the only circumstance where such a sanction is proper.[4] Instead, the Court of Appeals has explained that Rule 37 also empowers the trial court to strike a party's pleading for "failure to respond to certain discovery requests." *Karppi*, 327 S.C. at 542, 489 S.E.2d at 682 ("Rule 37 expressly grants the trial court power to order

[4] *Estate of Chandler v. Five Star Quality Care, Inc.*, No. 2013-CP-40-03071 (Richland Cnty. Com. Pl. Dec. 29, 2015) (In rejecting this same argument, Judge Gee stated "the child's game reflected by the actions of [Defendants] is more akin to 'Go Fish,' where Plaintiff's counsel continually asks for discoverable material and instead of handing over that material, defense counsel makes opposing counsel 'go fish' until they happen to stumble upon crucial witnesses and critical documents. That defense counsel then makes those witnesses available for deposition and produces those documents for review does not insulate them from a motion for sanctions if the Court finds the failure to disclose the document was done in bad faith and caused prejudice to the opposing party.").

judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests."). Defendants' argument overlooks the foregoing caselaw, as well as the settled principle that "the selection of a sanction is within the court's discretion." *Kershaw County*, 302 S.C. at 395, 396 S.E.2d at 372. Here, because Defendants intentionally refused to timely respond to discovery requests and withheld information about Blue Max Trucking, the Court finds the standard for striking their answer is amply satisfied.

Additionally, even assuming Defendants were correct that the Court could only strike a party's answer for violation of a court order, it would still be proper to do so here. As noted above, Defendants failed to comply with several orders in this matter. To this day, Defendants have not complied with the Court's August 27, 2020 Order granting Plaintiff's motion to compel and directing Defendants to produce all post-accident incident reports and post-accident drug testing. Again, while Defendants represent they are not in possession of these documents, Smoak testified in his deposition that he provided a written statement to Murray Sand and took a drug test on the day of the accident.[5] Defendants also violated the consent scheduling order dated May 17, 2021, which set a written discovery deadline of September 1, 2021. Defendants' violation of this order was particularly egregious—Defendants produced over 5,000 documents after the discovery deadline and after representing to the Court and Plaintiff on multiple occasions that they had conducted exhaustive searches and produced all documents in their possession.

[5] Notably, counsel for Plaintiff sent Murray Sand a letter of representation within one month of Ms. Haselden's accident, putting Defendants on notice of Plaintiff's claim. Although Defendants claim they did not receive this letter, they still offer no legitimate reason for their failure to produce any drug test results. During the hearing on Plaintiff's motion, defense counsel's only explanation for this failure was that Defendant Smoak may have mistakenly testified that he took a drug test after the accident with Plaintiff. However, Defendant Smoak has never contradicted his deposition testimony, via affidavit or otherwise. Similarly, Defendants have never produced an affidavit of a records custodian explaining that the test results do not exist.

For the foregoing reasons, the Court finds Plaintiff has met her burden of proving Defendants' discovery misconduct was willful. This factor supports the harsh sanction of striking Defendants' answer and holding Defendants in default.

III. Prejudice

Finally, the Court considers the degree of prejudice caused by the discovery violation. *Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. Although the Court is mindful that a sanction resulting in default is "harsh medicine that should not be administered lightly," *id.* at 198, 511 S.E.2d at 718, the irreparable prejudice Defendants have caused Plaintiff in this case warrants striking Defendants' answer.

Defendants' discovery violations have repeatedly prevented Plaintiff from learning basic facts about this accident.[6] Although Plaintiff knew from early on in this case that Murray Sand was hauling riprap to Crowder Construction Company in Edisto at the time of the accident, Defendants refused to provide any documents relating to their agreement with Crowder Construction. Accordingly, Plaintiff issued a subpoena to Crowder Construction on March 30, 2021, requesting "any and all contracts, agreements, purchase orders, schedules, receipts, delivery logs, delivery records, weight tickets, and any other documents in any form whatsoever relating to Murray Sand Company, Inc. from January 1, 2016 through July 1, 2017." As noted above, Defendants were copied on this subpoena and it is clear that Plaintiff was doing everything in her power to discover the relationships between the entities involved in this transaction.

On May 19, 2021, a representative from Crowder Construction responded, "Although we worked on the Edisto project, we do not have records of Murray Sand working for us." Of course,

[6] "Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed." *Scott v. Greenville Housing Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (2003).

because Defendants continued to withhold the information, Plaintiff would not know until months later that Crowder Construction did not have any records relating to Murray Sand because its contracts were with Blue Max Trucking.

