EXHIBIT 2

STATE OF SOUTH CAROLINA COUNTY OF JASPER	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
MARK W. MCGILTON, Plaintiff, v. 1223 MAY RIVER ROAD, LLC, D.R. HORTON, INC., AND LOTTY TRUCKING, LLC F/K/A RAMOS TRUCKING, LLC, Defendants.	CIVIL ACTION NO. 2021-CP-27-00069 **ORDER GRANTING IN PART AND DENYING PART DEFENDANT'S MOTION TO RECONSIDER, ALTER, OR AMEND**
1223 MAY RIVER ROAD, LLC, Third-Party Plaintiffs, v. KENNETH SCOTT BUILDERS, Inc., Third-Party Defendants.	

This matter comes before the Court on Defendant D.R. Horton's Motion to Reconsider, Alter, or Amend the Order Granting Plaintiff's Rule to Show Cause, striking Defendant's Answer, and Denying Defendant's Motion for Sanctions. This Court Amends its previous Order as follows:

DISCUSSION

This Court has addressed discovery issues involving D.R. Horton numerous times; D.R. Horton was previously held in contempt for discovery abuse in this matter. The Court of Appeals has explained:

> The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." *State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (quoting

> *Hodge v. Myers*, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

Samples v. Mitchell, 329 S.C. 105, 113-114, 495 S.E.2d 213, 217 (1997).

The imposition of sanctions for discovery abuse is generally entrusted to the sound discretion of the circuit court. *Downey v. Dixon*. In deciding on an appropriate sanction, the court should consider a sanction that will "serve to protect the rights of discovery provided by the Rules." *Id.* (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970) ("[O]ver-leniency [in the imposition of sanctions] is to be avoided where it results in inadequate protection of discovery."); C. Wright, *The Law of Federal Courts* § 90 at 596 (4th ed. 1983) ("Without adequate sanctions, the procedure for discovery would be ineffectual."); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976) (dictum) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.").

Rule 37, SCRCP, "expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion, for a party's failure to respond to certain discovery requests." *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997) (citing Rule 37(b)(2)(C) and (d), SCRCP). *See*, *also*, *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) ("[p]ursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may 'make such orders in regard to the failure as are just,' including an order dismissing the action or proceeding, or any part thereof."); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg.*

Co., 334 S.C. 193, 198-199, 511 S.E.2d 716, 718-719 (Ct. App. 1999) (affirming trial court's order to strike and render default judgment where the record was full of multiple egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery).

An order striking pleadings is an appropriate sanction when a party fails to comply with multiple court orders and when a "clear and explicit warning of the consequences if the defendant failed to comply with the order of the Court" was rendered by the trial court. *Griffin Grading* at 199, 511 S.E2d at 719. *See also Davis v. Parkview Apartments*, 409 S.C. 266, 762, S.E.2d 535 (2014) (upholding an order of dismissal as a sanction for plaintiff's repeated failure to comply with discovery orders); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (affirming the sanction of striking the appellant's answer and declaring him in default where evidence supported the circuit court's finding that the appellant willfully destroyed evidence and willfully violated a temporary restraining order); *Halverson v. Yawn*, 328 S.C. 618, 620–21, 493 S.E.2d 883, 884–85 (Ct. App. 1997) (finding that a dismissal of a complaint was appropriate when appellant failed to timely respond to discovery requests, in violation of an order).

While the sanction of striking a party's pleading is severe, South Carolina courts have done so when the situation necessitates this "harsh medicine" for discovery abuses. *See also McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, or (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant "it was inclined to strike [defendant's] answer."). "However, severe sanctions, such as the dismissal of an action, should only be imposed

in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair*, 379 S.C. at 466, 665 S.E.2d at 832.

A. Plaintiff's Rule to Show Cause

In his initial discovery requests Plaintiff served on July 22, 2021, Plaintiff asked D.R. Horton to identify all communications between D.R. Horton, Inc. and Kenneth Scott Builders, Inc. relating to Cypress Ridge. (Plaintiff's Gen. Interrog. No. 2). Plaintiff asked D.R. Horton to "Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense of this case." (Plaintiff's Stand. Interrog. No. 2). Plaintiff also asked D.R. Horton to identify all documents "which You have knowledge relating to this lawsuit." (Plaintiff's Gen. Interrog. No. 4).

Plaintiff further requested a copy of any building permits, zoning permits, or other documents obtained by D.R. Horton to develop Cypress Ridge, located at 210 Hulston Landing Rd., Bluffton, SC 29909. (Plaintiff's 1st RFP No. 11). The Plaintiff also requested "[c]opies of all documents identified, referred to, or used in your answers to Plaintiff's First Set of Interrogatories." (Plaintiff's 1st RFP No. 1).

