THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2024-001681
Case No. 2019-CP-43-1021

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

v.

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

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred in Sumter County on February 9, 2017. The Respondent's decedent, Judy Haselden, was rear-ended by a tractor-trailer driven by the Appellant Michael D. Smoak and owned by his employer, Murray Sand Company, Inc. Smoak was acting within the course and scope of his employment when the accident occurred. Smoak was hauling a load of rip-rap from Kershaw County to Edisto Beach, where Crowder Construction Company was involved in a beach renourishment project.

Judy Haselden filed her initial complaint against the Appellants on February 9, 2017 (R. 41-46), and she filed an amended complaint on September 3, 2020. (R. 363-368). Those pleadings allege claims for negligence and negligent hiring, training, and supervision. Liability for the collision is not disputed, but there are issues in dispute related to damages and medical causation. (R. 370). The accident itself involved minimal property damage, and there were no complaints of injury at the scene. Haselden, in fact, drove her vehicle from the scene.

Judy Haselden passed away in February 2024, and by order filed May 15, 2024, the Appellant Kimberly Welch, as the Personal Representative of the Estate of Judy Haselden, was substituted as the Plaintiff. (R. 35-37).

On March 22, 2023, Haselden filed a motion for sanctions requesting that the trial court strike the Appellants' answer and hold them in default. (R. 375-388). A hearing was held before Circuit Court Judge George M. McFaddin, Jr. on August 4, 2023. (R. 676-733). Thereafter, on February 12, 2024, Judge McFaddin issued a sanctions order granting the motion for sanctions and striking the Appellants' answers thereby holding them in default. (R. 14-34).

The Appellants filed a motion for reconsideration which was denied by form order filed September 8, 2024. (R. 38-40). The Appellants thereafter filed a timely appeal to this Court.

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, 489 S.E.2d 679, 681 (Ct. App. 1997). "A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Id*. "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*.

ARGUMENTS

I. The trial court committed errors of law and abused its discretion in granting the Respondent's motion for sanctions and striking the Appellants' answer thereby holding them in default.

As a discovery sanction, the trial court struck the Appellants' answers and has held both Appellants in default. The Appellants dispute that their conduct during discovery warrants sanctions, and even if some sanction was warranted, the trial court abused its discretion in awarding the harshest sanction available. The trial court failed to properly exercise its discretion in considering lesser and more narrowly tailored sanctions as available to address the misconduct as found. For that reason, the Appellants seek a reversal of the trial court's sanctions order.

Under South Carolina law, "[t]he imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Karppi v. Greenville Terrazzo Co.*, *Inc*., 327 S.C. 538, 489 S.E.2d 679, 681 (Ct. App. 1997). "A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred." *Id*. "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*.

It is well settled that "Rule 37 expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests." *Karppi*, 489 S.E.2d at 682, *citing* Rule 37(b)(2)(C) and Rule 37(d), SCRCP. "However, when the court orders default or dismissal, or the sanction itself

results in default or dismissal, the end result is nevertheless harsh medicine that should not be administered lightly." *Id*. As this Court has further recognized, "the sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation, Inc. v. Head Balloons, Inc*, 303 S.C. 152, 399 S.E.2d 439, 440 (Ct. App. 1990). Additionally, it is imperative that "the sanction should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast." *Id*. Moreover, "[a] sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party." *Karppi*, 399 S.E.2d at 684 (Anderson, J., concurring). As Judge Anderson further explains in his concurrence in *Karppi*,

> The sanction of striking pleadings should not be lightly used, since it can amount to judgment against the delinquent party without an opportunity to be heard on the merits. A default judgment is clearly a drastic remedy and should be resorted to only in extreme situations, as where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders or persists in an outright refusal to comply with discovery obligations, or where there is a series of episodes of nonfeasance on the part of counsel amounting to a near total dereliction of professional responsibility and going well beyond ordinary negligence.

Id.

It is also well-settled that a failure to exercise discretion amounts to an abuse of that discretion. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987) ("[w]hen the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred"). The case of *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is instructive. In that case, this Court explained as follows: "Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A

failure to exercise discretion amounts to an abuse of discretion." 495 S.E.2d at 216. *See also*, *State v. Smith*, 276 S.C. 494, 280 S.E.2d 200, 202 (1981) ("the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised").

