THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Daniel M. Coble, Circuit Court Judge

Appellate Case No. 2024-000833

Christine Jernigan and Justin Jernigan..... Appellants,

v.

Kershaw County Sheriff's Office .....Respondent.

FINAL BRIEF OF APPELLANTS

Justin A. Jernigan, Esq.
S.C. Bar No. 74954
302 Pine Cliff Dr.
Seneca, SC 29672
864-710-5029
justin.a.jernigan@gmail.com

ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 10

RELEVANT LEGAL STANDARDS 10

I. Right to Appeal 10

II. Equitable/Injunctive Relief 11

III. FOIA, Section 30-4-100(A) - Mode of Trial Rights 12

ARGUMENT 14

I. Issues on Appeal are Immediately Appealable Under S.C. Code Ann. § 14-3-330 14

A. The October 20, 2023, 9:44am Order's Findings that Respondent Complied with FOIA, Section 30-4-30(c), "Involves the Merits" and "Affects Substantial Rights" of Count I 16

B. The October 20, 2023, 9:44am Order's Determination That Respondent Did Not Spoliate the BWC Records/Evidence Forming the Basis of Count II "Involves the Merits" and "Affects Substantial Rights" of Count II 18

C. The October 20, 2023, 9:44am Order's Findings that Respondent Complied with FOIA Overrules, Modifies, and/or Refuses to Enforce the Equitable/Injunctive Relief Granted by Judge Newman's December 28, 2022, Form 4 Order 19

D. This Court Should Consider the Discovery and Recusal Matters of the October 20, 2023, Orders Because Related Appealable Issues are Before the Court 20

II. The Circuit Court Erred by Failing to Follow the Procedural Requirements, Deadlines, and Substantive Legal Standards of FOIA, Section 30-4-100(A) 20

III. The Circuit Court Erred in Denying Appellants' Motion for Sanctions/Contempt 21

A. The Circuit Court Erred by Finding That Respondent Did Not Spoliate the BWC Records/Evidence of Count II 22

B. The Circuit Court Erred by Finding that Respondent Complied with FOIA and Judge Newman's December 28, 2022, Form 4 Order 24

C. The Circuit Court Erred by Finding That Respondent's Unsworn Interrogatory Answers Met the Requirements of Rule 33(a), SCRCP 25

D. The Circuit Court Erred by Denying the Motion for Sanctions/Contempt When it Was Not Substantively Opposed by Responsive Briefing 26

IV. The Circuit Court Erred in Denying Appellants' Motion to Recuse 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Brown v. Elliot, 876 F.3d 637 (4th Cir. 2017) 23

Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003).....18

Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985).....17, 20

Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014).....7, 29

Dorchester County Dept. of Social Services v. Miller,
477 S.E.2d 476, 324 S.C. 445 (Ct. App. 1996).....16

Ellis v. Procter and Gamble Distributing Co.,
433 S.E.2d 856, 857, 315 S.C. 283 (1993) 7, 9, 20, 30

Ferguson v. Charleston Lincoln Mercury, 349 S.C. 558, 564 S.E.2d 94 (2002) 20

Gathers v. South Carolina Elec. & Gas,
311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993).....19, 23

Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).....10

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 10

John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008).....19, 23

Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014) 10

Link v. Sch. Dist. of Pickens County, 302 S.C.1, 393 S.E.2d 176 (1990) 16

Osmundson v. School District 5, 443 S.C. 610, 905 S.E.2d 418 (Ct. App. 2024) 5, 13

Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005).....12

Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.,
387 S.C. 583, 694 S.E.2d 15 (2010) 11

Richland Cty. v. Kaiser, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002) 11, 19

Richland Cty. v. S.C. Dep't of Revenue, 422 S.C. 292, 811 S.E.2d 758 (2018).....17

Scratch Golf v. Dunes W. Residential Golf Props., Inc.,
361 S.C. 117, 603 S.E.2d 905 (2004) 11

Seago v. Horry Cnty., 378 S.C. 414, 663 S.E.2d 38 (2008) 17

Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001) 19, 23

Sloan v. South Carolina Dep't of Revenue, 409 S.C. 551, 762 S.E.2d 687 (2014) 6, 24

State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) 17

Stone v. Thompson, 426 S.C. 291, 826 S.E.2d 868 (2019).....14

Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) 14

United Medical Supply Co. v. United States, 77 Fed. Cl. 257 (Fed. Cl. 2007).....22

Statutes

S.C. Code Ann. 30-4-100(A) ..... passim

S.C. Code Ann. 14-3-330.....9-11, 14-16, 20

S.C. Code Ann. 30-4-30(c) ..... passim

S.C. Code Ann. 15-53-10, *et seq* 3

S.C. Code Ann. § 23-1-240(g)(5) 3

Rules

Rule 33(a), SCRCP 6-7, 25, 29

STATEMENT OF ISSUES ON APPEAL

I. Whether issues on appeal are immediately appealable under S.C. Code Ann. § 14-3-330.

II. Whether the circuit court erred by failing to follow the procedural requirements, deadlines, and substantive legal standards of FOIA, Section 30-4-100(A).

III. Whether the circuit court erred in denying Appellants' Motion for Sanctions/Contempt.

IV. Whether the circuit court erred in denying Appellants' Motion to Recuse.

STATEMENT OF THE CASE

Respondent Kershaw County Sheriff's Office ("Respondent" or "KCSO") took police action against law-abiding citizens on the morning of June 29, 2022. (R. pp. 293-95, 410). Specifically, Respondent performed a traffic stop and detained Appellant Christine Jernigan and her mother Ann Martin ("Mrs. Martin"), who is a vulnerable adult. (R. pp. 139-40). Respondent took these actions because Appellant Mrs. Jernigan and her mother were acting in a manner that was "against the wishes of" third-party private citizens. (R. pp. 294, 410).

Undersigned counsel traveled to KCSO's main office on the morning of June 29, 2022, and requested that KCSO release his mother Mrs. Jernigan and grandmother Mrs. Martin unless they were being charged with a criminal offense. (R. pp. 4, 20, 140). Instead, KCSO forced Mrs. Martin to exit her daughter Mrs. Jernigan's vehicle in order to be returned to a privately-owned, for-profit assisted living facility located in Kershaw County. (R. p. 140).

On September 12, 2022, Appellants initiated this special-proceeding (Counts I and II) seeking declaratory and equitable relief in the Court of Common Pleas for Kershaw County. (R. pp. 1-18). Count I of the Complaint seeks declaratory/equitable relief pursuant to the South Carolina Freedom of Information Act ("FOIA"), S.C. Code § 30-4-100(A). Appellants' underlying July 22, 2022, FOIA Request to Respondent seeks public records relevant to the

above-noted KCSO police actions/activities of June 29, 2022 (described in detail therein), including all relevant audio/video recordings. (R. pp. 15-18).

