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**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable David P. Caraker, Circuit Court Judge  
Civil Action No. 2022-CP-22-00739

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Appellate Case No. 2025-001074

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Ryan Cobb, Malon Cobb, Cobb Trucking, LLC, and Brandy Cobb, Respondents,

v.

David Alan Bigelow, Heritage Hauling, Inc., Boggs Contracting, Inc.,  
and Safe Shield, LLC, Defendants,

of which Boggs Contracting, Inc. is the Appellant.

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**INITIAL BRIEF OF APPELLANT BOGGS CONTRACTING, INC.**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court abuse its discretion by expressly declining to issue any sanction under any Rule of Civil Procedure but still striking Boggs Contracting's Answer based only on its "inherent power," when there is no legal basis or authority for such a sanction?
- II. Did the Circuit Court abuse its discretion by making unsupported factual findings that Boggs Contracting acted in bad faith to intentionally conceal documents in discovery and intentionally caused delays in discovery?
- III. Did the Circuit Court abuse its discretion by failing to consider a lesser sanction?
- IV. Did the Circuit Court abuse its discretion by imposing a sanction against Boggs Contracting equivalent to a finding of criminal contempt without following mandatory due process protections?
- V. Did the Circuit Court abuse its discretion because there is no reasonable factual support for the Circuit Court's finding that Respondents were prejudiced by the discovery violations they allege?
- VI. Did the Circuit Court abuse its discretion by failing to rule on whether its Order striking Boggs Contracting's Answer also affected Boggs Contracting's cross-claim against other Defendants?

## STATEMENT OF THE CASE

This is a personal injury lawsuit arising from a February 2022 commercial vehicle accident in Georgetown County. (Am. Compl. ¶ 10.) The issues on appeal arise from an April 2025 Circuit Court Order striking Appellant's Answer to Respondents' Complaint as a discovery sanction. (Order p. 12.) The Order declined to issue any sanction under Rule 37, SCRPC or any Rule of Civil Procedure but still *sua sponte* struck Appellant's Answer based on the "inherent power" of the court. (*Id.*)

Respondents filed their original Summons and Complaint on August 30, 2022, against Defendants David Bigelow, Heritage Hauling, Inc., and Boggs Contracting, Inc. (Compl.) Respondents amended their Complaint on May 3, 2024, to add Safe Shield, LLC as an additional defendant. (Am. Compl.)

The subject commercial vehicle accident occurred in a road construction zone, and Appellant Boggs Contracting, Inc. was the paving contractor for the road resurfacing project. (Am. Compl. ¶ 6.) Boggs Contracting subcontracted with Heritage Hauling to deliver hot mix asphalt to the paving site in dump trucks. (Hayes dep. 132:2-5.) The collision occurred while Bigelow, a Heritage Hauling employee, was driving a Heritage Hauling dump truck to deliver asphalt to the paving site. (Am. Compl. ¶ 11.) Bigelow rear-ended a commercial delivery truck leased by Respondent Cobb Trucking, LLC and occupied by Respondents Ryan Cobb and Malon Cobb, causing catastrophic injuries and damage. (*Id.* at 10, 12.) Boggs Contracting did not employ the driver (Bigelow) or any individuals involved in the collision, and it did not have any ownership, lease, or other interest in any of the vehicles involved in the collision. (Lewis dep. 38:2-9; 71:5-18.) Boggs Contracting managed the paving project but had no direct involvement in the collision.

Respondents generally allege that Bigelow and Heritage Hauling are liable for negligently operating the dump truck that caused the collision, that Safe Shield is liable for negligence in

alleged shortcomings with traffic control in the construction zone, and that Boggs Contracting is vicariously liable for Bigelow's alleged negligence and directly and/or vicariously liable for alleged shortcomings with traffic control in the construction zone. (Am. Compl. ¶¶ 16, 38, 43, 59-60.)

Between the commencement of the lawsuit in August 2022 and December 2024, the parties exchanged multiple written discovery responses and document productions and conducted nine (9) depositions. Respondents filed three (3) motions to compel discovery responses against Boggs Contracting in April 2023, December 2023, and March 2024, each of which was resolved prior to a hearing. (Apr. 2023 Mtn. Compel; Dec. 2023 Mtn. Compel; Mar. 2024 Mtn. Compel.) The Circuit Court issued Form 4 Orders recognizing that each of the Motions to Compel were resolved. (May 11, 2023 Form 4 Order; February 5, 2024 Form 4 Order; April 26, 2024 Form 4 Order.)

On April 17, 2024, in connection with the third motion to compel discovery responses, Boggs Contracting provided a verification signed by one of its corporate officers, Kevin J. Hayes, Jr. (Hayes Verification.) On April 24, 2024, Mr. Hayes testified in his deposition as a Rule 30(b)(6) corporate representative of Boggs Contracting. The verification and portions of Mr. Hayes' testimony later became part of the subject of Respondents' Motion for Sanctions.

On December 4, 2024, Boggs Contracting filed a Motion for Substitution of Counsel to replace its prior counsel with new defense counsel. (Mtn. Substitution of Counsel.) The Circuit Court granted the substitution of counsel the next day, on December 5, 2024. (Dec. 5, 2024 Order.)

On December 13, 2024, the parties conducted a deposition of an employee of the South Carolina Department of Transportation. During that deposition, Boggs Contracting's new defense counsel introduced an email as a deposition exhibit that had not been previously produced in the

case. (*Id.* at 77:22-25; Bourque Dep. Ex. 2 (Guillot Email).) That email also later became part of the subject of Respondents’ Motion for Sanctions.

On January 2, 2025, Respondents filed a Motion for Sanctions Against Defendant Boggs Contracting, Inc. for Abuse of Discovery. (Mtn. for Sanctions.) The primary impetus for the Motion for Sanctions was the email first disclosed in the December 13, 2024 deposition. (*Id.* at 10.) The arguments and authorities cited in Respondents’ Motion were based on Rule 37, SCRC, and case law interpreting that Rule. (*See, e.g., id.* at 12-13.) There was no mention in the Motion of any request for the Court to take any action based on the Court’s “inherent power.”

At the time the Motion was filed, this case was listed as the number 3 date certain trial in Georgetown County for June 16, 2025. (Nov. 27, 2024 Order.)

Respondents’ Motion for Sanctions contended—and the Circuit Court ultimately ordered—that Boggs Contracting intentionally concealed documents that should have been produced earlier, and that the purported discovery abuse was attributable solely to Boggs Contracting itself, not in any part to any other person or entity, including Boggs Contracting’s prior counsel or its insurance carrier. (Mtn. for Sanctions p. 12; Order p. 8.) In response, Boggs Contracting acknowledged that documents were not produced that should have been produced but contended that the failure to produce documents was not intentional and was attributable to inadvertent shortcomings by multiple different persons and entities who each made mistakes, including Boggs Contracting itself, its prior counsel, and its insurance carrier. (Resp. to Mtn. for Sanctions pp. 4-6.) Boggs Contracting also contended (1) that the prior discovery shortcomings were cured after the appearance of substitute defense counsel, and (2) that Respondents were not prejudiced because the shortcomings were cured long before trial, at a point when significant written discovery, depositions, and expert discovery were still to be conducted. (*Id.* at 14.)

After Respondents' motion was filed, and before the hearing occurred, Boggs Contracting (through the new counsel substituted on December 4, 2024) collected 648,787 documents from its electronic systems and, after thorough review, located and produced 133 documents responsive to Respondents' discovery requests. (*Id.* at 7.) Respondents made no further contention that any documents remained unproduced.

The Circuit Court held a WebEx hearing on Respondents' Motion on February 20, 2025. The arguments and authorities Respondents cited in the hearing were again based on Rule 37, SCRPC, and case law interpreting that Rule. There was no mention at all in the hearing of the Court's "inherent power." Respondents acknowledged the sufficiency of Boggs Contracting's supplemental document production during the hearing, and they withdrew their request for a search of Boggs Contracting's email servers because they were satisfied with the supplemental discovery. (Hrg. Transcript 24:17-24.)

After the February hearing, all parties proceeded forward in discovery with an expectation that the case was ongoing, including exchange of interrogatories, requests for production, requests for admission, producing documents, and scheduling nine (9) more depositions.

On March 18, 2025, the circuit judge emailed counsel for the parties, announcing his intention to grant Respondents' motion and strike Boggs Contracting's Answer and requesting Respondents' counsel to submit a proposed order. (March 18, 2025 Email.)

Respondents' counsel submitted a proposed order on March 31, 2025. The Circuit Court adopted the proposed order as submitted by Respondents' counsel, and the order was filed on April 22, 2025. The Order rejected Respondents' request for sanctions under Rule 37, SCRPC and declined to issue any sanction under that rule. (Order p. 8.) The Order struck Boggs Contracting's Answer to Respondents' Complaint, stating that "the Court grants sanctions using its inherent

powers and not based on Rule 37.” (Order p. 12.) The Order declined to consider the merits of any party’s claims or defenses, stating that “[t]his decision is in no way a comment on the merits of this case.” (Order p. 13.)

Boggs Contracting filed a Motion for Reconsideration on April 23, 2025. (Mtn. for Reconsideration.) Respondents filed a response in opposition to the Motion for Reconsideration on May 4, 2025. (Resp. in Opposition.) On May 20, 2025, the Circuit Court entered a Form 4 Order denying the Motion for Reconsideration. (May 20, 2025 Order.)

Boggs Contracting then filed and timely served its Notice of Appeal on June 2, 2025.

### **STANDARD OF REVIEW**

The decision to impose sanctions and the terms of those sanctions are within the discretion of the trial court, and an appellate court will not disturb the trial court’s decision absent an abuse of discretion. *Ex parte Gregory*, 378 S.C. 430, 436-37, 63 S.E.2d 46, 50 (2008); *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). The circuit court abuses its discretion if “the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the right of appellant, thereby amounting to an error of law.” *Karppi*, 327 S.C. at 543, 489 S.E.2d at 681.

A discovery “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. [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.” *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

## STATEMENT OF FACTS

### **I. Claims and Defenses in the Underlying Case**

This is a personal injury lawsuit arising from a February 2022 commercial vehicle accident in a road construction zone on a rural, two lane road in Georgetown County. (Am. Compl. ¶ 10.) Boggs Contracting, Inc. was the paving contractor for the road resurfacing project. (Am. Compl. ¶ 6.) Boggs Contracting subcontracted with Heritage Hauling, Inc. to deliver hot mix asphalt to the paving site in dump trucks. (Hayes dep. 132:2-5.) The collision occurred while David Bigelow, a Heritage Hauling employee, was driving a Heritage Hauling dump truck to deliver asphalt to the paving site. (Am. Compl. ¶ 11.) Mr. Bigelow rear-ended a commercial delivery truck leased by Respondent Cobb Trucking, LLC and occupied by Respondents Ryan Cobb and Malon Cobb.<sup>1</sup> (*Id.* at 10.) Boggs Contracting did not employ the driver (Bigelow) or any individuals involved in the collision, and it did not have any ownership, lease, or other interest in any of the vehicles involved in the collision. (Lewis dep. 38:2-9; 71:5-18.) Boggs Contracting managed the paving project but had no direct involvement in the collision.