In the case at bar, the trial court used a "shotgun blast" and abused its discretion in failing to consider lesser and more narrowly tailored sanctions for the discovery misconduct found. This is most evident because the trial court failed to consider or address the nature of the claim, the Appellants' admitted liability for the motor vehicle accident, the significance of the discovery at issue to any issues truly in dispute for trial, and the impact of the Appellants' insurance coverage on the Respondent's claims of prejudice. The trial court's lack of discretion in those aspects of the sanctions analysis demonstrates an abuse of discretion warranting a reversal of the trial court's imposition of the harshest sanction available.

Additionally, the trial court abused its discretion by failing to differentiate between the Appellants. The trial court awarded the harshest sanction available against the Appellant Michael D. Smoak; yet, the court never identified any discovery abuse or misconduct actually committed by Smoak.[1] This is particularly critical because this Court in *Karppi* found an abuse of discretion where the trial court failed to differentiate between multiple parties or consider the impact on multiple-party litigation. This Court, in fact, explained that "[t]he need for the trial

[1] This Court has recognized that a litigant may be sanctioned for discovery abuses committed by his counsel. *See*, *Griffin Grading & Clearing, Inc.*, 334 S.C. 193, 511 S.E.2d 716, 719 (Ct. App. 1999) ("the acts of an attorney are directly attributable to and binding on the client"). However, that rule has no applicability here. The trial court found no evidence of any discovery-related wrongdoing by the Appellants' counsel. Specifically, the trial court ruled as follows: "Before discussing this ruling in more detail, the Court notes that Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel. Based on its review of the record, the Court agrees and finds that the prejudice Plaintiff has suffered is directly attributable to Defendants' bad faith conduct." (R. 21).

court to narrowly tailor its sanction to the offense committed by a party is never more evident than in cases involving multiple parties. Where, as here, multiple parties are involved, the trial court must closely scrutinize the dynamics of the litigation and be extremely cautious before striking the pleadings of a transgressing party because of the effects such action is likely to have on the other parties." *Karppi*, 489 S.E.2d at 682.

A. The Appellants did not violate any court orders and certainly not in such a manner to warrant the ultimate sanction of striking an answer.

While it is true that Rule 37(d), SCRCP, does allow for an award of sanctions absent the violation of a court order, it is also true that existing precedent has not permitted a trial court to award the ultimate sanction of striking an answer in the absence of the violation of a court order. In fact, in *Skywaves I Corp. v. Branch Bank & Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018), this Court affirmed the trial court's refusal to strike an answer where there was no violation of a court order. In that case, the appellant cited five appellate decisions where the ultimate sanction of striking an answer was affirmed. But this Court readily distinguished those cases by pointing out that "unlike the defendants in the cited cases, BB&T and Edahl never violated a court order." 814 S.E.2d at 657.

The same is true in the present case. Contrary to the trial court's ruling, the Appellants never violated a court order. In its sanctions order, the trial court found that the Appellants "failed to comply with several orders" and cited to the August 27, 2020 order and the consent scheduling order filed May 17, 2021. (R. 28). Both of those orders require close examination.

First, the only order adjudicating an actual motion to compel filed by the parties is the August 27, 2020 Order. In its sanctions order, the trial court ruled: "To this day, Defendants have

not complied with the Court's August 27, 2020 Order granting Plaintiff's motion to compel directing Defendants to produce all post-accident incident reports and post-accident drug testing." (R. 28). The trial court is in error. That motion to compel addressed three limited issues: (1) the existence of the alleged post-accident report prepared by the Appellant Smoak, (2) the existence of the alleged post-accident drug test given to Smoak, and (3) a dispute whether the Respondent was entitled to claim file materials from a liability insurance company. (R. 7). The resulting order "granted" the motion to compel as to the alleged post-accident incident report and the alleged post-accident drug test, but the trial court also acknowledged that "during the hearing, Defendant's counsel represented as an officer of the Court that extensive efforts to locate these documents to date has [sic] been fruitless and responsive documents are not in her possession." (R. 8). The transcript from the May 19, 2020 motion hearing also reflects that the court was advised that extensive searches had been undertaken and those documents had not been located. (R. 667-668). The August 27, 2020 Order reflects that the trial court was satisfied with the explanation for the missing documents (if they indeed existed at one time). The only affirmative relief awarded by the trial court did not even pertain to those documents, but rather to the claims file information. (R. 9). The trial court expressly ordered that "Plaintiff may seek any non-privileged and relevant materials mentioned above directly from Murray Sand, or through Travelers, by way of the subpoena process." (R. 9). There was no specific direction by the trial court for the Appellants to take further action as to any incident report or drug test.[2] Moreover, no sanctions were requested nor awarded. In fact, there was no request even for a spoliation charge, which would be an appropriate lesser