Pursuant to FOIA, Section 30-4-30(c), upon receipt of a written request seeking public records, the public body must (within 10 business days) (*i*) determine the availability of the public records relevant to the FOIA request; (*ii*) provide written explanations to the requestor as to those relevant public records available for disclosure; (*iii*) provide written explanations to the requestor as to those relevant public records not available for disclosure (e.g., records claimed to be exempt from disclosure); and (*iv*) provide the requestor with a date certain, within thirty (30) calendar days, when the available public records will be disclosed. *See* S.C. Code Ann. § 30-4-30(c).

On July 25, 2022, Respondent provided the below FOIA Response and written determination to Appellants:

> After reviewing your request, we do not have any reports regarding the incident you mentioned from June 29, 2022. The only records of this incident in our system are the calls made to our central dispatch, and you will have to obtain those records from them. According to the records and your request, you were informed that the issue you were dealing with was a civil issue, so that is why we do not have any records regarding this incident. If you have any further questions or concerns, you are welcome to contact us.

(R. pp. 169-70).

Count I of the Complaint seeks: a finding that the written determination provided by Respondent to Appellants on July 25, 2022, (copied above) violates the statutory written determination requirements of FOIA, Section 30-4-30(c); a finding that the purported "civil issue" exemptions to disclosure claimed in the July 25, 2022, Response are in violation of FOIA; equitable relief compelling disclosure of the relevant public records requested; and an order awarding Appellants reasonable attorneys' fees, costs, and expenses incurred in this action. (R. pp. 11-12).

The Complaint requests that the circuit court "[s]chedule an initial hearing within 10 days of the date of service" pursuant to FOIA, Section 30-4-100(A). (R. p. 12). In this respect, the General Assembly amended/updated FOIA, S.C. Code Ann. § 30-4-100(A) (eff. May 19, 2017, emphasis added) to include procedures and deadlines (underlined below) that the chief administrative judge ("CAJ") of the circuit court is required to follow upon the filing of a FOIA case:

> A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court *must* schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court *shall* establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

The procedural requirements, deadlines, and substantive legal standards of FOIA, Section 30-4-100(A), were not followed in the present case.

Count II of the Complaint seeks declaratory/equitable relief pursuant to S.C. Code Ann. §§ 15-53-10, *et seq*., and statutory provisions allowing individuals to request and receive body-worn camera ("BWC") data, S.C. Code Ann. § 23-1-240(g)(5). (R. pp. 11-12). Notably, Subsection (5) of Section 23-1-240(g) (emphasis added) specifies that individuals who are themselves the subjects of body worn camera ("BWC") recordings – i.e., Appellants on June 29, 2022 – are "persons who may request and *must* receive data recorded by a body-worn camera … pursuant to … a court order." Count II requests an order requiring disclosure of the relevant BWC data pursuant to S.C. Code 23-1-240(g)(5). (R. p. 12).

With regard to Count II, Appellants' July 22, 2022, FOIA Request "respectfully request[ed] that all body-worn camera records … be preserved" by KCSO. (R. pp. 17-18). Respondent's then-counsel, Kershaw County Attorney Tommy Morgan, Esq. ("Mr. Morgan"), indicated via email on July 28, 2022, that the relevant body worn camera audio/video recordings of the June 29, 2022, police-involved incidents would not be provided in response to Appellants' July 22, 2022, FOIA Request. (R. pp. 165-66). Undersigned counsel replied, on August 1, 2022, as follows: "Understand [that] there is [a] FOIA exemption for body cam video, but respectfully request preservation." (R. p. 165).

In further regards to Count II, at the status conference on December 5, 2022, before the Honorable DeAndrea G. Benjamin, Respondent's counsel revealed, for the first time, that all relevant body worn camera audio/video recordings of the June 29, 2022, police-involved incidents – for which preservation was explicitly requested – had instead been destroyed by KCSO.

> I've told the Court and [Appellants' counsel] Justin that there are no body cams in existence. So that's kind of a moot point at this point.

(R. p. 210, lines 2-3).

> I [Appellants' counsel] asked that [KCSO] preserve the body camera [recordings]. It's in the [July 22, 2022, FOIA] request … and they're required under their own policies to have the body camera and under the records [act].

(R. p. 212, lines 18-19 and R. p. 213, lines 2-3).

Respondent produced its "BWC Records Retention Schedules" document to Appellants on January 9, 2023. (R. pp. 217-18). The relevant body worn camera recordings documenting KCSO's police actions on the morning of June 29, 2022, were apparently destroyed, or "written over," once the 60-day minimum retention period of the BWC Retention Schedules expired; i.e., on August 27, 2022. In contrast, the "Traffic Stop" label of the BWC Retention Schedules, and

its corresponding 180-day retention period, should have applied to all the relevant body worn camera audio/video recordings of KCSO's traffic stop on the morning of June 29, 2022. (*See* R. p. 218). Thus, the body worn camera recordings of the June 29, 2022, traffic stop should not have been destroyed prior to December 26, 2022, pursuant to the requirements of Respondent's own BWC Retention Schedules.

Respondent filed its Answer on October 28, 2022, including affirmative defenses alleging that formal service of process was not properly executed, and that undersigned counsel lacks "capacity" to proceed individually as to Count I of the Complaint (i.e., *pro se*). (R. p. 22). Counsel for the parties conferred as required pursuant to Rule 11, SCRCP, matters concerning the third and fourth defenses of the Answer were clarified, and these matters were resolved amicably amongst the parties. (R. p. 441).

The initial 10-day hearing required pursuant to FOIA, Section 30-4-100(A) was delayed for approximately three months, until December 19, 2022, due to scheduling issues beyond Appellants' control. (R. p. 199, lines 14-23; R. p. 206, line 14-p. 208, line 21; R. p. 238, line 17-p. 239, line 10). The CAJ is responsible for scheduling the initial hearing and establishing a scheduling order to fully resolve all FOIA actions within six months of initial filing if a final determination cannot be reached at the initial hearing. *See Osmundson v. School District 5*, 443 S.C. 610, 905 S.E.2d 418 (Ct. App. 2024) (interpreting the 10-day hearing requirement based on its plain meaning, as a matter of first impression).

At the December 19, 2022, initial hearing, the Honorable Jocelyn Newman, CAJ, stated: "I think that [KCSO] should do a written response, almost like you're responding to interrogatories or requests for production, as to each item set forth in the FOIA request." (R. p. 251, lines 17-20; R. p. 255, lines 5-16). Appellants respectfully submit that Judge Newman's

instructions at the December 19, 2022, initial hearing regarding the written response required by FOIA, Section 30-4-30(c) are consistent with precedent. *See*, *e.g.*, *Sloan v. South Carolina Dep't of Revenue*, 409 S.C. 551, 762 S.E.2d 687, 688-89 (2014) (holding that the DOR's "equivocal and evasive" FOIA response was "manifestly at odds with the clarity mandated by" Section 30-4-30(c)). Judge Newman's December 28, 2022, Form 4 Order states that "[KCSO] shall fully comply with the South Carolina Freedom of Information Act vis-a-vis [Appellants'] requests within 20 days of the hearing." (R. p. 24).

