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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-001681
C/A No. 2019-CP-43-01021

Kimberly Welch, as Personal Representative of the
Estate of Judy Ann Haselden,... Respondent,

v.

Michael D. Smoak and Murray Sand Co., Inc.,... Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. Whether the circuit court abused its discretion in determining Appellants committed discovery abuses that warranted striking Appellants' answer.

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on February 9, 2017. Judy Haselden, the Respondent's decedent, was rear-ended by a tractor-trailer driven by Appellant Michael Smoak and owned by Appellant Murray Sand Co., Inc. Smoak was acting in the course and scope of his employment with Murray Sand at the time of the accident. (R. p. 369; Answer to Amended Compl. at ¶ 5). Specifically, Smoak was hauling riprap from Kershaw to Edisto Beach, where Crowder Construction Co. was involved in a beach renourishment project.

Because this is an appeal from the circuit court's order imposing the harsh discovery sanction of striking Appellants' answer, the discovery background in the case below is crucial. Ms. Haselden filed her complaint against Smoak and Murray Sand on May 21, 2019, and immediately served her first interrogatories and requests for production. Murray Sand filed its answer on July 25, 2019, and Smoak filed his answer on August 26, 2019.[1] However, neither Murray Sand nor Smoak timely responded to Ms. Haselden's discovery requests, so Ms. Haselden 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 and produced 552 pages of documents. (R. pp. 61-81; Murray Sand's Discovery Responses). On April 30, 2020, Smoak provided his first discovery responses but did not produce any documents. The same day, Murray Sand provided 40 additional pages of documents.

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

Appellants also filed their response to Ms. Haselden's motion to compel on April 30, 2020. The response stated that Murray Sand 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 Plaintiff seeks[.]" (R. p. 198; Memo Opp. Mot. Compel). However, on May 18, 2020, the day before the hearing on Ms. Haselden's motion to compel, Murray Sand produced an additional 246 pages of documents. During the hearing, counsel for Murray Sand again represented that all relevant documents in Murray Sand's possession had been produced to Ms. Haselden. (R. p. 667; May 19, 2020 Hearing Transcript) ("[A]s I stated and as you'll see repeatedly in our voluminous responses to these discovery requests, that I've given them everything I've got. I've had my client search and search and search again.").

On May 27, 2020, Murray Sand moved to dismiss Ms. Haselden's complaint. (R. pp. 246-47; Mot. Dismiss). The motion did not set forth the grounds on which dismissal was sought, and Murray Sand never filed a memorandum in support of its motion. Murray Sand also moved for a protective order and stay of discovery. (R. pp. 248-49; Mot. Protective Order). In its memorandum in support of the motion for protective order, Murray Sand argued the discovery Ms. Haselden sought exceeded the needs of the case because "the underlying accident was relatively minor." (R. p. 272; Memo Support Mot. Protective Order). And Murray Sand again represented it had "produced everything in [its] possession that was not privileged." (R. p. 270). On July 29, 2020, Ms. Haselden submitted a memorandum in opposition rebutting Appellants' arguments about the severity of her damages. (R. p. 358; Memo Opp. Mot. Protective Order).

The circuit court granted Ms. Haselden's motion to compel on August 27, 2020, ordering Murray Sand to produce all post-accident incident reports and post-incident drug testing. (R. p. 8;

Order Mot. Compel). Although Smoak previously testified that he provided a written statement to Murray Sand and took a drug test after this accident, Appellants have never produced these materials. (R. p. 97, line 13-p. 99, line 25; R. p. 128 lines 3-18; R. p. 170 lines 3-12; Smoak Depo. Transcript). The circuit court also denied Murray Sand's motion for a protective order on the same day. (R. pp. 1-5; Order Mot. Protective Order). On September 25, 2020, Murray Sand produced an additional 90 pages of documents.

Over the course of the next year, despite several requests from Ms. Haselden, Appellants did not supplement their production. As of May 2021, Appellants had produced approximately 1,000 pages of documents. On May 17, 2021, the parties entered into a consent scheduling order that set a written discovery deadline of September 1, 2021, and provided the case would be subject to trial on or after November 1, 2021. (R. pp. 11-13; Scheduling Order).

Despite Murray Sand's previous representations that it had produced everything in its possession, Murray Sand produced 5,110 pages of documents on September 30, 2021—over five times the total number of pages of documents Appellants had produced over the previous two years. This production, just a month prior to the case being subject to trial, occurred after the discovery deadline and after Ms. Haselden had filed five motions to compel in an (unsuccessful) effort to obtain all relevant documents.[2] The September 2021 production included numerous documents that had already been produced, and, like Murray Sand's previous productions, none of the documents were Bates stamped. However, the production also included over 3,000 pages of new, previously undisclosed documents.

[2] Ms. Haselden filed her first motion to compel on November 5, 2019. A year later, on November 5, 2020, Ms. Haselden filed two additional motions to compel. She also filed motions to compel on July 14 and September 15, 2021.

Indeed, over two years into the litigation, Appellants first disclosed accident registers relating to Ms. Haselden's accident, the existence of an excess liability insurance policy, and the involvement of Blue Max Trucking. Appellants' delayed disclosure of Blue Max Trucking is particularly important. Buried amongst duplicate documents in Appellants' September 30, 2021 production was a three-page document revealing that Murray Sand was hauling riprap for Blue Max Trucking on the date of the accident. (R. pp. 501-03; Blue Max Trucking Document). The document consisted of a two-page summary of the trips Murray Sand completed for Blue Max Trucking between January 30 and February 22, 2017, as well as an invoice from Murray Sand to Blue Max Trucking in the amount of $52,756.62. (*Id.*).

Ms. Haselden immediately issued a subpoena to Blue Max Trucking requesting all contracts and other records with Murray Sand, along with any other records relating to Blue Max Trucking's involvement with the beach renourishment project at Edisto Beach. (R. pp. 504-06; Blue Max Trucking Subpoena). 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." (R. pp. 507-08; Blue Max Trucking Affidavit). Thus, by concealing Blue Max Trucking's involvement beyond the statute of limitations and after the document retention period expired, Appellants prevented Ms. Haselden from pursuing a claim against Blue Max Trucking or even determining its potential liability for her accident.