Respondents allege that Ryan Cobb and Malon Cobb were catastrophically injured in the collision. They further allege that Cobb Trucking, LLC had to go out of business because of the loss from the collision. Respondent Brandy Cobb, the wife of Ryan Cobb, brought a loss of consortium claim.

Respondents contend Boggs Contracting is vicariously liable for Mr. Bigelow's actions and directly and/or vicariously liable for alleged issues with traffic control in the construction zone. (Am. Compl. ¶¶ 38, 43, 59-60.) Boggs Contracting has asserted numerous defenses, including potentially dispositive defenses on which Boggs Contracting contends it would be entitled to

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<sup>1</sup> A third occupant, La'Jai Webster, was also injured and filed a separate civil action that is not at issue in this appeal.

summary judgment if allowed to defend the case on the merits. (Am. Ans. to Am. Compl.) These defenses include (but are not limited to) federal preemption under the Federal Aviation Administration Authorization Act (“FAAAA”), which completely bars all of Respondents’ claims against Boggs Contracting, and the well-established rule that a principal is not vicariously liable for the negligent acts of an independent contractor. (*Id.* at 41, 47.) All of the other defendants are subcontractors or an employee of a subcontractor, and Boggs Contracting denies as a matter of law that it can be vicariously liable for the alleged negligence of any of the other defendants. (*Id.*)

The Circuit Court expressly declined to consider the merits of Boggs Contracting’s defenses. (Order p. 13.)

## **II. Discovery Dispute Over Documents Not Produced by Boggs Contracting**

The discovery dispute raised in Respondents’ Motion for Sanctions involved Respondents’ First and Third Sets of Rule 34 Requests for Production to Boggs Contracting. (Mtn. for Sanct. pp. 4-5.)

Respondents issued their First Set of Requests for Production to Boggs Contracting in December 2022. (*Id.* at 4.) Boggs Contracting’s prior counsel did not notify Boggs Contracting that the Requests existed until after the due date for responses had passed. (Feb. 12, 2025 Aff. ¶ 12.) Boggs Contracting acknowledges that it failed to respond in a timely manner. (Boggs Contracting’s Resp. to 1st RFPs.) Respondents filed their first Motion to Compel responses, which was resolved by agreement in May 2023 when Boggs Contracting produced responses to the Requests before the hearing on the Motion to Compel. (*Id.*; Apr. 2023 Mtn. Compel; May 2023 Consent Order; May 2023 Form 4 Order.) The Court entered a Form 4 Order finding the motion was moot. (*Id.*)

Respondents issued their Third Set of Requests for Production to Boggs Contracting in September 2023. (Mtn. for Sanct. p. 5.) Request No. 42 was central to the dispute, as it called for

all communications between Boggs Contracting and any third party relating to the subject collision or the subject load. (*Id.* at 7.) Boggs Contracting responded in a timely manner with objections to the Requests and did not produce any documents. (Boggs Contracting’s Resp. 3rd RFPs.) Respondents filed their second motion to compel responses in December 2023, seeking production of responsive documents. (Dec. 2023 Mtn. to Compel.) Boggs Contracting produced a supplemental response in February 2024 stating that no materials existed responsive to Request No. 42. (Boggs Contracting’s Resp. Supp. Resp. 3rd RFPs.) Respondents then withdrew their second motion to compel in February 2024 based on (1) Boggs Contracting’s supplemental response stating that no responsive materials existed, and (2) an agreement that Boggs Contracting would provide a written verification of its responses. The Court entered a Form 4 Order finding the motion was moot. (Feb. 2024 Form 4 Order.)

Respondents filed their third motion to compel in March 2024, seeking to compel production of the written verification that had not yet been produced. (March 2024 Mtn. to Compel.) Boggs Contracting provided the verification in April 2024 signed by Kevin J. Hayes, Jr. as an officer of Boggs Contracting, and Respondents withdrew the motion. (Apr. 2024 Form 4 Order.) The verification stated:

Pursuant to Rule 33, South Carolina Rules of Civil Procedure, I, Kevin J. Hayes, Jr., officer of Boggs Contracting, Inc. affirm that the Responses, First Supplemental Responses and Second Supplemental Responses to Plaintiffs’ Third Requests for Production provided are true and accurate **to the best of my knowledge** and **reserve the right to further supplement the Responses if new information is discovered or becomes available.**

(Hayes Verification (emphasis added).)

In a later, unrefuted affidavit dated February 12, 2025 (after the Motion for Sanctions was filed), Mr. Hayes attested that he did not know the April 2024 verification was overdue or was the

subject of a Motion to Compel. (Feb. 12, 2025 Aff. ¶ 11.) Boggs Contracting’s prior counsel never provided that information to Boggs Contracting, including Mr. Hayes. (*Id.* at 12.) As stated below, Boggs Contracting does not contend this excuses the delay in producing the verification, but it is one of many facts showing there is no support for the Circuit Court’s finding that the discovery shortcomings were solely attributable to Boggs Contracting itself and that Boggs Contracting intentionally withheld documents or information.

After Boggs Contracting produced the verification, Respondents deposed Mr. Hayes on April 24, 2024, as a Rule 30(b)(6) corporate representative of Boggs Contracting. (Hayes dep.) Contrary to Respondents’ unsupported arguments, Mr. Hayes gave truthful and accurate testimony. Mr. Hayes testified that **to his knowledge**, there were no responsive emails other than the ones that had been produced. (Hayes dep. 98:4-6.) He went on to state that “Related to that incident, **that is all that I’m aware of.**” (Hayes dep. 99:17-20) (emphasis added).) He further explained the steps he had taken to search for responsive emails. (Hayes dep. 98:7 – 99:20.) While it became known later that other emails existed, there is no evidence to refute Mr. Hayes’ signed verification or testimony that he was not aware of any other responsive emails at that time.

On December 4, 2024, Boggs Contracting filed a Motion for Substitution of Counsel to replace its prior counsel with new defense counsel. (Mtn. Subst. Counsel.) The Circuit Court granted the substitution of counsel the next day. (Dec. 5, 2024 Order.) On December 13, 2024—nine (9) days after the substitute defense counsel appeared—the parties conducted a deposition of a third party witness from the South Carolina Department of Transportation (SCDOT), which had been scheduled for some time before the substitution of counsel. (Bourque dep.) During that deposition, Boggs Contracting’s new defense counsel introduced as an exhibit a February 2022 email between Boggs Contracting employee Matthew Guillot and the SCDOT employee witness,

which had not been previously produced in the case. (*Id.* at 77:22-25; Bourque Dep. Ex. 2 (Guillot Email).) The email had been in Boggs Contracting’s insurance carrier’s file since Boggs Contracting provided it to the carrier in September 2022, approximately one (1) week after Boggs Contracting was served with the original Summons and Complaint. (Feb. 12, 2025 Aff. ¶ 7.) However, the email was never provided to the prior counsel and was not produced in the litigation before December 13, 2024. (*Id.*) Having given the email to the insurance carrier promptly after being served with the Summons and Complaint, Boggs Contracting itself did not know the email was not produced earlier in the litigation. (*Id.*)

As explained to the Circuit Court (Resp. to Mot. Sanct. p. 8-9), the subject email supports Boggs Contracting’s defense, and there is no reason Boggs Contracting would have intentionally withheld it from production. In the email, Boggs Contracting’s project manager asked the SCDOT representative if he could provide a traffic control report from the prior day, which was the date of the collision incident. (Guillot email.) It requested official documentation of a verbal report given by SCDOT’s on-site engineer that the traffic control was set up properly before the accident. (*Id.*) The SCDOT representative responded they could not “retroactively do a traffic control inspection report.” (*Id.*) In the full email exchange, which was later located and produced as part of Boggs Contracting’s extensive efforts to ensure all discovery was supplemented and complete, Boggs Contracting’s representative replied simply “Thanks, Chris.” (Ex. C to Resp. to Mot. Sanct.) The email merely confirmed the SCDOT representatives’ observations that there were no issues with traffic control before the collision incident, and there is no reason Boggs Contracting would have intentionally withheld it from production.

**III. The Circuit Court Ignored the Record Showing Prior, Inadvertent Shortcomings in Discovery by Multiple Persons and Entities, and There Is No Basis for the Circuit Court’s Unsupported Finding That All Discovery Shortcomings Were Solely Attributable to Boggs Contracting Itself and That Boggs Contracting Intentionally Withheld Documents or Information.**

Boggs Contracting acknowledges that some documents and written discovery responses were unintentionally not produced in a timely manner. (Feb. 12, 2025 Aff. ¶ 12.) Boggs Contracting also acknowledges that its own searches for responsive documents did not locate all responsive documents. (Resp. to Mtn. for Sanctions 10.) Examples of the prior shortcomings by multiple persons and entities, which were remedied by substitute counsel before the hearing on Respondents’ Motion for Sanctions, are explained below. Boggs Contracting does not contend that the facts recounted here excuse the inadvertent failure to produce documents in a timely manner. However, these unrefuted facts show there is no support for the Circuit Court’s finding that the discovery shortcomings were solely attributable to Boggs Contracting itself and that Boggs Contracting intentionally withheld documents or information.

**A. Documents inadvertently overlooked by the insurance carrier**

The unrefuted record reflects that a former Boggs Contracting employee provided multiple relevant and responsive documents to its insurance carrier within the first week after being served with the Summons and Complaint in September 2022. (Feb. 12, 2025 Aff. ¶ 7.) Boggs Contracting believed that anything it had sent to its insurance carrier had been provided to defense counsel and produced in discovery, even though those documents unknowingly never made it to prior counsel.<sup>2</sup> (*Id.* ¶¶ 4-7.) Boggs Contracting did not knowingly withhold these documents from production, and the Circuit Court’s finding that it did so cannot be supported by the record. No one at Boggs

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<sup>2</sup> Boggs Contracting’s own insurance carrier tendered Boggs Contracting’s defense to another insurance carrier, and that second insurance carrier hired Boggs Contracting’s defense counsel.

Contracting realized the documents were not provided to prior counsel or not produced in discovery until after the Motion for Sanctions was filed. (*Id.* ¶ 7.)

The overlooked documents included the February 4, 2022 email exchange between Boggs Contracting employee Matthew Guillot and the SCDOT representative referenced above and in Respondents' Motion for Sanctions and the Circuit Court's Order. (Feb. 4, 2022 Email.) (Tellingly, even though numerous depositions were scheduled after Respondents' Motion for Sanctions was filed, Respondents never requested to depose Mr. Guillot regarding the email, indicating its lack of importance to Respondents' case.) The overlooked documents provided to the carrier in September 2022 also included photographs and videos of the collision scene taken by an engineering firm one (1) day after the collision incident. (Resp. to Mtn. for Sanctions p. 12.) The Boggs Contracting employee who arranged the engineering inspection left the company shortly after providing the insurance carrier a link to download the photographs and video on September 30, 2022, and the unrefuted record shows that no one from Boggs Contracting realized those photographs and video were not downloaded by the insurance carrier or produced. (Feb. 12, 2025 Aff. ¶ 7.)