[2] In its sanctions order, the trial court noted that "Defendants have never produced an affidavit of a records custodian explaining that the test results do not exist." (R. 28). Yet, the August 27, 2020 Order did not direct the Appellants to produce such an affidavit and there was no discussion of such an affidavit during the hearing. If requested to provide such an affidavit, the Appellants would have complied and remain willing to do so. That, in fact, is an example of a lesser sanction or resolution of the issue, short of striking an answer.

sanction to be imposed where a court determines there is a willful loss or destruction of pertinent records. Certainly, there is no basis for the "shotgun blast" of striking an answer for the violation, if any, of the August 27, 2020 Order.

By way of further explanation, the Appellants have offered credible explanations for the failure to locate and produce any post-accident report or post-accident drug test. The Respondent claims that such documents exist based solely on the deposition testimony of the Appellant Smoak. Yet, based on due diligence and its search, the Appellant Murray Sand believes that Smoak's testimony was mistaken and such documents never existed. As the evidence reflects, the Appellants' counsel made multiple trips to Murray Sand's offices to search for such records. The Appellants, however, cannot produce what they do not have and which may never have existed.

Indeed, the most reasonable explanation for the non-existence of those documents is that Smoak misspoke because he was given a post-accident drug test following a subsequent motor vehicle accident while employed at Murray Sand. Murray Sand produced all documents in its possession relating to the subsequent accident, including a copy of a negative post-accident drug test conducted at Lowcountry Drug Screening. More importantly, the accident at issue in this case would not have required Murray Sand to administer a drug test because, pursuant to federal regulations, carriers are only required to drug test employees in post-accident situations where the employee receives a citation and there is a fatality, bodily injury with immediate medical treatment, or disabling damage to the vehicle. *See*, 49 C.F.R. § 382.303. In this case, the Respondent did not die, did not undergo immediate medical treatment for bodily injury, and was able to drive her vehicle from the scene with a slightly bent bumper. As photographic evidence confirms, the property damage was minimal. (R. 545). Furthermore, there is no evidence that the investigating officer suspected Smoak was under the influence. (R. 547-548). Therefore, it is most plausible that

Murray Sand did not require Smoak to submit for testing and that Smoak was thinking of the later accident when he testified that there was a drug test. Consequently, improper speculation about the existence of these documents cannot support the severe sanction of striking an answer, particularly where there are available lesser and more appropriate sanctions, such as a spoliation charge, if warranted. In deciding the appropriate sanction, it is also important to recognize that the Appellants' liability for the motor vehicle accident is not disputed, and hence, these documents are not relevant to any issues truly in dispute for trial.

Second, the trial court found that the Appellants violated the written discovery deadline of September 1, 2021, as contained in a consent scheduling order dated May 17, 2021. (R. 11-13). The trial court found that "Defendants' violation of this order was particularly egregious" because "Defendants produced over 5,000 documents after the discovery deadline and after representing to the Court and Plaintiff on multiple occasions that they had conducted exhaustive searches and produced all documents in their possession." (R. 28). However, the deadline in the consent scheduling order expressly stated: "Written discovery shall be completed no later than September 1, 2021. This shall not limit the parties from supplementing written discovery responses, nor shall it limit the parties from serving Requests to Admit pursuant to S.C. Code Ann. 19-1-60." (R. 11). The 5,000 pages of documents to which the trial court referred were produced on September 30, 2021, which was *less than a month* after the deadline.[3] Moreover, supplemental discovery responses were expressly provided for and required by the language of the consent scheduling order. And finally, it is important to review what was actually included in the 5,000 pages of documents. They consisted primarily of 3,096 pages of the Respondent's medical records obtained

[3] The trial court called it "5,000 documents," but in reality, it was 5,000 pages of documents.

by way of multiple subpoenas to medical providers,[4] 763 pages of documents received by subpoena from the South Carolina Youth Advocate Program (SCYAP),[5] and 763 pages of tax returns. By the trial court's own count, there were less than 350 pages of "new" documents pertaining to subjects other than medical records, tax returns, and SCYAP records.