Defendant D.R. Horton has based its defense in this case on the premise that it is merely an owner of the development and did not have a hand in the construction or act as a general contractor. (See Def. D.R. Horton, Inc.'s Mtn. for Summary Judgment as to Pl. Mark W. McGilton, and Def. D.R. Horton, Inc.'s Mtn. to Reconsider, Alter or Amend Order on its Mtn. for Summary Judgment). Defendant deposed the Plaintiff's safety and compliance expert, highlighting the contention that D.R. Horton was purportedly merely an owner of the land and not a General Contractor. Plaintiff's safety and compliance expert testified that D.R. Horton's responsibilities

over the land and development merely as owner and not acting as contractor would be very limited if existent at all.

After Plaintiff's Safety and Compliance Expert testified, in a subsequent deposition Mr. Alfredo Uriostegui, the driver of the dump truck involved in the collision in this matter, testified that he regularly worked on a site in Cypress Ridge where D.R. Horton was building its regional office building. (Uriostegui Dep. 235:14-237:23). He also testified that he loaded and removed dirt from the site where D.R. Horton was building its regional office building both across Hulston Landing Rd. to another phase of the Cypress Ridge development as "good dirt." (Uriostegui Dep. 235:14-237:23). He testified further that he removed dirt from the site where D.R. Horton was building its regional office building and hauled it off site for use at other construction sites. (Uriostegui Dep. 235:14-237:23). Finally, Mr. Uriostegui testified he regularly worked all day hauling dirt from the office building site to the townhome site at Cypress Ridge. (Uriostegui Dep. 184:23-185:3).

Based upon the later deposition testimony of Mr. Uriostegui, Plaintiff's counsel searched for any permits or plans relating to what is known as the "Commercial" phase or Office/RV Lot phase of the Cypress Ridge development within material produced by Defendant D.R. Horton. While Defendant had produced invoices and payment requests from Kenneth Scott Builders, Inc. relating to the Office/RV Lot phase (showing that Kenneth Scott Builders invoiced D.R. Horton over $300,000.00 for work), D.R. Horton produced no permits or plans relating to the Office/RV lot phase.

Plaintiff filed a Freedom of Information Act (FOIA) request for material relating to the Office/RV lot phase of development by D.R. Horton with the Town of Bluffton. In response to the FOIA request, the Town of Bluffton produced:

1. A copy of the building permit for the regional office headquarters for D.R. Horton showing that D.R. Horton was both the applicant and the General Contractor for the regional office building within the commercial phase a/k/a office and RV phase of Cypress Ridge;
2. Documents showing that plans for the site of D.R. Horton's regional office and the R/V Lot phase were one and the same;
3. Volumes of communications (hundreds if not thousands of pages) between D.R. Horton's 30(b)(6) deponents, the Town of Bluffton concerning the control, methods, permitting, and means of the development of Cypress Ridge, and several communications between Kenneth Scott Builders, Inc. and D.R. Horton's employees; and
4. Several notices of inspection and notices of violations relating to grading, surface and wastewater rules and regulations from the Town of Bluffton directed to Defendant D.R. Horton.

These documents tend to show that D.R. Horton was the general contractor of record for the very phase of work which was being completed by the Dump Truck Operator (as defined in Plaintiff's Complaint) when the Dump Truck Operator collided with the Plaintiff on his way back to Cypress Ridge to perform more work for D.R. Horton. The documents support Plaintiff's contention that D.R. Horton was the General Contractor over the phase of development from which the Dump Truck Operator mined dirt and regularly hauled loads of dirt off site. That is, these documents are evidence that Defendant D.R. Horton was acting as the General Contractor over the Dump Truck Operator, having power, control and responsibility over him.

The documents support Plaintiff's contention that D.R. Horton allowed an uninsured and un-maintained dump truck to operate on its construction site and the Operator to keep its truck on its construction site for well over a year. D.R. Horton concealed these facts from the Plaintiffs and failed to disclose these facts to the court in its motion for Summary Judgment. D.R. Horton was in possession of these very same documents but failed to produce them for over three years after Plaintiff's discovery requests to which these documents would have been responsive.

The record reflects this is the fourth time the parties have been before the circuit court regarding the Defendant D.R. Horton's failure to cooperate fully with discovery. On September 20, 2022, the Honorable Bentley Price entered an order on Plaintiff's motion to compel and for sanctions, noting the parties had reached an agreement such that "the Motion to Compel would be withdrawn without prejudice with leave to Plaintiff to file the motion again and seek sanctions should Defendant D.R. Horton not comply with Plaintiff's outstanding discovery requests, comply with continuing discovery obligations, and work in good faith with Plaintiff to resolve any further discovery disputes." (Sept. 20, 2022 Consent Order at p. 1-2).

On March 4, 2024, the Honorable Diane Goodstein sanctioned Defendant D.R. Horton, held the Defendant in contempt, and ordered:

> [Defendant] may purge the contempt before trial by engaging in no more willful discovery violations. It shall strictly abide by time deadlines. It shall cooperate fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's September 22, 2022 Order and with this Order.