Appellants' February 23, 2023, Motion for Sanctions/Contempt raises three primary issues: (*i*) spoliation of the relevant body worn camera records/evidence of Count II; (*ii*) failure to comply with the statutory response and written determination obligations of FOIA, Section 30-4-30(c), as ordered by Judge Newman in December 2022; and (*iii*) failure to comply with the discovery requirements of the SCRCP in response to Appellants' October 29, 2022, First Set of Discovery Requests. (R. pp. 90, 101-18). At the conclusion of the April 27, 2023, hearing on Appellants' Motion for Sanctions/Contempt, the Honorable Daniel Coble took the matter under advisement stating:

> THE COURT: …I'm going to try to address those three main issues about destroying evidence. The FOIA response and then the discovery response.
>
> MR. JERNIGAN: Thank you, Your Honor.

(R. p. 521, lines 15-17).

With respect to (*iii*), the discovery responses, the Motion for Sanctions/Contempt seeks an order compelling Respondent to provide full/complete *verified* answers to Appellants' October 29, 2022, First Set of Interrogatories (Ex. B), as required by Rule 33(a), SCRCP ("Each interrogatory shall be answered separately and fully in writing under oath"). At the April 27, 2023, hearing, Judge Coble indicated that he would need to review this matter in order to

determine if KCSO was, in fact, required to provide verified answers in response to Appellants' October 29, 2022, First Set of Interrogatories.

> THE COURT: "I'm going to review the discovery questions and their responses because I'm not aware that a verification is required under oath but I need to review."

(R. p. 522, lines 12-14).

Nevertheless, on June 2, 2023, Judge Coble entered a Form 4 Order stating that *all* the requested relief of Appellants' Motion for Sanctions/Contempt was denied, and that a formal/written order would be entered at a later date. Our Supreme Court has held that a judge's impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." *Ellis v. Procter and Gamble Distributing Co*., 433 S.E.2d 856, 857, 315 S.C. 283, 285 (1993). Appellants filed a Motion to Recuse on July 14, 2023, raising objective, appearance-based concerns pursuant to Canon 3E(1) that the circuit court's June 2, 2023, Form 4 denial of all requested relief cannot be supported by the record in this case.

In this respect, the denial cannot be supported because the record establishes that Respondent: (*i*) destroyed relevant body worn camera audio/video recordings of Count II, for which preservation was explicitly requested on multiple occasions, 120 days before expiration of the 180-day retention period that is required for "Traffic Stops" in its own BWC Retention Schedules (R. p. 218); (*ii*) did not take any action to comply with Judge Newman's December 28, 2022, Form 4 Order within 20 days of the initial hearing, or thereafter; and (*iii*) did not provide full/complete verified interrogatory answers under oath as required by Rule 33(a), SCRCP. *Cf. Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535, 547 (2014) (determining that disqualification was not required under Canon 3E(1) because "the Record supports all of the court's orders in this case, including the Discovery Order").

The circuit court's October 20, 2023, 9:44am Written Order finalizes the prior June 2, 2023, Form 4 general denial of all the relief requested by Appellants' February 23, 2023, Motion for Sanctions/Contempt. The 9:44am Written Order (*see* below, emphasis added), however, only attempts to address one of the three grounds of Appellants' Motion or Sanctions/Contempt:

> On December 28, 2022 Judge Jocelyn C. Newman issued a Form 4 Order (the Order) stating, 'Following a hearing on December 19, 2022, the Court ordered that Defendant[] shall fully comply with the South Carolina Freedom of Information Act vis-à-vis Plaintiff's requests within 20 days of the hearing.'
>
> After thoroughly considering all of the arguments made during the April 27th, 2023 hearing and the written submissions of the parties, this Court *finds that Defendant complied with the Order to the best of its ability and in good faith*. Therefore, Plaintiff's Motion for Sanctions/Contempt is hereby **DENIED**.

(R. pp. 564-65).

As illustrated above, the 9:44am Written Order finds that Respondent "complied with" Judge Newman's Order "to the best of its ability and in good faith," even though Respondent did not take any steps towards complying with Judge Newman's December 28, 2022, Form 4 Order. (R. p. 50). The 9:44am Written Order does not address, consider, and/or rule on the other two grounds of the Motion for Sanction/Contempt; i.e., (*i*) spoliation of the relevant body worn camera records/evidence of Count II; and (*iii*) failure to comply with the discovery requirements of the SCRCP. (*See* R. pp. 564-65).

The circuit court's October 20, 2023, 9:41am Written Order denies Appellants July 14, 2023, Motion to Recuse, stating as follows:

> Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Roche v. Young Bros., Inc*., 332 S.C. 75, 504 S.E.2d 311 (1998). "As the threshold for a showing of bias is high, a finding of judicial bias must be based on an abiding impression left from a reading of the entire record, not from particular comments or ruling considered in isolation." *Alexander v. Parks*, 834 Fed. Appx. 778 (2020) (internal citations omitted). "It is not sufficient for a party seeking a judge's disqualification to simply allege bias; the party must show some evidence of bias

> or prejudice." Appellate Court Rule 501, Code of Jud. Conduct, Canon 3, subd. E(1)(a).
>
> After reviewing the applicable law and considering the arguments raised by the parties, the Court finds no evidence of judicial bias or prejudice. Plaintiffs' Motion is based solely on allegations that are not supported by evidence. Accordingly, the Court concludes that disqualification is unwarranted. As such, Plaintiffs' Motion to Recuse, Vacate, and Reassign is hereby **DENIED**.

(R. pp. 561-62).

As illustrated above, the circuit court's October 20, 2023, 9:41am Written Order does not consider or address any of the appearance-based Canon 3E(1) concerns raised by Appellants' Motion to Recuse or Reconsider; notably, that "impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." *Ellis*, 433 S.E.2d at 857, 315 S.C. at 285; (R. pp. 328-31, 344-46).

Pursuant to Rule 59(e), SCRCP, Appellants timely-filed an October 30, 2023, Motion to Reconsider the respective October 20, 2023, Written Orders entered in the above-captioned case denying the February 23, 2023, Motion for Sanctions/Contempt, and July 14, 2023, Motion to Recuse or Reconsider. (R. pp. 567-84). The circuit court denied Appellants' October 30, 2023, Rule 59(e) Motion to Reconsider on May 3, 2024. (R. pp. 585-87). Appellants timely-filed and served a Notice of Appeal on May 21, 2024.

The present appeal was initially dismissed, by an Order entered June 4, 2024, on grounds that issues raised are not appealable pursuant to S.C. Code Ann. § 14-3-330. On June 20, 2024, Appellants filed a Motion to Reinstate on grounds that issues raised are appealable under S.C. Code Ann. § 14-3-330. Appellants' June 20, 2024, Motion to Reinstate was granted on September 3, 2024, and the parties were directed to address the issue of appealability in their briefs.