Notably, with respect to both orders that the trial court found were violated, the Appellants were never warned about the possibility of having their answer struck by the court as happened in *Griffin Grading & Clearing, Inc.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), and in most other similar appellate decisions. *See, Davis v. Parkview Apartments*, 409 S.E. 266, 762 S.E.2d 535, 541 (2014) (stating prior to dismissal the trial court admonished a party that their continued non-compliance with court orders could result in dismissal and the trial court said explicitly "he was strongly leaning towards dismissing the cases"); *Barnette v. Adams Brothers Logging, Inc.*, 355 S.C. 588, 586 S.E.2d 572, 576 (2003) (plaintiff was given strict deadline to comply with an order and warned from the bench that failure to obey "may well result in dismissal"); *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830, 832 (Ct. App. 2008) (noting "the trial court warned the [party] … it was inclined to strike the [party's] Answer" and despite the warning the party still failed to submit a requested Order within a court- imposed deadline); *Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883, 884 (Ct. App. 1997) (finding a court order prior to dismissal specifically stated if discovery was not answered within thirty days, the plaintiff's complaint would be dismissed). Instead, without any prior warnings, the initial and only sanction awarded by the trial court was the ultimate sanction of striking the answer. Clearly, the trial court did not consider any lesser available sanctions which would have been more tailored to the violations it found, and on that basis, among

[4] Of the fourteen subpoena responses produced, eight had been previously produced in other supplementation.

[5] The records received from SCYAP were actually received on September 29, 2021, the day before they were produced.

others, the trial court abused its discretion. The trial court's finding of an "egregious" violation of the consent scheduling order is not supported by the evidence, and as discussed at length, there was no violation of the August 27, 2020 Order pertaining to the post-accident incident report or drug test. To reiterate as well, the trial court never identified any discovery abuses committed by the Appellant Smoak, but the court nonetheless struck his answer as well and, contrary to *Karppi*, never considered the impact of the sanction on multi-party litigation.

B. The trial court abused its discretion in concluding that the production of three pages of Blue Max Trucking records on September 30, 2021 warranted the striking of the Appellants' answer.

The primary focus of the trial court's finding of discovery misconduct warranting the ultimate sanction of striking the Appellants' answer is the production on September 30, 2021 of three pages of records relating to Blue Max Trucking. Those documents consist of a two-page spreadsheet showing deliveries of rip-rap to the Crowder Construction project from January 30, 2017 through February 22, 2017, and a one-page invoice totaling $52,756.62 to Blue Max Trucking. (R. 549-551). Without supporting evidence, the trial court concluded that the "Defendants intentionally withheld the identity of a potential defendant, Blue Max Trucking, from Plaintiff until after the statute of limitations expired" on February 9, 2020. (R. 21). The trial court thus ruled: "because Defendants' discovery violations denied Plaintiff the opportunity to pursue a claim against Blue Max Trucking, this factor favors the harsh sanction of striking Defendants' answer." (R. 22).

The trial court abused its discretion in making that ruling for several reasons. To recap, our Supreme Court has held that "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." *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974).

First, there is no evidence to support a finding of intentional misconduct or willfulness by either Appellant. In fact, as previously stated, there is no evidence whatsoever of any misconduct by the Appellant Smoak. There is no evidence that Smoak had possession of or withheld any records related to Blue Max Trucking. There is, in fact, no evidence that Smoak was even aware that the deliveries of rip-rap were for Blue Max Trucking. The striking of Smoak's answer is clearly in error and an abuse of discretion.