Boggs Contracting's substitute counsel learned of the engineering inspection while reviewing documents on Saturday, February 1, 2025—a month after the Motion for Sanctions was filed—because no one from Boggs Contracting, the insurance carrier, or prior counsel was aware of it. Substitute counsel had to obtain the photographs and video directly from the engineering firm on February 5, 2025, because no one from Boggs Contracting, the insurance carrier, or prior counsel still had the files. Substitute counsel produced them to counsel for all parties the very next day, on February 6, 2025. Importantly, those photographs and video do not provide any new or

different information that was not previously known in this case, and there is no prejudice to any party by the delay in their production. Respondents have not argued otherwise.

**B. Delays by prior defense counsel with written discovery responses**

The unrefuted record also reflects that Boggs Contracting's prior counsel caused delays with several sets of written discovery requests. This led to multiple motions to compel by Respondents, which were each resolved shortly before the respective motion hearings. These were the exact issues raised in Respondent's Motion for Sanctions. These issues were resolved in 2023 and 2024, but Boggs Contracting itself did not even know about the prior discovery issues until the Motion for Sanctions was filed because prior counsel did not tell Boggs Contracting about them. (Feb. 12, 2025 Aff. ¶ 12.) Boggs Contracting was also unaware that some of these delays were the subject of motions to compel. (*Id.* ¶ 11.)

Boggs Contracting was not made aware of Respondents' request for a verification of its Responses to their Third Requests for Production until April 3, 2024, over a month after Respondents filed their March 7, 2024 Motion to Compel the verification, and Boggs Contracting did not know the verification was the subject of a Motion to Compel until Respondents' Motion for Sanctions. (*Id.* ¶ 11.)

**C. Documents and emails previously searched and collected by Boggs Contracting**

The unrefuted record also reflects that Boggs Contracting's failure to produce some documents was not intentional and was the result of poor communications between prior counsel and Boggs Contracting. Prior counsel did not conduct their own search of Boggs Contracting's documents or email system for responsive information and did not retain a discovery vendor to manage the documents. (*Id.* ¶¶ 8-9.) Rather, prior counsel largely left Boggs Contracting's non-lawyers to locate responsive documents on their own, with little guidance. (*Id.*) Importantly, as

reflected in the record, Boggs Contracting acted at the instruction of prior counsel, who only instructed Boggs Contracting to locate and provide documents related to the subject incident and emails between Boggs Contracting and Heritage Hauling related to the subject incident. (*Id.* ¶ 8.) Boggs Contracting did not know the instructions it received from prior counsel did not encompass everything Respondents requested.

As the record reflects, Mr. Hayes testified that he searched his own emails as instructed by prior counsel and directed Boggs Contracting's employees to search their email accounts two (2) different times, and he provided the results to prior counsel. (Hayes dep. 98:4-99:20.) Mr. Hayes signed the verification in April 2024 verifying that Boggs Contracting's discovery responses were correct to the best of his knowledge, but only after he identified employees likely to have information about the collision and directed them to perform a second search. (*Id.* at 98:7-99:9.) The two (2) responsive emails he found were produced alongside the signed verification. (2nd Supp. Resp. Resps. to 3rd RFPs.) While it later became known that some documents were missed, the number of missed documents was small, and they did not have a material effect on any party's claims or defenses.

#### **IV. The Circuit Court's Order Contradicted the Plain Meaning of the April 2024 Hayes Verification, With No Support in the Record for the Order's Mischaracterization.**

The numerous unsupported findings in the Circuit Court's Order include objectively inaccurate characterizations of the April 17, 2024 verification signed by Mr. Hayes as an officer of Boggs Contracting. The verification is quoted in its entirety above on page 8. (*See* Hayes Verification.) Respondents repeatedly took this verification out of context and misrepresented its content and plain meaning in their Motion and in oral argument, and those misrepresentations carried over into the Circuit Court's order. (*See, e.g.,* Mtn. for Sanctions pp. 14-15; Order p. 9.) By its plain language, the verification affirmed that the referenced discovery responses were true and

accurate **to the best of Mr. Hayes' knowledge**, and there is no evidence in the record that this statement was inaccurate. (Hayes Verification.) Mr. Hayes signed the verification after he directed a second search for responsive documents, and the verification was served alongside the responsive documents Mr. Hayes located in this search. (*Id.*; Feb. 12, 2025 Aff. ¶ 10.) The verification further stated that Boggs Contracting reserved the right to further supplement the Responses if new information was discovered or became available, which further shows that Mr. Hayes was not able to affirm things outside of his knowledge. (Hayes Verification.)

As explained above on pages 9 and 14, Mr. Hayes testified in his deposition consistently with the plain meaning of his verification. In a later, unrefuted affidavit signed after the Motion for Sanctions was filed, Mr. Hayes attested that he did not know the April 2024 verification was overdue or was the subject of a Motion to Compel. (Feb. 12, 2025 Aff. ¶ 11.)

**V. Respondents Requested Sanctions Only Pursuant to Rule 37, SCRPC, but the Court's Order Expressly Rejected Rule 37 and *Sua Sponte* Issued Sanctions Only Pursuant to the Court's "Inherent Power" Despite No Legal Precedent for Such a Sanction.**

Respondents filed their Motion for Sanctions almost six (6) months before this case was scheduled for trial. (Mtn. for Sanctions.) The Motion requested sanctions "pursuant to Rules 11, 26, 34, and 37 of the South Carolina Rules of Civil Procedure." (*Id.* at 1.)<sup>3</sup> Respondents' request to strike Boggs Contracting's Answer was specifically made pursuant to Rule 37 and only Rule 37 (*Id.* at 17), because that is the only legal authority that could allow such an extraordinary, nuclear-level discovery sanction even if the facts warranted it, which they do not. The Motion did not request or even mention any sanctions or relief pursuant to the "inherent power" of the court, presumably because Respondents were aware there is no precedent for striking a defendant's

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<sup>3</sup> Rules 26 and 34 do not include any provisions for discovery sanctions.

answer pursuant only to the court's inherent power, and there is no legal precedent for issuing such a sanction absent an express finding that a party violated a court order.

On March 18, 2025, the circuit judge emailed counsel for the parties, announcing his intention to grant Respondents' motion and strike Boggs Contracting's Answer and requesting Respondents' counsel to submit a proposed order. (March 18, 2025 Email.) The court's email specifically instructed Respondents' counsel to "please touch on the law regarding sanctions, with particular attention to striking an answer." (*Id.*)

Respondents' counsel drafted a proposed order and sent it to the court on March 31, 2025. The Circuit Court adopted Respondents' proposed order as submitted. Whereas the only alleged basis for sanctions stated in Respondents' Motion was asserted specifically pursuant to Rule 37 and only Rule 37, Respondents' counsel apparently recognized that Rule 37 did not support striking Boggs Contracting's Answer. Therefore, the Order expressly rejected Respondents' request for sanctions under Rule 37, SCRCPP, and declined to issue any sanction under that rule. (Order p. 8.) Nevertheless, the Order still struck Boggs Contracting's Answer to Respondents' Complaint, basing the sanction of striking Boggs Contracting's Answer solely on the "inherent power" of the Court. (*Id.* at 10.) The Order was the first mention in this case of any relief based on the Court's "inherent power" rather than Rule 37—it was never mentioned in the parties' briefing or arguments or by the Court before it suddenly appeared in the proposed order. The Order stated that "the Court grants sanctions using its inherent powers and not based on Rule 37." (*Id.* at 12.) It also expressly declined to consider the merits of any party's claims or defenses, stating that "[t]his decision is in no way a comment on the merits of this case." (*Id.* at 13.) In adopting the proposed order as submitted, the Circuit Court issued a *sua sponte* sanction based on an argument that was

never presented to the court. However, as set forth below, this is not a valid basis for striking a defendant's Answer.

**VI. The Court Ignored Boggs Contracting's Unrefuted Affidavit that Contradicts the Court's Unsupported Findings of Fact.**

As explained above, on February 13, 2025, Boggs Contracting submitted an Affidavit of Kevin J. Hayes, Jr., the same corporate officer who submitted the earlier verification regarding prior discovery responses. The February 2025 affidavit attested to all of the statements below. Although **nothing** in the record rebuts or challenges any of these sworn statements, the Circuit Court's Order ignored and disregarded the entirety of the affidavit.

- In September 2022, an employee of a Boggs Contracting affiliate provided documents related to the subject incident to Boggs Contracting's insurance carrier within a week after Boggs Contracting was served with the Summons and Complaint. That employee then left the company approximately three (3) weeks later. (Feb. 12, 2025 Aff. ¶¶ 4-5.)
- To the best of his knowledge, Mr. Hayes did not believe anyone at Boggs Contracting was aware of the materials provided to the insurance carrier in September 2022, other than that employee who left the company in October 2022. (*Id.* ¶ 6.)
- Mr. Hayes was unaware that the information sent to the insurance carrier in September 2022 had not been produced in discovery, and he did not believe anyone affiliated with Boggs Contracting was aware of this. (*Id.* ¶ 7.)
- Mr. Hayes was not aware that his April 2024 verification was overdue or was the subject of a Motion to Compel until Respondents' Motion for Sanctions was filed in January 2025, because prior counsel never told him this. (*Id.* ¶ 11.)
- Mr. Hayes did not know until February 2025 that prior counsel had delayed providing many of Respondents' written discovery requests to Boggs Contracting. (Prior counsel never told Boggs Contracting about the delays, even after motions to compel were filed.) (*Id.* ¶ 12.)

**VII. Boggs Contracting Retained Substitute Defense Counsel and Went to Great Lengths to Fully Remedy the Discovery Shortcomings, and Respondents Agreed the Issues Were Resolved by Supplemental Production Months Before the Scheduled Trial.**

The record shows that, since Boggs Contracting obtained substitute counsel in December 2024, the substitute counsel initiated a comprehensive review of the discovery process throughout the life of the case and determined additional action was needed to ensure full compliance with the Rules of Civil Procedure. Between the time substitute counsel was retained and the hearing on Respondents' Motion for Sanctions, Boggs Contracting's efforts to ensure compliance with its discovery obligations included the following:

- Retained an outside vendor to collect 648,787 documents from 34 email accounts of Boggs Contracting employees and officers;
- Manually reviewed 37,097 documents for responsive information;
- Produced 133 responsive documents from the electronic discovery vendor's collection. (Only approximately 27 unique documents pertain to the collision incident itself; the low number confirms that very little was missed earlier in the discovery process);
- Numerous Boggs Contracting employees participated in more than 20 hours of in-person and virtual meetings with counsel, plus countless hours communicating with counsel by email to provide information;
- Made all employees and executives – from dispatchers to pavers – available for meetings with counsel and to assist with collecting responsive information;
- Obtained and produced photographs and video taken by an engineering firm the day after the collision incident, and met with the engineering firm regarding those materials;
- A Boggs Contracting officer and employees reviewed every prior written discovery response with counsel to ensure any incomplete information is supplemented; and
- Worked directly with a third-party software company to obtain information from that system in a producible format, and produced 714 pages of screenshots from the system and spreadsheets generated from data in the software.