On March 22, 2023, Ms. Haselden filed a motion for sanctions requesting that the circuit court strike Appellants' answer and hold them in default. (R. pp. 375-88; Mot. Sanctions). Appellants did not file a memorandum opposing Ms. Haselden's motion. On August 4, 2023, the Honorable George M. McFaddin, Jr. conducted a hearing and heard arguments from the parties. On February 12, 2024, the circuit court issued an order granting Ms. Haselden's motion, ruling

"Defendants' discovery conduct in this case warrants the harsh sanction of striking Defendants' answer." (R. p. 21; Sanctions Order).

Appellants filed a motion to reconsider on February 22, 2024. (R. pp. 520-44; Mot. Reconsider). On September 8, 2024, the circuit court denied Appellants' motion to reconsider. (R. pp. 38-40; Order Mot. Reconsider). This appeal followed.

STANDARD OF REVIEW

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion." *Id*. "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id*.

ARGUMENT

I. The circuit court did not abuse its discretion in striking Appellants' answer after carefully considering the discovery posture of the case, the willfulness of Appellants' misconduct, and the resulting prejudice to Respondent.

This appeal stems from the circuit court's determination that Appellants committed severe discovery abuses throughout the proceedings below. The circuit court found that Appellants "consistently failed to provide or supplement discovery responses in a timely fashion, disobeyed the Court's discovery orders, and misled the Court and Plaintiff." (R. p. 21; Sanctions Order). More importantly, however, the circuit court ruled that Appellants "intentionally withheld the identity of a potential defendant, Blue Max Trucking, from Plaintiff until after the statute of limitations." (*Id.*). The circuit court determined Appellants' discovery conduct resulted in

"irreparable prejudice" to Respondent. (R. p. 29; Sanctions Order). Accordingly, the circuit court issued an order striking Appellants' answer and holding them in default.

Contrary to Appellants' arguments, the sanctions order was not the result of an abuse of discretion. In its order, the circuit court carefully considered the discovery posture of the case, the willful nature of Appellants' discovery abuses, and the resulting prejudice to Respondent. (R. pp. 21-32); *see Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999) ("In determining the appropriateness of a sanction, 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."). Exercising its discretion, the circuit court found those factors supported the harsh sanction of striking Appellants' answer—particularly because the discovery misconduct included the intentional concealment of a potential defendant until after the expiration of the statute of limitations.

Appellants advance inconsistent and unconvincing arguments in an effort to justify their conduct below. Regarding their failure to disclose the document showing they were hauling for and being paid by Blue Max Trucking at the time of the accident, Appellants switch between (i) artificially narrowing the scope of discovery requests to claim the document was not requested and (ii) the "preposterous" claim that Appellants could not identify the document until several years into the litigation. (App. Br. at 13-16); (R. p. 26; Sanctions Order). Appellants' arguments respecting prejudice are even more brazen. They ask the Court to ignore the fact that their impermissible conduct denied Respondent the opportunity to explore a claim against Blue Max Trucking because of their mistaken beliefs about the severity of Respondent's damages. (App. Br. at 17, 19-20). In short, Appellants' arguments only highlight their misconduct below and their misguided views about a party's obligations in civil discovery. This Court should affirm.

A. Appellants' decision to intentionally conceal the identity of Blue Max Trucking until after the expiration of the statute of limitations warranted the harsh sanction imposed.

As Appellants acknowledge, the September 30, 2021 production of records relating to Blue Max Trucking was the "primary focus" of the circuit court's sanctions order. (App. Br. at 12). The circuit court determined that Appellants "intentionally withheld the identity of Blue Max Trucking for over two years." (R. p. 26; Sanctions Order). And the circuit court found the resulting prejudice to Respondent was substantial: "Defendants' discovery violations have severely prejudiced Plaintiff by preventing her from pursuing claims against all potentially liable parties." (R. p. 30).

Appellants challenge the circuit court's findings as to both willfulness and prejudice. (App. Br. at 13-16, 17-20). They also suggest their concealment of Blue Max Trucking is irrelevant to the sanctions analysis because it did not involve the violation of a court order. (App. Br. at 7). As Respondent will show, their arguments fail.

1. The circuit court's finding that Appellants acted willfully is supported by sufficient evidence.

Before a trial court may impose the severe remedy of striking a party's pleading, it must determine there is "some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682. Where there is evidence to support the lower court's finding of willfulness, that finding cannot be attacked on appeal. *See QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (affirming an order striking a party's answer where "there was evidence to support the trial court's finding that Appellant willfully violated the TRO"). Here, there is ample evidence to support the circuit court's finding that, for years of the litigation, Appellants willfully concealed the fact that they were hauling for Blue Max Trucking at the time of the accident.

This lawsuit was filed in May 2019. As of May 2021, after Respondent filed several motions to compel, Appellants had produced approximately 1,000 pages of documents and represented, on several occasions, they had "produced everything in [their] possession that was not privileged." (R. pp. 17, 270). Although Respondent knew Appellants were hauling riprap from the Willow Oak Quarry in Kershaw to Crowder Construction in Edisto Beach, Respondent did not know Appellants were hauling for and being paid by Blue Max Trucking. (R. pp. 64-65; Murray Sand Discovery Responses).

On September 30, 2021, a month after the discovery deadline and a month prior to the case being subject to trial, Appellants produced over 5,000 pages of documents—five times the amount of documents that had been produced in over two years of litigation. (R. p. 17). The documents were not Bates stamped, and the production included documents that were previously produced. (*Id.*). Buried amongst duplicates, however, was the three-page document showing that Murray Sand was hauling riprap for Blue Max Trucking on the date of the accident. (R. pp. 501-03). Accordingly, well over two years into the litigation, Respondent learned for the first time that Murray Sand was performing extensive work for Blue Max Trucking at the time of the accident, generating a bill for over $50,000. (*Id.*).

The September 2021 production was an improper "document dump" designed to conceal responsive information. *See Scott Hutchison Enterprises, Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 54 (S.D.W. Va. 2016) (finding "Defendants' actions constituted a 'document dump' and were improper under the discovery rules"). Specifically, the production was intended to conceal the three-page Blue Max Trucking document that Appellants had withheld up to that point. (R. p. 26). The circuit court found Appellants' decision to produce the Blue Max Trucking document amongst hundreds of pages of duplicates revealed their intent to conceal the information. (*Id.*) ("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.").