The same is true as to the Appellant Murray Sand. The Respondent, who has the burden as the moving party to prove bad faith, willful disobedience, or gross negligence, presented no testimony from any representative of Murray Sand. *See*, *Griffin Grading,* 511 S.E.2d at 719 ("[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross negligence to its rights to justify the sanction"). With her motion for sanctions, the Respondent filed the deposition of Michael Smoak, but no testimony from Murray Sand. The Respondent, in fact, scheduled and cancelled the Rule 30(b)(6) deposition of Murray Sand on several occasions. Thus, the record contains speculation but no evidence, and speculation is not evidence. *See*, *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822, 831 (Ct. App. 2012).

Second, the evidence does not support a finding that the Respondent made a request for information about Blue Max Trucking or would have revealed the involvement of Blue Max Trucking prior to February 9, 2020, assuming that is the date that the statute of limitations expired. The statute of limitations arguably expired on a later date had a discovery rule argument been made.[6] Nonetheless, assuming that the Respondent had until February 9, 2020 to sue Blue Max

[6] The record shows the motor vehicle accident took place on February 9, 2017. (R. 547). The Respondent's complaint was not filed until May 21, 2019, over two years after the

Trucking, the Respondent needed to show that her discovery served prior to that date sought information about Blue Max Trucking. In its sanctions order, the trial court ruled there were five of the Respondent's initial requests for production to which the Blue Max Trucking documents were responsive:

> 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, 2018.
>
> 47. A copy of all trip reports pertaining to the trip in which the tractor trailer was engaged on February 9, 2017.

(R. 24). The Appellants dispute that. As for request #14, requesting all faxes, the Blue Max Trucking documents do not bear any hallmarks of being faxed such as fax codes or transmission details typically seen in faxed documents. As to request #20, the Appellants understood "pickup and delivery records" in the general trucking context envisions documents from the date of the trip including items such as loading and unloading records, bills of lading, and the like. In this respect, this request essentially seeks the same materials as request #24, with the exception of expense sheets and interchange records. Interchange records are inapplicable because the trailer was never changed during the trip. Further, expense sheets generally refer to the driver's expenses incurred

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accident. (R. 41). The statute of limitations arguably ran on February 9, 2020, absent consideration of the discovery rule.

during the course of the trip. Request #21 requests trip summaries which typically consist of logbooks or mileage reports. Finally, "trip reports" likely refer to hours of service reports or logbooks, although the request is vague. Certainly, none of these requests would have put the Appellants or their counsel on notice that the Respondent was exploring potential agency issues or that it was necessary to produce internal spreadsheets or invoices. *See,* Rule 34(b), SCRCP (stating requests for production must "describe each item and category with reasonable particularity"). Notably, no specific requests were made for records of payment for services, contracts for services, records of who paid them, who they hauled for, or any similar matters. In sum, it was unreasonable to conclude that these requests required production of the Blue Max Trucking documents.

Accordingly, the Appellants were under no duty to produce the three-page Blue Max Trucking documents prior to the expiration of the statute of limitations. The discovery situation as it stood when the statute arguably expired in February 2020, was that Murray Sand had responded to the Respondent's first sets of interrogatories and requests for production, and none of the initial discovery would have been specific enough to require production of the Blue Max Trucking documents, even had they been located at that time. It is also important to point out that the Respondent's counsel made no argument at that time that the responses to the foregoing requests were deficient. Instead, her counsel took issue only with the existence/non-existence of the alleged post-accident drug test and post-accident report. In other words, the Respondent's counsel never claimed the initial responses were deficient because they did not provide records of payment, invoices, or contracts, nor did they request supplemental responses to provide any such information, presumably because the original requests were not tailored or intended to seek such information and

documentation.[7] Simply put, it did not appear that the Respondent sought to discover any agency issues in her initial discovery.

Moreover, despite disagreement whether the three pages of Blue Max Trucking documents were responsive to the first sets of discovery, the fact is those records were not discovered until 2021, and there is no evidence to refute that. As explained to the trial court, the Appellants' counsel had already made multiple trips to locate other documents and was working with a company representative who had not been employed by Murray Sand at the time of the accident. (R. 723-724). The three pages of Blue Max Trucking documents were eventually discovered once the Respondent began demanding company financial records in lead up to her abortive Rule 30(b)(6) deposition. Thus, there is no evidence that counsel or any representative of Murray Sand reviewed the Blue Max Trucking documents at the time they responded to Respondent's initial discovery requests and consciously or intentionally chose not to produce them.

