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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton, Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC, Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., Third-Party Defendants.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. **The Circuit Court Abused Its Discretion When It Struck D.R. Horton, Inc.’s Amended Answer And Third-Party Complaint And Declared It In Default for Alleged Discovery Violations Thereby Providing Respondent A Possible Multi-Million Dollar Judgment From D.R. Horton, Inc. Who Did Not Own, Rent, Lease, Operate, Control, Manage, Engage, or Utilize The Vehicle Involved In The Accident And Did Not Employ, Contract With, Have Control Over, Manage, Engage, Or Utilize The Vehicle’s Driver.**

- II. **The Court Abused Its Discretion By Not Considering That Respondent Served On D.R. Horton, Inc., Overbroad Discovery Demands That Far Exceeded Appropriate Discovery In This Vehicular Accident Case, Including Discovery Requests For Years Of Documents and Information Before The Driver Became A Subcontractor Of Kenneth Scott Builders, And For Years Before Kenneth Scott Builders Became The General Contractor For Horizontal Development for Cypress Ridge, And Including Documents Related To All Of Cypress Ridge, A Development Of More Than 1,400 Acres, More Than 1400 Homes, and Developed in 19 Phases Over 15 Years, Which Discovery Requests D.R. Horton, Inc. Attempted To Satisfy And Narrow.**

STATEMENT OF THE CASE

Respondent filed suit in Beaufort County against Alfredo Uriostegui (“Uriostegui”) and Jacob-AU Trucking LLC (“Jacob-AU”)—the driver and owner, respectively, of the dump truck that collided with Respondent. Summons & Complaint, No. 2018-CP-07-00607, Mar. 20, 2018. ROA. Respondent then filed an amended complaint adding Kenneth Scott Builders (“KSB”), the general contractor that hired Jacob-AU, as an additional defendant. Amended. Summons & Complaint, No. 2018-CP-07-00607, Apr. 12, 2018. ROA. D.R. Horton was not named in that suit. Respondent eventually settled with KSB for \$1 million (the limits of its insurance policy) and dismissed his claims against KSB. Stipulation Dismissal Kenneth Scott Builders, LLC, Feb. 24,

2022; Amended. Stipulation Dismissal, Feb. 10, 2023; and Oct. 23, 2024 email from Ben Shelton to John Crawford. ROA.

Almost three years after filing the Beaufort County action, Respondent filed the present action in Jasper County against 1223 May River Road, LLC (“May River”)—the owner of the development where Uriostegui was working at the time of the collision with Respondent, and Lotty Trucking—the company Respondent alleged was responsible for maintenance of the dump truck that Uriostegui was driving. Complaint, No. 2021-CP-27-00069, February 17, 2021. ROA. Respondent also sued D.R. Horton in the Jasper County action in the same case. Plaintiff’s Complaint and Summons, filed February 17, 2021. ROA. May River filed a third-party complaint against KSB, who Respondent did not include in this action and Motion to Dismiss. May River’s Amended Answer & Third-Party Complaint, Apr. 15, 2021. ROA. Respondent, May River, and KSB settled their claims against one another, and the Court dismissed May River. Mot. Order Dismissal, Apr. 26, 2022; Order Dismissal 1223 May River Road, LLC, Oct. 26, 2022. ROA.

Plaintiff filed a Motion for Entry of Default as to Defendant Lotty Trucking, LLC, f/k/a Ramos Trucking, LLC, on March 22, 2021 almost immediately for failure to timely answer the Complaint. ROA.

Defendants D.R. Horton, Inc., and 1223 May River Road filed a Notice of Motion and Motion to Transfer Venue, April 16, 2021, because there was a case already pending in Beaufort County, South Carolina for the same accident. ROA. D.R. Horton filed a Memorandum in Support of Its Motion to Transfer Venue on August 16, 2022 ROA, and an Amended Memorandum in Support of its Motion to Transfer Venue was filed August 16, 2022. ROA. Plaintiff filed a Memorandum in Opposition to Motion to Change Venue, August 15, 2022. ROA. Appellant and

Respondent entered in a Consent Order on September 9, 2022 to settle discovery issues and Appellant's Motion to Transfer Venue to Beaufort County, South Carolina. ROA.

D.R. Horton, Inc. filed an Answer to the Complaint on April 14, 2021, a Motion to Amend Answer on August 4, 2022, a Memorandum in Support of Its Motion to Amend, filed August 16, 2022, and a Summons and Amended Answer and Third-Party Complaint to bring claims against KSB was filed October, 26, 2022 after the Court granted the motion to amend. ROA. Order Granting Motion to Amend, filed October 26, 2022. ROA. The Answer and Amended Answer also included Motions to Dismiss. ROA.

Kenneth Scott Builders, LLC filed its Answer to 1223 May Rivers Road Third-Party Complaint on May 27, 2021. ROA. Kenneth Scott Builders filed its Answer to D.R. Horton, Inc.'s Third Party Complaint on November 22, 2022. ROA.

Plaintiff filed a Motion to Compel D.R. Horton, Inc., and Motion for Sanctions Per Rule 37 (d), SCRCF, Against Defendant D.R. Horton, Inc. on November 4, 2021. ROA. D.R. Horton filed a Notice of Motion and Motion to Stay Discovery, on August 3, 2022, ROA, and a Memo in Support of Its Motion to Stay Discovery and In Opposition to Plaintiffs' Motion to Compel and for Sanctions on August 16, 2022. ROA. Plaintiff's Memorandum in Support of its Motion to Compel and For Sanctions was filed August 17, 2022. ROA.

On May 21, 2024, D.R. Horton filed a Motion for Summary Judgment as to Plaintiff McGilton and a Memo of Law in Support on May 29, 2024. The Circuit Court denied the Motion on June 4, 2024. ROA. Third-Party Defendant Kenneth Scott Builder's filed a Motion for Summary Judgment March 29, 2024. ROA. Kenneth Scott Builder's Memorandum in Support of its Motion for Summary Judgment was filed May 23, 2024. ROA. D.R. Horton, Inc.'s Memo in

Opposition to Kenneth Scott Builders' Motion for Summary Judgment as to D.R. Horton, was filed May 29, 2024. ROA. The Court issued a Form 4 Order Denying Plaintiff and Defendant Motions for Summary Judgment on June 4, 2024. ROA. D.R. Horton filed a Motion to Reconsider, Alter Or Amend Order on its Motion for Summary Judgment on June 13, 2024. ROA.

Plaintiff filed a Renewed Motion to Compel D.R. Horton and Rule to Show Cause Regarding Sanctions Per Rule 37(d), SCRCPP, on October 17, 2023. ROA. The Court filed an Order Granting Plaintiff's Motion to Compel, For Sanctions, and Holding D.R. Horton in Contempt on March 5, 2024. ROA.

Various scheduling Orders have been issued during the case. D.R. Horton, Inc.'s Notice of Motion and Motion to Amend Scheduling Order was filed June 6, 2024 with a Memorandum in Support of its Motion to Extend Scheduling Order, filed June 10, 2024. The Court granted, with an Order, filed June 13 2024 (amending scheduling Order). ROA. Other Consent Scheduling Orders were issued January 17, 2024; August 28, 2024, and on December 13, 2024. ROA. A trial date had not been set and discovery was ongoing and open when the Court struck Appellant's Answer and declared it in default. ROA.

Plaintiffs' Motion For Rule To Show Cause, to Strike, and for Contempt per Rule 37(d), SCRCPP, Against D.R. Horton, Inc., For continuing Violations of Orders Dated Sept. 22, 2022, March 5, 2024, and June 13, 2024 was filed August 19, 2024. ROA. This is the motion that led to the Court declaring Appellant in default and striking its answer. Plaintiff's Memorandum in Support of its Motion for Rule to Show Cause, Consolidated Memorandum of Discovery Motions Against D.R. Horton, Inc. and Memorandum in Opposition to Defendant D.R. Horton, Inc.'s Motion for Costs and Sanctions Against Plaintiff was filed October 14, 2024. ROA.