STANDARD OF REVIEW

The issues on appeal concern the circuit court's interpretation and application of statutes, rules, and/or precedent to undisputed facts of record, which are questions the appellate court is free to decide with no particular deference to the circuit court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citations omitted). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law *de novo*." *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Although an injunction is equitable in nature, the analysis presents a question of law if the matter can be determined based on interpretation and application of statutory provisions to the facts of record. *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785, 788 (2014) (citation omitted).

In construing a statute, a court examines and enforces the statutory language as written. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning. … '[T]here is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning' unless a statutory provision is ambiguous.") (citations omitted).

RELEVANT LEGAL STANDARDS

I. Right to Appeal

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by" Section 14-3-330 of the South Carolina Code. *Id*., 362 S.C. at 195, 607 S.E.2d at 708. "An

order generally must fall into one of several categories" listed in Section 14-3-330 to be immediately appealable. *Id*. Section 14-3-330 allows a party to directly appeal:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas …;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out … any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding …; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction ….

II. Equitable/Injunctive Relief

"An injunction is an equitable remedy that may be used to require a party to perform an action." *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002). To obtain an injunction, a party generally must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (citations omitted).[1] Our legislature, however, has mandated that all FOIA violations must be considered "an irreparable injury for which no adequate remedy at law exists" by the hearing court. S.C. Code § 30-4-100(A). Thus, a FOIA litigant need only show a likelihood of success to obtain equitable/injunctive relief.

[1] Our appellate courts have clarified that the "balancing of the equities" aspect of the test is "subsumed by the irreparable harm and inadequate remedy at law components of the three-part test." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

The "likelihood of success" element does not require a party to "prove an absolute right," rather, the party seeking equitable relief "need only present a fair question to raise as to the existence of such a right." *Peek*, 367 S.C. at 456, 626 S.E.2d at 37 (citation omitted). If the party makes a "*prima facie* showing" with respect to the relief requested, the lower court should issue the injunction. *Id*. Section 30-4-100(A) states that the "court may order equitable relief as it considers appropriate."

III. FOIA, Section 30-4-100(A) - Mode of Trial Rights

The original version of Section 30-4-100 provided all citizens the right "to apply to the circuit court for injunctive relief to enforce the provisions of [FOIA]." 1978 Act No. 593, Section 11.[2] Effective May 26, 1987, the General Assembly updated Section 30-4-100 to mandate that all FOIA violations "must be considered an irreparable injury for which no adequate remedy at law exists." 1987 Act No. 118, Section 8.

During the 2017 round of updates, the General Assembly amended S.C. Code Ann. § 30-4-100(A) (eff. May 19, 2017, emphasis added) to include the below procedural mandates and deadlines that the CAJ's of the circuit courts are required to follow upon the filing of a FOIA case:

> Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court *must* schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court *shall* establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause.

The 2017 FOIA amendments impose "time constraints within which *determinative hearings* on the requests for relief must be made." 2017 Act No. 67 (H. 3352), Section 4, Effect

[2] H*2727 (Rat #0739, Act #0593 of 1978) General Bill.

of Amendment (emphasis added). The CAJ of the circuit court was assigned to fulfill the expedited scheduling/time requirements via the last round of amendments to H. 3352. *See* S. Journal (Wed., May 10, 2017), 122d Gen. Ass., 1st Reg. Sess., at 36-39 (S.C.).

On May 2, 2017, when H. 3352 was considered by the Judiciary Committee, Senator Margie Bright Matthews, Esq., of Colleton County, noted that the CAJs were available to decide FOIA matters locally on an expedited basis. Senator Matthews explained that adding the scheduling/time constraints would "create an avenue of filing FOIA requests like a temporary [injunction] motion so that it would have [to be] fast-tracked within ten days." S. Judiciary Comm. Meeting, 122d Gen. Assemb., 1st Reg. Sess. (S.C. May 2, 2017), available at https://www.scstatehouse.gov/video/archives.php, at 01:53:00 to 1:54:50; Rule 65, SCRCP.

This Court, on June 26, 2024, reversed and remanded a dismissal (on technical/procedural grounds) of Plaintiff Osmundson's FOIA action for failure to request and have the court hold the initial hearing within 10 days of service. *Osmundson*, 443 S.C. 610, 905 S.E.2d 418. Osmundson argued that the statute imposes the duty on the circuit court to schedule the 10-day hearing without a requirement for the FOIA plaintiff to do anything further other than to request it (which the plaintiff did in his complaint). *Id.*, 443 S.C. at 613.

This Court found that "the legislative intent behind the ten-day requirement was to benefit FOIA applicants;" "A review of the legislative history indicates the amendments to the FOIA since its enactment have been to expand rights; thus, we find the purpose of the ten-day requirement was to expedite resolution, not to erect a procedural barrier;" and held that the circuit court erred in dismissing the FOIA action on technical/procedural grounds. *Id.* at 615. Thus, *Osmundson* held, pursuant to the plain and unambiguous language of Section 30-4-100(A), that the circuit court is responsible for scheduling an initial hearing within ten days of the service

on all parties. Based on the plain and unambiguous language of Section 30-4-100(A), if the hearing court is unable to make a final ruling at the initial 10-day hearing, as in the present case, the court must thereafter establish a scheduling order and conclude actions brought pursuant to this chapter within six months of initial filing; i.e., by April 12, 2023, in the present case.

The General Assembly also provided public bodies with a corresponding right to seek declaratory relief via an expedited hearing under Section 30-4-110(A) in the 2017 FOIA amendments. Accordingly, the public body has a duty to file an action seeking relief with respect to (*i*) alleged "unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests," or (*ii*) where the public body "received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure." S.C. Code Ann. § 30-4-110(A). Respondent did not request a hearing or seek declaratory relief pursuant to Section 30-4-110(A) in this case.

ARGUMENT

I. Issues on Appeal are Immediately Appealable Under S.C. Code Ann. § 14-3-330(1)-(4)

Our appellate courts, and the appealability statue itself, emphasize that appealability turns on the effect of a particular motion/order rather than the label given. *See* S.C. Code Ann. § 14-3-330(2) (stating that "[a]n order affecting a substantial right" is directly appealable if it "*in effect* determines the action"); *Thornton v. S.C. Elec. & Gas Corp*., 391 S.C. 297, 303, 705 S.E.2d 475, 477 (Ct. App. 2011) (stating, at n.6, that "[o]ur courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability"). In this respect, appealability must be determined on a case-by-case basis. *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). Any order "involving the merits," "affecting a substantial

right," or "granting, continuing, modifying, or refusing an injunction" is immediately appealable under Section 14-3-330.