The trial court was also "persuaded" by the Respondent's argument that "the Defendant withheld information about Blue Max Trucking for self-serving reasons" and specifically "that Murray Sand likely agreed to indemnify and hold Blue Max Trucking harmless from any liability arising from Murray Sand's actions on behalf of Blue Max Trucking." (R. 26). Once again, the trial court relied on pure speculation and no evidence in making that ruling. There is no evidence of any hold harmless agreement with Blue Max Trucking, or for that matter, any agreement whatsoever between those entities. In addition to being unsupported by evidence (as opposed to speculation), that "finding" also defies common sense. If Blue Max Trucking were entitled to

[7] The Respondent cites its March 2021 subpoena to Crowder Construction as evidence that should have put the Appellants on notice it wanted to explore agency relationships. However, that subpoena was served more than a year after the statute of limitations arguably expired.

indemnification, that would be covered by Murray Sands' commercial liability coverage, and hence, there would be no reason to "protect" Blue Max Trucking or conceal its involvement. As the record shows, Murray Sands has $2 million combined of primary and excess insurance coverage, which is more than adequate for the potential loss in this litigation.[8] Furthermore, there is clearly no evidence of any "self-serving reasons" for the Appellant Smoak to withhold production of the Blue Max Trucking documents to warrant the ultimate sanction of having his answer stricken.

In short, the trial court erred in concluding that the Respondent had proven that any failure to produce the three pages of Blue Max Trucking documents was the result of bad faith, willful disobedience, or gross negligence committed by *both* Appellants, Michael Smoak included.

Finally, the trial court also abused its discretion on the prejudice prong of the analysis. The trial court concluded that the Respondent suffered from "irreparable prejudice" because she was barred from joining Blue Max Trucking as a party-defendant to this litigation. That conclusion assumes that Blue Max Trucking had a "slam dunk" statute of limitations defense had the Respondent attempted to amend in or about September 2021 to add Blue Max Trucking to the litigation. No such attempt was made, and there is no judicial determination that the discovery rule would not have tolled the statute of limitations until the Respondent learned of the involvement of Blue Max Trucking. The trial court never explains why the discovery rule would not have tolled the statute of limitations, particularly if the Respondent could show she exercised due diligence to try to learn its identity. The trial court found that the initial discovery requests were sufficiently tailored to learn of the Blue Max Trucking documents and its involvement. If that truly were the case, then the discovery rule would have tolled the statute of limitations. Frankly, the Respondent never provided

[8] As evidence of the Respondent's valuation of her claims in this litigation, the Court may take judicial notice of the Offer of Judgment filed August 4, 2023, where the Respondent made an offer of judgment of $600,000, which is well within its liability coverage. (R. 518-519).

a reasonable justification for not at least attempting to join Blue Max Trucking and making a discovery rule argument for tolling.[9] Her failure to do so suggests that there is no real prejudice to her case, and this argument is just a ruse to obtain the striking of the Appellants' answers.

In addition, it is highly speculative that the Respondent even had a valid claim against Blue Max Trucking. South Carolina law is well-settled that a principal "is not vicariously liable for the negligent acts of an independent contractor." *Ruh v. Metal Recycling Services, LLC*, 439 S.C. 649, 889 S.E.2d 577, 579 (2023), *citing Rock Hill Telephone Co. v. Globe Communications, Inc.*, 363 S.C. 385, 611 S.E.2d 235, 238 (2005). The facts of the accident in this case are undisputed. As Michael Smoak testified, the Respondent stopped at a yellow light at an intersection. Smoak, as the following vehicle, was unable to stop in time and collided with the rear of the Respondent's vehicle. (R. 102-103). Blue Max Trucking, as the principal which retained Murray Sand, would have no liability for the motor vehicle accident. Relying on *Ruh*, a 2023 decision in which a claim for negligent selection of an independent contractor was first recognized in South Carolina, the trial court found that the "Plaintiff may have determined a viable negligent selection claim against Blue Max Trucking existed." (R. 31-32).[10] The trial court did not examine whether there was a legal basis in law and fact for such a claim, and in fact, the court acknowledged that the Respondent's "investigation may have revealed such a claim was not viable." (R. 32). Yet, despite the admittedly