The circuit court also determined the timing of Appellants' production was willful. (*Id.*). Because Appellants "waited until after the statute of limitations and document retention period provided by law had expired," Respondent could not bring a claim against Blue Max Trucking or even obtain records from Blue Max Trucking relating to the arrangement with Murray Sand or the trip in question.[3] The circuit court further agreed with Respondent's argument that Appellants likely had "self-serving reasons" for withholding the information, such as to avoid the burden of having to indemnify Blue Max Trucking. (R. p. 26 n.3).

Thus, the circuit court's willfulness finding was supported by sufficient evidence. *See QZO, Inc.*, 358 S.C. at 257, 594 S.E.2d at 547. After reviewing the submissions and hearing the arguments of counsel, the circuit court determined the circumstances surrounding the September 2021 production evidenced Appellants' intent to conceal the identity of Blue Max Trucking for years of the litigation. Appellants' arguments to the contrary are without merit.

Seeking to explain their failure to timely produce the Blue Max Trucking document, Appellants' primary argument is that Respondent never requested the information. (App. Br. at 13-15). Addressing this argument, the circuit court determined the Blue Max Trucking document was responsive to five of the requests for production Respondent served along with her complaint in May 2019. (R. p. 24). Specifically, the circuit court ruled the document was responsive to each of the following requests:

[3] As noted above, Blue Max Trucking responded to Respondent's subpoena by stating "documents responsive to this subpoena have been purged in accordance with State and Federal laws and regulations or are otherwise unable to be located." (R. pp. 507-08). The Federal Motor Carrier Safety Administration sets the retention period for carriers like Blue Max Trucking. *See* 49 C.F.R. § Pt. 379, App. A; (R. p. 30 n.7).

> 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.

(*Id.*); (R. pp. 73-78).

As to request 14, Appellants contend the Blue Max Trucking document was not responsive because it does not "bear any hallmarks of being faxed such as fax codes or transmission details typically seen in faxed documents." (App. Br. at 14). Tellingly, however, Appellants do not go so far as to say the document was *not* faxed, and the "hallmarks" that Appellants claim are missing could easily have been included on an accompanying cover sheet. Regardless, there is no question that the last page of the Blue Max Trucking document is an invoice that was transmitted from Murray Sand to Blue Max Trucking on or about February 27, 2017. Accordingly, Appellants' arguments concerning request 14 fail.

As to request 20, Appellants state only that they "understood 'pickup and delivery records' in the general trucking context envisions documents from the date of the trip[.]" (App. Br. 14). In other words, Appellants claim the Blue Max Trucking document could not be considered a "pickup and delivery record" because it contains information for a wider timeframe. This argument is entirely without merit. The document is responsive to request 20 because it details the tonnage of

riprap picked up from the Willow Oak Quarry in Kershaw and delivered to Crowder Construction for each day between January 30 and February 22, 2017. (R. pp. 501-03).

Discussing request 21, Appellants simply posit that trip summaries "typically consist of logbooks or mileage reports." (App. Br. 15). Of course, even assuming Appellants are correct, their argument has no bearing on whether trip summaries can also consist of information about loads hauled over a specified timeframe. Again, the document at issue shows the tonnage of riprap Murray Sand hauled for Blue Max Trucking throughout February 2017. There is no credible argument that the document does not classify as a "trip summary."

As to request 24, Appellants claim "expense sheets generally refer to the driver's expenses incurred during the course of the trip." (App. Br. at 15). However, the plain language of the request was not limited to expenses incurred by the driver. The invoice Murray Sand submitted to Blue Max Trucking could fairly be considered an "expense sheet" as that term is commonly understood.

Finally, as to request 47, Appellants contend "trip reports likely refer to hours of service reports or logbooks, although the request is vague." (App Br. 15). Appellants' argument conflicts with their original response to request 47, which contained no vagueness objection and interpreted the phrase "trip reports" similarly to "trip summaries." (R. p. 78). Unquestionably, the document at issue provides a report of the trips Murray Sand completed for Blue Max Trucking throughout February 2017.

Discussing Appellants' interpretation of the foregoing discovery requests, the circuit court stated that Appellants' arguments "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.'" (R. p. 24 (quoting *Samples v. Mitchell*, 329 S.C. 105, 113, 495 S.E.2d 213, 217

(Ct. App. 1997))).[4] The circuit court's ruling was correct. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003) (explaining the purpose of discovery); *see also Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 242 (M.D.N.C. 2010) ("[D]iscovery requests should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under Rule 37(a)." (citation omitted) (cleaned up)). Indeed, accepting Appellants' arguments about the scope of the discovery requests would encourage litigants to interpret requests narrowly to avoid production of relevant information.

Appellants' next argument—that the Blue Max Trucking document was not discovered until 2021—also fails. Relying on an affidavit submitted by Arthur Dehay *after* the circuit court's sanctions order,[5] Appellants claim the Blue Max Trucking document was discovered during a Rule 30(b)(6) deposition preparation meeting. (App. Br. at 16); (R. pp. 653-55). Although Appellants' brief offers no explanation for why the document was not identified at any point during the two previous years, Appellants argued below that any failure to produce the document was a result of poor record keeping. (R. p. 699; Transcript Mot. Sanctions).

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[4] The circuit court also correctly recognized the fact that Appellants produced the Blue Max Trucking document in September 2021 negated their argument that the document was not responsive to the discovery requests. (R. p. 25).