D.R. Horton, Inc.'s Memorandum in Opposition to Plaintiff's Motion for Rule to Show Cause To Strike and for Contempt Per Rule 37(d), SCRPC, Against D.R. Horton, Inc. For Continuing Violations of Order Dated Sept. 22, 2022, March 5, 2022, and June 13, 2024 was filed October 16, 2024. ROA. Filings regarding that Motion and Appellant's Motion for Sanctions against Plaintiff include Affidavit of Jason M. Imhoff, filed October 16, 2024, ROA, Affidavit of John Crawford, filed October 11, 2024, ROA, D.R. Horton's Memorandum in Support of Motion for Sanctions Per Rule 37(d), SCRPC, Against Plaintiff, filed October 16, 2024. ROA, Letter and Deposition of Jared O'Sako, filed October 17, 2024, ROA, D.R. Horton's Response and Objections to Plaintiff's Proposed Order on Rule To Show Cause, to Strike Pleadings and for Contempt, filed December 23, 2024, ROA, Letter, filed October 18, 2024, ROA, and Plaintiff McGilton's Reply to D.R. Horton, Inc.'s "Response," filed January 1, 2025. ROA.

The Court granted Plaintiff's Motion for Sanctions and Defaulted D.R. Horton from the case. Order, January 15, 2025. ROA. D.R. Horton filed a Motion to Reconsider, Alter or Amend the Order Granting Plaintiff's Motion For Rule to Show Cause, to Strike, and for Contempt on January 27, 2025. ROA. Plaintiff filed a Return to Defendant D.R. Horton, Inc.'s Motion for Reconsideration on February 24, 2025. ROA. D.R. Horton filed a Reply in Support of its Motion to Reconsider, Alter or Amend the Order Granting Plaintiff's Motion for Rule to Show Cause, to Strike, and for Contempt on March 31, 2025. The Court issued an Order Granting in Part and Denying Part Defendant's Motion to Reconsider, Alter, or Amend, signed June 2, 2025, filed June 3, 2025. The Order is misnamed because it did not grant anything to Appellant. ROA.

Plaintiff McGilton made two Offers of Judgment to Appellant. The first was for \$6,000,000 and was filed October 3, 2024. ROA. The second was filed after the Court declared Appellant in default, on June 4, 2025 for almost 3 times as much - \$15,000,000. ROA.

Appellant filed its Notice of Appeal on June 5, 2025 appealing the January 15, 2025 and June 3, 2025 Orders. ROA.

STANDARD OF REVIEW

Sanctions are an extraordinary remedy that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (noting that sanctions should be shaped to protect a party's discovery rights). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and *degree of prejudice*." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (emphasis added) (citation omitted). A trial court's failure to consider and weigh these factors constitutes an abuse of discretion. *Richardson ex rel. 15th Circuit Drug Enforcement Unit v. Twenty-one Thousand & No/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020). The Court reviews a Circuit Court's discovery sanction for an abuse of discretion. "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the rights of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

SUMMARY OF FACTS

This case arises from a motor vehicle accident that occurred in Bluffton, South Carolina in May of 2018. *See generally*, Complaint. ROA. Mr. Uriostegui was driving his company's empty dump truck after completing his dirt moving work for the day when the dump truck crossed the center line and collided with Respondent. Complaint ¶ 2. ROA.. Tosky Depo. ROA. Mr. Uriostegui's company, Jacob-Au Trucking, LLC ("Jacob-Au Trucking"), owns the dump truck. Complaint ¶ 2. ROA.¹

Jacob-Au Trucking was hired as a subcontractor by the horizontal general contractor Kenneth Scott Builders, Inc. ("KSB") to move dirt on at least two separate and distinct jobs. Complaint ¶¶ 7, 8. One project is located at 1223 May River Road, and is unrelated to Cypress Ridge. The other predominately consists of the horizontal construction portion of Cypress Ridge Phase 7, along with an RV section and office building, for which D.R. Horton hired KSB as the sitework general contractor to clear, grade, and install water and sewage in those areas of the Cypress Ridge subdivision.² *See O'Sako Aff.* ¶ 11. ROA. S.C. Indep. Contractor Agreement, ROA, Scope of Work. ROA. This is known as "horizontal construction." May River also separately contracted with KSB for work at its nearby property.

It is undisputed that D.R. Horton did not own and was not driving the vehicle that collided with Respondent. Rather, Respondent alleges that Uriostegui worked on site development for property owned by D.R. Horton known as Cypress Ridge. Complaint, Feb. 17,

¹ Respondent alleges that the dump truck was maintained by Lotty Trucking, LLC ("Lotty"). Complaint ¶ 3. ROA.

² Cypress Ridge is a subdivision located in Bluffton, South Carolina that includes over 1400 homes, commercial areas, and various amenities. ROA. Cypress Ridge spans 1412 acres and has been developed over fifteen years through nineteen phases. ROA.

2021, ¶¶ 5, 8. ROA. Respondent is desperate to come up with a relationship between Appellant and Uriostegui; however there is none. Contrary to Respondent's claims, D.R. Horton did not control, operate, manage, engage and/or utilize Uriostegui or Jacob-AU for anything. *Id.* ¶ 13; Tosky Depo. pp. ROA. Mr. Uriostegui also confirmed that he did not know any D.R. Horton employees and did not work for D.R. Horton. Depo. Tr. ROA. Respondent's allegations against D.R. Horton are also at odds with testimony from Mr. Uriostegui stating that he had left the 1223 May River Road Project at the time of the accident (and not Cypress Ridge). Uriostegui Depo. 232:4-7. ROA. Kenneth Tosky confirmed in his deposition that Mr. Uriostegui had completed the two loads of dirt to be moved that day before the accident occurred. Tosky Depo. Tr. ROA. Mr. Uriostegui owned his own truck and was therefore free to drive it wherever he desired after work, therefore, he was off duty that day as soon as he dumped his load before the accident. Uriostegui Depo. Tr. ROA

D.R. Horton had nothing to do with the accident. Respondent was aware D.R. Horton had nothing to do with the accident, or the parties involved, likely before the complaint was ever filed and certainly after taking Mr. Uriostegui's and Mr. Tosky's depositions. Despite this knowledge, Respondent did not dismiss the case as to D.R. Horton but did dismiss the case against KSB for one million dollars.

The Circuit Court struck Appellant's Answer and declared it in default because Respondent wrongly convinced the Circuit Court that a permit Respondent obtained via a FOIA request showed D.R. Horton as a general contractor and not just an owner. Freedom of Information Act (FOIA), 5 U.S.C. § 552. Respondent hoped to prove that D.R. Horton was the general contractor for Uriostegui or Jacob-AU's horizontal land development work. However,

KSB, not D.R. Horton, is the horizontal land developer general contractor for Uriostegui and Jacob-AU's work. That fact would eliminate any likelihood of D. R. Horton's liability under South Carolina law. Respondent claims that the permit is proof that D.R. Horton withheld documents and disobeyed court orders. Pl.'s Mot. Rule Show Cause, Ex. 2. ROA. That the permit is not evidence that D.R. Horton engaged in the horizontal development work at Cypress Ridge. It did not. In fact, D.R. Horton does not self-perform land development work. Special licensing is required to be a general contractor for the land development stage of a development. ROA. The permit at issue is for the **vertical construction** of an office building. ROA. It is **not** for hauling dirt, which is **part of horizontal development** and the work that Uriostegui performed as a subcontractor for KSB on the date of the accident.