(Resp. to Mtn. for Sanctions pp. 6, 7, 19.)

Importantly, during the February 20, 2025 hearing on Respondents' Motion for Sanctions, Respondents acknowledged the sufficiency of Boggs Contracting's supplemental document production and withdrew their request for a search of Boggs Contracting's email servers because they were satisfied with the supplemental discovery. (Hrg. Transcript 24:17-24.)

### **VIII. The Court's Order Was Based on Numerous Inaccuracies and Unsupported Statements and Findings of Fact.**

The Circuit Court made numerous findings of fact not supported by the record, incorrect characterizations and assumptions not supported by the record, and incorrect applications of law. Boggs Contracting presented a more comprehensive statement of these incorrect findings of fact to the Circuit Court in its Motion for Reconsideration, (*see* Mtn. for Reconsider. pp. 11-15), but the Circuit Court denied that Motion in a Form 4 Order with no explanation. As a partial list (illustrative only, not exhaustive), examples of inaccuracies and unsupported statements include the following:

- The Circuit Court found Boggs Contracting **itself** was solely responsible for the discovery deficiencies, which included written discovery responses produced multiple times on the day before hearings were scheduled on motions to compel. (Order pp. 8, 13.) However, every one of those written discovery responses was signed and produced **by Boggs Contracting's prior counsel**, and the Court ignored the unrefuted affidavit showing Boggs Contracting did not even know about these delays caused by its prior counsel. (Feb. 12, 2025 Aff. ¶ 11-12.)
- The Circuit Court found Boggs Contracting stated under oath that certain emails did not exist, but Boggs Contracting never made this statement. (Order p. 2.) The record shows that Mr. Hayes actually testified that **to his knowledge**, there were no responsive emails other than the ones that had been produced. (Hayes dep. 98:4-6.) Mr. Hayes'

written verification of the discovery responses further stated that affirm that the responses were “true and accurate to the best of my knowledge” and expressly “reserve[d] the right to further supplement the Responses if new information is discovered or becomes available.” (Verification.)

- The Circuit Court found Mr. Hayes changed his testimony about the existing responsive discovery and blamed prior counsel for the problems with Boggs Contracting’s document production, (Order p. 6), but the unrefuted record shows Mr. Hayes did not know about former counsel’s numerous delays and failures to produce discovery until after the Motion for Sanctions was filed, (Feb. 12, 2025 Aff. ¶¶ 11-12).
- The Circuit Court found that “it was seemingly simple for [Mr. Hayes] to find the documents [photographs and video taken by an engineering firm the day after the subject incident] after Plaintiffs filed the motion for sanctions,” (Order p. 7,) but the record shows that neither Mr. Hayes nor anyone else at Boggs Contracting was ever able to locate those documents at all. By strong contrast, the new, substitute counsel only learned of the existence of those documents while reviewing materials extracted by a specialized electronic discovery vendor and had to obtain those documents directly from the engineering firm because no one at Boggs Contracting, including Mr. Hayes, had access to the documents or knowledge of their existence.
- The Circuit Court found that Mr. Hayes’ “affidavit states that no one affiliated with Boggs [Contracting] had knowledge of the information sent to the insurance carrier,” (Order p. 8), but Mr. Hayes’ affidavit did not make this statement. Mr. Hayes stated he did not “believe anyone affiliated with Boggs Contracting was aware that the information sent to the insurance carrier in September 2022 was not provided to Boggs

Contracting’s prior counsel and had not been produced in discovery.” (Feb. 12, 2025 Aff. ¶ 7.)

- The Circuit Court found that Mr. Guillot knew an email he authored had not been produced, (Order p. 8), but there is no basis in the record to state that Mr. Guillot had any information about documents that were or were not produced. By contrast, discovery responses and document productions were produced by prior counsel, without Mr. Guillot’s involvement.

**IX. After the Court’s Order, Respondents Took a New Position Contradicting Their Own Argument and Contradicting the Very Basis of the Order.**

After the Circuit Court’s Order was entered, Respondents acknowledged in their response in opposition to Boggs Contracting’s Motion for Reconsideration what the record in this case plainly shows and what Boggs Contracting has argued all along—that delays in Boggs Contracting’s document productions were not caused solely by Boggs Contracting itself. (Plfs. Resp. p. 23.) Respondents’ Motion for Sanctions and their proposed Order, which the Circuit Court adopted in full, fundamentally hinged on the incorrect assertion that Boggs Contracting itself – and only Boggs Contracting – intentionally produced documents late in discovery. (*See, e.g.*, Order p. 7.) On this point, which lies at the center of the Court’s Order, Respondents’ response brief to the Motion for Reconsideration directly contradicts all of Respondents’ prior arguments and the Order itself, which Respondents drafted. Respondents cannot have it both ways.

Respondents now claim that all parties, including Boggs Contracting, have a cause of action against Boggs Contracting’s insurer for its contribution to discovery delays, (Plfs. Resp. pp. 23, 25), despite all previous arguments that the insurer had no contribution to any discovery delays. While there is no basis for such an assertion, the fact that Respondents now acknowledge what Boggs Contracting has argued all along is conclusive proof that the Court’s Order was unfounded.

Boggs Contracting takes full responsibility for the unintentional role it played in the delayed document production, but Boggs Contracting certainly did not intend to overlook responsive documents. The discovery delays were the result of miscommunications and unintentional oversights by Boggs Contracting's prior counsel, the insurance carrier, and Boggs Contracting's officers and employees, not intentional dilatory tactics or attempts to conceal evidence.

### **ARGUMENT**

**I. The Circuit Court abused its discretion by expressly declining to issue any sanction under any Rule of Civil Procedure but still striking Boggs Contracting's Answer based only on its "inherent power," when there is no legal basis or authority for such a sanction.**

The Circuit Court abused its discretion by expressly declining to issue sanctions pursuant to Rule 37 or any Rule of Civil Procedure but still imposing a *sua sponte* sanction pursuant only to the Circuit Court's purported "inherent power." (Order p. 12.) No legal grounds exist to strike Boggs Contracting's Answer as a sanction for discovery abuse, especially when the Circuit Court expressly rejected any sanction under Rule 37. *See Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 458-59, 814 S.E.2d 643, 657-58 (Ct. App. 2018) (holding the Circuit Court did not have authority to strike Appellants' answers as a sanction for deceitful conduct absent the violation of a court order). Neither the cases cited in the Order nor the South Carolina Rules of Civil Procedure permit striking Boggs Contracting's answer in this case, and the sanction is a direct violation of mandatory procedural due process protections and the statutes and case law favoring the disposition of cases on their merits.

**A. The Circuit Court abused its discretion by rejecting Respondents' request for Rule 37 sanctions but still striking Boggs Contracting's Answer.**

The Circuit Court misapplied South Carolina law by rejecting Respondents' request to strike Boggs Contracting's Answer as a Rule 37 sanction but still striking Boggs Contracting's Answer. In a self-contradictory conclusion, the Circuit Court disregarded the established

framework for addressing discovery violations by finding the Rules of Civil Procedure did not warrant any sanction but circumventing the Rules to issue a nuclear-level sanction anyway. (Order p. 12.) This misapplication of the law amounts to an abuse of discretion.

In *Valentine v. Davis*, the Court of Appeals rejected an attempt to “circumvent the rules governing the practice of law in the name of equity and fairness” and cautioned against doing so. 319 S.C. 169, 170-71, 460 S.E.2d 218, 218-19 (Ct. App. 1995). While the procedural context was different—arising from a plaintiff’s attempt to compel additional plaintiffs into the case with no basis for such a request under the Rules of Civil Procedure—the Court’s admonition regarding going outside the Rules to achieve a particular outcome is directly on point here. *See id.* The Court of Appeals emphasized that such an action would “jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system.” *Id.* *See also, e.g., Gibbes v. Greenville & C.R. Co.*, 14 S.C. 385, 389 (1881) (holding that while courts may adopt and interpret their own rules, they cannot modify procedural rules set by the general assembly because “it is the duty of the court to enforce the law as it stands. . .”).

Here, the Circuit Court found no basis in the Rules of Civil Procedure to issue any sanction against Bogg Contracting. Whereas Respondents requested sanctions “pursuant to Rules 11, 26, 34, and 37 of the South Carolina Rules of Civil Procedure,” (Mtn. for Sanctions p 1), the Circuit Court recognized that none of these rules permitted striking Boggs Contracting’s Answer. Rules 11, 26, and 34 do not apply to Respondents’ motion at all. Rule 11, SCRCF, only permits an “appropriate sanction” if a party signs a document in violation of the Rule, but Respondents’ Motion does not allege Boggs Contracting signed a document in violation of Rule 11. Rules 26 and 34, SCRCF, are similarly inapplicable because they do not include provisions for discovery sanctions. Rule 37 provides the framework for addressing discovery disputes and imposing

sanctions for discovery abuses, but the Circuit Court rejected Respondents' request to strike Boggs Contracting's Answer as a Rule 37 sanction.

As in *Valentine*, the Circuit Court cannot circumvent the Rules to achieve an outcome not permitted under the Rules by invoking its "inherent power" and imposing a nuclear-level sanction against Boggs Contracting despite finding there is no basis for sanctions under the Rules. Boggs Contracting respectfully asks this Court to reverse the Circuit Court's decision and hold that the Circuit Court abused its discretion by rejecting Respondents' motion for sanctions under Rule 37 but still striking the Answer anyway. The Circuit Court's Order is self-contradictory and flies in the face of the principles of continuity and uniformity that are "essential to the orderly administration of the legal system," *Valentine*, 319 S.C. at 173, 460 S.E.2d at 220, and the Order should be reversed.

**B. The Circuit Court abused its discretion by striking Boggs Contracting's Answer despite no violation of any court order.**

Rule 37(b), SCRPC governs discovery sanctions and explicitly provides for sanctions only when a party fails to comply with an applicable court order.<sup>4</sup> It is undisputed in this case that no order compelling discovery was ever issued and, therefore, Boggs Contracting did not violate a discovery order. Because there is no court order, there can be no sanction under Rule 37. This is the reason Respondents submitted a proposed order to the Circuit Court that went to great lengths to avoid Rule 37 as the basis for the sanction award.