[5] This evidence is not properly before the Court. Appellants did not submit any evidence opposing Respondent's motion for sanctions until after the circuit court issued its order striking their answer; counsel simply appeared at the hearing and presented argument. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."). Because Appellants first submitted the affidavit of Mr. Dehay along with their motion to reconsider, the Court should not consider it. Rule 6(d), SCRCP (stating "opposing affidavits may be served not later than two days ***before*** the hearing, unless the court permits them to be served at some other time" (emphasis added)); *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) ("A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

There were several reasons for the circuit court to reject Appellants' self-serving argument that the Blue Max Trucking document was not discovered until two years into the litigation. First, the circuit court presided over previous discovery motions filed by the parties and heard Appellants represent on numerous occasions that they had produced everything in their possession. (R. p. 198 (stating "all documents in Defendant's possession . . . had been produced")); (R. p. 270 (stating counsel "had produced everything in her possession that was not privileged")). After hearing these representations about Appellants' discovery efforts, the circuit court had good reason to reject Appellants' post hoc explanation that the Blue Max Trucking document simply turned up during a deposition prep meeting. Of course, as Respondent will discuss in more detail below, Appellants' explanation also fails to account for the other documents—information about an excess insurance policy and accident registers relating to the collision—that were produced for the first time in the September 2021 production.

Second, the circuit court rejected Appellants' argument about the belated discovery of the document because of its "significan[ce] to Murray Sand's business operations." (R. p. 25; Sanctions Order). As the circuit court noted, the Blue Max Trucking document contained an invoice by which Murray Sand requested payment of over $50,000 for several weeks' worth of work for Blue Max Trucking. To the circuit court, the idea that Appellants could not identify this document for several years was "preposterous." (R. p. 26).

Third, the circuit court determined that even if Appellants' "poor record keeping" argument was correct, it would not justify their misconduct. (R. p. 25) ("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[.]" (quoting *Ashmore v. Allied Energy, Inc.*, No. 8:14-CV-00227-JMC, 2016 WL 2898007, at *4 (D.S.C. May 18, 2016))). The circuit court's ruling was especially

appropriate in light of the regulations applicable to trucking companies like Murray Sand. The Federal Motor Carrier Safety Administration requires carriers to maintain financial and accounting records for a period of three years. 49 C.F.R. § Pt. 379, App. A. Additionally, the regulations require that the company organize the records such that they can be provided for inspection within 48 hours after a request is made by the Federal Motor Carrier Safety Administration. 49 C.F.R. § 390.29.

Appellants' final argument relating to willfulness is that there is no evidence to support the circuit court's statement that Appellants likely "withheld information about Blue Max Trucking for self-serving reasons." (App. Br. at 16 (quoting R. p. 26)). As the sanctions order explains, Respondent argued that although she could not discover information about the relationship between Blue Max Trucking and Murray Sand, Murray Sand likely agreed to hold Blue Max Trucking harmless from any liability arising from Murray Sand's actions on behalf of Blue Max Trucking. Because Appellants did not respond to this argument or state such an agreement did not exist, the circuit court agreed with Respondent's argument. (R. p. 26 n.13).

In their brief, Appellants still refuse to state whether such an agreement with Blue Max Trucking existed. Instead, they scold the circuit court for speculating as to any potential indemnification agreement. (App. Br. at 16-17). Of course, Appellants have never produced more than three pages of documents relating to Blue Max Trucking, and Blue Max Trucking responded to Respondent's subpoena stating that it had no documents to produce relating to Murray Sand because of the applicable document retention period. Under these circumstances, the circuit court's statement was valid. Whether Murray Sand simply wanted to protect its business relationship with Blue Max Trucking or sought to avoid the burden of indemnification, the circuit

court appropriately determined Appellants withheld information about Blue Max Trucking for self-serving reasons.[6]

In sum, the circuit court's finding of willfulness is entitled to substantial deference, and Appellants have not presented any compelling reason to upset it on appeal.[7]

2. The circuit court correctly determined that Appellants' concealment of Blue Max Trucking resulted in substantial prejudice to Respondent.

The prejudice caused by Appellants' failure to disclose their relationship with Blue Max Trucking cannot be overstated. By waiting to disclose the Blue Max Trucking document after the expiration of the statute of limitations, Appellants prevented Respondent from pursuing a claim against Blue Max Trucking. Just as importantly, however, Appellants also prevented Respondent from learning whether Blue Max Trucking was responsible for the accident in the first place.

As noted above, Respondent first learned that Appellants were hauling for and being paid by Blue Max Trucking in September 2021—over two years after she first requested documents relating to the accident. Immediately after identifying the Blue Max Trucking document in Appellants' production, Respondent sent a subpoena to Blue Max Trucking requesting all contracts and other records relating to Murray Sand around the time of the accident, as well as other records relating to Blue Max Trucking's involvement with the beach renourishment project at Edisto Beach. (R. pp. 504-06). Blue Max Trucking responded that it was not in possession of the

[6] Appellants also make the conclusory assertion that indemnification would be covered by Murray Sand's insurer. (App. Br. at 17). Even assuming that is correct, Murray Sand could have decided to conceal Blue Max Trucking from Respondent so that it would not have to file a claim with its insurer and risk its rates increasing.

[7] The Court should affirm even if it determines Appellants' misconduct is more properly described as "bad faith" or "gross indifference" to Respondent's discovery rights. *See Griffin Grading & Clearing, Inc.*, 334 S.C. at 198-99, 511 S.E.2d at 719 (describing the conduct that must be present for the sanction of default to be imposed); Rule 220(c), SCACR.

requested documents because 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." (R. pp. 507-08).

Discussing prejudice, the circuit court determined Appellants' decision to withhold the information relating to Blue Max Trucking "prevent[ed] [Respondent] from pursuing claims against all potentially liable parties." (R. p. 30). Specifically, the circuit court ruled Respondent could not amend her complaint to name Blue Max Trucking as a defendant because the statute of limitations had expired by September 2021. (*Id.*). More fundamentally, Respondent was unable to assess whether a claim against Blue Max Trucking would be viable. (R. pp. 31-32). The circuit court rightly found that no sanction other than striking Appellants' answer could remedy that substantial prejudice. (R. p. 32).

Each of Appellants' arguments concerning the circuit court's prejudice determination falls flat. Appellants first contend the circuit court incorrectly determined that a claim against Blue Max Trucking in September 2021 would be time barred, as the discovery rule would have operated to toll the statute of limitations. (App. Br. at 17-18). Appellants do not cite any authority supporting their discovery rule argument because there is none. Indeed, our Supreme Court has squarely rejected the argument that the discovery rule applies to a plaintiff's efforts to discover a wrongdoer's identity. *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (stating "the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer"). As the *Wiggins* Court explained:

> The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Id. (quoting *Tollison v. B & J Mach. Co.*, 812 F. Supp. 618, 620 (D.S.C. 1993)). Thus, the Court should reject Appellants' suggestion that a claim against Blue Max Trucking in September 2021 would have been timely.

