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.

REPLY BRIEF OF APPELLANTS

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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.

In their opening brief, the Appellants Michael D. Smoak and Murray Sand Company asserted that their conduct during discovery did not warrant sanctions, and even if some sanction was warranted, the trial court abused its discretion in awarding the harshest sanction available – the striking of their answers and placing them in default. Additionally, the Appellants argued that 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.

In her response brief, the Respondent Kimberly Welch fails to demonstrate that the trial court did not abuse its discretion in awarding the harshest sanction available. To recap, in *Karppi v. Greenville Terrazzo Co.*, *Inc*., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997), this Court held that "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." 489 S.E.2d at 682. 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*.

As addressed at length in the Appellants' opening brief, the trial court committed numerous errors of law that rise to the level of an abuse of discretion. Nonetheless, even if this Court agrees

that there were discovery abuses committed by one or both Appellants, the trial court clearly abused its discretion by failing to consider a lesser and more narrowly tailored sanction, i.e., a "rifle-shot" that addresses the specific harm as opposed to a "shotgun blast" consisting of the striking of both Appellants' answers.

A. Trial Court Clearly Erred in Striking Appellant Smoak's Answer Where Respondent Admits There Is No Evidence of Discovery Abuse by Smoak.

For starters, the trial court abused its discretion by failing to differentiate between the two Appellants – Michael Smoak and Murray Sand Company. The trial court awarded the harshest sanction available against the Appellant Smoak even though the court never identified any discovery abuse or misconduct *actually committed* by Smoak. The Respondent argues that that issue is not preserved because it was not raised or addressed until the motion to reconsider. She is incorrect for several reasons. First, as far as the propriety of raising that issue in the motion to reconsider, the trial court never stated that the issue was not timely or properly raised, nor did the Respondent make that timeliness argument in defense of the motion to reconsider. Second, the issue was addressed during the August 4, 2023 hearing on the motion for sanctions as part of the discussion of the *Karppi* decision. Specifically, the Respondent made the same argument on the merits that she makes in her brief, namely that *Karppi* involved "two independent defendants" and that in the case at bar, the Appellants are not "independent" in that they have the "same insurance policy" and the liability is vicarious. (R. 722-723). Thus, the issue of treating the Appellants "jointly" was discussed by the parties during the hearing, although the trial court did not expressly address that issue in its order, which made it appropriate for the Appellants to assert it as part of their motion to reconsider.

Moreover, as our appellate courts have stated, issue preservation "is not a 'gotcha' game

aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." 730 S.E.2d at 285. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). Here, the error committed by the trial court in striking the Appellant Smoak's answer in the absence of any discovery misconduct by him is certainly preserved for appellate review.

As for the merits of that issue, the Respondent's analysis is flawed and lacks merit. In essence, as argued during the hearing, the Respondent attempts to impute the alleged misconduct by Murray Sand to Smoak because they "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." *See*, Respondent's Brief, p. 28. Critically, the Respondent fully conceded that "Appellants are correct that the circuit court did not identify any discovery abuse committed by Smoak." *Id*. She tries to excuse this clear abuse of discretion by now arguing, without any supporting evidence, that "Murray Sand has always been responsible for the defense of this action." *Id*. That, even if true, makes no material difference. There is no legal basis for imputing any alleged wrongdoing by Murray Sand to Smoak. He was no longer even employed by Murray Sand during the pendency of this litigation. Moreover, the fact that they are insured under the same insurance policy is absolutely immaterial and shows the extremes to which the Respondent is going to try to justify striking Smoak's answer when, by her own admission, there is no evidence Smoak did anything wrong. Importantly, the fact that both Appellants are represented by the same counsel makes no difference

because the trial court explicitly 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). Therefore, there are no misdeeds by Smoak's counsel for which he may be found responsible. In short, as the Respondent readily admits, there is no finding or evidence that Smoak committed any discovery abuses, and on that basis, it is clear that the trial court abused its discretion in striking Smoak's answer.

B. Trial Court Abused its Discretion in Failing to Consider and Rule Out Any Lesser, More Narrow Sanction

As to another key point, the Respondent makes a weak preservation argument. To reiterate, it was incumbent on the trial court, before imposing the harshest sanction available, to make the appropriate findings to show that the sanction imposed was "reasonable" and 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. In effect, the trial court must show, in the words of this Court, that it imposed a "rifle-shot" rather than a "shotgun blast." *Id*. Thus, the Respondent was required to show and the trial court was required to find that there are no lesser sanctions available to address the misconduct found. Despite the Respondent's apparent contention to the contrary, that issue *was* raised and litigated in the trial court, and in fact, the trial court made a conclusory and unsupported finding that "[u]nder the circumstances of this case, that prejudice cannot be remedied by any lesser sanction." (R. 32). The trial court similarly declared without explanation that "the severe sanction of striking Defendants' answer is warranted because nothing else would be adequate." (R. 32). Thus, it is

unclear how the Respondent now argues that this critical element of the analysis required by the trial court before imposing the harshest sanction is somehow not preserved for appellate review. It was obviously an issue raised to and addressed by the trial court, albeit not correctly.