[9] It appears that the trial court suggested that an attempt to join Blue Max Trucking "could result in Plaintiff having to reimburse fees and costs to Blue Max Trucking for having to defend against same." (R. 31). That is unsupported in the law. Defendants prevail routinely on statute of limitations defenses without obtaining an award of attorney's fees and costs. Certainly, the assertion that the statute of limitation was tolled by the discovery rule where the Respondent exercised due diligence to learn of Blue Max Trucking's involvement, even if ultimately unsuccessful, would not have resulted in an award of attorneys' fees and costs as a Rule 11 sanction or the like.

[10] Since *Ruh* was not decided until June 21, 2023, it is highly questionable whether the Respondent would have even brought a negligent selection of independent contractor claim against Blue Max Trucking on or before February 9, 2020.

speculative nature of a potential claim against Blue Max Trucking, the trial court found sufficient prejudice to the Respondent to impose the harshest sanction available – striking the Appellants' answers. That clearly constitutes an abuse of discretion.

Additionally, there is no indication from the sanctions order that the trial court ever considered and rejected a lesser available sanction – a sanction more properly and narrowly tailored to the alleged prejudice and one that did not "go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Balloon Plantation,* 399 S.E.2d at 440. To borrow this Court's language, the sanction should be a "rifle-shot" and not a "shotgun blast." *Id.* Remarkably, the trial court stated in a conclusory manner that "[u]nder the circumstances of this case, that prejudice cannot be remedied by any lesser sanction." (R. 32). The trial court similarly declared that "the severe sanction of striking Defendants' answer is warranted because nothing else would be adequate." (R. 32). Yet, the trial court never mentions what "lesser sanction" it considered and rejected as inadequate or why any such lesser sanction was indeed inadequate.[11] The obvious reality is that the trial court never considered a lesser sanction – one more narrowly tailored to the alleged prejudice. This is the classic case, as in *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), where "[a] failure to exercise discretion amounts to an abuse of discretion." 495 S.E.2d at 216.

Frankly, if the trial court truly found that the Respondent was prejudiced because she was barred from bringing a viable claim against Blue Max Trucking, a lesser sanction narrowly tailored to that harm was available. As the Appellants argued, there is no prejudice to the Respondent for the added reason that this is an admitted case of negligence and there is $2 million in combined

[11] In a related context, the South Carolina Supreme Court has explained that an exercise of discretion requires proof that the decision-maker was "faced with alternatives, actually weighed competing considerations and made a conscious choice." *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 60 (1997).

primary and excess liability insurance coverage. (R. 712). That coverage is more than adequate to compensate the Respondent for her loss, even if she were to recover in excess of the $600,000 sought by an offer of judgment in August 2023. (R. 518-519). Yet, a lesser sanction would have been to hold the sanctions in abeyance until final judgment, and if a jury awards more than $2 million, then the court could examine whether there was indeed prejudice by the Respondent not being permitted to pursue some type of negligent selection of independent contractor claim against Blue Max Trucking. However, if the jury awards less than $2 million, clearly there was no prejudice – certainly not prejudice that warrants a "gunshot blast" – that being the ultimate sanction of striking an answer.

In sum, as the foregoing discussion has outlined, the trial court committed numerous errors of law that rise to the level of an abuse of discretion. For each of those myriad of reasons, and particularly the totality of the circumstances, the sanctions award should be reversed. If this Court concludes that there are discovery abuses committed by one or both Appellants, despite the paucity of evidence, then clearly a lesser and more narrowly tailored sanction which is a "rifle-shot" that addresses the specific harm would be warranted, but certainly not the striking of the Appellants' answers.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Michael D. Smoak and Murray Sand Company, Inc. respectfully request that the Court reverse the Order of Circuit Court Judge George M. McFaddin, Jr., filed February 12, 2024, and the Form Order denying a subsequent motion for reconsideration and to vacate the sanctions imposed by the trial court in those orders.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Final Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellants Michael D. Smoak and Murray Sand Company, Inc., does hereby certify that service of the foregoing **Final Brief of Appellants** was made upon all counsel of record by email only this the 6th day of June 2025, as follows:

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