Next, Appellants question whether Respondent "had a valid claim against Blue Max Trucking." (App. Br. at 18). Appellants suggest the circuit court erred in finding Respondent may have had a viable negligent selection claim against Blue Max Trucking because *Ruh*, a Supreme Court decision recognizing such a claim, was not decided until 2023. *Ruh v. Metal Recycling Servs., LLC*, 439 S.C. 649, 889 S.E.2d 577 (2023); (App. Br. at 18). Further, Appellants argue that because the circuit court acknowledged such a claim may not have been viable, it was improper for the court to determine that Respondent was nevertheless prejudiced by her inability to explore Blue Max Trucking's liability. (App. Br. at 18-19).

For starters, *Ruh* does not support Appellants' argument that Respondent could not have determined a negligent selection claim existed against Blue Max Trucking prior to the expiration of the statute of limitations. Although the *Ruh* Court recognized that a principal in the independent contractor relationship can be held liable for its "own negligence in selecting the independent contractor," 439 S.C. at 652, 889 S.E.2d at 579, the Court also explained that its holding "should come as no surprise to even a casual student of the law." *Id.* at 654, 889 S.E.2d at 580. Indeed, the Court stated that its holding was supported by case law dating back over 150 years and reflected the fundamental tenet that "liability follows the tortious wrongdoer." *Id.* at 654-55, 889 S.E.2d at 580. Thus, like the plaintiff in *Ruh*, Respondent could have determined the law provided a mechanism for holding Blue Max Trucking liable prior to the Supreme Court's decision in 2023.

Appellants' other argument—that investigation may have determined a negligent selection claim against Blue Max Trucking would not be viable—completely misses the mark. Because

Respondent cannot discover records relating to Blue Max Trucking's selection of Murray Sand for the Crowder Construction project, she will never know for certain whether a negligent selection claim would be viable.[8] As the circuit court recognized, "[t]he prejudice here stems from the fact that Defendants' intentional misconduct denied Plaintiff the opportunity to make that determination." (R. p. 32). Because Appellants' discovery abuses prevented Respondent from even investigating whether Blue Max Trucking was responsible for her accident, Appellants' arguments about the ultimate merits of a negligent selection claim are off target.

Finally, Appellants boldly argue there is "no prejudice" to Respondent because "this is an admitted case of negligence and there is $2 million in combined primary and excess liability coverage." (App. Br. at 19-20). This argument completely overlooks the above point that, regardless of her ability to recover against Appellants, Respondent will never be able to determine whether Appellants were the only parties responsible for her injuries. *See Smith v. Tiffany*, 419 S.C. 548, 564, 799 S.E.2d 479, 488 (2017) (discussing a plaintiff's right to choose which tortfeasors she will sue).

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[8] To be sure, Respondent submits that such a claim would have merit based on the information available. In determining whether a principal exercised reasonable care in selecting a contractor, courts consider the competence and care exhibited by the contractor. *Ruh*, 439 S.C. at 659, 889 S.E.2d at 583 ("[A] principal's actual knowledge that a contractor has demonstrated—or failed to demonstrate—competence and carefulness in prior work will always be relevant to whether the principal breached the standard of care."). Even the limited evidence available suggests that Murray Sand did not exercise competence and care in employing drivers. Smoak testified in his deposition that he had received several speeding tickets and had been involved in other accidents. (R. pp. 114-19; Smoak Depo.). Smoak also had an extensive criminal history, including a guilty plea to "racing on the highway." (R. pp. 146-60). And of course, Appellants' only explanation for the missing records of a drug test Smoak testified to taking after this accident is that "Smoak misspoke because he was given a post-accident drug test following a subsequent motor vehicle accident while employed at Murray Sand." (App. Br. at 9).

Additionally, although Appellants claim throughout their brief that this is a case of admitted liability, that statement is misleading. In their answer to Respondent's amended complaint, Appellants admitted "simple negligence;" however, they denied that "Plaintiff was injured as a result of Defendants' simple negligence." (R. p. 370). Importantly, Appellants also pled comparative negligence as an affirmative defense, and they denied a request for admission that "Plaintiff was not negligent." (R. pp. 371-72); (R. p. 201). Even in their brief, Appellants suggest that Respondent improperly "stopped at a yellow light at an intersection." (App Br. at 18).

Appellants' arguments about the available insurance coverage are also misleading. Although they assert there is $1 million in excess coverage, they point to no evidence in the record for support. *See Thompson*, 357 S.C. at 105, 590 S.E.2d at 513 (noting arguments of counsel are not evidence). Indeed, the only evidence in the record relating to the available excess coverage is a July 2021 letter that Appellants attached to their motion to reconsider. (R. pp. 568-69). In the letter, dated over two years into the litigation, the insurance carrier simply states that it received certain correspondence from Murray Sand and "reserves its rights and defenses under the policy, at law and/or in equity." (*Id.*).

More importantly, however, Appellants' argument that there is "no prejudice" fails because it is premised on the erroneous view that a defendant's discovery obligations are determined by its *subjective* view of the severity of the plaintiff's injuries. The circuit court rejected a similar argument by Appellants early in this litigation. On May 27, 2020, Appellants sought a protective order and stay of discovery, arguing that because Respondent's damages were "minimal," her discovery requests were "disproportionate to the needs of the case[.]" (R. pp. 248, 272). Respondent opposed the motion, explaining that she had undergone multiple surgeries and

incurred significant medical bills and should be allowed to obtain relevant discovery.[9] (R. p. 358). Refusing to accept Appellants' arguments about Respondent's injuries, the circuit court denied the motion. (R. pp. 1-5). The circuit court specifically determined Respondent's discovery requests were not "not oppressive, unduly burdensome, disproportionate to the needs of the case, or irrelevant." (R. p. 3).