The Court of Appeals' analysis in *Skywaves I Corp. v. Branch Banking & Tr. Co.* is instructive here. 423 S.C. at 458-59, 814 S.E.2d at 657-58. In that case, the Court of Appeals

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<sup>4</sup> Numerous courts have confirmed that failure to comply with a court order is a fundamental requirement of Rule 37(b). *See, e.g., Downey v. Dixon*, 294 S.C. 42, 44 n.1, 362 S.E.2d 317, 318 n.1 (Ct. App. 1987) ("There must be an order of the Court before sanctions are imposed under [Rule 37(b)].")

affirmed denial of the plaintiff's motion to strike the defendants' answers as a sanction for alleged "deceitful conduct" in discovery that arose, in part, out of the defendants' denial that a certain document existed. *Id.* at 458, 814 S.E.2d at 657. Similar to this case, there was no violation of a court order. *Id.* The Court of Appeals rejected the plaintiff's reliance on cases that struck a defendant's answer as a sanction for violating a court order. *Id.* Because the defendants did not violate any court order, the Court of Appeals affirmed the decision not to strike the defendants' answers because there were no legal grounds to do so. *Id.* at 459, 814 S.E.2d at 658-59. Similar to this case, the plaintiff recognized the lack of authority for striking an answer in the absence of violation a court order, so the plaintiff attempted to circumvent this requirement, asking the court "to strike [the defendants'] answers through the doctrines of unclean hands or judicial estoppel." *Id.* at 456, 814 S.E.2d at 656.

The circuit court rejected the plaintiff's request, and the Court of Appeals affirmed. *Id.* at 459, 814 S.E.2d at 658-59. While the requested alternative basis to circumvent the requirement of Rule 37 in *Skywaves* looked to equitable remedies rather than the court's "inherent power," the principal correlates that the Circuit Court abuses its discretion by striking a defendant's answer when there is not even an allegation that the defendant ever violated any order of the court. Regardless of whether the court looks favorably on the actions or inactions of any party or its counsel, striking an answer is an unduly harsh remedy that should not and cannot be issued in the absence of violating a court order.

The Circuit Court's holding that violation of a court order is not required because Boggs Contracting allegedly engaged in "bad faith conduct . . . aimed at avoiding entry of a court order" is also a misapplication of South Carolina law. (Order pp. 12-13.) The crux of the court's finding is that Boggs Contracting should be punished for the parties' agreement to resolve the discovery

disputes rather than requiring the Circuit Court to invest juridical resources to review and rule upon a discovery disagreement. This holding runs counter to the long-standing exhortation and expectation of all South Carolina courts that members of the bar will resolve discovery disputes without requiring the courts to engage in such matters. The Circuit Court abused its discretion by using Boggs Contracting's efforts to resolve discovery disputes against it as a basis to issue a case dispositive sanction.

Respondents cannot circumvent the requirements of Rule 37 and obtain a case dispositive discovery sanction merely by avoiding Rule 37 as the basis for the sanction. The Circuit Court's reliance on its inherent power to impose sanctions, rather than Rule 37, SCRPC, underscores the absence of any legal authority for the Circuit Court's ruling. The plain language of Rule 37(b) only permits striking a party's answer when the party fails to comply with a court order, but it is undisputed that Boggs Contracting did not violate a court order for discovery.

**C. Neither the cases cited in the Circuit Court's Order nor any other case law support the Circuit Court's overreaching exercise of its "inherent power" in this case.**

There is no legal basis for the Circuit Court's *sua sponte* sanction against Boggs Contracting. While the Circuit Court cited three (3) cases to support its unprecedented use of "inherent power" to issue sanctions, these cases do not apply to the facts of this case, and none of them support the propositions for which they were cited in the Circuit Court's Order. The Circuit Court also ignored the long line of precedent that holds a party's answer may only be stricken as a discovery sanction for violating a discovery order, and even then only after the party has been warned that further non-compliance could result in such a severe sanction.

**1. None of the cases the Circuit Court cited provide a legal basis for the exercise of the court's "inherent power" to strike Boggs Contracting's Answer in this case.**

The cases cited in the Circuit Courts' Order do not provide a legal basis for rejecting Rule

37 sanctions and instead striking Boggs Contracting's Answer based only on the court's "inherent power." First, *Ex parte Dibble* does not support the proposition that the Circuit Court has inherent power to sanction Boggs Contracting because that case only addressed a court's inherent power to appoint lawyers to represent clients on a *pro bono* basis. 279 S.C. 592, 565, 310 S.E.2d 440, 442 (Ct. App. 1983); (Order p. 7). *Dibble* did not address sanctions at all, and the inherent power the court relied upon in *Dibble* has no application to the facts of this case. Second, contrary to the implication of the Circuit Court's Order, *Brandt v. Gooding* did not even rely upon the court's "inherent power" in dismissing the plaintiff's complaint; it relied upon Rule 41(b), which does not apply in this case. 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006) (hereinafter "*Brandt I*"); (Order p. 7). Third, while the Circuit Court cited *Gathers v. S.C. Elec. & Gas Co.* as support for the court's inherent power to issue sanctions for discovery violations outside of Rule 37, *Gathers* did not even address a discovery sanction for failing to produce documents. *Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993); (Order p. 12). Rather, *Gathers* involved an adverse jury charge as a sanction for spoliation of evidence. *Id.* *Gathers* did not address discovery abuse or sanctions, and its holding does not support the Circuit Court's proposition that "[s]anctions are permissible for discovery violations outside of Rule 37." (Order p. 12.)

**2. Abundant case law reflects that striking Boggs Contracting's Answer was improper.**

Many South Carolina cases demonstrate that courts only strike a defendant's answer after the court gives ample warning and opportunities to correct the discovery issues alleged. *See, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (finding the Circuit Court appropriately struck a party's answer after it gave the party "ample opportunity to amend their discovery responses both before and after he issued the Discovery Order"); *Griffin Grading*

*& Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 196, 511 S.E.2d 716, 718 (Ct. App. 1999) (striking a party’s answer only after it violated multiple discovery orders, including one which cautioned the court would consider striking the party’s answer if it failed to comply with the order); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 465, 665 S.E.2d 830, 831 (Ct. App. 2008) (upholding a sanction striking a party’s answer after the Circuit Court “warned it was inclined to strike the answer” if the party did not resolve the discovery issues in 45 days).

In this case, the Circuit Court’s decision to reject Respondents’ request for sanctions under Rule 37 but then *sua sponte* strike Boggs Contracting’s Answer based only on its inherent power is misplaced. The Circuit Court correctly found that there was no basis for sanctions under Rule 37—Boggs Contracting did not violate any court orders and did not engage in any misconduct before the court. Unlike the cases above, Boggs Contracting supplemented its discovery of its own accord, without any court order or sanctions to compel it to do so. Moreover, no warning or instruction from the court was required for Boggs Contracting to supplement the overlooked documents in its document production. Boggs Contracting learned for the first time in December 2024 that at least one (1) responsive document had not been produced in earlier discovery. Boggs Contracting then undertook a series of affirmative steps, of its own accord, to fully resolve the issues, and it is undisputed that the documents Respondents sought have already been produced.

**D. The Circuit Court abused its discretion by issuing a case-dispositive discovery sanction even though the court expressly declined to consider the merits of the claims and defenses, and the law favors adjudication on the merits of the case rather than holding Boggs Contracting in default.**

Striking Boggs Contracting’s Answer has the effect of placing Boggs Contracting in default in this case without any consideration for the merits of its defense, even though Boggs Contracting has strong meritorious defenses to Respondents’ claims and may be entitled to summary judgment on all claims. However, South Carolina law always favors deciding litigation on the merits of a

case rather than holding a party in default, especially when there is evidence that a party is likely to prevail on the merits. *See Melton v. Olenik*, 379 S.C. 45, 55, 664 S.E.2d 487, 493 (Ct. App. 2008) (holding the court should consider the merits of a case when deciding whether to set aside an entry of default).

South Carolina law strongly favors litigation being decided on the merits of the case. South Carolina's appellate courts have repeatedly recognized that "South Carolina's policy favor[s] the disposition of issues *on their merits* rather than on technicalities." *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (emphasis added); *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 524 (Ct. App. 1986) (recognizing that "[w]e favor trial of issues on merit over securing judgment by slight technicalities.").

Despite the well-established line of cases favoring disposition of cases on their merits, the Circuit Court expressly declined to consider the merits of the case in striking Boggs Contracting's Answer. (Order p. 13.) Factors that must be considered to assess whether an entry of default can stand include whether the defendant has a meritorious defense and the degree of prejudice to the plaintiff if relief is granted. *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). Boggs Contracting has a strong meritorious defense against Respondents' claims for multiple reasons. As just one example, Respondents' claims against Boggs Contracting for Heritage Hauling and David Bigelow's actions are preempted under the Federal Aviation Administration Authorization Act ("FAAAA"). The FAAAA expressly preempts state laws that regulate the price, route, or service of any motor carrier with respect to the transportation of property in interstate or intrastate commerce. 49 U.S.C. § 14501(c). Respondents' claims against Boggs Contracting arise from the actions of its independent contractor

motor carrier, Heritage Hauling, and are preempted. *Eggleston v. United Parcel Serv., Inc.*, 428 S.C. 373, 378, 834 S.E.2d 713, 715 (Ct. App. 2019).<sup>5</sup>

As another example showing Boggs Contracting’s meritorious defense, Boggs Contracting cannot be held liable for the actions of an independent contractor. Principals such as Boggs Contracting are generally not vicariously liable for the negligent acts of an independent contractor. *Rock Hill Tel. Co. v. Globe Commc’ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005). Heritage Hauling and Safe Shield were independent contractors, and Boggs Contracting cannot be held liable for their negligence. In addition, there is no prejudice to Respondents if the Order striking Boggs Contracting’s Answer is set aside for the reasons further explained below.

The merits of Boggs Contracting’s defense are highly relevant to the issues raised in the Motion for Sanctions, but the Circuit Court explicitly declined to consider the merits of Boggs Contracting’s defense before striking Boggs Contracting’s Answer. South Carolina public policy strongly favors the disposition of cases on their merits, and it is an abuse of discretion not to consider the merits of a case before taking away a party’s right to a defense.

**II. The Circuit Court abused its discretion by making unsupported factual findings that Boggs Contracting acted in bad faith to intentionally conceal documents in discovery and intentionally caused delays in discovery.**

The Circuit Court’s Order is also an abuse of discretion because the record does not support the Circuit Court’s finding that any alleged conduct by Boggs Contracting “was intentional and in bad faith.” (Order p. 7.) The law **requires** the moving party to show bad faith, willful disobedience, or gross indifference to its rights to justify the severe sanction of striking a party’s answer. *Skywaves*, 423 S.C. at 457, 814 S.E.2d at 657; *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip.*

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<sup>5</sup> See also, e.g., *Ye v. GlobalTranz Enters., Inc.*, 74 F.4th 453 (7th Cir. 2023) (finding claims were preempted by the FAAAA against a broker who arranged for a motor carrier under contract to ship goods when the motor carrier was involved in a motor vehicle accident); *Fuelling v. S&J Logistics LLC*, No. 7:22-CV-00905-JDA, 2024 WL 4802709 (D.S.C. Nov. 15, 2024) (same).