(Mar. 5, 2024 Order Granting Pl.'s Mtn. to Compel, for Sanctions, and Holding D.R. Horton in Contempt at 7). Importantly, Judge Goodstein added "*I am providing D.R. Horton with a clear and explicit warning that upon a finding of any further discovery violations by any judge, that its pleadings will be subject to being struck*." (emphasis added).

On June 13, 2024, the Honorable Robert Bonds granted D.R. Horton leave to disclose experts in this matter after D.R. Horton failed to comply with the previous scheduling order and failed to disclose experts within the time frame set forth in the scheduling order. Judge Bonds specifically found "[D.R. Horton] failed to comply with the scheduling order and has not shown good cause for such violation." (Jun. 13, 2024 Order at 1).

This Court finds Defendant D.R. Horton has engaged in willful disobedience as well as gross indifference to the prior orders of this Court, resulting in prejudice to the Plaintiff and justifying said sanctions. *McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008); *see also Davis v. Parkview Apartments*, 409 S.C. 266 (2014). Judge Price's order was direct; Judge Goodstein's order held D.R. Horton in contempt and provided a clear warning; and Judge Bonds' order found D.R. Horton failed to demonstrate good cause for continuing to violate prior orders. Defendant D.R. Horton's repeated disregard for the discovery process and subsequent court orders has caused prejudice to the Plaintiff.

The Court find the appropriate sanction for D.R. Horton's repeated violation that will "serve to protect the rights of discovery provided by the Rules" is to strike its Answer and declare Defendant D.R. Horton in default. *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987); *Davis v. Parkview Apartments*, 409 S.C. 266, 762, S.E.2d 535 (2014). Accordingly, the Court GRANTS Plaintiff's Motion, strikes Defendant D.R. Horton's answer, and declares D.R. Horton in default.

B. Defendant's Motion for Sanctions

Defendant D.R. Horton moved for sanctions against Plaintiff after Plaintiff filed his Rule to Show Cause, contending Plaintiff engaged in discovery abuse by producing three expert

witnesses for depositions who were not prepared to give complete testimony. The Court respectfully rejects these arguments.

With regard to Lindsay Moore, the life care planner, D.R. Horton was aware that her report disclosed potential medical costs which were not certain at the time of the report and were dependent upon future recommendations by Plaintiff's treating physicians when D.R. Horton scheduled her deposition. Ms. Moore's deposition testimony merely removed the potential future medical costs which were uncertain from a table at the end of her report, and reserved leave to incorporate those amounts should Plaintiff and his physicians determine that medical costs indeed are necessary (and not potential) in the future. Furthermore, any issue regarding her failure to attend in person is moot since in response to Plaintiff's offer to have Ms. Moore drive to the deposition site, D.R. Horton's counsel agreed to proceed with the virtual deposition (and attended the deposition virtually himself).

With regard to Michael Fryar, Plaintiff's vocational rehabilitation assessment and earning capacity expert, D.R. Horton was aware that his report was preliminary because Mr. Fryar's written report specified that his findings were preliminary. Mr. Fryar reserved the opportunity to modify and/or supplement his findings, and at the time of the deposition and the time of his report, Mr. Fryar did not have the final disability conclusion from Plaintiff's physicians regarding Plaintiff's ability to work.

With regard to Andy Rowland, D.R. Horton insisted upon taking Mr. Rowland's deposition before D.R. Horton's Rule 30(b)(6) deposition, after being informed that many of Mr. Rowland's opinions might not be final or conclusive without being able to review the same. D.R. Horton was fully aware that Mr. Rowland needed additional information prior to formulating final conclusive

opinions, some of which turned out to be the very documents D.R. Horton failed to produce in discovery.

The Court finds there is no discovery abuse on Plaintiff's part regarding these three witnesses. This Court therefore deny D.R. Horton's request that the Court enter sanctions against Plaintiff pursuant to Rule 37, SCRCP.

CONCLUSION

For the reasons stated, the Court respectfully GRANTS in part and DENIES in part Defendant's Motion to Reconsider, Alter, or Amend its previous Order. However, the result of the previous Order remains and the Court GRANTS the Plaintiff's Motion and finds the Defendant failed to show cause why its Answer should not be struck as a sanction for repeated discovery abuse. Accordingly, the Court strikes the Defendant's Answer as permitted by Rule 37(b)(2)(C), SCRCP, and declares Defendant D.R. Horton in default.

The Court DENIES the Defendant's Motion for Sanctions.

SO ORDERED.

Jasper Common Pleas

Case Caption: Mark W. Mcgilton VS 1223 May River Road, Llc , defendant, et al

Case Number: 2021CP2700069

Type: Order/Other

So Ordered

s/ Maite Murphy 2166