The KSB contract with D.R. Horton shows that KSB was hired as the *general contractor* for the horizontal development and that D.R. Horton had no control over that work. KSB Contract. ROA. The vertical portion of that project which pertains to the permit Respondent complains about, is entirely separate from and has nothing to do with the site work that was being performed by KSB, Jacob-AU, and Uriostegui. Respondent's counsel knows the difference between horizontal and vertical development and knows that horizontal development is the stage of development at issue in this case, which is evidenced by Respondent's definition of "horizontal land development" in the interrogatories served on D.R. Horton. ROA.

D.R. Horton did not produce the permit and related documents as part of its document production because *they are not relevant* to horizontal sitework (which is the type of development relevant to this case) and *Appellant did not understand that Respondent asked for them as part of the agreed upon narrowing of Respondent's discovery requests*. The permit

itself states that it is for a building – so vertical construction. Permit. ROA Appellant and Respondent discussed Respondent’s significantly overbroad discovery requests and agreed to have a “discovery” deposition of a D.R. Horton employee to assist Respondent in sharpening its discovery requests to avoid having to ask the Court to intervene to limit the scope and nature of the discovery Respondent had demanded. The parties also agreed that Respondent would choose what documents it needed from phase 7 of Cypress Ridge, review them, and *let Appellant know if other discovery was needed*. Respondent did not ask for other documents. Phase 7 was chosen by Respondent because an area for which site work was being performed by KSB and its subcontractor Jacob-AU, and Mr. Uriostegui.

After reviewing the phase 7 documents, unbeknownst to Appellant, Respondent filed a FOIA request with Bluffton, South Carolina to obtain all permits and other planning department documents from Bluffton, South Carolina for all phases and all 1400 acres and 1400 homes of Cypress Ridge.³ The permit and plans were not part of the agreed upon phase 7 discovery, but rather than simply acknowledge that the permit at issue was not part of the agreed upon discovery and then following up with a request for any additional discovery needed, if any, Respondent filed a motion for sanctions to win the case that way because he knew he had no chance of winning on the facts and the law. **Respondent gave D.R. Horton no notice, made no attempt to resolve, and provided no opportunity for D.R. Horton to explain anything about that permit.**⁴

³ Respondent could have just asked for the documents at Bluffton, South Carolina planning. No FOIA request was necessary.

⁴ Every time, from the very beginning of the case and before the venue and duplicate lawsuits issue were resolved, Respondent asked the Circuit Court to strike D.R. Horton’s Answer and declare it in default. ROA.

Around that same time, Respondent was dealing with the realization that the case it imagined and the relationships among KSB, D.R. Horton, Jacob-AU, and Mr. Uriostegui that Respondent hoped his discovery would prove were not as Respondent alleged in his complaint. The complaint is so riddled with false claims that it might be sanctionable. Respondent's own safety and compliance expert testified during a deposition that "D.R. Horton's responsibilities over the land and development merely as owner and not acting as contractor would be very limited if existent at all." Order, Jan. 15, 2025. ROA.

Respondent was facing all of these pieces of adverse information and seeing his case fall apart. Appellant had some rough patches earlier in the litigation regarding discovery, so it was an easy target in an attempt to have a party declared defaulted.⁵ Respondent's overbroad discovery requests were a significant problem.

Respondent's initial discovery requests asked for what is estimated to be tens of thousands of documents and some requests would require D.R. Horton to create documents to fully respond. Sometimes the request specified "horizontal" development, but sometimes not, although "horizontal land development was one of only 7 definitions in the interrogatories. The discovery was grossly overbroad for a vehicular accident case, often seeking 15 years of documents despite KSB, Mr. Uriostegui, and Jacob-AU having only provided services at Cypress Ridge for a little over 2 years at the time the accident occurred. As an example of the overbroad discovery requests, Respondent asked for information about every piece of equipment and materials ever purchased over a fifteen-year period that was used at Cypress Ridge – thus every

⁵ Respondent had earlier defaulted another litigant for failure to timely file a pleading.

tape measure, drill, saw, hammer, router, pickup truck, level, square, piece of lumber, window, floor tile, paint brush, and nail, etc. purchased over fifteen years for vertical and horizontal development, including the item, date of purchase and cost. Every single thing purchased for fifteen years for a development of over 1400 acres, over 1400 homes, and commercial buildings. General Interrog. 19. ROA. Respondent's counsel knows better than to serve such an outrageous discovery request in this type of case. What relevance does the date and cost of a paint brush for house number 357 have in a vehicular accident case involving, at most, the horizontal work in a specific phase? Tens of thousands of documents is probably an understatement of the number of pages requested once every piece of material to build over 1400 homes is produced. Another example, Respondent asked for a list and summary of all requests for insurance policies, certificates and subcontractor and vendor lists for all of Cypress Ridge from January 1, 2013 through March 13, 2018. General Interrog. 11. ROA. The accident occurred on a specific day and time, March 13, 2018. Requesting insurance information for a 5-year period for all of Cypress Ridge is overbroad.

Complying with Respondent's demands also would have required that D.R. Horton research all public court files in South Carolina and prepare a document that lists all litigation it has been a Defendant in for the past ten (10) years, including the causes of action, disposition of the case and any settlement agreement reached between the parties. General Interrog. 21. ROA. First, Respondent could have just as easily prepared this information itself. It is equally available to Respondent in public records. Second, every litigation matter for ten years is overbroad and not designed to elicit relevant information for this car accident case. Respondent also sought every insurance policy for every person or entity involved in Cypress Ridge on March

13, 2018. Doc. Prod. 12. ROA. This would require D.R. Horton to produce health insurance policies for the painters, for example, which would not be relevant. The painters' general liability insurance would also not be relevant because painters are involved with vertical development while this case concerns horizontal development.

D.R. Horton could have reasonably objected to many of the discovery requests Respondent demanded and pursued protection from the Court. In hindsight, that would have been better, however the Court allowed the parties to work out the discovery issues. Appellant's attorneys expected fair-play but got sharp practices. D.R. Horton's attorneys believed they had reached agreement with Respondent's attorneys that resolved the discovery requests, but then Respondent filed a motion for sanctions.

After a rough start that led to Judge Goodstein's Order that was designed to get D.R. Horton's attention, ROA, Appellant's attorneys tried to move the discovery in the case forward. At Appellant's suggestion, Respondent took O'Sako's deposition as a discovery deposition to help Respondent better frame and narrow its discovery needs. That deposition led to D.R. Horton providing the folder tree for phase 7 of the development (which was the phase Respondent requested). O'sako testified that KSB worked at phase 7, the RV lot, and the commercial area for the office building. O'Sako Depo. pp. 129, line 25-130 lines 2-25. ROA. Upon review of the phase 7 discovery tree, Respondent decided he wanted all of the documents. They were provided. At that point, the plan was for Respondent to review the phase 7 documents and decide if additional phases were needed. But Respondent did not follow up after the phase 7 production to request any additional documents and never contacted Appellant about it until he filed the motion to compel and for sanctions that resulted

in the Orders on appeal. ROA. Respondent also did not tell Appellant about the permit at issue until after Respondent filed its motion to compel and for sanctions. ROA. Appellant felt blindsided and that Respondent had laid a trap. But had Appellant requested in discovery all the documents Respondent requested and received in the FOIA request, D.R. Horton would have objected to the overboard and not relevant discovery request and would have asked the Court to narrow the request to what is relevant. Instead, Respondent filed a secret FOIA request and then told the Court the documents were relevant despite the agreement to limit discovery to phase 7 unless Respondent, after reviewing phase 7, advised that other phases or documents were needed.

On Appellant's part, there was never an intention to not be cooperative. There was also no intention to not produce relevant documents. Appellant produced thousands of pages in response to the discovery responses. The permit was not relevant and is not about Appellant performing horizontal land development. The permit was in the public records for anyone to see for the entire case.⁶ Nothing was hidden. Appellant believed the permit for the vertical development of the building was simply not relevant to the case (nor was any permit or plans pertaining to vertical construction relevant to a vehicular accident involving a truck that KSB contracted for to move dirt) and D.R. Horton believed it was outside the scope of the agreement between the parties to narrow the discovery requests.