Now, Appellants attempt the same strategy on this Court. Although they present no evidence supporting their view that Respondent's damages are minimal—once again, they rely only on arguments of counsel—they ask the Court to excuse their misconduct on that basis. The Court should refuse to do so and clarify that a party's discovery obligations are not limited by its personal beliefs about the damages at issue in the case.

3. Appellants' intentional concealment of Blue Max Trucking warrants the sanction of striking Appellants' answer.

Finally, Respondent will briefly address Appellants' argument that because the concealment of Blue Max Trucking did not violate a court order, it cannot serve as the basis for the sanction imposed. As explained below, Appellants' argument is a non-starter because Appellants *did* violate the circuit court's orders, along with other discovery abuses that were unrelated to their concealment of Blue Max Trucking. Nevertheless, even assuming that was not the case, egregious misconduct like concealing the identity of a potential defendant until after the expiration of the statute of limitations is sufficient to warrant the harsh sanction of default.

[9] Although this appeal is not the forum to litigate Respondent's damages, Respondent continues to vigorously contest Appellants' refrain that this case does not involve significant damages. Although the most recent information about Respondent's damages has not been presented to the circuit court and is not part of the record, Respondent has provided Appellants with discovery responses demonstrating that Ms. Haselden's medical bills exceed $400,000.

Our trial courts have broad discretion to sanction a party that engages in discovery misconduct. *See, e.g.*, *Karppi*, 327 S.C. at 542, 489 S.E.2d at 681 ("The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court."); *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) ("[T]he selection of a sanction is within the court's discretion."). In determining the appropriate sanction, courts should consider "the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511 S.E.2d at 719. Where the sanction involves dismissal or default, however, the moving party must show "bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.*

Contrary to Appellants' argument, our trial courts' discretion is not limited such that, regardless of the conduct in question, the sanction of default or dismissal is only appropriate where an order is violated. As Appellants acknowledge, Rule 37(d), SCRCP, allows for the sanction of default "in the absence of the violation of a court order." (App. Br. at 7). Indeed, this Court noted as much in *Karppi*: "Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, **<u>or</u>**, upon motion, for a party's failure to respond to certain discovery requests." 327 S.C. at 542, 489 S.E.2d at 682 (emphasis added). And of course, Rule 37 is not the sole basis for the courts' ability to sanction litigants—courts have broad inherent authority to do so. *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

Although Appellants seek to read this Court's decision in *Skywaves*[10] as creating a bright line requirement that courts may only strike an answer after violation of a court order, the Court

[10] *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018).

did not go so far. Unlike the instant case, *Skywaves* involved an appeal from the *denial* of a motion to strike the defendants' answers. Accordingly, the plaintiff had the burden of demonstrating that the circuit court abused its discretion in refusing to grant the requested sanction. This Court found no error by the lower court, as the case did not even involve the element of "bad faith, willful disobedience[,] or gross indifference to [a party's] rights" that must be present for the court to strike a pleading. *Id.* at 458, 814 S.E.2d at 657. The Court went on to note that the defendants did not violate any court order, unlike the sanctioned parties in the cases the plaintiff relied on. *Id.* at 458-59, 814 S.E.2d at 657-58. However, the Court never stated that a violation of a court order is *required* before a court may strike a party's answer.

Regardless of whether discovery abuse involves the violation of a court order, the concealment of discoverable information, or other misconduct, the circuit court's role is the same. The court must consider the discovery posture of the case, the willfulness, and the degree of prejudice. *Samples*, 329 S.C. at 112, 495 S.E.2d at 216 (discussing the proper analysis where a party willfully concealed discoverable information). And if the misconduct involves bad faith, willful disobedience, or gross indifference to a party's rights, the option to strike a pleading is available. *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511 S.E.2d at 719.

Here, the circuit court performed the proper analysis. As Respondent has explained, the circuit court found Appellants' misconduct was intentional and the resulting prejudice to Respondent was substantial. Under these circumstances, Appellants' concealment of Blue Max Trucking was sufficient to justify the circuit court's sanctions order.

B. Appellants' failure to comply with court orders, failure to produce discoverable information, misrepresentations about their discovery efforts, and general interference with Respondent's ability to prepare for trial also warranted the striking of Appellants' answer.

Although Appellants' concealment of Blue Max Trucking was the focus of the sanctions order, the circuit court also relied on several other instances of discovery misconduct in determining it was proper to strike Appellants' answer. The circuit court found Appellants violated discovery orders, misrepresented their efforts to participate in discovery, withheld information, and consistently failed to provide or supplement discovery responses in a timely manner.

Although the circuit court identified numerous abuses in its order, Appellants only address one in their brief. Appellants contend the circuit court incorrectly determined they violated the August 27, 2020 order granting Respondent's motion to compel and the May 17, 2021 scheduling order. Respondent will discuss each order in turn.

The August 27, 2020 order granted Respondent's motion to compel as to "post-accident incident reports" and "post-accident drug testing"—records that the circuit court determined would "certainly be relevant and not subject to any applicable privilege." (R. p. 8). In its sanctions order, the circuit court reached the obvious conclusion that because Appellants have never produced a post-accident incident report or a post-accident drug test, they violated the order. (R. p. 28).

Appellants argue that although they have never provided the records in question, they did not violate the August 27, 2020 order. (App. Br. at 7-10). They claim their failure should be excused because the circuit court's order acknowledged Appellants' representation that they had conducted extensive searches and could not find the documents. (App. Br. at 8). As to the post-accident drug test, Appellants argue Smoak "misspoke" when he testified in his deposition that he provided a drug test after this accident. (App. Br. at 9).

Contrary to Appellants' position, nothing in the August 27, 2020 order stated that Appellants were excused from compliance simply because of their representation that "efforts to locate these documents to date has been fruitless[.]" (R. p. 8). Plainly, when the circuit court granted Respondent's motion to compel as to the post-accident incident reports and the post-accident drug test, it expected Appellants to either produce those documents or otherwise confirm that they could not do so. (*Id.*). Indeed, in its sanctions order, the circuit court explicitly found Appellants had not complied with the previous order. (R. p. 28). The circuit court further found that Appellants had not presented any justification for their failure to do so. (R. p. 28 n.5).[11]

The same is true today. Appellant Smoak testified in his deposition that he provided a written statement to Murray Sand and took a drug test after this accident. (R. p. 97, line 13-p. 99, line 25; R. p. 128 lines 3-18; R. p. 170 lines 3-12). Appellants present no explanation or argument respecting their failure to provide the post-accident incident report. And as to the drug test, they continue to insist that Smoak's sworn testimony was mistaken. However, as noted by the circuit court, "Smoak has never contradicted his deposition testimony, via affidavit or otherwise[,]" and Appellants "have never produced an affidavit of a records custodian explaining that the test results do not exist." (R. p. 28 n.5). Indeed, Appellants did not even attempt to explain the missing drug test in the affidavit they submitted along with their motion to reconsider the sanctions order. Thus, the Court should affirm the circuit court's determination that Appellants violated the August 27, 2020 order.