*Mfg. Co.*, 334 S.C. 193, 198-99, 511 S.E.2d 716, 719 (Ct. App. 1999). This showing is not optional. *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015); Rule 37(b)(2), SCRPC. “A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.” *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996); *see also Kershaw Co. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) (affirming the trial court’s denial of discovery sanctions that would have amounted to default judgment because “there was no evidence of any intentional misconduct on the part of [the party] or its counsel.”).

The Circuit Court’s reliance on Mr. Hayes’ testimony and signed discovery verification for its finding of bad faith is improper because the Order misstated both Mr. Hayes’ testimony and the verification. There is no evidence supporting the claim that Mr. Hayes’ testimony and verification were incorrect at the time they were made. (Order p. 6.) By contrast, Mr. Hayes stated that Boggs Contracting’s prior discovery responses were complete and correct to the best of his knowledge, and the subsequent discovery of additional responsive documents does not retroactively render Boggs Contracting’s earlier representations false. (Hayes Verification.) Mr. Hayes made the representations after a search for responsive information, based on the information available to Boggs Contracting at the time. (Feb. 12, 2025 Aff. ¶ 10.)

Similarly, the Circuit Court’s decision to ignore the unrefuted evidence of shortcomings by Boggs Contracting’s prior counsel and its insurance carrier, instead incorrectly attributing all shortcomings solely to Boggs Contracting itself, is improper. The record evidence directly contradicts the finding that the discovery shortcomings were solely attributable to Boggs Contracting itself and that Boggs Contracting intentionally withheld documents or information.

**A. There is no reasonable factual support for the Circuit Court’s finding that Boggs Contracting intentionally concealed documents.**

There is no evidence to support the Circuit Court’s finding that Boggs Contracting intended

to conceal documents in discovery through its representations to Respondents about the results of its search for responsive documents. This finding is objectively inaccurate and unsupported for at least three (3) reasons. First, the Circuit Court summarily characterized Mr. Hayes' verification of Boggs Contracting's discovery responses as false with no factual support and without weighing Mr. Hayes' actions to verify the responses. Second, the Circuit Court ignored the extraordinary actions Boggs Contracting took to locate documents and supplement its document production after new defense counsel substituted into the case, including Respondents' affirmation on the record that Boggs Contracting remedied the discovery shortcomings before the hearing on the Motion for Sanctions. Third, the Circuit Court disregarded the fact that, even after the extraordinary measures to confirm all documents were produced, only a small number of documents were located that were not produced earlier, and they had a low impact on the merits of the case. The record does not support any argument or finding that Boggs Contracting sought or obtained any advantage by the delayed production of documents.

**1. Mr. Hayes' testimony and the signed discovery verification were true and correct based on the information known to Mr. Hayes at the time they were made.**

The Circuit Court's Order merely summarily characterized Mr. Hayes' verification of Boggs Contracting's discovery responses as false without weighing Mr. Hayes' actions to verify the responses. The Circuit Court further wrongly assumed, contrary to the evidence in the record, that it was "simple" for Mr. Hayes to locate the photographs and video taken by an engineering firm the day after the subject incident. (Order p. 7.) However, these characterizations are incorrect and unsupported.

First, Boggs Contracting did exactly what it was supposed to do when "Plaintiffs' counsel focused in on the absence of responsive documents" by requesting a signed verification. (*Id.* at 12.) The unrefuted record shows that Mr. Hayes performed his own search and directed others to

do the same. (Feb. 12, 2025 Aff. ¶ 10.) It is undisputed that the two (2) responsive emails located in this search were produced alongside Mr. Hayes' verification. (*Id.*)

Second, there is no evidence in the record to support the Circuit Court's assertion that Mr. Hayes was the one who found the scene photographs and video after Respondents' Motion for Sanctions was filed, which is incorrect and not based on anything in the record. (Order p. 7.) The subject photos and video were taken by an engineering firm the day after the incident occurred in February 2022. The unrefuted record reflects that no one remaining at Boggs Contracting during the discovery process was aware of the documents, and the new defense counsel only learned of the documents' existence in conjunction with an electronic discovery vendor hired in December 2024 after new counsel was retained. The substitute counsel and electronic discovery vendor conducted a comprehensive collection and processing of approximately 650,000 documents from more than thirty (30) current and former employees, and the existence of the old photos and video was discovered there. Even then, the new counsel had to go to great lengths to obtain the documents directly from the engineering firm because they did not exist in Boggs Contracting's files. Mr. Hayes did not find any additional responsive communications; these were located by a highly specialized electronic discovery vendor who collected and searched hundreds of thousands of emails from multiple corporate inboxes. Contrary to the Circuit Court's finding, the fact that Boggs Contracting's employees did not find emails that were only later found by a specialized electronic discovery vendor is not evidence that that any alleged conduct by Boggs Contracting was intentional or in bad faith.

**2. The record shows Boggs Contracting took extraordinary measures to supplement its document production, which demonstrates that Boggs Contracting did not intend for the documents to be withheld.**

Boggs Contracting took extraordinary measures to supplement its document production months before the scheduled trial, but the Circuit Court abused its discretion by not considering

these remedial measures in assessing Respondents' Motion for Sanctions. It is an error of law to sanction a party for a discovery violation when the party has remedied the defect well in advance of trial. *See, e.g., McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize . . . an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter."). Once a party has cured issues in its discovery, courts overwhelmingly either decline to issue sanctions at all or temper their sanctions to allow cases to proceed on the merits. *See, e.g., CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 81-82, 716 S.E.2d 877, 885 (2011) (affirming discovery sanctions were not required because the receiving party received responsive documents and information before trial).

The record shows that Boggs Contracting's substitute counsel retained a specialized electronic discovery vendor to collect and search 648,787 documents from thirty-four (34) email accounts of Boggs Contracting employees and officers to leave no stone unturned to ensure no other documents had been missed. It required the specialized electronic discovery vendor, not Mr. Hayes or anyone else at Boggs Contracting, to locate the supplemental documents produced after the Motion for Sanctions was filed. As demonstrated to the Circuit Court, Boggs Contracting and its substitute counsel took extraordinary actions of their own accord to correct the issues Respondents allege, including:

- Retained an outside vendor to collect 648,787 documents from thirty-four email accounts of Boggs Contracting employees and officers;
- Manually reviewed 37,097 documents for responsive information;
- Produced 133 responsive documents from the electronic discovery vendor's collection. (Only approximately twenty-seven unique documents pertain to the collision incident itself; the low number confirms that very little was missed earlier in the discovery process);
- Numerous Boggs Contracting employees participated in more than twenty hours of in-person and virtual meetings with counsel, plus countless hours communicating with

counsel by email to provide information;

- Made all employees and executives – from dispatchers to pavers – available for meetings with counsel and to assist with collecting responsive information;
- Obtained and produced photos and video taken by an engineering firm the day after the collision incident, and met with the engineering firm regarding those materials; and
- A Boggs Contracting officer and employees reviewed every prior written discovery response with counsel to ensure any incomplete information was supplemented.

(See Resp. to Mtn. for Sanctions pp. 6, 7, 19.)

These extraordinary actions show Boggs Contracting went to great lengths to correct the shortcomings with its prior document production and that it never intended to withhold the small number of documents that were located and produced. The Circuit Court’s decision to ignore these undisputed facts and sanction Boggs Contracting as if it had not supplemented its discovery is a clear error of law, not supported by any statute or case law.

**3. Only a small number of documents were not produced earlier, and they had a low impact on the merits of the case, so Boggs Contracting had no incentive not to produce the documents earlier.**

Boggs Contracting did not benefit from the delayed document production, and there is no evidence that Boggs Contracting had any motivation to intentionally delay the production of those documents. The supplemental document production included a relatively low number of responsive emails and documents about the subject collision, and the record shows that none of these documents had any significant impact on Respondents’ case. The Circuit Court’s Order references a February 4, 2022 email between Matt Guillot and Christopher Bourque of SCDOT and photographs and videos taken by an engineering firm the day after the collision, (Order p. 5,) but it ignores that neither impacts Respondents’ claims against Boggs Contracting. Despite Respondents’ mischaracterization of the February 4, 2022, email exchange as evidence that Boggs Contracting was hiding something, the emails actually support Boggs Contracting’s position that

there were no problems with traffic control at the collision site at the time of SCDOT's inspection. (Feb. 4, 2022 Email.) The positive impact this email has on Boggs Contracting's defense is additional evidence that Boggs Contracting did not intend for the email not to be produced sooner.

**B. There is no reasonable factual support for the Circuit Court's finding that Boggs Contracting intentionally caused delays in discovery.**

The Circuit Court's finding of bad faith fundamentally hinges on the incorrect assertion that Boggs Contracting – and only Boggs Contracting – intentionally withheld documents from discovery, but this finding is not supported by the record or the Circuit Court's own findings. (*See, e.g.*, Order p. 7.) Respondents finally acknowledged in their Response to Boggs Contracting's Motion for Reconsideration what the record in this case plainly shows and what Boggs Contracting has argued all along, that delays in Boggs Contracting's document productions were not caused solely by Boggs Contracting itself. (Plfs. Resp. pp. 2, 23.) This acknowledgement from Respondents directly refutes their own previous argument that Boggs Contracting itself and no one else caused discovery shortcomings. (Mtn. for Sanctions p. 4). Despite this acknowledgment, the Circuit Court declined to Reconsider its Order that held, without any evidence, that Boggs Contracting alone intentionally withheld documents in discovery. (Order p. 7.)

**1. While Boggs Contracting acknowledges its prior counsel caused delays in discovery, there is no evidence that Boggs Contracting intended or even knew about the delays caused by prior counsel until after the Motion for Sanctions was filed.**

There is no evidence Boggs Contracting knew its prior counsel were not responding to Respondents' discovery requests on time or that Boggs Contracting intended to avoid the entry of court orders so Respondents could not request sanctions for discovery violations. The record shows Boggs Contracting's prior counsel did not provide it with information about the overdue status of the requests or Respondents' motions to compel, (Feb. 12, 2025 Aff. ¶ 11), meaning Boggs Contracting could not have intentionally caused these delays because the company did not even

know they were occurring.

The Circuit Court incorrectly applied the holding in *Griffin Grading* that the acts of an attorney “are directly attributable to and binding on the client.” (Order p. 8); *Griffin Grading*, 334 S.C. at 200, 511 S.E.2d at 719. While an attorney’s *acts* are attributable and binding on its client, the acts of a third party do not constitute intentional bad faith by the party in the absence of evidence the party directed the acts alleged. *Contrast Griffin Grading*, 334 S.C. at 200, 511 S.E.2d at 719 (finding sanctions were warranted for counsel’s acts because there was no evidence in the record the named party was unaware of its former attorney’s failures to comply with discovery) (emphasis added), *with Karppi*, 327 S.C. at 545 n.6, 489 S.E.2d at 683 n.6 (finding the named party should not be sanctioned for relying on its attorney’s advice because doing so was “clearly unjust, and would not properly serve the purposes for sanctions.”) (emphasis added).