The Circuit Court found for Respondent in an Order dated January 15, 2025. Appellant

⁶ Respondent also complains that a small number of emails involving KSB were part of the FOIA request. Again, those emails were likely includable in other phases of the development, and would either be not relevant or would have been produced if other phases of the development had been requested. D.R. Horton was waiting on Respondent's decision as to what other phases, if any, it desired.

does not believe that the Circuit Court understood why the permit and the documents were not relevant and were outside the scope of the agreement the parties reached regarding discovery. The Circuit Court struck Appellant’s Answer and declared that Appellant was in default. Order, January 15, 2025. ROA. Appellant field a Motion for Reconsideration arguing, among other things, that the Circuit Court failed to find that Respondent was prejudiced and should therefore not have struck Appellant’s Answer and should not have declared Appellant in default. The Circuit Court issued a Second Order in which it stated in conclusory terms without analysis, explanation, or degree of prejudice that Respondent was prejudiced. Order, filed June 3, 2025. ROA. The only substantive difference between the two Orders is shown below using “compare docs” to identify the differences between the documents:

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

Below is a timeline of some of the relevant discovery communications with counsel.

The chart shows that Appellant was an active participant in the discovery efforts.

April 4, 2023	Following a consent order resolving Respondent’s First Motion to Compel, Parties attend conference call to discuss entering into an agreement to narrow discovery to relevant documents related to Cypress Ridge.
June 13, 2023	Respondent takes Jared O’Sako deposition as a discovery deposition to aid in narrowing and refining Respondent’s discovery requests

August 11, 2023	D.R. Horton provides a breakdown of the contents of the Cypress Ridge Phase 7 land development file to confirm the contents would provide what Respondent was seeking.
December 6, 2023	D.R. Horton provides Cypress Ridge Phase 7 land development file as agreed. (Respondent did not request additional phases)
March 4, 2024	D.R. Horton requests dates for the depositions of Respondent, Ken Tosky, the at-fault driver, and Jacob-Au Trucking. Respondent responds with limited dates and requests 30(b)(6) of D.R. Horton.
May 21, 2024	Respondent again requests 30(b)(6) of D.R. Horton but does not provide dates or topic.
May 24, 2024	Respondent provides preliminary expert reports; D.R. Horton requests dates for Respondent's experts' depositions.
May 31, 2024	D.R. Horton requests 30(b)(6) topics for D.R. Horton.
June 3, 2024	Respondent provides 30(b)(6) topic list including 105 topics .
June 4, 2024	D.R. Horton follows up regarding scheduling depositions.
June 6-7, 2024	Parties discuss narrowing lengthy 30(b)(6) topic list down from original 105 topic list Respondent provided.
June 11, 2024	Respondent provides amended list of 30(b)(6) topics.
June 12, 2024	D.R. Horton notices the deposition of Andy Rowland.
June 13, 2024	Court issues amended scheduling order and required D.R. Horton to disclose experts by June 14, 2024 and make them available for deposition.
June 14, 2024	D.R. Horton sends supplemental discovery responses, including expert disclosures.
June 24, 2024	Respondent sends Rule 11 letter requesting index of production.
June 26, 2024	D.R. Horton notices the depositions of expert Lindsay Moore, Michael Fryar, and David Hill.
June 27, 2024	D.R. Horton sends letter in response to Respondent's Rule 11 letter.
July 3, 2024, July 11, 2023	D.R. Horton repeatedly requests expert Andy Rowland's file in advance of his deposition scheduled for July 16, 2024.
July 12, 2024	Respondent provides Michael Fryar and Andy Rowland's expert files.
July 16, 2024	Deposition of Andy Rowland; Respondent provides additional contents of Rowland's file not previously produced.
July 17, 2024	D.R. Horton provides requested categorized and indexed production.
July 19, 2024	Deposition of Michael Fryar; Respondent provides additional contents of Fryar's file not previously produced.
August 19, 2024	Respondent supplements production with partial FOIA response from Town of Bluffton. Respondent withholds some of the FOIA documents.
August 20, 2024	Respondent files Motion for Rule to Show Cause.
August 26, 2024	Deposition of expert Lindsay Moore; Moore indicates she has not produced entire file.
August 27, 2024	Respondent requests that the matter be continued from the October trial roster.

September 3, 2024	Respondent informs D.R. Horton that it will not be taking D.R. Horton's 30(b)(6) or Steve Moore's deposition.
September 4, 2024	After repeated follow ups, Respondent supplements production with remaining FOIA response documents.

As the chart above shows, Appellant engaged in discovery, attempted to move the case forward with the suggestion that Jared O'Sako be deposed as a discovery deposition (allowing him to be deposed again by Respondent as a fact witness later if desired), and had to repeatedly request that Respondent remedy its late and incomplete discovery responses. Respondent also made another attempt to be overbroad in his discovery requests with 105 topics proposed for D.R. Horton's 30(b)(6) deponent. The parties spent time and resources narrowing the 105 topics only to have Respondent unilaterally cancel the deposition entirely.

At the time the Court struck Appellant's Answer and declared it in default, discovery was ongoing and the time frame for discovery was still open, depositions were scheduled or held open, *no trial was imminent*, and Respondent had the documents about which it complained in its possession. There was no prejudice to Respondent.

ARGUMENTS

I. The Circuit Court Abused Its Discretion When It Struck D.R. Horton, Inc.'s Amended Answer And Third-Party Complaint And Declared It In Default for Alleged Discovery Violations Thereby Providing Respondent A Possible Multi-Million Dollar Judgment From D.R. Horton, Inc. Who Did Not Own, Rent, Lease, Operate, Control, Manage, Engage, or Utilize The Vehicle Involved In The Accident And Did Not Employ, Contract With, Have Control Over, Manage, Engage, Or Utilize The Vehicle's Driver.

The Court abused its discretion when it imposed the severe sanction of striking Appellant's Answer and Counterclaims and declaring Appellant in default. Order, January 15, 2025. ROA. The Order misstates and overlooks significant, relevant law and fails to evaluate all

the factors it was required to evaluate before reaching such a harsh sanction. Order, January 15, 2025. ROA. For example, the Order fails to analyze prejudice to Respondent, which the Court must consider *before* imposing a sanction as severe as striking an answer and defaulting a litigant in a multi-million-dollar lawsuit. The Circuit Court did not even mention *prejudice* in its January 15, 2025 Order in which it struck Appellant's Answer and declared Appellant in default. ROA. In response to Appellant's Motion for Reconsideration, ROA, the Circuit Court merely added conclusory statements that Respondent was prejudiced without analyzing how and the degree to which it was prejudiced. Order, June 3, 2025. ROA. A comparison of the two Orders included above in the Facts section shows only conclusory statements as to prejudice.