As set forth above, in addition to discovery matters under the SCRCP, Appellants' February 23, 2023, Motion for Sanctions/Contempt raises KCSO's failure to comply with the statutory response and written determination obligations of FOIA, Section 30-4-30(c), and Judge Newman's December 2022 oral/written Orders; as well as the spoliation of the BWC records/evidence that form the basis of Count II. (R. pp. 90, 101-18). Appellants respectfully submit that Section 14-3-330(1)-(3) allows these matters of the October 20, 2023, 9:44am Written Order to be appealed directly.

Notably, the circuit court's October 20, 2023, 9:44am Written Order finds that Respondents' FOIA Response dated July 25, 2022, "complied with" the written determination requirements of Section 30-4-30(c), and Judge Newman's December 28, 2022, Form 4 Order. (R. pp. 564-65). These findings strike/eliminate Count I of the Complaint's request for relief on grounds that "KCSO's written determination of July 25, 2022," violates the written determination requirements of FOIA, Section 30-4-30(c), and thereby prevents judgment from which appeal may later be taken. (R. pp. 12). The circuit court's October 20, 2023, 9:44am Written Order also, *sub silentio*, determines that Respondent did not spoliate the body worn camera records/evidence that form the basis of Count II of the Complaint. (*Compare* R. pp. 90, 101-110 *with* R. pp. 564-65). Appellant respectfully submits that these erroneous legal determinations of the October 20, 2023, 9:44am Written Order, which are based on undisputed facts of record, involve the merits and affect substantial rights in this special-proceeding pursuant to Section 14-3-330(1)-(3).

Moreover, pursuant to Section 14-3-330(4), the October 20, 2023, 9:44am Written Order overrules, modifies, and/or refuses to enforce the equitable/injunctive relief granted by Judge Newman's December 28, 2022, Form 4 Order – i.e., ordering KCSO to "fully comply with the South Carolina Freedom of Information Act vis-à-vis [Appellants'] requests within 20 days of the hearing." (R. p. 24). Judge Newman could not have issued the December 28, 2022, Form 4 Order if Respondent had, in fact, already fully complied with Section 30-4-30(c)'s written determination requirements via its July 25, 2022, FOIA Response. The equitable relief granted by the December 28, 2022, Form 4 Order following the December 19, 2022, initial FOIA hearing is the law of this case and cannot be overruled, modified, and/or refused by Judge Coble's later October 30, 2023, 9:44am Written Order. *See Dorchester County Dept. of Social Services v. Miller*, 477 S.E.2d 476, 483, 324 S.C. 445 (Ct. App. 1996) (citations omitted).

A. The October 20, 2023, 9:44am Order's Findings that Respondent Complied with FOIA, Section 30-4-30(c), "Involves the Merits" and "Affects Substantial Rights" of Count I

The October 20, 2023, 9:44am Order's determination that Respondent complied with the legal written response requirements of FOIA, Section 30-4-30(c), involves the merits and affects substantial rights in this special proceeding pursuant to Section 14-3-330(1)-(2). *See* (R. pp. 564-65). The Order's determination prevents judgment from which an appeal may later be taken, and effectively strikes the Complaint's request for declaratory/injunctive relief on the grounds that "KCSO's written determination of July 25, 2022," fails to comply with and/or violates the written determination requirements of FOIA, Section 30-4-30(c). (R. p. 12). An interlocutory order is appealable where the order's determination "has the effect of striking out a pleading." *Link v. Sch. Dist. of Pickens County*, 302 S.C.1, 393 S.E.2d 176 (1990).

The 9:44am Order's determination is also a final order affecting substantial rights in this special proceeding under subsection (3). Notably, this is a special proceeding because Appellants are seeking declaratory/equitable relief, and the October 20, 2023, 9:44am Order becomes law of the case if not appealed.

Moreover, orders affecting the mode of trial are immediately appealable and become law of the case if a timely appeal is not filed. *See Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985). The prevailing rule of statutory interpretation is that "use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) (citation omitted). Statutory provisions are generally regarded as mandatory when, as in the present case, the power or duty is for the security or protection of important rights. *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981) (citation omitted); *see also Seago v. Horry Cnty.*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) ("FOIA grants the public an immutable right to access public records").

The expedited resolution requirements and substantive legal standards of Section 30-4-100(A) are imposed using "must" and "shall" language. First, "[u]pon the filing of the request for declaratory judgment or injunctive relief related to provisions of [FOIA], the chief administrative judge of the circuit court *must* schedule an initial hearing within ten days of the service on all parties." S.C. Code Ann. § 30-4-100(A) (emphasis added). Second, "[i]f the hearing court is unable to make a final ruling at the initial hearing, the lower court *shall* establish a scheduling order to conclude actions brought pursuant to [FOIA] within six months of initial filing," unless "good cause" exists to extend the proceedings. *Id.* Moreover, "a violation of [FOIA] *must* be considered to be an irreparable injury for which no adequate remedy at law exists." *Id.*

FOIA was "enacted to prevent the government from acting in secret" and should be "liberally construed to carry out the purpose mandated by the legislature." *Campbell v. Marion County Hosp. Dist*., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (citations omitted). The lower court's failure to comply with and follow the mandatory procedural and substantive legal standards of Section 30-4-100(A) has effectively denied Appellants the statutory "mode of trial" rights explicitly enacted by the legislature for the benefit of FOIA plaintiffs.

B. The October 20, 2023, 9:44am Order's Determination That Respondent Did Not Spoliate the BWC Records/Evidence Forming the Basis of Count II "Involves the Merits" and "Affects Substantial Rights" of Count II

The October 20, 2023, 9:44am Order, *sub silentio*, determined that Respondent did not spoliate the body worn camera records/evidence that form the basis of Count II of the Complaint. (*Compare* R. pp. 90, 101-110 *with* R. pp. 564-65). This implicit determination involves the merits and affect substantial rights in this special proceeding seeking declaratory/equitable relief pursuant to Section 14-3-330(1)-(3).

It is undisputed that Appellants requested, in writing, that KCSO and its pre-suit counsel preserve all the BWC records/evidence relating to the relevant June 29, 2022, police activities. (R. pp. 17-18, 101-102, 165-66). It is undisputed that the "Traffic Stop" label of KCSO's BWC Retention Schedules, and its corresponding 180-day retention period, should have applied to all the relevant body worn camera audio/video recordings of KCSO's traffic stop of Appellant Mrs. Jernigan, and her mother Mrs. Martin, on the morning of June 29, 2022. *See* (R. pp. 102-104, 218).

KCSO spoliated evidence by ensuring that all the body worn camera recordings of the June 29, 2022, police-involved incidents were "written over" 120 days before expiration of the 180-day retention period that is required for "Traffic Stops." (R. pp. 102-109). If the correct

Traffic Stop category and corresponding 180-day retention period had been properly applied, the body worn camera recordings of the June 29, 2022, traffic stop could not have been destroyed prior to December 26, 2022.

KCSO was legally obligated to preserve all relevant records/evidence beginning at the point when a party reasonably should know that the materials may be relevant to anticipated litigation. *See*, *e.g.*, *Silvestri v. General Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001); *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (holding that the duty to preserve evidence is triggered when a "party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation"); *Gathers v. South Carolina Elec. & Gas*, 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993). (R. pp. 104-05).