It is a clear error of law and grossly unjust to sanction Boggs Contracting for relying on its prior counsel to produce timely responses to discovery where there is no evidence that Boggs Contracting was aware of, let alone directed, its prior counsel’s delays. The so called “bad faith conduct [] aimed at avoiding entry of a court order” that the Circuit Court found happened entirely outside Boggs Contracting’s awareness or control, and there is no evidence Boggs Contracting knew about the delays. (Order p. 13.)

**2. While Boggs Contracting’s insurance carrier inadvertently did not forward documents to its prior counsel, there is no evidence that Boggs Contracting intended or even knew about this miscommunication, and it cannot be used as evidence that Boggs Contracting intended to conceal the documents from discovery.**

As explained to the Circuit Court, Boggs Contracting’s insurance carrier inadvertently did not provide some documents to Boggs Contracting’s prior counsel that Boggs Contracting sent to the carrier approximately one week after the lawsuit was filed in September 2022. (Feb. 12, 2025 Aff. ¶ 7.) Respondents claimed in their Response to Boggs Contracting’s Motion for

Reconsideration that all parties, including Boggs Contracting, have a cause of action against the insurance carrier for its alleged contribution to the discovery shortcomings in this case. (Plfs. Resp. at 23, 25.) While there is no basis for such an assertion, the fact that Respondents acknowledge what Boggs Contracting has argued all along shows that the Circuit Court’s finding that the discovery shortcomings were solely attributable to Boggs Contracting itself and that Boggs Contracting intentionally withheld documents or information was unfounded.

The record shows that Boggs Contracting did not intend to overlook responsive documents or for its insurance carrier not to forward documents to Boggs Contracting’s prior counsel. The carrier’s actions cannot be imputed as evidence of Boggs Contracting’s intent because there is no evidence Boggs Contracting intended the miscommunications and oversights between its insurance carrier and its prior counsel. Importantly, the very fact that Boggs Contracting provided these documents to its insurance carrier is strong evidence that it did not intend to conceal them.

### **III. The Circuit Court abused its discretion by failing to consider a lesser sanction.**

A discovery sanction must be narrowly aimed at the specific misconduct of the party sanctioned, but the Order striking Boggs Contracting’s Answer was not. A court may not issue a discovery sanction that goes “beyond the necessities of the situation to foreclose a decision on the merits of a case.” *Balloon Plantation, Inc.*, 303 S.C. at 154, 399 S.E.2d at 440 (holding it was “unduly harsh under the circumstances” to place the defendants in default and strike their counterclaim as a discovery sanction); *cf. Patton v. Miller*, 420 S.C. 471, 493, 804 S.E.2d 252, 263 (2017) (finding it was “entirely contrary to the spirit of the . . . Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.” (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962))). The purpose of sanctions is to ensure compliance and fairness, not to punish a party unduly. Sanctions should not be unduly harsh but should be limited in scope to address the party’s violation of a court order. *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682.

*Karppi v. Greenville Terrazzo Co., Inc.* is instructive here. In *Karppi*, the Court of Appeals reversed a circuit court’s sanction order that struck a defendant’s answer because the sanction was “unduly harsh under the circumstances,” was not limited to the scope of the violation of the court’s order, and because alternative sanctions would have been sufficient. *Id.* at 545, 489 S.E.2d at 682-83. The Supreme Court found that striking the answer was an abuse of the court’s discretion that “ran afoul of the requirement that the sanction imposed be reasonable – comprehensive, yet not overly broad,” and stressed that alternative and more narrowly tailored sanctions would have been sufficient to protect discovery rights and punish wrongdoing. *Id.* at 544-45, 489 S.E.2d at 682-83.

As in *Karppi*, any number of alternative sanctions in this case would be more appropriately tailored to remedy the prior discovery shortcomings, protect the rights of all parties, and address the unintentional mistakes attributable to Boggs Contracting. Boggs Contracting proposed several alternative sanctions in its Motion for Reconsideration filed with the Circuit Court. (Mtn. for Reconsider. p. 2.) Boggs Contracting already went to great lengths to correct the discovery shortcomings and supplemented its document production, and Respondents acknowledged to the Circuit Court that the supplemental production was sufficient. (Hrg. Transcript 24:17-24.) The only prejudice Respondents could articulate – that they could not question Boggs Contracting’s Rule 30(b)(6) corporate representatives about the supplemented documents – is easily avoided by reopening the Rule 30(b)(6) deposition, which Boggs Contracting does not oppose.<sup>6</sup>

Contrary to the Circuit Court’s finding, striking Boggs Contracting’s Answer is the definition of a nuclear-level sanction, (Order p. 12), and it is overly harsh in this case. It is unjust to sanction Boggs Contracting so severely for mistakes that took place outside its control. Boggs

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<sup>6</sup> Boggs Contracting does not concede that Respondents suffered any actual prejudice because the supplemental document production has little to no impact on Respondents’ case, and Respondents still had the opportunity to depose the authors of the supplemented emails.

Contracting acknowledges that it failed to produce responsive documents in discovery and takes responsibility for this mistake. However, even Respondents acknowledged in their response to Boggs Contracting’s motion for reconsideration that the errors in its document production cannot be entirely attributed to Boggs Contracting. (Plfs. Resp. p. 23.) *See Karppi*, 327 S.C. at 545 n.6, 489 S.E.2d at 683 n.6 (“[U]nder these circumstances it seems from the record as though the attorney [] was at least as much to blame as the party itself, for its indiscretions. To penalize [the party] so severely for apparently relying on the advice of its attorney, under these circumstances, is clearly unjust, and would not properly serve the purposes for sanctions.”).

The Circuit Court abused its discretion by not considering the actions (and inactions) of Boggs Contracting’s prior counsel. Until Mr. Hayes reviewed Respondents’ Motion for Sanctions, he was not aware the discovery verification he signed was overdue when the prior counsel provided it to him, or that the verification was the subject of a motion to compel. (Feb. 12, 2025 Aff. ¶¶ 11-12.) Mr. Hayes was also not aware and does not believe anyone at Boggs Contracting was aware that the information sent to the insurance carrier in September 2022 was not provided to Boggs Contracting’s prior counsel and had not been produced in discovery. (Feb. 12, 2025 Aff. ¶ 7.) The record does not support the findings that Boggs Contracting intentionally delayed discovery and avoided orders on motions to compel so Respondents could not later seek sanctions against Boggs Contracting. Rather, the record shows that Boggs Contracting conducted a good faith search for responsive documents consistent with the instructions it received from prior counsel, but Boggs Contracting acknowledges the search was not complete and a small number of documents were missed.

Striking Boggs Contracting’s Answer is the kind of sanction the court described as a “hydrogen bomb” in *Balloon Plantation*, where the court stated: “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. In the instant case, the sanction was a hydrogen bomb. The defendants were denied the opportunity to present a defense.” *Balloon Plantation*, 303 S.C. at 154, 399 S.E.2d at 440.) It is neither reasonable, comprehensive, nor narrowly tailored, and as the court highlighted in *Karppi*, alternative sanctions are sufficient to remedy the prejudice Respondents allege without denying Boggs Contracting a meritorious defense.

**IV. The Circuit Court abused its discretion by imposing a sanction against Boggs Contracting equivalent to a finding of criminal contempt without following mandatory due process protections.**

The Circuit Court abused its discretion by imposing a sanction against Boggs Contracting equivalent to a finding of criminal contempt without following mandatory due process protections. While the Circuit Court did not use the word “contempt,” the Court’s finding that Boggs Contracting “gave a false affirmation and false testimony under oath,” (Order p. 6), and citation to case law for the court’s inherent power to punish with criminal contempt sanctions show that the Circuit Court intended to sanction Boggs Contracting in the same way the court punishes contempt. *See Brandt I*, 368 S.C. at 627, 630 S.E.2d at 264 (finding Brandt in contempt of court for submitting a fraudulent document to the court and dismissing his complaint as a sanction pursuant to Rule 41, SCRCP). Importantly, a court abuses its discretion by issuing sanctions without providing the sanctioned party notice and an opportunity to respond prior to the imposition of sanctions. Here, the Circuit Court rejected the stated basis for Respondents’ Motion for Sanctions pursuant to Rule 37 and, with no notice to Boggs Contracting, instead issued a sanction equivalent to criminal contempt on a completely different legal basis never mentioned to Boggs Contracting,

**A. Striking Boggs Contracting’s Answer pursuant to the court’s inherent power is the equivalent of a finding of criminal contempt.**

Striking Boggs Contracting’s Answer pursuant to the court’s inherent power is the

equivalent of a finding of criminal contempt because the sanction is meant to punish, not induce compliance with a court order. The level of due process protection owed to a party sanctioned pursuant to the court's inherent power depends on whether the sanction is civil or criminal in nature. *See Poston v. Poston*, 331 S.C. 106, 117, 502 S.E.2d 86, 91 (1998) (“[M]ost procedural requirements applicable to other criminal trials are applicable to a hearing on criminal contempt.”). Whether a sanction is civil or criminal is determined by the purpose for which the power is exercised, including the nature of the relief and the purpose of the sanction imposed. *Id.* at 111, 502 S.E.2d at 88. The purpose of a civil sanction is to urge the offending party to compliance for the benefit of the complainant, and the sanctioned party can obtain relief from the sanction by complying with the court's order. *Id.* at 111-12, 502 S.E.2d at 88-9. By contrast, criminal sanctions are punitive and meant to “preserve the court's authority.” *Id.* at 111, 502 S.E.2d at 88. A party cannot “undo or remedy” a criminal sanction, because it is “solely and exclusively punitive.” *Id.* (quoting *Hicks v. Feiock*, 485 U.S. 624, 633 (1988)).

The Circuit Court cited its inherent power to “punish” Boggs Contracting with a sanction, and the sanction of striking Boggs Contracting's Answer does not provide any remedy to the discovery deficiencies raised in Respondents' motion. (Order p. 7.) Moreover, the Circuit Court did not provide any way for Boggs Contracting to undo or remedy the sanction. Striking Boggs Contracting's Answer does not induce it to comply, nor can Boggs Contracting change its conduct to gain relief from the sanction. Thus, striking Boggs Contracting's Answer is equivalent to a finding of criminal contempt, and the Circuit Court was required to afford procedural due process protections before issuing the sanction.

**B. The Circuit Court abused its discretion because it did not afford Boggs Contracting the mandatory procedural due process protections of notice and an opportunity to respond required with a finding of criminal contempt.**

Sanctions pursuant to a court’s inherent powers are restrained by constitutional due process protections that were not followed in this case. A sanctioned party is entitled to notice and an opportunity to respond prior to the imposition of sanctions. *Burns v. Universal Health Servs. Inc.*, 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct. App. 2000) (addressing Rule 11 sanctions). Importantly, “[i]n order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.” *Id.* Failure to afford these procedural protections is an abuse of discretion. *Id.* at 513, 532 S.E.2d at 9. Additionally, while a determination of contempt is within the sound discretion of the trial judge, it is subject to reversal if the finding lacks evidentiary support or there has been an abuse of discretion. *Spartanburg Cnty. Dep’t of Soc. Servs. v. Padgett*, 296 S.C. 79, 84, 370 S.E.2d 872, 874 (1988).