Respondent learned not long before filing his Motion to Compel and for Sanctions that his case against D.R. Horton was not likely to be successful because the factual evidence was not supporting Respondent's tenuous theory of liability. Respondent resorted to what seems to be disingenuous arguments and mischaracterization of a "permit" obtained via a FOIA request that shows D.R. Horton as a general contractor. Respondent argued that Appellant willfully failed and refused to provide the permit and certain plans and communications. That permit and the other documents produced in the FOIA response are (1) outside of the scope of documents agreed upon by the parties; (2) irrelevant to the accident and the horizontal land development; and (3) in no way prejudicial to Respondent's case. Respondent cannot be prejudiced with the documents in hand before a trial date is set and before discovery is closed. Moreover, as discussed more fully below, the documents from the FOIA request are not even relevant to this car wreck case. Respondent was injured by a driver performing a specific role, for a specific general contractor (KSB), during a specific phase (phase 7), of the development. Respondent's

counsel has failed to understand that (or willfully misleads the Circuit Court) and led the Circuit Court to the same factual and legal misunderstanding. Permits and planning documents for other phases not completed in the timeframe around the accident are not relevant, nor, as explained herein, are vertical permits related to vertical construction relevant to a car accident case when the driver worked on horizontal development moving dirt in his truck. D.R. Horton would have had no reason to believe that 15 years and 19 phases of construction documents or any vertical construction documents would be relevant discovery to an automobile wreck case.⁷

The effect of the Circuit Court's Orders is to grant a possible multi-million-dollar windfall⁸ to Respondent and Respondent's counsel, who has already received a million dollars in the duplicate case that was filed in Beaufort County, South Carolina.⁹

Even after the parties narrowed the interrogatory and document production requests, Respondent again proposed overbroad discovery when he proposed 105 topics for D.R. Horton's

⁷ In fact, the Order goes beyond the relief sought in Respondent's Motion by not only striking D.R. Horton's Answer but also declaring D.R. Horton in default. Compare Pl.'s Mot. Rule Show Cause at 3 (seeking "a hearing on a Rule to Show Cause as to why D.R. Horton's pleadings should not be stricken"), ROA, with Order at 10, striking D.R. Horton's Answer and declaring D.R. Horton in default.) ROA.

⁸ See Oct. 23, 2024 email from Ben Shelton to John Crawford (offering to settle for \$6 million, with an offset of \$1 million for amounts received from a prior settlement) and a later offer of judgment after the Circuit Court declared Appellant in default for almost three times as much - \$15,000,000. ROA.

⁹ D.R. Horton objected to the sanctions and showed that it had engaged in discovery in its previously filed Motion for Sanctions and Memorandum in Support; Memorandum in Opposition to Plaintiff's Motion; Exhibits to D.R. Horton's motion and memoranda in support; D.R. Horton's Response and Objections to Plaintiff's Proposed Order on Rule to Show Cause; and affidavits of John T. Crawford, Jr., and Jason M. Imhoff. ROA.

30(b)(6) deposition. The parties engaged in discussions to narrow that down, but overbroad demands that have to then be narrowed through extensive back and forth seems to be Respondent's counsel's approach to discovery. Much like the scorched earth discovery of days past and now frowned upon because it leads to discovery abuse, delays, and controversy as it did in this case.

Sanctions are an extraordinary remedy that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011). "The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). Striking a pleading is "harsh medicine that should not be administered lightly." *Id.* Accordingly, the Court must find a heightened level of misconduct. *Id.* "Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Id.*

a. D.R. Horton has produced the relevant documents mutually agreed upon between the Parties.

The crux of Respondent's argument for sanctions against D.R. Horton is that D.R Horton failed to produce certain documents and communications in response to Respondent's discovery requests. Contrary to Respondent's selective memory regarding the agreements

between the Parties, D.R. Horton produced the documents pursuant to a mutual agreement and Respondent did not request any others.

After O'Sako's deposition, the parties reached an agreement about D.R. Horton supplementing its discovery responses. ROA. The Parties agreed to D.R. Horton providing its land development file for Cypress Ridge Phase 7 to narrow the pool of documents from a fifteen-year, multi-phase project. *See Crawford Aff. and Exhibits*, filed October 15, 2024. ROA. D.R. Horton produced the phase 7 file December 2023. *Crawford Aff.* ¶ 11. ROA. After the hearing with Judge Goodstein, Respondent's counsel sent an email on January 3, 2024, addressing discovery material D.R. Horton provided on December 6, 2023, and stating that he would "reach out with any issues, concerns or questions regarding it separately." Jan. 3, 2024 email from Ben Shelton to Kim Wooten. ROA. No such follow-up occurred, leading D.R. Horton to believe that the production was sufficient and consistent with the parties' agreed scope of discovery. While Respondent has attempted to paint a picture of D.R. Horton as the problem, Respondent's counsel failed to identify any issues with the production, as this email demonstrates. As a result, D.R. Horton had no notice that Respondent believed D.R. Horton's production was deficient.

For six months, Respondent raised no further issues with D.R. Horton's production until sending a Rule 11 letter on June 24, 2024 requesting a table of contents, which D.R. Horton promptly agreed to address. ROA. Respondent raised no issues with the contents of the production, the need for additional documents, or concerns regarding missing communications. *Crawford Aff.* at ¶ 12. ROA. Even after D.R. Horton provided a table of contents for the production per Respondent's request, Respondent did not identify any deficiencies with the

contents of the production. Crawford Aff. at ¶ 12. ROA. Respondent made no further effort to consult with D.R. Horton before filing the present Motion. Mem. Opp'n Pl.'s Mot. Rule Show Cause at 6. ROA.

While Respondent has attempted to paint a picture of D.R. Horton as the problem, Respondent's counsel failed to identify any issues with the production, as this email demonstrates. As a result, D.R. Horton had no notice that Respondent believed D.R. Horton's production was deficient.

Indeed, the only *specific* request the Order cites is a request for permits associated with "210 Hulston Landing Rd., Bluffton, SC 29909." Order at 4. ROA. The permit Respondent cites to show D.R. Horton's bad faith is for construction of a building at 30 Silver Lake Rd. Pl.'s Mot. Rule Show Cause, Ex. 2. ROA. On its face this document is not even responsive to Respondent's requests. No discovery request seeks documents for 30 Silver Lake Rd. The Court did not address or consider this context in the Order, which counsels against its finding that D.R. Horton acted in bad faith. Therefore, its decision to sanction D.R. Horton was an abuse of discretion. *Cf. Dunn*, 298 S.C. at 502–03, 381 S.E.2d at 735–36 (reversing the trial court after concluding that there was no evidence to support the trial court's finding that a party's actions were unjustified where the trial court made no findings as to a relevant agreement between the parties' attorneys). Also, Respondent has the permit in his possession (and could have obtained the permit from the Town of Bluffton by simply asking for it at any time without resorting to a FOIA request, even before Respondent filed the Beaufort County action in March 2018). There can be no prejudice where Respondent has the documents about which he complains, for a trial that is not yet even scheduled. Additionally, the Order states that Appellant produced invoices and

payments requests from KSB relating to the Office/RV Lot, ROA, which is the Office for which Appellant has the permit for the vertical construction of the Office. ROA. There was no attempt to “hide” ground site work at the Office/RV lot which is evident because Appellant produced the invoices and payment requests for that work. Respondent could have simply asked for that land development file for Office/RV Lot in accordance with parties’ agreement that Respondent would review the phase 7 land development file and then advise Appellant of any other discovery it needed. Respondent did not do that. Instead, Respondent planned to “catch” Appellant.

Respondent decided it wanted documents related to the Office/RV lot after deposing the driver Mr. Uriostegui, Order, January 15, 2025, but hid that from Appellant. **Respondent did not ask Appellant for those documents as the parties had agreed would be done for additional documents Respondent decided he needed after he reviewed the phase 7 land development file.** The Circuit Court ignored the agreement the parties agreed to for discovery to resolve Respondent’s overbroad discovery requests and avoid tens of thousands of pages being produced. After the Circuit Court telling the parties they could reach agreement on discovery issues, the Court obliterated that agreement and instead went back to the original discovery requests to condemn Appellant to a default declaration. And Respondent led the Circuit Court there with its subterfuge. Respondent’s motion was disingenuous from the start because he did not become aware that KSB worked at the office building or the RV lot from Mr. Uriostegui’s deposition. Jared O’Sako, who Appellant offered to Respondent for a discovery deposition so that Respondent could tailor its discovery requests told Respondent’s attorney that KSB performed site work there on June 13, 2023. O’Sako Depo. pp. 129, line 25-130 lines 2-25. ROA.