C. The October 20, 2023, 9:44am Order's Findings that Respondent Complied with FOIA Overrules, Modifies, and/or Refuses to Enforce the Equitable/Injunctive Relief Granted by Judge Newman's December 28, 2022, Form 4 Order

FOIA, Section 30-4-100(A) states that the "court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists." "An injunction is an equitable remedy that may be used to require a party to perform an action." *Richland County*, 351 S.C. at 94, 567 S.E.2d at 262.

Judge Newman's December 28, 2022, Form 4 Order granted equitable/injunctive relief – i.e., ordering KCSO to "fully comply with the South Carolina Freedom of Information Act vis-à-vis [Appellants'] requests within 20 days of the hearing." (R. p. 24). Judge Newman could not have issued the December 28, 2022, Form 4 Order if KCSO had complied with Section 30-4-30(c)'s written determination requirements via its July 25, 2022, FOIA Response. The October 20, 2023, 9:44am Order's findings that KCSO's July 25, 2022, written determination complies

with the requirements of FOIA, Section 30-4-30(c), overrules, modifies, and/or refuses to enforce the December 28, 2022, Form 4 Order pursuant to Section 14-3-330(4).

D. This Court Should Consider the Discovery and Recusal Matters of the October 20, 2023, Orders Because Related Appealable Issues are Before the Court

As noted above, the basis for Appellants' July 14, 2023, Motion to Recuse is that the circuit court's denial of all the relief requested by Appellants' February 23, 2023, Motion for Sanctions/Contempt cannot be supported by the record in this case. *See Ellis*, 433 S.E.2d at 857, 315 S.C. at 285 (holding that a judge's impartiality might reasonably be questioned "when his [or her] factual findings are not supported by the record"). Our appellate courts may consider matters not otherwise directly appealable if there is an appealable issue before the court and a ruling on appeal will avoid unnecessary litigation. *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002). Appellants respectfully submit that the Recusal Order and underlying discovery issues may, and should, also be considered on appeal because these matters relate to appealable issues properly before this Court pursuant to Section 14-3-330(1)-(4).

II. The Circuit Court Erred by Failing to Follow the Procedural Requirements, Deadlines, and Substantive Legal Standards of FOIA, Section 30-4-100(A)

As discussed above with regard to appealability under Section 14-3-330, orders affecting the mode of trial are immediately appealable and become law of the case if a timely appeal is not filed. *See Creed*, 285 S.C. 542, 331 S.E.2d 351. The expedited resolution requirements and substantive legal standards of Section 30-4-100(A) are "mode of trial" rights imposed using "must" and "shall" language.

"The General Assembly has the power and authority to change the statutes in any manner in which, in its best judgment, it may deem wise." *Fort Sumter Hotel v. S.C. Tax Comms.*, 201 S.C. 50, 60, 21 S.E. 2d 393, 397 (1942). The circuit courts can "now only carry out by its order

the plain meaning and intent of the statutes as they appear on the books today. That course alone constitutes the cornerstone of constitutional government." *Id.*[3] The scheduling/time constraints of Section 30-4-100(A) created an expediated avenue for filing/resolving FOIA actions like a temporary injunction motion. If final resolution is not reached following the 10-day hearing, a scheduling order must be entered to ensure final resolution within six months of filing.

The circuit court's failure to comply with and follow the mandatory procedural requirements, deadlines, and substantive legal standards of Section 30-4-100(A) has effectively denied Appellants the statutory "mode of trial" rights enacted by the legislature for the benefit of FOIA plaintiffs. This places Appellants, and all similarly-situated FOIA plaintiffs, in an untenable situation. The circuit courts are not carrying out the plain meaning and intent of Section 30-4-100(A) as it appears on the books today in this and other FOIA cases and, as a result, a cornerstone of our constitutional government is breaking down.

Appellants respectfully submit that the circuit court erred by failing to follow the procedural requirements, deadlines, and substantive legal standards of FOIA, Section 30-4-100(A) to reach a timely final resolution. Appellants respectively request that the Court reverse the October 20, 2023, Orders and grant appropriate relief on Counts I and II based on the record.

III. The Circuit Court Erred in Denying Appellants' Motion for Sanctions/Contempt

As discussed above, Appellants filed a Motion for Sanctions/Contempt on February 23, 2023, raising three primary issues: (*i*) spoliation of the relevant body worn camera records/evidence of Count II; (*ii*) failure to comply with the statutory response and written determination obligations of FOIA, Section 30-4-30(c), as ordered by Judge Newman in

[3] *Quoting* Judge Grimball (Charleston County) compelling compliance with procedural due process rights of the 1935 Alcoholic Liquors Act.

December 2022; and (*iii*) failure to comply with the discovery requirements of the SCRCP in response to Plaintiffs' October 29, 2022, First Set of Discovery Requests. (R. pp. 90, 101-18). The circuit court's October 20, 2023, 9:44am Written Order finalizes the prior June 2, 2023, Form 4 general denial of all the relief requested by Appellants' February 23, 2023, Motion for Sanctions/Contempt.

A. The Circuit Court Erred by Finding That Respondent Did Not Spoliate the BWC Records/Evidence of Count II

The circuit court's October 20, 2023, 9:44am Order erred by holding, *sub silentio*, that Respondent did not spoliate the body worn camera records/evidence of Count II.

Courts have held that "[a]side perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence." *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007). It is undisputed that Appellants requested, in writing, that Respondent and its pre-suit counsel preserve all the BWC records/evidence relating to the relevant June 29, 2022, police activities. (R. pp. 17-18, 101-102, 165-66). It is undisputed that the "Traffic Stop" label of KCSO's BWC Retention Schedules, and its corresponding 180-day retention period, should have applied to all the relevant body worn camera audio/video recordings of KCSO's traffic stop of Appellant Mrs. Jernigan, and her mother Mrs. Martin, on the morning of June 29, 2022. (R. pp. 102-104, 218).

KCSO spoliated evidence by ensuring that all the body worn camera recordings of the June 29, 2022, police-involved incidents were "written over" 120 days before expiration of the 180-day retention period that is required for "Traffic Stops." (R. pp. 103-104). If the correct Traffic Stop category and corresponding 180-day retention period had been properly applied, the body worn camera recordings of the June 29, 2022, traffic stop could not have been destroyed prior to December 26, 2022. In other words, all of these body worn camera audio/video

recordings should have been retained pursuant to the requirements of KCSO's own Body Camera Retention Schedules until: At least three weeks after the hearing/status-conference held on December 5, 2022; over three months after Appellants filed/served their Complaint on September 12 and 14, 2022; and over five months after KCSO received Appellants' July 22, 2022, FOIA Request. (R. p. 104).