The Circuit Court cited *Brandt I* as the source of its inherent power to “punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.” (Order p. 7.) (citing *Brandt I*, 368 S.C. at 628, 630 S.E.2d at 264 ). However, the United States Court of Appeals for the Fourth Circuit later disapproved the holding in *Brandt I*, specifying that when a court issues sanctions beyond those authorized by the Rules of Civil Procedure, it must follow certain due process considerations that were not afforded to Boggs Contracting in this case. *Brandt v. Gooding*, 636 F.3d 124, 133 (4th Cir. 2011) (hereinafter “*Brandt II*”).

**1. The Circuit Court was required to comply with due process before issuing a sanction for bad faith conduct pursuant to its inherent powers.**

If inherent powers are invoked, “[a] court must, of course, exercise caution . . . and it must comply with the mandates of due process . . . .” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (explaining a suit may be dismissed pursuant to a court’s inherent powers if the court finds bad

faith and complies with due process mandates). The court should not rely on its inherent powers to issue sanctions unless the Rules of Civil Procedure and any applicable statutes are inadequate to address the sanctionable conduct. *Id.* at 49; *contrast Brandt I*, 368 S.C. at 627, 630 S.E.2d at 264 (dismissing a complaint as a sanction for civil contempt pursuant to Rule 41, SCRCP, not the court’s inherent powers) and *Skywaves*, 423 S.C. at 459, 814 S.E.2d at 658-59 (finding it improper to strike a defendant’s answer when there is no basis issue sanctions under Rule 37).

Parties accused of criminal contempt in state court are afforded the same due process rights under the Fourteenth Amendment as parties accused in federal court.<sup>7</sup> *Brandt II*, 636 F.3d at 133. When a party is sanctioned for conduct that occurs outside the court’s personal view,<sup>8</sup> the party must be afforded certain rights, including reasonable notice from the court; an opportunity to be heard in defense, including a chance to examine the witnesses against him and offer testimony; and, in cases of severe punishment, a jury trial. *Id.* at 134; *Poston*, 331 S.C. at 113, 502 S.E.2d at 90-91. The burden of proof for criminal contempt is beyond a reasonable doubt. *Poston*, 331 S.C. at 113, 502 S.E.2d at 89.

Here, the Circuit Court relied on its inherent power because it found “Boggs’ conduct is more than just a discovery violation – it includes the use of a false affidavit and false testimony under oath at deposition” that “thwart[ed] the judicial process and upend[ed] the purposes of the discovery rules.” (Order p. 6.) The Circuit Court cited the holding in *Brandt I* concerning criminal

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<sup>7</sup> “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV; *see also Poston*, 331 S.C. at 116, 502 S.E.2d at 91 (overruling the lower court’s sanction because it “could potentially violate [] due process rights under the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution.”).

<sup>8</sup> Contempt for conduct that occurs directly under the court’s view is treated differently than conduct that occurs outside the court’s eyes. *Brandt II*, 636 F.3d at 133.

contempt sanctions to issue sanctions to “punish” Boggs Contracting for “offenses...calculated to obstruct, degrade, and undermine the administration of justice.” (*Id.* p. 7); *Brandt I*, 368 S.C. at 628, 630 S.E.2d at 264. Therefore, because the Circuit Court issued a sanction equivalent to criminal contempt pursuant only to its inherent powers, the Court was required to comply with procedural due process protections before striking Boggs Contracting’s Answer.

**2. The Circuit Court was required to provide Boggs Contracting with notice of sanctions pursuant to the court’s inherent powers and an opportunity to be heard in defense against those sanctions.**

The Circuit Court violated Boggs Contracting’s due process rights by *sua sponte* imposing a new basis for striking its Answer without prior notice or an opportunity to be heard. Procedural due process requires the sanctioned party be provided notice from the court of the possible imposition of inherent-powers sanctions and an opportunity to respond before the court imposes sanctions. *Burns*, 340 S.C. at 514, 532 S.E.2d at 9; *Brandt II*, 636 F.3d at 135 (holding an opposing party’s request for sanctions is insufficient to provide notice that sanctions may be issued pursuant to the court’s inherent power).

Like in *Brandt* and *Burns*, the Circuit Court issued sanctions against Boggs Contracting without affording Boggs Contracting the procedural protections of notice and an opportunity to respond on the issue of sanctions under the court’s inherent power. Boggs Contracting’s defense centered solely on responding to Respondents’ Motion for Sanctions pursuant to the Rules of Civil Procedure. It did not include any defense for sanctions under the court’s inherent power because, again like in *Brandt* and *Burns*, the Circuit Court did not give Boggs Contracting any notice of the possibility of such sanctions. Respondents’ Motion was made pursuant to the Rules of Civil Procedure, and more specifically, Rule 37 sanctions. During the hearing on Respondents’ Motion, the parties’ arguments centered on Rule 37 sanctions, and there was no mention of the court’s inherent powers.

Boggs Contracting had no opportunity to examine witnesses, offer testimony, or defend itself before the Circuit Court *sua sponte* issued a sanction pursuant to its inherent power, and the Circuit Court abused its discretion by sanctioning Boggs Contracting without affording it the mandatory procedural due process protections of notice and an opportunity to respond.

**V. The Circuit Court abused its discretion because there is no reasonable factual support for the Circuit Court’s finding that Respondents were prejudiced by the discovery violations they allege.**

A party must be prejudiced by actual discovery failures for sanctions to be appropriate. However, Respondents were not prejudiced because Boggs Contracting supplemented its document production months before trial, and the supplemental documents it produced do not have a significant impact on any parties’ claims or defenses. *See CFRE, LLC*, 395 S.C. at 83, 716 S.E.2d at 886 (2011) (finding no prejudice where all responsive documents were produced before trial and the requesting party admitted no documents were missing despite the party’s technical failure to comply with discovery). Respondents’ counsel notified the Circuit Court during the hearing on the Motion for Sanctions that they were satisfied with the sufficiency of the supplemental responses and did not believe any further search of Boggs Contracting’s email servers was necessary. (Hrg. Transcript 24:17-24.) Contrary to Respondents’ assertions, however, the supplemental documents themselves have a low impact on the merits of the case because they only confirm Boggs Contracting’s position that SCDOT found there were no issues with traffic control before the accident.

The Circuit Court abused its discretion by holding that prejudice is presumed merely because Respondents “lost opportunities in discovery.” (Order p. 10.) The Circuit Court cited *Downey* for the proposition that prejudice is presumed when “the rights of discovery provided by the Rules. . . are not accorded” unless the “party who has failed to submit to discovery can show a lack of prejudice.” (Order p. 9); *Downey*, 294 S.C. at 46, 362 S.E.2d at 319. However, this is an

incorrect application of *Downey*, which involved a party's failure to answer interrogatories or attend his deposition before the case proceeded to trial. *Id.* at 43, S.E.2d at 317. Unlike in *Downey*, where the requesting party never received answers to its interrogatories and never had an opportunity to depose the other party, Boggs Contracting responded to Respondents' initial discovery requests and supplemented its responses when additional responsive documents were located. The requesting party in *Downey* was prejudiced because the first time the responding party answered its discovery requests in any way was during his testimony at trial. By strong contrast, Boggs Contracting ensured Respondents had every opportunity to review its document production and conduct more discovery before trial.

A requesting party is not prejudiced by discovery failures if the producing party cures those failures reasonably before trial. *CFRE, LLC*, 395 S.C. at 83, 716 S.E.2d at 886. There is no prejudice to Respondents here because Boggs Contracting supplemented its document production months before trial, and Respondents had ample opportunity to prepare fully for trial. Discovery was still ongoing at the time the Circuit Court issued the Order striking Boggs Contracting's Answer, and all parties still had substantial written discovery, depositions, and expert discovery that had not even begun. The only prejudice identified in the Order is that Respondents "lost opportunities in discovery" because they did not have all of Boggs Contracting's document production before its Rule 30(b)(6) deposition, but there is no evidence that the supplemented documents would have had any effect on the deposition or that Respondents did not have time to investigate the documents before trial. (Order p. 10.) Moreover, the "lost opportunities" could be remedied by allowing an additional deposition to address information that was not produced in a timely manner because there was plenty of time to conduct any necessary additional discovery before trial. Prejudice cannot be presumed in this case because there is no negative impact on

Respondents' ability to prepare for trial. *Samples v. Mitchell*, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997).

Neither the Order nor Respondents articulate any true prejudice to Respondents' ability to prepare for trial. After receiving Boggs Contracting's supplemental document production, Respondents did not seek any additional depositions, even of the authors of the supplemented emails, nor did they subpoena the engineering firm for its file.<sup>9</sup> Respondents' assessment that they had no need to follow up on any of Boggs Contracting's supplemental document production is further evidence the supplemental documents have no effect on Respondents' case or ability to prepare for trial.

Boggs Contracting did not produce documents on the eve of trial, and there is no reason Respondents cannot conduct additional depositions and discovery to investigate Boggs Contracting's supplemental document production, especially since other parties were still issuing discovery requests and noticing depositions before the Circuit Court struck Boggs Contracting's Answer.

**VI. The Circuit Court abused its discretion by failing to rule on whether its Order striking Boggs Contracting's Answer also affected Boggs Contracting's cross-claim against other Defendants.**

The Circuit Court's Order is unclear whether the Circuit Court struck Boggs Contracting's cross-claim for equitable indemnity against Defendants Heritage Hauling and David Bigelow. The Circuit Court did not reference Boggs Contracting's cross-claim at all during the hearing on

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<sup>9</sup> With no basis in the record, the Order incorrectly characterizes the photographs taken by the engineering firm as an "engineering investigation." (Order p. 9.) There is no basis in the record for the Court's statement the late production of these photos affected questions asked at depositions as well as trial preparation, as Respondents have never made any such contention. (*Id.*) Nor did the engineering firm perform any "engineering investigation" or analysis of the photographs and videos. (*Id.*)

Respondents' Motion for Sanctions or the Order striking Boggs Contracting's Answer. Boggs Contracting raised this issue in its Motion for Reconsideration, but the Circuit Court declined to address it, merely issuing a Form 4 Order denying the Motion for Reconsideration with no explanation. Therefore, the status quo created by the Court's orders is ambiguous whether Boggs Contracting even remains a party in the lawsuit. There is no controlling precedent or statute to determine the status of the cross-claim because the Circuit Court made itself the sole authority on the sanction by not relying on any statute or case law as the basis for its decision. Not only is the sanction itself an abuse of discretion, but it is also an error of law and further abuse of discretion for the Circuit Court to refuse to clarify whether the cross-claim against Heritage Hauling remains pending.

### **CONCLUSION**

For the reasons set forth above, Appellant Boggs Contracting, Inc. requests that the Court reverse the Circuit Court's Order striking its Answer and remand this case for further proceedings.

Respectfully submitted,

#### **MURPHY & GRANTLAND, P.A.**

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