Defendant Murray Sand, on the other hand, has known throughout this litigation that it did not have a contract to haul riprap on the date of the accident and that it was hauling for and being paid by Blue Max Trucking. However, to protect Blue Max Trucking, Defendants did not disclose its identity until over two years after Plaintiff filed this action and served her discovery requests. Of course, Plaintiff was unable to obtain any meaningful information from Blue Max Trucking at that time because the records retention period provided by law had passed.[7] More significantly, Plaintiff was unable to amend its Complaint to name Blue Max Trucking as a new defendant because the statute of limitations had run. Accordingly, Defendants' discovery violations have severely prejudiced Plaintiff by preventing her from pursuing claims against all potentially liable parties.

Defendants do not deny that Plaintiff was prejudiced by their belated disclosure of Blue Max Trucking. Instead, Defendants' only response is a far-flung argument that Plaintiff should have attempted to amend her complaint or otherwise bring a claim against Blue Max Trucking after learning of its involvement. This specious argument underscores the irreparable prejudice Plaintiff suffered because of Defendants' untimely disclosure.

[7] Appendix A to Part 379 of the Federal Motor Carrier Safety Regulations requires companies like Murray Sand to retain the following: all contracts until expiration; financial and accounting records for at least three (3) years; shipping and agency documents for at least one year; all claim records, together with supporting data, for one year following settlement of the claim; and records, reports, orders and tickets pertaining to weighting of freight for three (3) years. 49 C.F.R. part 379, Preservation of Records.

As explained above, Defendants did not produce any documents identifying Blue Max Trucking until September 2021—over two years into the litigation and after the statute of limitations had run. *See* S.C. Code Ann. § 15-3-530(5) (setting forth three-year statute of limitations for negligence actions). Under these circumstances, any separate action against Blue Max Trucking clearly would have been time barred, and it was reasonable for Plaintiff not to pursue such a futile claim. Additionally, Defendants' suggestion that Plaintiff simply could have amended her complaint to include a claim against Blue Max Trucking is without merit. Although Rule 15(c), SCRCP, allows certain amendments to "relate back" to the original complaint, that rule does not apply when the amended pleading includes an additional defendant. *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) ("The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of party." (emphasis in original)). There is no legal authority or logical support for Defendants' assertion that Plaintiff should incur costs and engage in meritless motions practice, especially when such an attempt could result in Plaintiff having to reimburse fees and costs to Blue Max Trucking for having to defend against the same. Thus, the Court rejects Defendants' argument that Plaintiff should have attempted to pursue a claim against Blue Max Trucking after learning of its involvement.

The Court agrees with Plaintiff that the prejudice caused by Defendants' untimely disclosure of Blue Max Trucking is substantial. As counsel for Plaintiff noted during the hearing, our Supreme Court recently clarified that a principal can be held liable for harm caused by its negligent selection of an independent contractor. *See Ruh v. Metal Recycling Servs., LLC*, 439 S.C. 649, 652, 889 S.E.2d 577, 579 (2023). In this case, had Defendants timely disclosed Blue Max Trucking's involvement, Plaintiff may have determined a viable negligent selection claim

against Blue Max Trucking existed. On the other hand, investigation may have revealed such a claim was not viable. The prejudice here stems from the fact that Defendants' intentional misconduct denied Plaintiff the opportunity to make that determination. Under the circumstances of this case, that prejudice cannot be remedied by any lesser sanction.

More generally, Defendants' repeated abuses have prevented Plaintiff from prosecuting this case and preparing for trial. "The rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." *Samples v. Mitchell*, 329 S.C. 105, 113–14, 495 S.E.2d 213, 217 (Ct. App. 1997). Because Defendants have repeatedly provided dilatory and incomplete discovery responses, Plaintiff has been unable to learn basic information about the accident in a timely manner. Because Defendants have undoubtedly prevented Plaintiff from preparing for trial, a high degree of prejudice is presumed.

Finally, the severe sanction of striking Defendants' answer is warranted because nothing else would be adequate. Defendants' pattern of ignoring this Court's orders and the Rules of Civil Procedure demonstrates that a less severe sanction would not protect Plaintiff's discovery rights. In sum, the events to date leave no doubt that meaningful discovery in this case will never occur, and it is proper for the Court to strike Defendants' answer. *See Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719 ("If there was ever a case where striking a party's pleading was an appropriate sanction, it is this case where the record is full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery.").

CONCLUSION

The Court finds Defendants' actions in this case have repeatedly exceeded the realm of excusable discovery misconduct. No other sanction can remedy the severe prejudice Plaintiff has

realized as a result of Defendants' conduct. Therefore, the Court strikes Defendants' Answer and holds them in default. A damages hearing will be scheduled at a date and time that is convenient for the Court, the parties, and their counsel.

_____

The Honorable George M. McFaddin, Jr.
Circuit Court Judge

January ___, 2024
Sumter, South Carolina

Sumter Common Pleas

Case Caption: Judy Haselden VS Micheal D. Smoak , defendant, et al

Case Number: 2019CP4301021

Type: Order/Sanctions

So Ordered

S/George M. McFaddin, Jr., #2759