To that point, the trial court abused its discretion by failing to exercise its discretionary authority. Although the trial court states that there was no lesser sanction, the court provides no findings nor any analysis to show that it considered and rejected any lesser sanction. Instead, it stated in a conclusory manner that there is none. That makes it impossible for an appellate court to do its job and determine whether discretion was actually exercised and whether any error of law occurred. This Court's decision in *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is controlling. In *Samples*, this Court pointed out that the trial court's ruling "in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized." 495 S.E.2d at 216-217. That Supreme Court test provides that "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*." 495 S.E.2d at 217, *citing State v. Smith,* 276 S.C. 494, 280 S.E.2d 200, 202 (1981). (Emphasis added).

However, it is the highlighted language above that was not followed by the trial court in the case at bar. Notably, in addressing the merits, the Respondent could not say in her brief what lesser sanctions were considered by the trial court and ruled out. Instead, the Respondent baldly claims that "the circuit court was not required to list out the lesser sanctions it considered and explain why they were inadequate." *See*, Respondent's Brief, p. 31. Not surprisingly, no authority is cited for that proposition, and there is none. In fact, that proposition is contrary to the very "Supreme Court analysis" addressed in *Samples*. Logically speaking, it makes sense that a court, when required to

exercise discretion, should describe its decision-making and particularly, in this context, the lesser sanctions considered and deemed inadequate and the reasons for that conclusion. Only such factfinding will demonstrate that discretion was indeed exercised and that the exercise of discretion was not abused or otherwise grounded on an error of law.

This is not unusual. In other contexts where discretion is exercised, our appellate courts require a showing that discretion was appropriately exercised. For example, the 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). Moreover, for a dismissal based on a failure to prosecute, this Court adopted the federal four-prong test, and the final prong requires the trial court to consider "the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 902, 904 (Ct. App. 2006). In deciding the appropriate sanction for discovery abuse, the federal test generally requires an appellate court to examine "whether the district court explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate." *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995). *Accord*, *In re Nichols & Associates Tryon Properties, Inc.*, 36 F.3d 1093, *4 (4th Cir. 1994) (table) ("Although the court's order does state that it considered the effectiveness of less drastic sanctions, it does not identify which alternate sanctions it considered or explain why they could not remedy the situation as effectively as a default judgment. We find that such a conclusory statement does not satisfy this court's requirement that a trial court consider the effectiveness of less drastic sanctions").

In their opening brief, the Appellants pointed out that a less drastic sanction narrowly tailored to that harm was certainly available. As the Appellants argued, if the trial court truly found

that the Respondent was prejudiced because she was barred from bringing a viable claim against Blue Max Trucking, there is no prejudice to the Respondent because this is an admitted case of negligence and there is $2 million in combined 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" consisting of the ultimate sanction of striking an answer.

Notably, the Respondent did not discount the aforementioned as a less drastic sanction which would have been much better "aimed at the specific misconduct of the party sanctioned" than the striking of both Appellants' answers. *Balloon Plantation*, 399 S.E.2d at 439. Rather, the Respondent argues that calling this a case of "admitted liability" is "misleading," but the record shows that the Appellants admitted in the Answer to Amended Complaint to "simple negligence" and reserved the right to dispute causation for the decedent's injuries. (R. 370). The Respondent also states that the Appellants "suggested" in their opening brief that the decedent "improperly" stopped at a yellow light. The brief does not suggest any fault on the decedent's part. Moreover, the Respondent disputes whether the $2 million in liability coverage is sufficient, but she makes no mention of her offer of judgment in the amount of $600,000. That offer of judgment is strongly suggestive as to the Respondent's valuation of the damages. At any rate, the trial court abused its discretion in not considering whether it was appropriate to hold sanctions in abeyance to see

whether a jury returned a verdict in excess of the existing insurance coverage. At that point, the court would know if the Respondent was truly prejudiced by her failure to join Blue Max Trucking as an additional party-defendant rather than relying on pure speculation at this point.

C. Respondent's Claimed Prejudice is Highly Speculative and Doubtful

The Respondent argues that "[t]he prejudice caused by Appellants' failure to disclose their relationship with Blue Max Trucking cannot be overstated." *See*, Respondent's Brief, p. 15. Yet, in reality, it is entirely overstated. 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. However, there is no evidence to suggest that the Respondent had a viable claim against Blue Max Trucking. As the Appellants pointed out in their opening brief, 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 Respondent does not refute that point. This is a rear-end motor vehicle collision. Quite simply, a principal is not liable for the simple negligence of a driver employed by its retained independent contractor who failed to stop in time when the leading vehicle stopped at a yellow light and was rear-ended.