No policy or schedule of any kind could, in any case, provide a legally valid excuse for destroying relevant records/evidence knowingly, negligently, and/or intentionally. *See*, *e.g.*, *Micron Tech. v. Rambus Inc*., 645 F.3d 1311, 1329-31 (Fed. Cir. 2011) (holding that a prelitigation policy which included destroying/spoliating relevant evidence to prevent its production during anticipated litigation triggered the crime-fraud exception). Respondent was legally obligated to preserve all relevant records/evidence beginning at the point when a party reasonably should know that the materials may be relevant to anticipated litigation. *See*, *e.g.*, *Silvestri*, 271 F.3d at 590; *John B.*, 531 F.3d at 459 (holding that the duty to preserve evidence is triggered when a "party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation"); *Gathers*, 311 S.C. 81, 427 S.E.2d 687. (R. p. 104).

Respondent, particularly after being sanctioned and admonished previously, knew that by destroying "pivotal" body worn camera audio/video recordings they were threatening the integrity of the judicial process. (R. pp. 105-08, 220-24); *Brown v. Elliot*, No. 3:14-cv-01188, DE 43 and DE 61 (D.S.C. 2016), *aff'd by* 876 F.3d 637, 640-46 (4th Cir. 2017). The Fourth Circuit, in a published opinion, admonished KCSO and its counsel for providing evasive discovery responses with respect to "pivotal" audio/visual recording evidence of the underlying police-involved incident. *Id*. The Fourth Circuit determined that KCSO's "inaccurate

statements" in its discovery responses were "especially glaring" given that "in cases like this, a video recording of the incident frequently becomes the pivotal piece of evidence in litigation." *Id*. at 645-46.

In this case, Respondent cannot claim that its destruction of all the body worn camera audio/video recordings, was not, at least, committed knowingly or negligently. Appellants respectfully request that the Court reverse the October 20, 2023, Orders and grant appropriate relief as requested on the Motion for Sanctions/Contempt.

B. The Circuit Court Erred by Finding that Respondent Complied with FOIA and Judge Newman's December 28, 2022, Form 4 Order

The circuit court's October 20, 2023, 9:44am Order erred by holding that Respondent did not violate FOIA and Judge Newman's December 28, 2022, Form 4 Order granting equitable/injunctive relief – i.e., ordering KCSO to "fully comply with the South Carolina Freedom of Information Act vis-à-vis [Appellants'] requests within 20 days of the hearing." (R. p. 24).

Judge Newman could not have issued the December 28, 2022, Form 4 Order if KCSO had complied with Section 30-4-30(c)'s written determination requirements via its July 25, 2022, FOIA Response. At the December 19, 2022, initial hearing, Judge Newman stated: "I think that [KCSO] should do a written response, almost like you're responding to interrogatories or requests for production, as to each item set forth in the FOIA request." (R. p. 251, lines 17-20; R. p. 255, lines 5-16). Judge Newman's instructions at the December 19, 2022, initial FOIA hearing regarding the written response required by Section 30-4-30(c) are on point with controlling precedent. *See*, *e.g.*, *Sloan*, 762 S.E.2d at 688-89 (holding that the DOR's "equivocal

and evasive" FOIA response was "manifestly at odds with the clarity mandated by" Section 30-4-30(c)).[4]

Appellants respectively request that the Court of Appeals reverse the October 20, 2023, Orders, find that Respondent violated FOIA and Judge Newman's Order, and grant appropriate relief as requested on the Motion for Sanctions/Contempt.

C. The Circuit Court Erred by Finding That Respondent's Unsworn Interrogatory Answers Met the Requirements of Rule 33(a), SCRCP

The circuit court's October 20, 2023, 9:44am Order erred by holding, *sub silentio*, that Respondent's January 9, 2023, unsworn answers to Interrogatory Nos. 1 to 15 satisfied the requirements of Rule 33(a), SCRCP.

At the hearing on December 19, 2022, Judge Newman ordered Respondent, within 20-days, to provide answers/responses to Plaintiffs' October 29, 2022, First Set of Interrogatories Nos. 1-15. (R. p. 250, line 25-p. 251, line 4; R. p. 261, lines 20-23). On the court-imposed extended deadline, Respondent served unsworn answers to Interrogatory Nos. 1 to 15.

On February 10, 2023, Plaintiffs served their Rule 11(a), 10-Day Letter upon KCSO. (R. pp. 35-51). For the reasons set forth in detail therein, KCSO's unsworn answers/responses to the First Set of Interrogatories (Nos. 1-15) are evasive, incomplete, and improper. (R. pp. 37-49). Rule 33(a), SCRCP, requires that "[e]ach interrogatory [served upon a party] shall be answered separately and fully in writing under oath." Rule 33(d), SCRCP, specifies that answers to

[4] "Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the person making the request of its determination and the reasons for it … This determination must constitute the final opinion of the public body as to the public availability of the requested public record[s] … the record[s] must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided." S.C. Code Ann. § 30-4-30(c).

interrogatories can "be used [at trial] to the extent permitted by the rules of evidence." In view of these well-established requirements, KCSO's January 9, 2023, unsworn answers to Interrogatory Nos. 1 to 15 were not based upon good grounds and were interposed for purposes of delay. *See Saria v. Massachusetts Mut. Life Ins. Co*., 228 F.R.D. 536, 538-39 (S.D. W. Va. 2005) (determining that, "since interrogatory responses may be used at trial, they are nothing short of testimony," and that "[w]hen responses are only signed by an attorney, and not by the client, the attorney has effectively been made a witness").

Discovery is the quintessence of preparation for trial and when discovery rights are trampled prejudice must be presumed. *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). As courts have recognized:

> If a party served with interrogatories fails to answer them on time, or at all, or fails to answer the questions completely and responsively, such action can have a spiraling effect on the future scheduling of discovery, and inject into the litigation collateral disputes which typically require the intervention of the court to resolve. Thus, for interrogatories to work as intended by the drafters of the rules of civil procedure, it is essential that counsel who receives them act with diligence and good faith, and submit timely, responsive and complete answers.

Jayne H Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 653 (D. Md. 1997).

Appellants respectfully request that the Court reverse the October 20, 2023, Orders, find that Respondent violated the discovery requirements of the SCRCP, and grant appropriate relief as requested on the Motion for Sanctions/Contempt.

D. The Circuit Court Erred by Denying the Motion for Sanctions/Contempt When it Was Not Substantively Opposed by Responsive Briefing

The circuit court's October 20, 2023, 9:44am Order erred by denying the Motion for Sanctions/Contempt when it was not opposed in responsive briefing.

On March 28, 2023, the Clerk's Office published and circulated a Motions Roster setting Plaintiffs' February 23, 2023, Motion for Sanctions/Contempt for hearing on April 27, 2023.

The March 28, 2023, Motions Roster indicated that supporting memorandum should be filed by April 24, 2023. Respondents' Memorandum with attached Exhibits G to U was filed on the morning of April 24, 2023, in accord with the instructions that were provided on March 28, 2023, via the Motions Roster. As was previously the case with Respondents' February 10, 2023, Rule 11(a), 10-Day Letter, KCSO did not file any response to Respondents' Motion or Memorandum prior to the hearing on April 27, 2023.