Appellants also violated the May 17, 2021 consent scheduling order, which contained two deadlines that are relevant for purposes of this appeal: it provided a September 1, 2021 deadline

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[11] Importantly, the Honorable George M. McFaddin, Jr. presided over both the motion to compel and the motion for sanctions, along with most of the other discovery motions in this case. He was intimately familiar with the discovery posture of the proceeding.

for written discovery, and it provided that the case would be subject to trial on or after November 1, 2021. (R. pp. 11-13). The circuit court found Appellants' violation of this order was "particularly egregious[.]" (R. p. 28). Although Appellants only produced approximately 1,000 documents prior to the discovery deadline, Appellants "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." (*Id.*).

Appellants' sole argument relies on the provision of the order allowing the parties to "supplement[] written discovery responses" after the September 1, 2021 deadline. (R. p. 11); (App. Br. at 10-11). Appellants contend there was no violation because subpoena responses accounted for the majority of the September 30, 2021 production. (*Id.*). This argument fails.

As the circuit court found, the September 30 production included accident registers, information about an excess insurance policy, and the Blue Max Trucking document—all of which were "certainly available to Defendants when they received Plaintiff's first discovery requests in May 2019." (R. pp. 26-27). The production also included hundreds of pages of safety meeting documents and tax returns which, again, would have been in Appellants possession since the onset of the litigation. (R. pp. 17-18). Plainly, these materials cannot be considered "supplements" allowed under the scheduling order. Furthermore, while Appellants urge the Court to focus on the subpoena responses that were part of the September 30 production, they conveniently leave out any explanation of when those subpoena responses were received. For these reasons, the circuit court did not err in concluding the 5,000 plus page document dump a month prior to the case being subject to trial violated the scheduling order.

Finally, as noted above, Appellants fail to address the other discovery misconduct the circuit court relied upon in determining it was proper to strike Appellants' answer. Appellants

provide no explanation for their failure to produce the accident registers and information about excess liability coverage until over two years into the litigation. As the circuit court concluded, "the only logical explanation is that Defendants intentionally withheld these documents until after mediation and the discovery deadline to devalue Plaintiff's case." (R. p. 27).

Similarly, Appellants fail to explain several representations they made to the circuit court about their discovery efforts that later proved to be inaccurate. Within the first year and a half of this litigation, Appellants stated the following with respect to the materials in their possession:

- "Defendant Murray Sand has 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 Plaintiff seeks, as is indicated in Defendant's attached supplemental responses to Plaintiff's discovery requests. The only remaining document Murray Sand has uncovered in its extensive search for the documents identified by Plaintiff as withheld, is an employee handbook predating the handbook previously produced, which has since been supplied to counsel for Plaintiff." (R. p. 198).

- "[A]s I stated and as you'll see repeatedly in our voluminous responses to these discovery requests, that I've given them everything I've got. I've had my client search and search and search again. This is not a situation where my client is trying to be deceptive." (R. p. 667).

- "That being said, even after extensive searches, the only thing that he came up with is an additional handbook which I turned over immediately." (R. pp. 667-68).

- "Everything I've got has been turned over and has been turned over for a very long time." (R. p. 669).

Of course, well over a year after making these representations, Appellants produced over 5,000 pages of documents. The circuit court referenced that fact repeatedly in determining it was proper to strike Appellants' answer. (R. pp. 15-18, 27-28).

More generally, the circuit court found that Appellants' failure to participate in discovery prevented Respondent from preparing for trial. The circuit court examined Appellants' discovery

responses throughout the case and determined that Appellants "consistently failed to provide or supplement discovery responses in a timely fashion" and "repeatedly provided dilatory and incomplete discovery responses." (R. pp. 15-17, 21, 32). The circuit court correctly found Appellants' approach to discovery prevented Respondent from learning "basic information about the accident in a timely manner," thereby preventing her from preparing for trial. (R. p. 32). Although Appellants wish to ignore these findings, they firmly support the circuit court's decision to strike Appellants' answer. *See Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 911 S.E.2d 406 (2025) (affirming an order striking a party's pleadings where the party "missed discovery response deadlines; failed to fully comply with motions to compel; represented to the court they would cooperate in discovery, but then failed to follow through; and failed to pay past monetary sanctions," all of which amounted to "a deliberate pattern of discovery abuse").

C. Appellants' remaining arguments are unpreserved and without merit.

Appellants raise two additional arguments in an attempt to assign error to the circuit court. Appellants contend it was improper for the circuit court to strike Appellant Smoak's answer because there is no evidence he committed any discovery abuse. (App. Br. at 6). Appellants also contend the circuit court erred by failing to consider a lesser sanction that would sufficiently address their misconduct. (App. Br. at 19-20).

First, relying on this Court's decision in *Karppi*, Appellants contend the circuit court failed to consider the impact of its sanctions order on "multiple-party litigation." (App. Br. at 6). They claim that because Smoak did not engage in discovery misconduct, it was improper for the circuit court to strike his answer. (*Id.*).

As noted above, Appellants did not submit a memorandum in opposition to Respondent's motion for sanctions. During the hearing on Respondent's motion, Appellants never attempted to

distinguish between the discovery misconduct attributable to Smoak as opposed to Murray Sand, nor did they raise the specific argument that it would be improper for the circuit court to strike Smoak's answer. Instead, Appellants raised this argument for the first time in their motion to reconsider. (R. p. 542). Accordingly, this issue is not preserved. *See Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue raised for the first time in a Rule 59, SCRCP, motion is not preserved for appellate review).