The Respondent attempts to use the 2023 decision in *Ruh*, in which a claim for negligent selection of an independent contractor was first recognized in South Carolina, to suggest that the Respondent would have brought a viable negligent selection claim prior to February 9, 2020, which is the three-year mark after the accident. However, that is, at the very least, highly speculative, and based on the procedural history of the case, it is highly doubtful. Notably, by the date of February 9,

2020, the Plaintiff had not even pursued any negligent entrustment or negligent hiring or retention claim against Murray Sand based on any driving history of Michael Smoak. (R. 41-45). The Respondent did not amend to include such allegations until after February 9, 2020, when she filed her Amended Complaint on September 3, 2020. (R. 363-368). Nonetheless, the claim for negligent selection of an independent contractor was not part of South Carolina jurisprudence before February 9, 2020, and given the failure to plead a negligent entrustment claim before that date, it is highly speculative and doubtful to predict that the Respondent would have alleged a claim for negligent selection of an independent contractor before that date. Importantly, 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 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 constitutes an abuse of discretion.

D. Reliance on Pure Speculation in Place of Admissible Evidence is Misplaced

Finally, the Appellants point out that the Respondent, like the trial court, repeatedly makes assumptions and inferences that are not based upon any evidence in the record but rather are premised on pure speculation. In fact, such raw speculation permeates the Respondent's arguments.

For instance, the Respondent argues that the trial court should be allowed to speculate that the Appellants "withheld information about Blue Max Trucking for self-serving reasons." (R. 26). First, even the Respondent cannot show and does not even try to show that Michael Smoak withheld any information about Blue Max Trucking. Again, the striking of Smoak's answer is a clear abuse of discretion. Moreover, as to Murray Sand, the Respondent writes "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." *See*, Respondent's Brief, p. 14. However, by the Respondent's own admission, there is no evidence to support that premise. It is important to remind the Court that the Respondent filed the deposition of Michael Smoak in support of her motion, but no deposition testimony was submitted for Murray Sand. The Respondent, in fact, scheduled and cancelled the Rule 30(b)(6) deposition of Murray Sand on several occasions. Thus, the Respondent had the opportunity to obtain the sworn testimony from Murray Sand and declined to do so. Her own failure to conduct the needed depositions to establish the relief she sought with her motion for sanctions does not give her a pass on meeting her burden of proof. It certainly does not justify or allow her reliance on pure speculation.

Likewise, and most importantly, there is no evidence to support a finding of intentional misconduct or willfulness *by either Appellant*. Again, the Respondent concedes that "Appellants are correct that the circuit court did not identify any discovery abuse committed by Smoak." *See*, Respondent's Brief, p. 28. Thus, the striking of Smoak's answer is clearly in error and an abuse of discretion. As to Murray Sand, the Respondent also presented no evidence of bad faith or willful disobedience by any representative of Murray Sand. To reiterate, the burden of proof falls on the Respondent. The Respondent never acknowledges that she had the burden of proof, but that is well established. *See*, *Griffin Grading & Clearing, Inc.*, 334 S.C. 193, 511 S.E.2d 716, 719 (Ct. App. 1999) ("[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"). To reiterate, the Respondent presented no sworn testimony or other evidence to support her claim that Murray Sand personnel acted in bad faith or with willful disobedience or with gross negligence. Importantly, the record contains speculation but no evidence, and as this Court has

explained, speculation is not admissible evidence. *See*, *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822, 831 (Ct. App. 2012).

Recognizing this lack of real evidence to support her position and in an apparent attempt to try to uphold the trial court's sanctions award, the Respondent resorts to the new strategy of attacking the actions of defense counsel. For instance, the Respondent now refers to "[t]he September 2021 production" as "an improper 'document dump' designed to conceal responsive information." *See*, Respondent's Brief, p. 8. She point blank claims that the so-called "document dump" was "intended to conceal the three-page Blue Max Trucking document that Appellants had withheld up to that point." *Id*. Yet, she presents no evidence that either Smoak or Murray Sand had any role in the "document dump" or tried to conceal anything. That is pure speculation. The same is true with the generalized allegation that the Appellants "misled the Court and Plaintiff." (R. 21). That is also pure speculation. The Appellants made no representations to the Court, except what was contained in the Smoak deposition transcript. The Respondent, at least, admits she has no evidence of Smoak's involvement, but as the record reflects, she has no evidence of Murray Sand's involvement either.

Additionally, and most importantly, the Respondent agreed in the trial court that the defense counsel did no wrong. In her motion for sanctions, the Respondent writes: "Plaintiff does not contend the discovery abuses in this case were orchestrated by defense counsel." (R. 375). Likewise, in its order, 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). That finding has not been appealed by the Respondent, and accordingly, it constitutes the law of the case.

See, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("an unappealed ruling, right or wrong, is the law of the case"). The Respondent cannot now on appeal take a different position and begin to blame defense counsel because she cannot otherwise meet her burden of proving bad faith or willful disobedience by Michael Smoak or Murray Sand with admissible evidence as opposed to pure speculation. *See*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from "chang[ing] his theory on appeal").

In sum, as outlined in the Appellants' opening brief and as supplemented herein, the trial court committed numerous errors of law that rise to the level of an abuse of discretion. For each of those 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 absence of admissible evidence as opposed to pure speculation, then clearly a less drastic 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. That was an abuse of discretion that should be overturned.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Michael D. Smoak and Murray Sand Company, Inc. respectfully renew their 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 Reply 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 Reply 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 Reply 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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