At the hearing on April 27, 2023, the circuit court denied KCSO's oral Motion pursuant to Rule 7(b)(1), SCRCP, that would have prevented the Motion from being heard at that time (*see* below).

> THE COURT: What we're going to do is we'll go forward today with Mr. Jernigan's motion. Anything that was referred to that was turned over Monday we won't refer to that today because -- unless -- there isn't enough time. So *anything that was turned over Monday*, if it's going to be -- with any motion you want to, you know, not continue it for continuance sake but if they're not prepared with *new* information *that they didn't have*, something *new* additional brought up that they could [not] have been aware of, we just want to make sure that they are prepared.
>
> MR. JERNIGAN: That's fair. If there is anything *new* that would like to be, you know, when I going through it, if there's something that's *new* or *that they weren't aware of* and they want to mention that, that's fine.
>
> THE COURT: Well, we'll keep it out in consideration.
>
> MR. JERNIGAN: You know, I did file this in accord with the instructions so I'm not sure why it would be kept out but we can do it however.
>
> THE COURT: All right. Let's go forward with this motion. Yes, sir, Mr. Jernigan.

(R. p. 489, lines 1-19).

Near the end of the hearing on April 27, 2023, the Judge granted KCSO's request for leave to submit supplemental briefing, via email, limited to new matters of Respondents' April 24, 2023, Memorandum that KCSO was previously not aware of (*see* below).

> THE COURT: What I'm going to do is I'm going to -- anything further Mr. Morrison? I'm ready to take it under advisement.
>
> MR. MORRISON: I would like the opportunity to respond to what we have received in writing because most of this we just received on Monday.
>
> THE COURT: Very well. I'm going to take -- I'm giving you 30 days to respond. Obviously any emails you will cc each other and you will email my law clerk, and they're not going to be lengthy, back-and-forth emails that tend to happen, but if there is a response, obviously you can respond.
>
> So I'll give you 30 days to respond to send in the responses that you got this stuff *Monday*. If you need to respond again --
>
> MR. MORRISON: Thank you.
>
> THE COURT: But I'm going to try to address those three main issues about destroying evidence. The FOIA response and then the discovery response.
>
> MR. JERNIGAN: Thank you, Your Honor.

(R. p. 520, line 25-p. 521, line 18).

The record establishes (*i*) that Plaintiffs' timely-filed April 24, 2023, Memorandum addressed well-known grounds, and (*ii*) that KCSO did not suffer unfair surprise or prejudice. (R. pp. 336-39, 470-73); *M & M Group, Inc. v. Holmes*, 666 S.E.2d 262, 265, 379 S.C. 468 (Ct. App. 2008) (holding that although the defendant did not comply with the technical requirements of Rule 7(b)(1), SCRCP, the plaintiff waived the argument by failing to argue/show the trial court that the technical violation "prejudiced it or caused unfair surprise in any way") (citation omitted).

Appellants respectfully request that the Court reverse the October 20, 2023, Orders and grant appropriate relief as requested on the Motion for Sanctions/Contempt.

IV. The Circuit Court Erred in Denying Appellants' Motion to Recuse

Appellants' July 14, 2023, Motion to Recuse raises objective, appearance-based concerns pursuant to Canon 3E(1) because the circuit court's June 2, 2023, Form 4 denial cannot be supported by the record in this case.

In this respect, the record establishes that Respondent (*i*) destroyed relevant body worn camera audio/video recordings of the June 29, 2022, police-involved incidents, for which preservation was explicitly requested, 120 days before expiration of the 180-day retention period that is required for "Traffic Stops" in its own BWC Retention Schedules (R. p. 218); (*ii*) did not take any action to comply with Judge Newman's December 28, 2022, Form 4 Order within 20 day of the initial hearing, or thereafter; and (*iii*) did not provide full/complete verified interrogatory answers under oath as required by Rule 33(a), SCRCP. *Cf. Davis*, 762 S.E.2d at 547 (determining that disqualification was not required under Canon 3E(1) because "the Record supports all of the court's orders in this case, including the Discovery Order").

The circuit court's October 20, 2023, 9:41am Written Order denies Appellants July 14, 2023, Motion to Recuse, stating as follows:

> Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Roche v. Young Bros., Inc*., 332 S.C. 75, 504 S.E.2d 311 (1998). "As the threshold for a showing of bias is high, a finding of judicial bias must be based on an abiding impression left from a reading of the entire record, not from particular comments or ruling considered in isolation." *Alexander v. Parks*, 834 Fed. Appx. 778 (2020) (internal citations omitted). "It is not sufficient for a party seeking a judge's disqualification to simply allege bias; the party must show some evidence of bias or prejudice." Appellate Court Rule 501, Code of Jud. Conduct, Canon 3, subd. E(1)(a).
>
> After reviewing the applicable law and considering the arguments raised by the parties, the Court finds no evidence of judicial bias or prejudice. Plaintiffs' Motion is based solely on allegations that are not supported by evidence. Accordingly, the Court concludes that disqualification is unwarranted. As such, Plaintiffs' Motion to Recuse, Vacate, and Reassign is hereby **DENIED**.

The circuit court's October 20, 2023, 9:41am Written Order does not consider or address any of the appearance-based Canon 3E(1) concerns raised by Appellants' Motion to Recuse; notably, that "impartiality might reasonably be questioned when his [or her] factual findings are not supported by the record." *Ellis*, 433 S.E.2d at 857, 315 S.C. at 285.

Appellants respectfully request that the Court reverse the October 20, 2023, Orders and grant appropriate relief as requested on the Motion to Recuse.

CONCLUSION

For the reasons set forth herein, the October 20, 2023, Orders should be reversed and appropriate relief entered.

Respectfully submitted,

By: s/Justin A. Jernigan

Justin A. Jernigan
S.C. Bar No. 74954
302 Pine Cliff Dr.
Seneca, SC 29672
864-710-5029
justin.a.jernigan@gmail.com

ATTORNEY FOR APPELLANTS

May 6, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Daniel M. Coble, Circuit Court Judge

Appellate Case No. 2024-000833

Christine Jernigan and Justin Jernigan..... Appellants,

v.

Kershaw County Sheriff's Office .....Respondent.

PROOF OF SERVICE

I hereby certify that the foregoing Final Brief of Appellants is being served by email to counsel for Respondent, David Morrison, Esq., at david@dmorrison-law.com. I hereby certify that one bound paper copy of the Final Brief of Appellants is being mailed to the Court as requested by the Clerk's March 18, 2025, Letter.

Respectfully submitted,

By: s/Justin A. Jernigan

Justin A. Jernigan
S.C. Bar No. 74954
302 Pine Cliff Dr.
Seneca, SC 29672
864-710-5029
justin.a.jernigan@gmail.com

ATTORNEY FOR APPELLANTS

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