Moreover, the Orders disregard all evidence and the law disproving Respondent's theory. "To establish joint venture or enterprise liability" in the motor vehicle context, "there must be a common purpose or community of interest," as well as "an equal right to control the direction and management of the vehicle." *Pruitt v. Bowers*, 330 S.C. 483, 487, 499 S.E.2d 250, 252 (Ct. App. 1998) (per curiam). The KSB contract does not allow D.R. Horton to control KSB or its down the chain subcontractor. ROA. The truck driver was not D.R. Horton's employee or D.R. Horton's subcontractor. Mr. Uriostegui Depo. ROA. He was KSB's subcontractor. Mr. Uriostegui Depo. ROA. Respondent's Motion and the Court's Order granting a default, results in an end run around this well-settled South Carolina law. *See, e.g., Cherry v. Myers Timber Co.*, 404 S.C. 596, 603–04, 745 S.E.2d 405, 409 (Ct. App. 2013) (affirming the grant of summary judgment in favor of a timber company because there was no evidence it controlled the logging company it hired to transport timber where, *inter alia*, it could not fire the contractor's employees and the contractor owned all its own equipment); *Richitelli v. Motiva Enters., LLC*, 389 S.C. 184, 189, 697 S.E.2d 667, 670 (Ct. App. 2010) (stating that an oil company and a distributor could not be held liable for the negligent driving of an employee of a franchisee unless there was "evidence of a master-servant relationship between the wrongdoer and the person sought to be charged for the result for the wrong *at the time and in respect to the very transaction out of which the injury arose*" (emphasis in original) (citation and internal quotations marks omitted)).

D.R. Horton presented ample evidence that it was not—indeed, *could not have been*—the general contractor for the site development work at issue in this case. *See* Mem. Opp'n Pl.'s Mot. Rule Show Cause, Ex. A., O'Sako Aff. ¶¶ 9–10. ROA, The "smoking gun" documents Respondents rely on are in fact irrelevant, as they relate to a project outside of the

agreed scope of discovery. *See Id.* ¶ 12. ROA. They are public documents that anyone could walk into the planning department in Bluffton, South Carolina and obtain. There was nothing secret about the permit and it was not hidden or wrongfully withheld from Respondent. Moreover, Respondent could have asked for it, as that was part of the discovery agreement, Respondent was supposed to review the phase 7 land development file, get a sense of what is in such a folder, and ask for any additional discovery or land development files it needed. This is the kind of discovery agreement that benefits litigants because it avoids the burden of tens of thousands of irrelevant documents needing to be sent and reviewed while allowing the discovery requester to refine what they need and ask for it.

D.R. Horton is on the permit as the general contractor for *vertical* construction at Cypress Ridge. *Id.* ¶ 10. ROA.¹⁰ The permit that Respondent cites relates to that vertical work. *Id.* ¶ 12. ROA. D.R. Horton was not and *could not* be the general contractor for the *horizontal* site work, including the hauling of dirt, that is at issue in this case. *Id.* ¶¶ 10–11. ROA. D.R. Horton’s failure to produce documents related to its status as the general contractor for a *different* project involving a *different* scope of work does not support Respondent’s request for sanctions, and certainly not a sanction as severe as default.¹¹

¹⁰ Respondent misrepresented Appellant’s summary judgment motions and memoranda and used that to sway the Court that Appellant was attempting to hide something. That is another error that supports reversal.

¹¹ Had Respondent properly requested discovery of tens of thousands of documents related to phases and years of development unconnected to the car wreck at issue in this case, D.R. Horton would have been allowed to object that such discovery was overbroad and seek relief from the Court if the parties could not reach an agreement as to scope. The Order obfuscates that process by assuming the documents are relevant and then viewing them in a light most favorable to a party that is essentially arguing a motion for summary judgment.

Put simply, D.R. Horton produced the documents contained within the files the Parties mutually agreed for D.R. Horton to produce. To the extent certain documents or communications were not part of those files, such documents were not flagged by either party as needing to be produced **throughout the course of almost a year**. Respondent, particularly after D.R. Horton produced a table of contents, could have easily seen what was contained in the production. Respondent could have notified D.R. Horton at any time prior to filing the Motion for sanctions that he believed certain documents were not included in the agreed upon production.

Until Respondent filed the Motion to Compel and for Sanctions, ROA, it was D.R. Horton's understanding that its production based on the agreement was sufficient pursuant to the agreement between the parties. Under these facts, Respondent's request that the Court sanction D.R. Horton for willfully failing to produce documents or withholding documents in bad faith when D.R. Horton understood it had acted in accordance with a discovery agreement is absurd, unfair, and threatens to undermine the civility the Courts want all attorneys to honor. The Circuit Court was advised of Appellant's position and the discovery agreement between the parties, but the Court seemed to weigh all inferences in Respondent's favor and ruled in Respondent's favor. The Court's references to the documents and assessment of the documents providing Respondent the likelihood of success on the merits without testimony, context, or all the facts, resulted in a *defacto* summary judgment decision in which the moving party was granted all possible inferences.

Instead of requesting that D.R. Horton supplement its production, suggesting reasonable search terms, or communicating with D.R. Horton regarding the production whatsoever,

Respondent waited until he received a FOIA response from the Town of Bluffton to play a game of “gotcha.” What Respondent fails to mention to the Court is that its FOIA request to the Town of Bluffton requested documents **for the entirety of the Cypress Ridge project, not just the portions at issue in this litigation.** To compare the response to a request for fifteen years’ worth of project documents on a large scale, mixed-use development project to the file of a single phase is specious. Respondent has admittedly not reviewed the entirety of the Town of Bluffton FOIA response but claims that the information therein is relevant and responsive. How was he able to know or able to make an honest representation of the documents when he had not yet reviewed them? D.R. Horton would submit to the Court that is not the case. The majority of the documents contained in the FOIA response are entirely unrelated to Cypress Ridge Phase 7. Even those related to Cypress Ridge Phase 7, such as emails, are not necessarily documents that would be contained in the land development file, which is the scope of the documents the parties agreed would be produced. Respondent now complains of having to sort through “thousands of documents,” which was the exact thing the agreement between the Parties sought to alleviate.

This is not a construction case regarding the entirety of the Cypress Ridge project. This is a motor vehicle accident case where Respondent alleges that the at-fault driver may have at some point performed work on the site development of Cypress Ridge. Documents and communications outside of the areas at issue are entirely irrelevant to the matter at hand and constitute discovery abuse. To require D.R. Horton to produce all documents for the entirety of the project would be unreasonable, unduly burdensome, and not related to the needs of the

case. What is relevant to this matter, by Respondent's own admission, is D.R. Horton's role in Cypress Ridge horizontal site work and the at-fault driver's relation to same.

As to the one permit document from the FOIA response Respondent relies on in its Motion to support its theory of D.R. Horton's "bad faith," Respondent misunderstands the construction process and the meaning of that document. The permit is for the vertical construction of an office building at Cypress Ridge and is entirely unrelated to Cypress Ridge Phase 7 or the sitework at Cypress Ridge. Ex. A, ¶ 12. ROA. Because the permit is unrelated to the Cypress Ridge Phase 7, it would not have been in the Cypress Ridge Phase 7 land development file that the Parties mutually agreed for D.R. Horton to produce. *Id.* at ¶ 14. ROA. The permit is entirely irrelevant to the phase and site development that the at-fault driver may have been involved in. To sanction D.R. Horton for failure to produce irrelevant documents and documents outside of the agreed upon scope of documents is unreasonable.