Nevertheless, Appellants' argument that the circuit court erred in striking Smoak's answer fails on the merits. Although Appellants are correct that the circuit court did not identify any discovery abuse committed by Smoak, that is in part because Smoak was incarcerated throughout this litigation and was not able to participate in discovery. (R. p. 84). More importantly, the circuit court focused on Murray Sand's conduct because this accident occurred while Smoak was acting in the course and scope of his employment, and Murray Sand has always been responsible for the defense of this action. Murray Sand and Smoak are represented by the same counsel, they are covered under the same liability insurance, and they filed a joint answer to Respondent's amended complaint. (R. pp. 369-74).

Accordingly, Appellants' alignment in this case is completely different than the defendants' alignment in *Karppi*. In that case, Karppi brought claims relating to his purchase of defective floor covering material. He sued Greenville Terrazzo, the retailer he purchased the material from, and Ogden Teck, the manufacturer. Ogden Teck then filed a counterclaim against Karppi, as well as a cross-claim against Greenville Terrazzo. Ultimately, after Ogden Teck failed to provide discovery requested by Karppi, the circuit court struck Ogden Teck's answer, its counterclaim, and its cross-claim. 327 S.C. at 542, 489 S.E.2d at 681.

This Court reversed, concluding the circuit court "failed to properly tailor its sanction to address the specific violation committed by Odgen Teck vis-à-vis Karppi." *Id.* at 543, 489 S.E.2d at 682. Specifically, the Court held that by striking Ogden Teck's cross-claim, the circuit court provided Greenville Terrazzo a "windfall"—even though there was no evidence that Ogden Teck violated Greenville Terrazzo's discovery rights. *Id.* at 543-44, 489 S.E.2d at 682. Notably, the Court also held the sanction prejudiced Greenville Terrazzo by restricting its ability to defend against Karppi's allegations. *Id.* at 544, 489 S.E.2d at 682-83 (explaining that because liability was presumed as to Ogden Teck, Greenville Terrazzo was summarily stripped of its ability to defend Karppi's claims on the ground that the materials it sold were not defective).

In sum, *Karppi* involved a unique situation where the sanction imposed against one defendant both benefitted and injured another defendant undeservedly. That is not the situation here. Respondent, who was the subject of Appellants' discovery abuse, is the only party that benefits from the sanctions order. And although the sanctions order adversely impacts Smoak, it only does so because of his connection to Murray Sand. Indeed, because Murray Sand is vicariously liable, it effectively stands in the shoes of Smoak. *See James v. Kelly Trucking Co.*, 377 S.C. 628, 634, 661 S.E.2d 329, 332 (2008). Again, Smoak and Murray Sand have been united throughout this litigation; they share the same counsel and are covered by the same liability insurance.

If the Court were to reverse the sanctions order as to Smoak, the only party that would receive a "windfall" is Murray Sand. Appellants' counsel would be able to defend the case on behalf of Smoak, which would confer a direct benefit on Murray Sand by limiting its vicarious liability. In that situation, Murray Sand would be able to avoid the consequences of its discovery

misconduct altogether. For these reasons, the Court should affirm the circuit court's decision to strike Smoak's answer.

Finally, Appellants argue the sanctions order should be reversed because the circuit court failed to consider and reject a lesser available sanction. (App. Br. at 19). Appellants acknowledge several portions of the sanctions order where the circuit court explicitly stated no lesser sanction would be adequate. (*Id.*) (quoting R. p. 32). According to Appellants, however, the circuit court erred because it did not specifically describe the alternative sanctions it considered and explain why they would not be adequate. (*Id.*).

This argument is also unpreserved. Appellants were certainly free to encourage the circuit court to consider alternative sanctions, but Appellants failed to do so. Because this argument was never raised to the circuit court, it is not properly before the Court. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (explaining that a party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments").

Regardless, the circuit court clearly considered whether a lesser sanction would have sufficed to address Respondent's prejudice and punish Appellants' misconduct. *See Karppi*, 327 S.C. at 545, 489 S.E.2d at 683 (explaining the purposes discovery sanctions serve). In determining it was necessary to strike Appellants' answer, the circuit court considered Respondent's inability to pursue a claim against Blue Max Trucking, Appellants' interference with Respondent's ability to prepare for trial, and Appellants' repeated misconduct. (R. pp. 31-32). The circuit court concluded its analysis as follows:

> [T]he 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.

(R. p. 32). Contrary to Appellants' suggestion, the circuit court was not required to list out the lesser sanctions it considered and explain why they were inadequate. And again, if Appellants wanted the circuit court to do that in this case, they should have asked. Regardless, the sanctions order makes it abundantly clear that the circuit court exercised significant discretion before deciding to impose "the harsh sanction of striking Defendants' answer." (R. p. 21).

CONCLUSION

For these reasons, the circuit court did not abuse its discretion in determining Appellants' discovery misconduct warranted the harsh sanction of striking their answer. Respondent respectfully requests that this Court affirm the circuit court's order.

[*Signature page to follow*]

Respectfully submitted,

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June 5, 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-001681
C/A No. 2019-CP-43-01021

Kimberly Welch, as Personal Representative of the
Estate of Judy Ann Haselden,..Respondent,

v.

Michael D. Smoak and Murray Sand Co., Inc.,.. Appellants.

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on June 5, 2025, I have served all counsel in this action with a copy of the below documents in accordance with the Supreme Court's May 29, 2020 Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Final Brief of Respondents

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[*Signature page to follow*]

Respectfully submitted,

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June 5, 2025

From:	Jennifer Lisandrelli
To:	Jeff Ammons; Sarah McDaniel; Wallace Carnwath; Faith Brown; Andrew Lindemann; Jennifer (Baker) Chapman
Cc:	Murrell Smith; Fred Hanna; E. Hood Temple; Alexander S. Hogsette; tlstokes@thlawsc.com
Subject:	Haselden v Smoak 2024-001681
Attachments:	image001.png image002.png image003.png Final Brief of Respondent, 1.pdf 2025.06.05 POS Final Brief, 1.pdf

Good afternoon. Attached is Respondent's Final Brief for service in the above matter.
Thank you.

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