Any failure by D.R. Horton to produce documents was—*at worst*—inadvertent and caused by a misunderstanding between the parties about the relevance of certain documents and Respondent's failure to ask for additional land development files after review of the phase 7 land development file, as the parties agreed to resolve overbroad discovery issues. Moreover, the documents on which Respondent and the Court focused—a permit and planning documents—were always easily and equally available to Respondent or any other member of the public from the Town of Bluffton.¹² Respondent could have asked for permits and planning

¹² Instead, Respondent's counsel engaged in a FOIA request to make it seem as though it had to use an extraordinary remedy to obtain documents, which it did not. Permits and planning documents are available without the need for a FOIA request by simply asking for them. See Citizen Self Service Portal, Town of Bluffton, <https://townofblufftonsc->

documents at any time and could have followed up with D.R. Horton for additional documents if the permits or planning documents led Respondent to believe other documents were relevant to the case and properly within the scope of discovery. However, the FOIA documents were not included in the party's agreed narrowing of Respondent's broad discovery requests and Respondent did not follow-up with Appellant after reviewing the phase 7 production to request the documents from Appellant.

Based on the law and facts, it was an abuse of discretion for the Circuit Court to strike Appellant's Answer and declare it in default. Appellant did not engage in any wrongdoing. Appellant provided the discovery the parties agreed to. The Circuit Court ignored the parties' agreement narrowing the discovery and erroneously concluded material facts in the moving party's favor to conclude that D.R. Horton is the general contractor for the horizontal site work, which it is not. Everyone who testified in a deposition confirmed that D.R. Horton is NOT the land phase general contractor. Moreover, the Circuit Court imposed the harshest sanction available to it, for what was, at worst, a misunderstanding. "The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). Striking a pleading is "harsh medicine that should not be administered lightly."

energovweb.tylerhost.net/apps/selfservice (last accessed Jan. 26, 2025) (providing a way for the public to, among other things, "[s]earch for existing permits, plans, inspections, code cases, requests and licenses"). Moreover, if a review of those documents caused Respondent's counsel to believe the scope of discovery should be broader, it should have pursued that with D.R. Horton.

Id. Accordingly, the Court must find a heightened level of misconduct. *Id.* "Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Id.*

The Circuit Court's Order strongly suggests that the Court made factual findings, among others, that D.R. Horton is the sitework horizontal construction general contractor and had power, control and responsibility over Mr. Uriostegui and knowingly allowed an uninsured driver with a poorly maintained dump truck work on its site, that Mr. Uriostegui was working for D.R. Horton at the time of the accident for D.R. Horton, and that Mr. Uriostegui had not finished his work day prior to the accident. Every one of these "facts" are contrary to deposition testimony provided to the Court. Mr. Uriostegui Depo; Tosky Depo; O'Sako Depo. ROA. Additionally, the deposition testimony of Tosky confirmed that D.R. Horton is the not the site work general contractor and that it would not even have known dirt was being transported that day. ROA. Tosky also testified that Mr. Uriostegui had already finished his work for the day before the accident occurred. Tosky Depo. ROA. The Circuit Court made its factual findings without even having all the deposition testimony of Mr. Uriostegui in its possession that it cites in its January 15, 2025 Order. There was no trial testimony, no cross examination, no rules of evidence, no expert opinions, and a misunderstanding of the difference between a licensed horizontal general contractor and a general contractor who constructs buildings. The Court, erroneously thinking that Appellant had violated the discovery rules, gave every inference and every benefit of the doubt to Respondent, the moving party in a type of reverse summary judgment. The Circuit Court took from the jury as fact finder the very heart of the case. The Court told the parties they could reach agreements on discovery. Appellant did that in good faith only to have

the Court ignore the agreement and then punish Appellant in the harshest manner possible for making and complying with the parties' discovery agreement. The Court simultaneously rewarded Respondent's sharp practice of not complying with the agreement and then disavowing it to take away D. R. Horton's day in court.

The Circuit Court abused its discretion. Appellant requests that the Court of Appeals reverse.

b. Respondent has not been prejudiced.

The Circuit Court did not find any prejudice to Respondent in its January 15, 2025 Order. In response to Appellant's Motion to Reconsider, The Circuit Court issued a second Order on June 3, 2025 that added one phrase and one sentence regarding prejudice to what is otherwise substantively an identical Order to the January 15, 2025 Order. ROA. A comparison of the two Orders shows the section on prejudice:

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

The Court did not adopt any of Respondent's prejudice allegations, but instead made conclusory statements about prejudice. That is not a sufficient analysis when a Court is depriving a litigant of its day in Court with a default declaration in a multi-million case. Even if

the allegations Respondent alleged in its Motion were true, (which Appellant denies) D.R. Horton maintains that the conduct alleged in no way prejudices Respondent's case. Respondent claims he was prejudiced by D.R. Horton's failure to produce "the permit for the construction of the site that is at-issue in this matter." That allegation is based entirely on Respondent's fundamental misunderstanding of large-scale construction project. As previously mentioned, the permit is for the vertical construction of an office building at Cypress Ridge and is entirely unrelated to Cypress Ridge Phase 7 or the sitework at issue anywhere in Cypress Ridge. ROA. Site work is an entirely different skill set than constructing a building. Respondent's reliance on the permit in its argument and accusations is simply a misrepresentation or a misunderstanding of the project in question.

There was and is no prejudice to Respondent. This case is not on a trial roster, depositions either remain to be taken or have been left open, and discovery remains open, further obviating any alleged prejudice to Respondent. *Cf. Downey*, 294 S.C. at 44, 46 n.4, 362 S.E.2d at 318, 319 n.4 (reversing and remanding for a new trial where the trial court merely imposed a \$50 fine on a defendant who failed to appear for a deposition or respond to interrogatories, but noting it did not necessarily justify striking the defendant's answer because "[i]t may very well be that [the plaintiff] can have her interrogatories answered and be given the opportunity to take the deposition of [the defendant] before the new trial takes place"). And, to the extent the Court feels it necessary for D.R. Horton to produce additional documents, Respondent has ample time to review them and prepare to present his case of liability for a motor vehicle accident against an uninvolved home developer to a jury. D.R. Horton is not responsible for, nor should it be sanctioned for, facts and law unfavorable to

Respondent.

Respondent *has* the documents and therefore cannot show any prejudice. See *CFRE, LLC*, 395 S.C. at 83–84, 716 S.E.2d at 886 (noting that a party was not prejudiced where it “ultimately received all pertinent and material information” and there was nothing more “of any consequence” that could have been produced). Under these facts, it was improper for the Court to impose any sanction, especially one as severe as striking D.R. Horton’s answer and “foreclos[ing] a decision on the merits.” *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682; see *Orlando*, 320 S.C. at 512, 466 S.E.2d at 355 (concluding that “the trial judge abused his discretion in excluding [an expert witness] and effectively dismissing the case” where the court acknowledged that there was no willful violation of discovery rules); *Karppi*, 327 S.C. at 545, 489 S.E.2d at 683 (reversing the trial court for striking an answer where “any number of lesser, more narrowly tailored sanctions would have sufficed”).

Striking D.R. Horton’s answer without showing prejudice to Respondent was an abuse of discretion and provides Respondent and Respondent’s counsel an unwarranted windfall.

c. An order striking D.R. Horton’s answer and declaring Appellant in default is not the appropriate sanction.

Because Respondent presented no facts to support its allegations of “discovery abuse” outside of baseless accusations and fundamental misunderstanding of construction documents, the Circuit Court should not have sanctioned Appellant. In the event that the Circuit Court believed D.R. Horton should be sanctioned, striking D.R. Horton’s answer and declaring it in default in what Respondent claims is a multi-million dollar vehicular accident in which the Court found that Respondent’s own safety and compliance expert testified during a deposition

that: "Plaintiff's safety and compliance expert testified that D.R. Horton's responsibilities over the land and development merely as owner and not acting as contractor would be very limited if existent at all" is not an appropriate or reasonable sanction.

D.R. Horton's defense would prevail at trial because it was not the general contractor for the land or "horizontal" development. While Respondent either knowingly or inadvertently misled the Circuit Court to a faulty conclusion that D.R. Horton was the general contractor for horizontal phase of the development, not a single witness or document shows that. Mr. Uriostegui, the driver of the vehicle, testified in his deposition that he did not work for D.R. Horton and that he did not have interactions with D.R. Horton or its employees. Depo Tr. ROA. Mr. Uriostegui confirmed throughout his deposition that he was a 1099 independent contractor working for Kenneth Scott Builders. Depo Tr. ROA.

Kenneth Tosky, principal of Kenneth Scott Builders, confirmed in his deposition that Kenneth Scott Builders did not purchase dirt from D.R. Horton, that D.R. Horton did not direct Kenneth Scott Builders as to time, location, purpose, transportation, or delivery and that D.R. Horton probably did not even know about the dirt being moved that day. Depo. Tr. pp 121-128. ROA. Kenneth Tosky also stated in his deposition that two loads of dirt were being moved that day and that Mr. Uriostegui had already completed the work before the accident. Depo. Tr. p. 121. ROA. Kenneth Tosky also confirmed that Mr. Uriostegui owned his own dump truck and worked for Kenneth Scott Builders. Depo. Tr. ROA. Respondent knew that its case against D.R. Horton had no merit and that is what motivated Respondent to pursue the Orders under appeal.

South Carolina law requires that a sanction be reasonable and in line with the necessities of the situation. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). The Court must consider the nature of the discovery, the posture of the case, willfulness, and degree of prejudice when determining the appropriateness of a sanction. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011). The Circuit Court's Orders striking D.R. Horton's answer and declaring it in default is unreasonable under the facts. To invoke such a severe remedy, the Court must find an element of **bad faith, willfulness, or gross indifference as to the discovery at issue**. *Id.* While the Circuit Court decided that D.R. Horton engaged in willful disobedience as well as gross indifference to the prior orders of this Court, the Court should not have let the past discovery issues determine the factual accuracy of the present one.¹³ The present discovery issue was not intentional. D.R. Horton should not be sanctioned and ousted from liability phase of the case for complying with the parties' discover agreement.

As fully explained herein, D.R. Horton did not act in bad faith, willful disobedience, or with gross indifference. D.R. Horton's action regarding the documents in dispute have been in line with agreements between the Parties and reasonable under the circumstances.

The Order concludes that "D.R. Horton has engaged in willful disobedience" and "gross indifference." Order, January 15, 2025 at 8. ROA This finding is not supported by the facts. D.R. Horton presented ample evidence of its negotiations with Respondent regarding the scope of discovery and its efforts to ensure it was complying with prior orders and agreements. To date,

¹³ Respondent made it a point to highlight prior disputes and prior orders to bolster his allegations; however, Respondent's Motion was without veracity.

D.R. Horton has produced approximately 4,000 or more documents. D.R. Horton's Resp. & Objections Pl.'s Proposed Order Rule Show Cause at 3 n.1. ROA. Rather than communicate so that D.R. Horton could explain *why* it had not produced certain documents, Respondent filed this Motion, misusing Judge Goodstein's previous order as a sword to accomplish what he could not achieve with arguments on the merits. The Court's failure to take this into consideration while finding that "D.R. Horton has engaged in willful disobedience as well as gross indifference to the prior orders of this Court," Order, January 15, 2025 at 8, ROA, constitutes an abuse of discretion. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) ("An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.").

What Respondent's counsel did was lay a trap. A party seeking information should be clear and specific; it is not up to a litigant to read the mind of an opposing party. As reflected in the Order, Respondent's initial discovery requests were incredibly broad, essentially asking for "all documents" related to Cypress Ridge. *See* Order, January 15, 2025 at 4–5. ROA. Cypress Ridge is a mixed-use development spanning 1,412 acres that was constructed in 19 phases over 15 years. D.R. Horton's Memo in Opposition to Plaintiff's Motion to Show Cause at 2 n.1, ROA. D.R. Horton did not believe that *all* documents related to this sprawling development, created over a decade and a half, were relevant in a car wreck case where Respondent already knows the name of (1) the other driver, (2) the other driver's company, and (3) the company that contracted for the work the driver was performing at the time of the collision. This led to extensive negotiations between the parties about the proper scope of discovery, some of which

are reflected in the timeline that D.R. Horton provided in its opposition to Respondent's Motion:

Respondent can show no prejudice it has experienced at the hands of D.R. Horton. The case is not up for trial, and depositions either remain to be taken or have been left open. The Order does not provide any analysis or basis for its conclusory statement that Respondent suffered any articulated prejudice, nor does it attempt to tailor a remedy to the facts of this case. Sanctions are an extraordinary remedy that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996). "The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (citation omitted). Defaulting Appellant in a multi-million-dollar lawsuit in which it has no actual liability to Respondent is not reasonable, especially in this factual scenario where Appellant produced the discovery the parties agreed to.

II. The Court Abused Its Discretion By Not Considering That Respondent Served On D.R. Horton, Inc., Overbroad Discovery Demands That Far Exceeded Appropriate Discovery In This Vehicular Accident Case, Including Discovery Requests For Years Of Documents and Information Before The Driver Became A Subcontractor Of Kenneth Scott Builders, And For Years Before Kenneth Scott Builders Became The General Contractor For Horizontal Development for Cypress Ridge, And Including Documents Related To All Of Cypress Ridge, A Development Of More Than 1,400 Acres, More Than 1400 Homes, and Developed in 19 Phases Over 15 Years, Which Discovery Requests D.R. Horton, Inc. Attempted To Satisfy And Narrow.

Appellant provided examples of the overbroad discovery demands that Respondent sent to Appellant in the Facts Section. Appellant participated in discovery discussions with Respondent in repeated efforts to narrow the discovery requests and to provide the discovery. In addition to suggesting and making available D.R. Horton employee Jared O'Sako for a

discovery deposition to assist Respondent in understanding the discovery available that would be relevant to the issues that would be present at trial, Appellant worked with Respondent to narrow the discovery requests. Respondent ultimately decided he wanted the land development files in the folder tree for phase 7 of Cypress Ridge. The parties agreed to a confidentiality agreement to protect Appellant's confidential information. Appellant then provided the discovery. Respondent asked for a table of contents for the documents already in labeled folders, but Appellant provided that as well. The discovery chart in the Facts Section shows some of the efforts in which Appellant engaged with regards to discovery.

The Order concludes that "D.R. Horton has engaged in willful disobedience" and "gross indifference." Order, January 15, 2025 at 8. ROA. This finding is not supported by the facts. D.R. Horton presented ample evidence of its negotiations with Respondent regarding the scope of discovery and its efforts to ensure it was complying with prior orders and agreements. To date, D.R. Horton has produced approximately 4,000 or more documents. D.R. Horton's Response and Objections to Plaintiff's Proposed Order Rule Show Cause at 3 n.1. ROA. "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)

The Circuit Court should have considered the efforts Appellant put forth to meet Respondent's need for relevant discovery while also having to deal with overbroad discovery requests. Appellant was not intentionally violating discovery orders or rules. It believed it had met Respondent's agreed upon discovery requirements.

If the Court thought that Appellant had fallen short in discovery, lesser sanctions were available. In that circumstance, it was an abuse of discretion not to employ a lesser sanction in this case.

CONCLUSION

D.R. Horton has produced agreed upon documents, actively participated in discovery, and attempted to move this case forward. To sanction D.R. Horton, particularly in such an extreme manner as to strike its pleading and determine Appellant in default is unreasonable, improper, and an abuse of discretion. The result would also be manifest injustice because there is no basis to find D.R. Horton liable to Respondent. Accordingly, D.R. Horton respectfully submits that the Court misapprehended relevant facts and law, and requests the Court reverse the Circuit Court January 15, 2025 and June 3, 2025 Orders.

August 13, 2025

s/Carl F. Muller

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